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Children as Subjects

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Children's lives, like those of adults, are often complex. Functional approaches to family, now a standard feature of family law discourse, would seem poised to respond to that complexity. Scholars and law reformers repeatedly ask how legal conceptions of family might better reflect and support the "reality" of family life in a world no longer dominated by the nuclear family. But although children's needs and interests frequently motivate these questions, children are rarely the subjects of proposals seeking to alter the law's relationship to family. Rather, new conceptions of family almost invariably propose to recognize various adults who might serve as parents or otherwise provide children with care, education and support. These adults often play extremely important roles in children's lives, making state recognition of those adults also potentially important to children. By focusing exclusively on adult caregivers, however, functional approaches to family overlook other aspects of children's experiences, contributing to simplified understandings of childhood in general. This Article both critiques those understandings and proposes a new way to theorize children's lives within family law analysis.

As an initial matter, functional approaches to family that recognize only adult caregivers fail on their own terms. Although vertical relationships with adults are a key aspect of children's lived reality, they do not encompass all of that reality. Rather, children also have relationships with one another, relationships that can be a key part of children's experiences and vital to children's well-being. These horizontal relationships are rarely mentioned within legal discourse, although they have long been present in so-called nuclear families in the form of sibling relationships and they may take on multiple forms in both nuclear and post-nuclear families, including step-sibling relationships, relationships with other children who live in the home, relationships with cousins, and relationships with friends from school, the neighborhood or the larger community. The failure to address these relationships between children means that functional approaches fail to reflect and support the full reality of children's lives.

More importantly, the focus on vertical relationships reveals a fundamental flaw with functional approaches themselves. By attempting to respond to reality, functional approaches to the family fail to acknowledge the ways that family law not only supports family life but also plays a role in constructing that life. As such, the law can never merely reflect some conception of reality existing exogenous to law. The law is part of

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that reality, influencing the ways that individuals and institutions conceptualize children, parents and family. Although previously unrecognized as such, the law's focus on children's vertical relationships is a key part of that process, signaling that state actors, legal scholars and other reformers value children's relationships only to the extent they are with adults who are fulfilling parental functions or the educative functions compelled by the state. This signal has the potential to shape family dynamics and children's lived experience by conveying the state's view of what is, or should be, important in children's lives. By failing to acknowledge this process of construction, functional approaches to the family contribute to the naturalization of a particular model of family life and unnecessarily limit the scope of family law reform.

This Article takes functional approaches to the family as its starting point but then moves beyond them in order to examine how childhood is constructed. The Article does this by taking children as the subject of its analysis, focusing on the ways that children function within families and without. But the Article also explores two other understandings of children as subjects, understandings that highlight some of the ways that children's experiences are currently constructed within the law and how that construction might be changed. First, children are almost invariably positioned as subject to adult authority within legal analysis. Although this positioning addresses children's dependency and incapacity, particularly during the earliest years of life, it also serves to construct children as dependent and incapacitated in all contexts. That all-encompassing construction is not inevitable. The second understanding of children as subjects asks how the law might consider children as subjects capable of exercising agency in some contexts even as they are simultaneously dependent on adults. The second understanding therefore proposes a new way to give effect to the normative view that children should be more fully viewed as persons before the law.

Other scholars have argued that children's agency and autonomy should be respected in the form of children's rights. Although aspects of these arguments are convincing, they implicitly reinforce the current construction of children as subject to adult authority. Most children's rights arguments hinge on the notions that, in certain contexts, children are either sufficiently mature to be considered adults or their desires are sufficiently important that they should be able to appeal to the courts in the face of conflict with a parent or school authority. Children's rights arguments therefore tend to reinforce the divide between child and adult, and between dependent and decisionmaker, by focusing on ways that some children should be moved over to the adult category or other children should be able to appeal to the authority of the state.

This Article considers children as subjects rather than rightsholders in an effort to blur the distinction between dependency and decisionmaking ability that permeates much of the law's consideration of children and adults. Children's horizontal relationships – their relationships with one another – are the focus of this effort because they comprise one context in which children navigate their own social worlds as subjects with agency and decisionmaking ability even while they are dependent on adults. These relationships currently fall within one of the gaps of family law, whereby the law ignores some aspects of family life in the process of addressing others. Although this gap may reflect an

appropriate assessment of the state's priorities, as well as an appropriate deference to family privacy, it also shapes constructions of children, parents and families. In particular, family law's focus on the parent-child relationship to the exclusion of children's horizontal relationships plays a large role in constructing children as objects of adult direction and care, ignoring the ways children may also be subjects in some contexts, both within family law discourse and the world at large. This Article examines that construction and, through the example of children's relationships with other children, asks how and why scholars may want to alter it in order to better support the subjectivity of both children and adults.

Part I explores the current construction of childhood within family law. Family law simplifies children's lives, constructing a world occupied by children's vertical relationships with adults. Although these relationships address children's dependencies, they also work to define children as dependent in virtually all contexts. Children's relationships with other children are therefore either ignored or framed as part of children's dependency: the few horizontal relationships currently addressed by the law are constructed as either derivative of the parent-child relationship or part of the harm that necessitates adult control. Part II in turn examines the converse of the legal construction of childhood: the construction of parenthood within family law. Family law also simplifies parents' lives, positing parents as consistently and monolithically in charge of their children's lives, barring abuse, neglect or other default. This legal construction necessarily influences non-legal conceptions of both parenthood and childhood. Indeed, there do not appear to be non-legal conceptions of the parent-child relationship entirely separated from the legal conception of the model parent vested with decisionmaking authority over a child.

Part III then examines how these conceptions of childhood and parenthood relate to the law's construction of subjectivity, for both adults and children. In particular, the Part explores ways the law could view children as subjects with agency in some contexts even as they are simultaneously dependent on adults. In doing so, the Part analyzes how adults, and particularly parents, are also simultaneously dependent and autonomous, despite the law's simplified understanding of parenthood and subjectivity in general. Part IV explores new ways to construct childhood by recognizing a fuller ranger of children's relationships with other children. How to recognize or otherwise address children's horizontal relationships as a legal matter is not obvious, particularly because this Article rejects calls for extending children the same relationship rights enjoyed by adults. However, by addressing three paths that scholars and law reformers might take to incorporate children's horizontal relationships into legal analysis, the Article highlights ways the law could embrace more diverse and complex understandings of the parent-child relationship and of subjectivity and dependency more broadly.

I. Constructions of Childhood

Children's lives can be complex. Although childhood is often glorified as a time of simplicity, innocence and play, experiences of childhood are both more contradictory and more diverse. Simplicity can be experienced alongside the complicated dynamics of

dependency, innocence alongside incapacity, and play alongside the work of learning and cognitive development. At and between these extremes, children interact with various adults, including their parents, extended family, teachers and other community members, as well as with other children, including their siblings, cousins, classmates and peers.

The law has traditionally been concerned with only a fraction of these interactions and relationships, thereby simplifying children's lives for purposes of legal analysis.[1] In the United States, state law has long mandated that children attend school, and a combination of state and federal education law regulates the policies and curricula of public schools and, to a lesser degree, private and home schools. The rest of children's experiences have been placed in the private sphere of the family through constitutional and common law doctrines of family privacy and laws prohibiting child labor. Family law governs this sphere, yet it generally has considered only the intersections of parental rights and state interests, asking when parental authority over children trumps state interests or state interests in children's well-being trumps parental authority.[2] Children's voices and views have generally been left out of this equation,[3] as have the voices and views of all adults not occupying the status of parent or state actor.

Much has changed within family law over the past forty years, yet the simplification of childhood has largely remained. As set forth below, this simplification affects legal constructions of childhood, as well as constructions of childhood more generally. Of course, any summary of the development of an entire field of law will also be a simplification, but this Part attempts to elaborate the ways that simplification remained the norm even during periods of reform and then explores the consequences of that simplification.

A. *The Role of Simplification within Family Law*

Developments in family law over the past forty years have largely adhered to the traditional view of children's lives as controlled by either parents or the state, with the exception of two paths of reform. First, spurred by the Supreme Court's 1967 decision in *In Re Gault*,[4] many scholars began to bring children's voices and views into the family

[1] *See, e.g.*, Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 547 (200) ("American lawmakers have had relatively clear images of childhood and adulthood – images that fit with our conventional notions. Children are innocent beings, who are dependent, vulnerable and incapable of making competent decisions.").

[2] *See, e.g.*, LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 70 (2006); Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 383 (1997–1998); Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 256 (1979).

[3] *See* Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 29 ("The competition for developmental control of a child is classically framed as a competition between parent and state."); Dolgin, *supra* note 2, at 381–82 (stating that family law analysis has "no place for children's voices or for recognition of children's personhood").

[4] 387 U.S. 1 (1967).

law equation, arguing for various conceptions of children's rights.[5] These calls led to some changes in legal doctrine, particularly with respect to children's claims against the state.[6] Moreover, on an international level, children's rights advocacy led to the adoption of the Convention on the Rights of the Child by the United National General Assembly in 1989.[7] By the mid-1990s, however, most scholars in the United States had abandoned their children's rights projects, primarily in acknowledgement of the tensions such projects created with traditional notions of parental rights.[8] Those tensions also were used to justify the United States' refusal to ratify the United Nations Convention, a refusal that persists to this day.[9] As such, family law has largely come to re-embrace its traditional focus on the intersection of parental rights and state interests.

Second, beginning in the 1980s, family law scholars embarked on a law reform project designed to expand legal notions of the family to include all groups functioning as families even if they did not enjoy family status.[10] As part of that project, scholars attempted to broaden the group of people permitted to exercise parental rights. As such, scholars retained their traditional focus on the intersection of parental rights and state interests, but they acknowledged more of the complexity of the parental function. Scholars argued for increased legal recognition of the childrearing performed by adults who do not occupy the legal status of parent but who function as parents or otherwise provide parent-like care and support.[11] Several states now recognize stepparents and

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[5] *See, e.g.*, MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 5–16 (providing a "brief history" of arguments in favor of children's rights beginning in the 1960s); Wald, *supra* note 2, at 261–81 (delineating four categories of children's rights).

[6] Some examples include the recognition of children's speech rights at school , *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503 (1969); the extension of due process protections to school expulsion decisions, *Goss v. Lopez*, 419 U.S. 565 (1975); the invalidation of laws denying children access to contraception, *Carey v. Population Services, Int'l*, 431 U.S. 678, 693–702 (1976) (plurality opinion); and the extension of abortion rights to minors upon a judicial finding of sufficient maturity, *Belotti v. Baird*, 443 U.S. 643–44 (1979).

[7] CONVENTION ON THE RIGHTS OF THE CHILD, opened for signature Nov. 20, 1989, art. 1, 144 U.N.T.S. 123, art. 12 (entered into force Sept. 2, 1990).

[8] GUGGENHEIM, *supra* note 5, at 42; *see also* Martha Minow, *Whatever Happened to Children's Rights?*, 80 MINN. L. REV. 267 (1995).

[9] Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 GEO. J. POVERTY L. & POL'Y 313, 313–318 (1998) (arguing that opposition to the Convention in the United States is rooted in protection of parents' rights). For a critique of the Convention on parental rights grounds, see, *e.g.*, Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT'L L.J. 449, 483–84 (1996).

[10] For examples, see Martha Minow, *All in the Family and In All Families: Membership, Loving, and Owing*, 95 W. VA. L. REV. 275, 287–88 (1992–1993); Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 270–72 (1991); Barbara Bennett Woodhouse, *"It All Depends on What You Mean by Home": Toward a Communitarian Theory of the "Nontraditional" Family*, 1996 UTAH L. REV. 569, 576–84; Barbara Bennett Woodhouse, *Towards a Revitalization of Family Law*, 69 TEX. L. REV. 245, 279–80 (1990).

[11] *See, e.g.*, Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 961–63 (1984); Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L. J. 1271, 1310–20 (2005); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood*

other "de facto" parents as family members, even in the absence of adoption or biological ties, [12] and recently two courts permitted a child to have three legal parents.[13] Other scholars have urged family law to go even further, calling for legal acknowledgment of childrearing that occurs outside of relationships that look like the parent-child relationship, such as the childrearing performed in extended care networks or in organizations like the Boy Scouts and Girl Scouts.[14] These calls attempt to separate childrearing functions from legal parental status in order to highlight the ways that such functions both do and do not overlap with traditional legal notions of parental prerogatives.

By attempting to address more of the complexity of children's lives, both of these trends expose the ways children's lives have generally been simplified within the law. The very discourse of children's rights, even if largely abandoned, emphasizes that children are not merely the objects of either parental or state authority, but rather can be capable of exercising their own will in at least some contexts. Parents, teachers and other adults in children's lives are, of course, often too aware of this possibility. That traditional conceptions of family law tend to ignore children's will – necessitating a reform discourse of children's rights – reveals the extent to which family law engages in analytical simplification. Similarly, calls to expand the concept of legal parent or to recognize other actors engaged in childrearing emphasize that children can be influenced by individuals who are neither biological or adoptive parents nor state actors. This possibility is also obvious to anyone who has experienced a so-called blended family or an engaged extended family or who has observed a youth sporting event or other after-school activity. Once again, however, family law renders such actors invisible when it focuses exclusively on children, parents and the state.

Although the law simplifies children's lives in these ways, family law scholars rarely acknowledge this process of simplification.[15] Such silence risks naturalizing what is in fact a particular legal construction of childhood. Many scholars,[16] mostly outside of

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to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 GEO. L.J. 459, 483–91 (1990).

[12] *See generally* John DeWitt Gregory, *Defining the Family in the Millenium: The* Troxel *Follies*, 32 U. MEM. L. REV. 687, 689–712 (2002) (describing cases and statutes extending some childrearing rights to grandparents, step parents, foster parents, co-parents and de facto parents); *Developments in the Law: Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 HARV. L. REV. 2052, 2054–64 (2004) (same); see *also* American Law Institute, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002) (proposing increased legal recognition of de facto parents).

[13] *See* Susan Frelich Appleton, *Parenting by Numbers*, work in progress on file with author.

[14] *See* Melissa Murray, *The Networked Family*, 94 VA. L. REV. 385 (2008); Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833 (2007).

[15] However, scholars are more attentive to the ways that parenting practices and goals are often simplified within family law. *See, e.g.*, Elaine M. Chui, *The Culture Differential in Parental Autonomy*, 41 U.C. DAVIS L. REV. 1173, 1193–98 (2008); Clare Huntington, *Repairing Family Law*, 57 DUKE L. J. 1245, 1274–94 (2008).

[16] *See, e.g.*, PHILIPPE ARIES, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE 15–133 (1960) (tracing the development of the "idea of childhood" over time); Allison James, *Understanding Childhood from an Interdisciplinary Perspective*, *in* RETHINKING CHILDHOOD 28–29 (Peter B. Pufall &

the law,[17] have discussed the ways that childhood, although rooted in biological age, is a social construction that shifts over time as it is constituted both structurally and through daily practice.[18] Of course, children are completely dependent on adults at birth due to undeveloped mental and physical capabilities, and only over time do children acquire the skills to pursue more independent courses of action. Yet childhood is constructed to encompass more than these periods of reduced capacity. The law plays a role in this construction, most noticeably as it specifies different ages for when children become legal adults for purposes of marriage, sexual activity, employment, driving, drinking, voting, and criminal prosecution. Similarly, courts have determined that children enjoy adult-like rights of privacy and association for some purposes, but for others children must wait until adulthood before they may exercise full autonomy.[19] The diverse and shifting nature of these age cut-offs reveals that the law is often motivated by factors other than or addition to understandings of capacity and maturity.[20] Accordingly, the law is one of the factors that contribute to the social, as opposed to biological, construction of childhood.

Family law scholars' simplification of children's lives can also play a role in this

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Richard P. Unsworth, eds. 2004) (demonstrating "[t]he socially constructed character of childhood" by examining "differing legal, social, and cultural expectations about children" across cultures); Alan Prout & Allison James, *A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems*, *in* CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD 7 (Allison James & Alan Prout eds., 1990) (emphasizing that childhood is not a naturally occurring state, but rather is an "actively negotiated set of social relationships"); Martin Woodhead, *Psychology and the Cultural Construction of Children's Needs*, *in* CONSTRUCTING AND RECONSTRUCTING CHILDHOOD, *supra*, at 60, 60–66 (emphasizing that although statements about children's needs may often be masked as empirical claims, they are almost always the product of social and cultural choices); Viviana A. Zelizer, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN *passim* (1985) (following the evolution of the concept of childhood and the value of children from the 1870s and 1930s).

[17] One family law scholar who has embraced the concept is Barbara Bennett Woodhouse. *See* Barbara Bennett Woodhouse, *Reframing the Debate About the Socialization of Children: An Environmentalist Paradigm*, 2004 U. CHI. LEGAL F. 85, 113 ("Modern scholars recognize that childhood is a culturally constructed idea, rather than a universal fact.").

[18] For discussions of the shifting meanings of childhood over time in the United States, see the essays in CHILDHOOD IN AMERICA (Paula S. Fass & Mary Ann Mason, eds. 2000), and HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW & THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY (2005).

[19] *See, e.g.*, David D. Meyer, *The Modest Promise of Children's Relationship Rights*, 11 WM. & MARY BILL RTS. J. 1117, 1117–20 (2003).

[20] *See* Leslie J. Harris & Lee E. Teitelbaum, CHILDREN, PARENTS AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS 494 (2002) ("The age of majority is arbitrary not in the sense that it is unreasonable but in that it is variable from time to time and is often established to reflect some, but not all, levels of maturity and capacity."); Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589, 639–45 (2002) (comparing *Belotti* and *Parham* and concluding that the "cases, and the broader category of children's constitutional rights, become coherent when considered in terms of public health and sound social policy"); Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L. J. 1, 5 ("It is more honest to disclose that competence and incompetence are used here as proxies for a variety of concerns about what societal decision-makers think children may need, and about what they simultaneously think allows adults to choose for themselves"); *cf.* Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 YALE L. J. 1131, 1164 n. 152 (1991) (stating that "the Twenty-Sixth Amendment extending the franchise to eighteen-year-olds grew out of the perceived unfairness of any gap between the Vietnam draft age and the voting age").

construction, albeit a less direct and influential one. Legal understandings of childhood outside of the context of specific laws or court holdings shape the discourse of family law reform, contributing to broader social discourses about children and families. Such discourses often constitute more than rhetoric; instead, to the extent the discourses simplify the complexity of childhood, children's lives can be shaped by the simplification. For example, family law scholars' simplification of childhood can feed into the glorification of childhood as a time of simplicity, innocence and play described above. Adults may therefore see or understand only a portion of children's lives, and children may internalize only a portion of their experiences as worthy of external acknowledgment.

The process of simplification within family law is therefore more than a matter of analytical ease; instead, it can also have consequences for children's lives. It is important to recognize these consequences, lest they be viewed as natural or otherwise pre-existing the law. The next section explores two aspects of this dynamic in more detail.

B. *From Simplification to Construction*

The law's simplification of children's lives reveals which aspects of children's lives scholars, legislators and courts currently believe are worthy of legal attention and which are not. Although legal attention is irrelevant to most children's day-to-day lives, this attention can affect their experiences by signaling the state's view of what is, or should be, important to children's lives. Most saliently, the law's simplification of childhood prioritizes children's relationships with adults over other relationships. This prioritization is embodied in laws and doctrine governing children's experiences at both home and school, although education law at times acknowledges that children benefit from interacting with other students.[21] In contrast, family law focuses exclusively on the parent-child relationship, rendering invisible the diverse relationships that children can experience with other children outside of school.

1. *A World of Vertical Relationships*

Family law's focus on the allocation of childrearing authority between parents and the state posits a world in which children are always dependent on adults, whether parents or state actors.[22] If family law frames its analysis in terms of who may exercise authority over children, then children become defined through that authority.

Children's dependence on adults is, of course, grounded in physical reality to a large extent: young children are indeed completely dependent on adults for life

[21] *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954). However, states' acceptance of home schooling indicates that peer interaction is not a necessary part of education, reinforcing the importance of the vertical relationship between teacher and student or state actor and student. For more discussion, *see infra* Part I.B.3.

[22] *See, e.g.*, Schall v. Martin, 467 U.S. 253, 265 (1984) ("[C]hildren, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as parens patriae.").

necessities, and children are otherwise incapable of many of the activities and skills that adults take for granted.[23] Children also need adult role models in order to understand and eventually become a part of various societal institutions run by adults. Moreover, the vertical, top-down relationships between adults and children that address these needs are extremely important to children on an emotional level, even when children become less dependent. Despite these facts, however, vertical relationships do not occupy the entirety of children's lives before adulthood. By ignoring other aspects of children's lives, family law's frame constructs children's dependence as monolithic and uniform when in fact it is often more diverse and shifting.

Family law's focus on vertical relationships suggests both that children are always dependent on adults and that such dependence can always be sufficiently addressed by allocating authority between parents and the state. This view of children's dependence acknowledges to some extent that different kinds of dependence require different responses: dependence resulting from lack of knowledge and analytical skills is addressed through school education, whereas other dependence is addressed through the caregiving, guidance and support of parents and their surrogates. However, this "other dependence" can in fact be varied, and at times may not require parental authority. For example, some aspects of children's dependence arise out of the need for daily care, shelter and financial support, needs which often can be well addressed by parents yet which are more salient for young children than older. Other forms of dependence are explicit consequences of the law, forcing children to rely on their parents when they might not otherwise have to. Because children are generally not permitted to engage in wage labor,[24] to enter into enforceable contracts[25] or to consent to medical care,[26] for example, they are dependent on adults to perform those functions for them. In this respect, the age of the child rarely matters; instead, the relevant factor is the status of "child" attaching to the individual in question.[27]

In addition to obscuring the differences between these types of dependence, family law also suggests that dependence defines all aspects of children's lives. By

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[23] *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 634 (1979) (finding that constitutional rights of girls seeking abortions could not be equated with those of adults because of minors' "peculiar vulnerability ... inability to make critical decisions in an informed, mature manner ... and the importance of the parental role in child-rearing"); Roper v. Simmons, 543 U.S. 551 (2005) (noting that minors are generally more reckless than adults and are more vulnerable to outside influences, and their character is not fully formed).

[24] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[25] Children may enter into contracts, but they are not liable for any breach thereof except in the context of provisions for "necessaries." Restatement (Second) of Contracts § 12(1)(b) (1981).

[26] Children generally need their parents' consent for medical care, although exceptions have been made in the context of "mature minors" and the treatment of alcoholism, drug addiction, sexually transmitted diseases and similar contexts. *See, e.g.*, Jennifer L. Rosato, *The Ultimate Test of Autonomy: Should Minors Have a Right to Make Decisions Regarding Life-Sustaining Medical Decisions?*, 49 RUTGERS L. REV. 1 (1996); Walter Wadlington, *Medical Decision Making for and by Children: Tensions Between Parent, State, and Child,* 1994 U. ILL. L. REV. 31.

[27] As such, children may get around some of these legal disabilities by seeking emancipation, but that possibility only reinforces the simplistic view of dependency underlying the current construction of legal childhood: children are acknowledged as possessing the capacity to exercise independent judgment only after they are officially moved into the status of "adult."

focusing exclusively on the ways adults can address children's dependence, family law ignores children's interactions outside of these forms of dependence. Accordingly, only some aspects of children's relationships with adults are acknowledged by the law. Aspects of adult-child relationships that do not hinge on dependence, such as play, friendship and other forms of emotional connection, are not just considered unworthy of legal analysis but are ignored altogether. Children's more horizontal relationships with other children – with other beings also defined by their dependence – also are largely rendered invisible, as discussed in more detail below, because such relationships are assumed to be incapable of addressing children's needs.

This view of children's dependence and the relationships that can address it leads to another consequence of family law's simplification of children's lives. Because children are framed as always being dependent on adults, they can escape that dependence only by becoming adults themselves. Family law therefore constructs children as pre-adults, meaning that children's lives are posited as having little purpose or value apart from the attainment of adult status and the subsequent integration into adult society.

One aspect of this construction of children as pre-adults can be found in the focus on children's socialization and development that pervades family law doctrine[28] and scholarship,[29] including some of my own.[30] Although this focus reflects a deep and vital concern about the quality of children's present and future lives, and thus should not be abandoned, that concern moves in only one direction, from the dependence and incapacity of childhood to the independence and capacity of adulthood. That single direction reinforces a view of children constructed solely in relation to adult authority and norms.[31] Children's experiences are important only to the extent they properly prepare children for adulthood. Such a construction tends to ignore any possibility that children may be more than passive recipients of adult childrearing, instead playing an active role in shaping their own worlds and the worlds of other children.[32] Children may not enjoy

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[28] Parham v. J.R., 442 U.S. 584, 602 (1979) ("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."); Troxel v. Granville, 530 U.S. 57, 68 (2000) (quoting *Parham*).

[29] *See, e.g.*, Buss, *supra* note 3, at 32; Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 482–88 (2006); Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CAL. L. REV. 967, 1002–11 (2003); Scott, *supra* note 1, at 550–51, 589–96. This focus is present even in the work of scholars who are sympathetic to notions of children's rights. *See, e.g.*, John Eekelaar, *The Importance of Thinking that Children have Rights,* in CHILDREN, RIGHTS AND THE LAW 221, 229–34 (Philip Alston, Stephen Parker & John Seymour, eds. 1992); Barbara Bennett Woodhouse, *Reframing the Debate About the Socialization of Children: An Environmentalist Paradigm*, 2004 U. CHI. LEGAL F. 85, 97–119.

[30] Rosenbury, *supra* note 14, at 839–50, 891–93.

[31] *See* BARRIE THORNE, GENDER PLAY: GIRLS AND BOYS IN SCHOOL 3 (1993) (emphasizing that "the concept of 'socialization' moves mostly in one direction. Adults are said to socialize children, teachers socialize students, the more powerful socialize, and the less powerful get socialized. Power, indeed, is central to all these relationships, but children, students, the less powerful are by no means passive or without agency.").

[32] *Id.*; *see also* Prout & James, *supra* note 16, at 8 ("Children are and must be seen as active in the construction and determination of their own social lives, the lives of those around them and the societies in which they live."); Buss, *supra* note 3, at 34 (pointing out that a child necessarily exercises some

the same subjectivity as adults, but they can enjoy some degree of subjectivity even amidst dependence. Family law overlooks that possibility by focusing primarily on children's development into adults.

Another aspect of family law that contributes to this construction of children as pre-adults can be found in family law's discussion of adolescence. Here, some family law scholars, most notably Emily Buss and Elizabeth Scott, have acknowledged the ways that adolescents have a more complicated relationship to dependence than do children or adults even if lawmakers often overlook this dynamic, instead "classifying adolescents legally either as children or as adults, depending on the issues at hand."[33] Buss has even emphasized that adolescents' relationships with one another play a role in adolescent identity development.[34] The work of Buss and Scott is important because it creates space for analysis outside of the model of adults socializing children. However, because such analysis relies on adolescence as a category, or construction, separate from childhood, this work is generally interpreted to mean that teenagers should be treated more like adults in certain contexts.[35] Indeed, in the specific context of adolescents' relationships with one another, adolescent friendships are often analogized to the friendships of young adults in college and other settings. Moreover, these scholars view adolescence as a "transitional stage,"[36] thereby reinforcing the view that children are on the road to adulthood, with adolescence being the penultimate stop. For some purposes children get there sooner than others,[37] but the journey remains the defining aspect of childhood.

This view of adolescents as almost-adults reveals that children must be on the verge of adulthood before family law scholars will view them as experiencing interactions that escape the dependence of childhood. For example, the focus on adolescents' horizontal relationships serves to obscure any value children may derive from relationships with other children at younger ages. Children are thereby constructed both as dependent on vertical relationships and on the path to occupying the top of that

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developmental control over her own development, "whether she likes it not," because "[s]he reacts when parents, the state, or anyone else, acts in an attempt to shape her development, and she reacts to the host of environmental and cultural forces that exist without regard to her development").

[33] Scott, *supra* note 1, at 548 ("For many purposes, adolescents are described in legal rhetoric as though they were indistinguishable from young children, and are subject to paternalistic policies based on assumptions of dependence, vulnerability, and incompetence. For other purposes, teenagers are treated as fully adults, who are competent to make decisions, accountable for their choice and entitled to no special accommodations."); *see also* Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607 (1992).

[34] Emily Buss, *The Adolescent's Stake in the Allocation of Educational Control Between Parent and State*, 67 U. CHI. L. REV. 1233, 1233 (2000) ("What matters to adolescent development is relationships with peers, because it is largely through these relationships that they pursue the difficult and important task of identity formation – the sorting and selecting of values, beliefs, and tastes that will define their adult selves"); *see also id.* at 1253–64, 1270–76.

[35] *See, e.g.*, Scott, *supra* note 1, at 555 ("As compared with younger children, adolescents are close to adulthood. They are physically mature, and most have the cognitive capacities for reasoning and understanding necessary for making rational decisions.").

[36] *Id.* at 549.

[37] This is particularly true in the context of criminal prosecution. *See, e.g.*, Barry C. Feld, *A Slower Form of Death: Implication of* Roper v. Simmons *for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J. L. ETHICS & PUB. POL'Y 9 (2008).

hierarchy. Experiences outside of those relationships and unrelated to that task are largely ignored unless they are viewed as furthering or interfering with those aspects of childhood. The next section explores this dynamic in the specific context of children's horizontal relationships.

2. *Horizontal Relationships as Dependency or Threat*

The construction of children as dependent on adults until they attain adult status has limited the nature of the law's consideration of children's horizontal relationships, meaning their relationships with other children. The law instead focuses most of its attention on children's relationships with adults, specifically their parents (or other adults serving as parents at the direction of the state) and teachers. This focus leaves unacknowledged many of the adults who play important roles in children's lives, including extended family members, other caregivers and community members.[38] However, the focus is even more incomplete with respect to children's relationships with one another. Family law generally does not recognize or otherwise respond to children's horizontal relationships, except in two, relatively narrow circumstances.

First, sibling relationships clearly fall within even narrow conceptions of family. The law confers legal status on sibling relationships[39] and, in some circumstances, step-sibling relationships.[40] Such status can be viewed as affirming the value of relationships exiting outside of the vertical relationships described above. Upon closer inspection, however, the consequences of sibling recognition are limited, because family law generally values sibling relationships only to the extent they are derivative of the parent-child relationship. Accordingly, sibling relationships are recognized primarily as a byproduct of children's dependence on their parents.

For example, laws in many states ask judges to take sibling relationships into account in various ways when making custody decisions in divorce and paternity proceedings and in abuse and neglect proceedings.[41] In these situations, statutes direct judges to attempt to keep siblings together, or to arrange for meaningful visitation. Such direction emphasizes that sibling relationships have some independent value even if the parent-child relationship that created the sibling ties has failed to live up to the state's expectations. However, attempts to keep siblings together can often fail, particularly in abuse and neglect proceedings. In the face of such failure, most states do not guarantee

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[38] *See, e.g.*, Murray, *supra* note 14; Rosenbury, *supra* note 14.

[39] Interestingly, with the exception of sibling recognition in abuse and neglect cases mentioned in the text following this footnote, the effect of this status is almost solely confined to the context of inheritance law. *See, e.g.*, Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 241–42 (2001).

[40] *See, e.g.*, Cynthia R. Hirschl, *Stepchildren and Inheritance Rights*, 1 U.C. DAVIS J. JUV. L. & POL'Y 36 (1996); Martha M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917 (1989).

[41] James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 966–70 (2002-03); William Wesley Patton, *The Status of Siblings' Rights: A View Into the New Millennium*, 51 DEPAUL L. REV. 1, 19–37 (2001).

that siblings can live with one another or even visit one another in different households.[42] Therefore, if the parent-child relationship falls apart, the sibling relationship is not always protected.

Moreover, the value of sibling relationships in this context is assumed to flow primarily from the common parent-child relationship. For example, under California law, a judge may not terminate parental rights if doing so would "substantially interfere[]" with sibling relationships.[43] This exception is intended to apply only in "exceptional circumstances,"[44] but its reach is even more limited by two other aspects of the law. Even if the exception applies, the primary effect is to move the child into guardianship instead of termination of parental rights and adoption. Although some children may benefit from guardianship, other children may benefit more from adoption. In order to maintain sibling ties, children must forego those potential benefits, revealing the parent-centric nature of the statute.[45] Indeed, the primary beneficiary of the statue may often be the parent, whose rights remain intact. In addition, the court must consider the strength of the sibling ties at issue solely from the perspective of the child who is the focus of the termination proceedings, not that child's siblings.[46] In situations where siblings have been divided between several foster homes, this limitation means that the court cannot consider why the child's siblings have been unable to maintain regular ties with the child. Instead, courts often assume that older siblings do not really care about maintaining sibling ties because they are "choosing" to spend time with their friends or foster families over the sibling who is the subject of the termination proceedings.[47] Such assumptions reinforce the view that the decision about the parent-child relationship should take precedence over attempts to maintain sibling ties.

Therefore, instead of valuing relationships between siblings as horizontal relationships with value apart from children's dependence, the law values sibling relationships primarily as a collateral consequence of the parent-child relationship. The

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[42] Dwyer, *supra* note 41, at 983 ("Children's interests [in maintaining sibling relationships] receive protection only when and to the extent that parents choose to exercise their decision making power in a manner consistent with children's interests."). As such, most states give "children *no* right to maintain a relationship with siblings who live in a different household." *Id.* This majority approach contrasts with children's limited right to maintain relationships with adults. Meyer, *supra* note 19, at 1119 n.10 (2002-03). In a minority of states, children who are separated from their siblings can petition for sibling visitation, at least prior to the termination of parental rights and any subsequent adoption. Dwyer, *supra* note 41, at 969, 983–84.

[43] CAL. WELF. & INST. CODE § 366.26(c)(1)(B)(v) (2008). For discussions of similar laws and a general critique of terminations that do not accommodate parental and sibling visitations, see Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 474–89 (1983).

[44] In re Celine R., 71 P.3d 787, 793 (Cal. Ct. App. 2003). For a case finding that such extraordinary circumstances existed, see In re Naomi P., 34 Cal. Rptr. 3d 236, 246–48 (Ct. App. 2005).

[45] *Cf.* In re L.Y.L., 124 Cal. Rptr. 2d 688, 696 (Ct. App. 2002) ("The court must balance the beneficial interest of the child in maintaining the sibling relationship, which might leave the child in a tenuous guardianship or foster home placement, against the sense of security and belonging adoption and a new home would confer.").

[46] Celine R., 71 P.3d at 793.

[47] *See, e.g.*, In re Tiffany M., 2007 WL 2259030, at *11–12 (Cal. Ct. App. Aug. 8, 2007). These siblings are therefore held to higher standards than those generally imposed on sibling relationships.

roles of horizontal relationships in children's lives are thus obscured. Family law once again constructs the parent-child relationship to be paramount to children's present and future lives, with sibling ties merely an added bonus.

Second, the law responds to children's horizontal relationships outside of the context of sibling ties when those relationships are perceived to be threatening to the children themselves, to other children or to larger communities. In such situations, the law often authorizes state intervention designed to end the horizontal relationship and alleviate the harm. In some respects, this intervention challenges the dominant construction of children as dependent on adults because it implicitly recognizes that children can and do exit outside of vertical relationships with adults. In other respects, this intervention reinforces that construction by focusing solely on the harm that can befall children outside of relationships with adults.

For example, states acknowledge children's relationships with one another when they pass various forms of anti-gang legislation.[48] Although this anti-gang legislation, compared to the treatment of siblings, more explicitly recognizes the potential intensity of children's relationships with one another,[49] that recognition focuses only on the potential dangers that can result from such intensity. Although some of those dangers concern the physical health and safety of children, most of them concern the power of the gangs to usurp parental or state authority. Anti-gang legislation therefore appears to be motivated more by the desire to maintain parental or state control over children than by the desire to acknowledge the power of children's relationships with one another. Similarly, many states and school districts have adopted anti-bullying statutes and policies. This form of state intervention too responds only to the harm of children's horizontal relationships, with a particular emphasis on the ways bullying can threaten the state's ability to control children's learning environments.[50]

Other forms of state intervention are less directly coercive, but they still attempt to alleviate the harm presumed to flow from children's interactions with other children outside of adult supervision. By passing curfew ordinances that limit the hours in which minors can congregate outside of the home, for example, states implicitly recognize that children seek to interact with one another. Once again, however, the state seeks to limit

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[48] California was the first state to pass anti-gang legislation, in 1988. The legislation created a new crime of participating in criminal street gang activity, making it a criminal offense to "participate[] in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity" if the person so participating "willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang." CAL. PENAL CODE §§ 186.22 (2007). Some statutes in other states go even further. *See, e.g.*, Beth Bjerregard, *The Constitutionality of Anti-Gang Legislation*, 12 CAMPBELL L. REV. 31, 32–33 (1998).

[49] For one discussion of this potential intensity, see ROBERT K. JACKSON & WESLEY D. MCBRIDE, UNDERSTANDING STREET GANGS 25–41 (1985).

[50] State definitions of bullying implicitly support this conclusion. For one example, see CONN. GEN. STAT. § 10-222d (2006) (defining bullying as "any overt acts by a student or group of students directed against another student with the intent to ridicule, humiliate or intimidate the other student while on school grounds or at a school-sponsored activity which acts are repeated against the same student over time").

that interaction in order to prevent potential harm.[51] Although congregating after hours can be an effective way to create community outside of adult surveillance, the lack of surveillance is also assumed to foster misconduct, justifying state intervention. Children are generally permitted to be outside after hours only when accompanied by a parent, engaging in an organized activity approved by a parent, or running an errand for a parent,[52] thereby reinforcing the primacy of the parent-child relationship while simultaneously positing children's relationships with other children as threatening and unsafe.

Similar concerns can be found in generalized fears about peer pressure.[53] These fears concede the importance of children's relationships with one another but, like the other areas described above, focus on the harms of those relationships to the exclusion of any benefits. Parents and teachers often assume that influences coming from outside the family or school curricula will both be at odds with their teaching and harmful to children. Parents and the state thus fear that some children will serve as bad examples for other children.

This focus on children constituting bad examples can be particularly prevalent when it comes to sex.[54] Some states criminalize teen sexual behavior in the hopes that potential sanctions will deter some children (generally boys) from pursuing sex and encourage other children (generally girls) to resist.[55] A larger number of states pursue policies designed to isolate teen mothers from other children. Beyond labeling teen pregnancy an epidemic, these states often enact policies designed to keep teen mothers

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[51] *See* Gregory Z. Chen, *Youth Curfews and the Trilogy of Parent, Child, and State Relations*, 72 N.Y.U. L. REV. 131, 132 (1997) ("Unlike most criminal laws, curfews on minors serve two state interests: crime prevention (in this case juvenile crime) and protection of minors from crime.").

[52] *See, e.g.*, Hutchins v. District of Columbia, 188 F.3d 531, 540–41 (D.C. Cir. 1999) (en banc) (plurality) (finding that curfew ordinance was constitutional because it imposed no restrictions on juveniles' activities if they were accompanied by a parent or adult authorized by the parent; parents could allow their children to run errands during curfew hours; and juveniles could attend official school, religious or other civic activities at any time); Qutb v. Strauss, 11 F.3d 488, 493–95 (5th Cir. 1993) (finding a youth curfew constitutional because it contained adequate exceptions respective of parental prerogatives); Panora v. Simmons, 445 N.W.2d 363, 370 (Iowa 1989) (upholding a youth curfew as constitutional because its interference with parental authority was "minimal").

[53] *See, e.g.*, JUDITH RICH HARRIS, THE NURTURE ASSUMPTION: WHY CHILDREN TURN OUT THE WAY THEY DO 147–71(1998). Many legal commentators are concerned with the dynamics of peer pressure, *see* Karst, *supra* note 29, but other commentators overlook it given their focus on parents and the state, s*ee, e.g.*, Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 327(2007) (emphasizing that "[t]wo major sources of assimilation demands on children are their parents and the state" without acknowledging that children can also assert assimilation demands on one another).

[54] The public outrage over an alleged teenage pregnancy pact, inspired by the movie Juno, in Gloucester, Massachusetts is one example. Kathleen Kingsbury, *Postcard: Gloucester,* TIME MAG., June 30, 2008, at 8 (reporting that 17 students at the public high school had become pregnant, and over half of those students "confessed to making a pact to get pregnant and raise their babies together").

[55] *See, e.g.* William N. Eskridge, Jr. & Nan D. Hunter, SEXUALITY, GENDER, AND THE LAW 142–46 (2d ed. 2004) (detailing state "age of consent" laws). The Bush administration has made the gendered assumptions beyond these laws explicit in both its marriage-promotion policies and its restrictions on federal sex education funding. *See* MCCLAIN, *supra* note 2, at 135–38, 256–89; *see also* Michelle Fine, *Sexuality, Schooling, and Adolescent Females: The Missing Discourse of Desire*, 58 HARV. EDUC. REV. 29 (1988).

away from the fathers of their children and away from other girls. Most obviously, some public school districts have until very recently operated separate schools for pregnant girls,[56] and many school districts still encourage pregnant girls to pursue alternative educational programs outside of mainstream schools.[57] Less obviously, some residential programs for teen mothers who are in state custody (either because of abuse or neglect jurisdiction or delinquency jurisdiction) provide those mothers with their own individual apartments and ban the fathers from the premises.[58] Not only does this policy deny the potential value of the mother-father relationship, but the individual apartments can also prevent the mothers from more fully bonding with each other and sharing childcare responsibilities. The state thereby isolates teen mothers, separating them first from the general population in care and then from other girls in their very position.[59] Many girls, although valuing semi-independent living, experience such isolation as punishment for the earlier relationships that led to their pregnancies.

By generally responding to children's relationships with other children only when those relationships coincide with a parent-child relationship or are thought to pose a threat to children or the larger community, the law fails to acknowledge the full range of children's relationships. Instead, the law focuses its attention on children's relationships with adults and the roles those relationships play in addressing dependency and staving off danger. This simplification constructs children as objects of adult direction and care, generally incapable of forming meaningful or important relationships outside of their relationships with adults. Legal analysis therefore ignores the possibility that children's relationships with other children could be similar to adults' relationships with other adults, in that both forms of horizontal relationship involve subjects interacting with other subjects. The rest of the Article explores ways that legal constructions of children could be altered by, first, examining the ways that parents are constructed as subjects through the vertical relationships described above, and second, theorizing ways children could also be constructed as subjects by recognizing the diversity and potential importance of children's relationships with other children.

II. Constructions of Parenthood

Parents' lives can also be complex. Parents juggle their own desires and interests, the demands of work in the home and the market, the time and energy of childrearing and

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[56] *See, e.g.*, Julie Bosman, *Schools for Pregnant Girls, Relic of 1960s New York, Will Close*, N.Y. TIMES, May 24, 2007, at A1.

[57] *See, e.g.*, Amber Hausenfluck, Comment, *A Pregnant Teenager's Right to Education in Texas*, 9 SCHOLAR 151, 169–83 (2006); Kate Giammarise, *Alternative-school leader helps girls to develop life skills*, THE BLADE (Toledo, Ohio), Sept. 18, 2008.

[58] *See, e.g.,* Lauren Silver, *Minding The Gap: Adolescent Mothers and the Politics of Impression Management*, work in progress on file with author.

[59] Other state policies serve to move teen mothers from the category of child to the category of adult. For example, some states encourage girls who become pregnant through statutory rape to marry the adult fathers of their children. Marriage then emancipates the pregnant minor, taking her out of legal childhood, and childhood interaction, altogether while simultaneously keeping her quasi-subject to the authority of her husband. *Cf.* Melissa Murray, *The Space Between: The Intersection of Criminal Law and Family Law*, IOWA L. REV. (forthcoming 2009).

childcare, and other relationships and community responsibilities. In many ways, the law acknowledges this complexity by endowing parents with authority to make their own decisions about how to engage in childrearing and to balance their various interests and demands.[60]

However, the law also simplifies parents' lives by consistently placing parents at the top of the parent-child hierarchy. This placement constructs parents as always addressing children's dependence and protecting them from harmful outside influences. These acts in turn usually amount to the understanding that parents control their children's lives. In fact, pursuant to the "exchange view" of parenthood, parents have rights over their children in exchange for the performance of parental duties.[61] The legal conception of parent thus hinges almost entirely on parents' rights to make decisions on behalf of their children free from state interference,[62] barring default in the form of divorce or custody disputes or cases of abuse or neglect.[63] Moreover, even in many instances of default, parents are still expected to provide financial support for their children even if they do not have full decisionmaking powers, reemphasizing that parents are primarily responsible for addressing children's dependence. As such, even in parent-child relationships that do not conform to the state's ideal, parents still occupy the top of the vertical relationship even if those parents are compelled to provide support against their will.

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[60] This authority flows from constitutional and common law notions of family privacy. *See, e.g.*, Parham v. J.R. 442 U.S. 584, 602 (1979) (recognizing, in a case litigated under the Fourteenth Amendment Due Process Clause, that the family is "a unit with broad parental authority over children"); s*ee also* Buss, *supra* note 3, at 29 (discussing the traditional "exclusion of other private parties competing with parents for some or all control over a child's upbringing").

[61] *See, e.g.*, Roe v. Doe, 272 N.E.2d 567, 570 (N.Y. 1971) ("[T]he child's right to support and the parent's right to custody and services are reciprocal: the father in return for maintenance and support may establish and impose reasonable regulations for his child."). For a critique of this view, see Bartlett, *supra* note 11, at 297–98.

[62] Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (discussing parents' right to "bring up children"); Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925) (discussing the right "of parents and guardians to direct the upbringing and education of children under their control"); Wisconsin v. Yoder, 406 U.S. 205, 213–14 (1972) ("[T]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society."); Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); *see also* Troxel, 530 U.S. at 78 (Souter, *J.*, concurring) (stating that parents have the right to "indoctrinate children"); *but see* Troxel, 530 U.S. at 91–93 (Scalia, *J.*, dissenting) (refusing to recognize a "theory of unenumerated parental rights").

[63] Minow, *supra* note 20, at 7 ("Public power becomes relevant only in exceptional circumstances, when parents default."). Given that divorce is often considered to constitute such default, Katharine Baker emphasizes that "parental rights give married parents the right to raise and socialize their children as they choose without interference from the state." Katharine Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523, 1526 (1998). Baker further delineates the aspects of that parental right by stating that "[p]arents are free to inculcate values, structure obligation, and demand compliance within the vertical relationship." *Id.* Although Baker correctly identifies some of the consequences of parental default, she fails to acknowledge that other groups of parents are accorded lesser privacy for reasons other than divorce, including for reasons of class and race. *See* Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 125–26 (1999).

Although this construction of parenthood in many ways reflects the reality of the parental role outside of the law, it is also a simplification. Parents may at times control their children's lives and address all of their dependence, but at other times children exert their own will or are influenced by non-parental actors, whether those actors are other children or adults.

This simplification of parenthood means that the legal construction of parenthood necessarily does more than reflect the experiences of parents. Instead, as with children's dependence, the law can also reinforce and, in part, create those experiences by repeatedly emphasizing the power parents should yield over children's lives. Indeed, it is difficult to imagine a non-legal conception of parent that does not incorporate the legal conception of a parent vested with decisionmaking authority and financial responsibility for her children. The law's construction of parenthood therefore has consequences for family life, consequences that can affect the lived experiences of both parents and children in at least three ways.

First, the construction of parenthood is the necessary corollary to the construction of childhood described in Part I. The construction of parenthood thereby plays a role in constructing children as objects of adult direction and care, with all of the consequences described above. However, the construction of parenthood also constructs parents as the providers of that direction and care, and that aspect of the construction too has consequences. As other scholars, particularly Melissa Murray, have emphasized, legal constructions of parenthood do not acknowledge the various other adult caregivers in children's lives.[64] This silence can affect not just third-party caregivers, who may feel marginalized and undervalued, but also parents themselves: parents often feel overwhelmed with the demands of the expansive yet exclusive notion of childrearing authority embraced by the law,[65] and can feel guilty about decisions to rely on third-party caregivers.[66] Therefore, although the legal construction of parenthood may benefit parents by reinforcing or even creating parental authority, it can also harm them by setting a bar that no parent can easily meet.

Second, the legal construction of parenthood can harm children, beyond positioning children as the objects of parental direction and care. The construction of children as objects discussed above obscures children's ability to exercise agency as subjects in various contexts, including the context of horizontal relationships. The construction of parenthood described here can limit children's agency in a more coercive manner, by controlling the terms of much of children's daily existence, at least in the

[64] Murray, *supra* note 14 at 387–94, 410–32; *see also* Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 693 (2006); Dorothy Roberts, *The Community Dimension of State Child Protection,* 34 HOFSTRA L. REV. 23, 27–35 (2005); Rosenbury, *supra* note 14, at 843–44, 878–80, 891–93; *cf.* Stephen D. Sugarman, *Framing Public Interventions With Respect to Children as Parent-Empowering*, unpublished manuscript available at http://www.law.berkeley.edu/faculty/sugarmans/#Child, at 1 ("The key message is that [most] parents need help, not only from extended family members and the community at large, but also from government.").

[65] Rosenbury, *supra* note 14, at 896–97.

[66] Murray, *supra* note 14, at 411.

home and at times outside of it.[67] This parental control can benefit children in many ways.[68] By emphasizing the benefits of parental authority and control, however, the legal construction of parenthood can mask the potentially coercive aspects of any vertical relationship, including the parent-child relationship.[69]

Some legal scholars, most notably Barbara Bennett Woodhouse, have critiqued the possible coercion flowing from this construction of parenthood.[70] Yet most legal scholars have embraced the hierarchal, and therefore potentially coercive, nature of the law's construction of the parent-child relationship on the ground that it best promotes children's best interests.[71] For example, Katharine Baker emphasizes that "parents make decisions for children that, if the children were adults, the children would make for themselves."[72] Baker also emphasizes that this parental decisionmaking is necessary because children are "emotionally dependent,"[73] and they need a vertical relationship in order to acquire "the ability to learn and reason and develop."[74] Baker therefore reinforces the construction of both parent and child as occupying the two ends of a vertical relationship in which power flows in only one, top-down direction.[75] That construction, with parenthood always occupying the top of the hierarchy, can harm children by forcing them to endure real or possible coercion, however big or small, as a price of receiving the benefits of the parent-child relationship.

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[67] *Cf.* Rosenbury, *supra* note 14, at 881–89.

[68] *See, e.g.*, Baker, *supra* note 63, at 1543–45; Emily Buss, *Adrift in the Middle: Parental Rights after Troxel v. Granville*, 2000 S. CT. REV. 279, 284–90; John E. Coons, *Intellectual Liberty and the Schools*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 495, 506–10 (1985); Stephen Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 940–41 (1996); Ferdinand Schoeman, *Rights of Children, Rights of Parents, and the Moral Basis of the Family*, 91 ETHICS 6, 17 (1980); Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL RTS. J. 1071, 1077–79 (2002–2003); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2410, 2415 (1995).

[69] These coercive aspects can also be masked by the assumption that parents engage in spontaneous care of children, thereby making coercion irrelevant. *See, e.g.*, Eekelaar, *supra* note 29, at 222 (discussing the work of Tom Campbell).

[70] *See* Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992) (arguing that *Meyer* and *Pierce* view children as parents' private property); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993); Barbara Bennett Woodhouse, *Out of Children's Needs, Children's Rights: The Child's Voice in Defining the Family*, 8 B.Y.U. J. PUB. L. 321 (1994); Barbara Bennett Woodhouse, *Of Babies, Bonding, and Burning Buildings: Discerning Parenthood in Irrational Action*, 81 VA. L. REV. 2493 (1995).

[71] *See* sources cited *supra* note 68.

[72] Baker, *supra* note 63, at 1540 n.82. Emily Buss and Elizabeth Scott make arguments very similar to Baker. *See supra* note 68.

[73] Baker, *supra* note 63, at 1543.

[74] *Id.* at 1544.

[75] Indeed, Baker is one of only a few other scholars who uses the term "vertical relationship" to describe the parent-child relationship. *Id*. at 1523, 1538–49. In addition, Baker wants to strengthen the power of any individual vertical relationship by limiting the number of adults who can make claims to control the upbringing of a child. *Id.* at 1547 ("Multiple vertical bonds that permit children to maintain relationships with many parent-like figures may serve the children's need for ongoing relationships, but they do so at the expense of a sense of belonging to one group."); *id.* at 1548 ("The more people with a 'claim' to a vertical relationship with the child, the less stable the child's life will be because more lives are necessarily less stable than fewer lives.").

Finally, even though parents, like children, are constructed through the vertical parent-child relationship, parents have more room to simultaneously exist outside of that construction. Although parenthood can be burdensome and time-consuming, the law does not assume that is encompasses all of parents' personal relationships. Instead, the law acknowledges that parents have, and value, relationships with other adults. For many parents, this acknowledgment pre-dates parenthood, with the soon-to-be-parents' horizontal relationship determining who will constitute the co-parents of the soon-to-be-born child. However, the law's protection of parents' horizontal relationships does not depend on the existence of an actual or potential vertical relationship. Instead, the law permits parents, like nonparents, to engage in intimate associations without other adults without undue interference from the state. The law even affirmatively supports some of those relationships – through recognition of marriage and marriage-like relationships – even if that means parents are engaged in meaningful relationships with adults who are not the co-parents of their children, or with adults who are the parents of other children. Parents therefore do not have to give up their position as parents in order to maintain diverse horizontal relationships with other adults.

Parenthood therefore does not, or at least does not have to, define the entirety of parents' existence. Rather parents may escape parenthood and be "merely" adults for purposes of the law. Their position at the top of the parent-child hierarchy therefore has benefits beyond controlling the direction of children's lives. Children, in contrast, are confined by their position at the bottom of the hierarchy. Because of their construction as objects, they are not entitled to the subjectivity that would enable them to both maintain yet periodically escape their place in the vertical parent-child relationship. The next Part examines this conception of subjectivity, and begins to theorize ways to move beyond it.

III. Constructions of Subjectivity

Examining the constructions of childhood and parenthood that flow from the law's consideration of the parent-child relationship reveals that children are bound by their position in that vertical relationship more than parents are. Indeed, by focusing on the nature of the vertical parent-child relationship, the law overlooks the roles children play in their own lives and the lives of other children,[76] thereby confining children to the role of recipient of adult knowledge and childrearing philosophies. Children are constructed as the constant objects of adult control, whereas parents are constructed as subjects, both within the parent-child relationship as the providers of that control and outside of that relationship as adults capable of forming relationships with other adults.

[76] *Cf.* Buss, *supra* note 3, at 30 (identifying the child herself as "another, often overlooked, private competitor for developmental control" over children); Rosalind Edwards & Miriam David, *Where are the Children in Home-School Relations? Notes Towards a Research Agenda*, 11 CHILDREN & SOCIETY 194, 195 (1997) (stating that the "prevalent home-school orthodoxy" in the field of sociology "does not consider children, either as individual or collective participants in the process" of education); *but see* THORNE, *supra* note 31, at 20 ("I was primarily interested in the ways kids construct their own worlds, with and apart from adults.").

Despite the power of these constructions, children need not be positioned solely as the objects or passive recipients of adult childrearing. Although rarely acknowledged within the legal construction of childhood,[77] children can in fact play active and positive roles in shaping their own worlds. Most saliently, children's relationships with other children can at times be more influential in shaping children's daily realities than are their relationships with parents, teachers or other adults.[78] Some of this influence can be negative, as fears of peer pressure remind us, but much of this influence can be positive or neutral, in much the same way that relationships between adults are influential. These horizontal relationships between children may not look like traditional (adult) friendships, particularly when children are younger, and the relationships are often ephemeral or fleeting, but they can still play important roles in children's lives.[79]

Acknowledging the diverse roles children play in their own lives and the lives of other children can challenge the very framework by which legal childhood and parenthood currently gain meaning. In a world in which children's horizontal relationships are accepted as a part of childhood, the value of children's lives would no longer exclusively hinge on dependency or the attainment of adult status. Rather, children could embody a subjectivity that is currently reserved for adults in legal discourse. This Part examines how family law could begin to theorize such subjectivity even while continuing to acknowledge and address the many ways that children remain dependent on adults.

A. *The Role of Subjectivity*

Any consideration of the child as subject must first confront the dual, and contradictory, meaning of subject in this context. This Part and the next focus on some of the situations where children may act as subjects with agency, whereas traditional considerations of children tend to focus on children "as subject to different authorities."[80] This traditional approach makes it difficult to view children as subjects with agency as opposed to objects of adult control.[81] Being subject implies a lack of power that renders impossible any attempt to be a subject. The title of this Article embraces this double meaning, but also adds a third: children as the subject of scholarly discourse in a field dominated by considerations of which adults should be entitled to enjoy the legal status of parent. In many ways, however, this third meaning is simply a manifestation of the original double meaning. Because children are assumed to be subject to adult authority, adults have been the only subject with agency in legal discourse.

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[77] For the few exceptions, see *supra* Part I.B.3.

[78] *See, e.g.*, HARRIS, *supra* note 53, at 147–71 (1998); Buss, *supra* note 34, at 1270–76; *cf.* McClain, *supra* note 2, at 82 ("Public discourse tends to 'go to extremes' about families, assuming either that family structure alone wholly determines a child's fate, or that parents have almost no impact on their children's development, with peers exerting a far more important influence. The truth surely lies somewhere in the middle."). This influence, of course, explains some of the fears surrounding peer pressure discussed above. *See supra* Part I.B.2.

[79] *See, e.g.*, WILLIAM S. CORSARO, WE'RE FRIENDS RIGHT? INSIDE KIDS' CULTURE 67–69 (2001).

[80] Minow, *supra* note 8, at 267–77.

[81] *Cf.* Woodhouse, *Hatching the Egg*, *supra* note 70, at 1812–14.

The multiple meanings of the word subject reflect more than linguistic flexibility. Instead, they also illustrate the role of the child in constituting the category of adult within legal discourse. The category of adult is often invisible in legal discourse, because adults are viewed as the universal legal subject.[82] The category of adult is therefore presumed in most legal analysis, particularly when that analysis hinges on the existence of an autonomous agent, governed by his own will, capable of exerting power over himself and others. This concept of the autonomous adult agent would not exist, however, except in comparison to the child.

The autonomous adult agent acquires meaning against the child, who is constructed not only as a pre-adult but also as dependent on adults and thus incapable of free will. This construction of the child provides an empty space against which to define adulthood;[83] adults are what children will become, once they properly develop. Therefore, childhood is not simply a social construction; rather, it is the construction that makes the category of adult possible. In turn, in order for the category of adult to have content, children must be constructed as appropriately subject to adult control and definition. Children and adults are thus mutually dependent on one another for their very existence as individuals embodying the categories of child and adult.

An example of this dynamic can be found in story told by Patricia Williams in her book, *The Alchemy of Race and Rights*:

> Walking down Fifth Avenue in New York not long ago, I came up behind a couple and their young son. The child, about four or five years old, had evidently been complaining about big dogs. The mother was saying, "But why are you afraid of big dogs?" "Because they're big," he responded with eminent good sense. "But what's the difference between a big dog and a little dog?" the father persisted. "They're *big,*" said the child. "But there's really no difference," said the mother, pointing to a large slathering wolfhound with narrow eyes and the calculated amble of a gangster, and then to a beribboned Pekinese the size of a roller skate, who was flouncing along just ahead of us all, in that little fox-trotty step that keep Pekinese from ever being taken seriously. "See?" said the father. "If you look really closely you'll see there's no difference at all. They're all just dogs."[84]

Williams tells the story primarily to emphasize the ways that subject position matters to lived experience, despite universalizing impulses in legal discourse. Williams concludes

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[82] *See* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1, 11 (2008) ("[T]he vulnerability perspective call attention to another problematic characteristic of the liberal subject: S/he can only be presented as an adult."). In this way, adult status operates much like whiteness. *See* BARBARA FLAGG, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW (1998).

[83] For a similar discussion of the relationship between adult and child in the field of sociology, see Leena Alanen, *Rethinking Childhood*, 31 ACTA SOCIOLOGICA 53, 56 (1988) (describing how the category of adult is meaningful only if the definition of child is "empty, without any substantial positive definition").

[84] PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 12 (1991).

that "These people must be lawyers," because, among other things, "How else do grown-ups sink so deeply into the authoritarianism of their own world view that they can universalize their relative bigness so completely that they obliterate the subject positioning of their child's relative smallness?"[85] Williams therefore acknowledges the ways that children become subject to adult reality, thereby limiting children's opportunities to assert their own positions as subjects. As Williams writes, the story "illustrates a paradigm of thought by which children are taught not to see what they see."[86]

The story can be read to reveal even more, however. Most saliently, the story illustrates the ways that subject positions are necessarily defined in relation to one another. The parents in the story are not simply imposing their realities onto their child. Instead, the parents' perspectives are made possible in large part because their reality is constructed through the distinction between adults and children, and even humans and "just dogs." The concept of human agency comes into being, and is continually reconstituted, by contrasting human capabilities against those of animals. Similarly, the concept of adult autonomy comes into being, and is continually reconstituted, by contrasting adult maturity against children's dependency. Here, the parents perform, and thereby reinforce, their positions as autonomous agents by, first, educating their son in the distinction between human and animal and, then, asserting their power to define what relationships and fears should matter to the child as he prepares to enter the world of adult maturity. The parents thereby exist as subjects by subjecting their son to their will.

In this way, the autonomy of the legal subject depends on the relation between adult and child. Even adults who are not parents depend on the relation to give content to the concepts of autonomy and agency that constitute the legal subject. Three influential scholars of children's lives acknowledged these dynamics while arguing for expanded parental control over children, declaring:

> To be a *child* is to be at risk, dependent, and without capacity to decide what is "best" for oneself.
> To be an adult is to be a risktaker, independent, and with capacity and authority to decide and to do what is "best" for oneself.
> To be an *adult who is a parent* is to be presumed in law to have the capacity, authority, and responsibility to determine and to do what is good for one's children.[87]

That declaration reveals how considerations of children's subjectivity – considerations that explore whether children can be agents even as they are also subject to parental and state authority – can challenge the very definition of subject embraced by the law. Despite the legal responses described in Part I, children can and do engage in relationships with other children that move beyond both dependency and threat. Most of

[85] *Id.* at 12–13.
[86] *Id.* at 13.
[87] JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 89 (1979) (emphasis in original).

the work exploring the positive aspects of children's horizontal relationships has been done not within legal scholarship but, as might be expected, within the fields of child sociology and psychology. This work emphasizes that children, from a relatively early age, are capable of creating rich social worlds with other children and of navigating those worlds without assistance from adults.[88] Moreover, these interactions with other children can help children better understand their interactions with adults and in larger society.[89]

If children move between dependency and subjectivity, then the categories of adult and parent – categories that depend on their relationship to the category of child by defining themselves as the opposite of that category – are called into doubt. That doubt can in turn destabilize notions of legal subjectivity, creating greater room for recognition of children's personhood within the law.

B. *The Complexity of Subjectivity*

Many theorists, particularly feminist legal theorists, have already challenged the standard definition of the subject within the law. These theorists argue that legal concepts of the autonomous agent are themselves constructs that bear little relation to lived experience. The law presumes autonomy and agency when in fact individuals are dependent on others in many ways and our actions are shaped both by those dependencies and by the societal structures, including legal rules, that facilitate those relationships.[90] For example, adults, like children, depend on the daily provision of care, by themselves or other adults or some combination thereof, and family law often facilitates that care by supporting economic interdependence through the system of benefits, obligations and default rules attaching to marriage and, in some states, marriage-like relationships.

Despite this dynamic of care and interdependence, the law tends to assume that adults are autonomous agents in almost all contexts. Feminist legal theorists have illustrated how that assumption can privilege certain people over others, primarily those (generally men) who receive more care than they give, thereby freeing them to pursue interests in ways that mask the support they receive from others (generally women).[91]

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[88] *See, e.g.*, CORSARO, *supra* note 79, *passim*; ANNETTE LAREAU, UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE 35–36, 165–97 (2003); THORNE, *supra* note 31*, passim*; Prout & James, *supra* note 16, at 8.

[89] *See, e.g.*, JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN 164 (2006) ("It could be that, as a general matter, the most appropriate realm for children to practice making relationship decisions, and a fully adequate realm, is just their relationships with peers – that is, their friendships and associations formed around particular activities, such as sports."); HARRIS, *supra* note 53, at 147–71; Mary Gauvain, *Sociological Context of Learning*, in LEARNING IN CULTURAL CONTEXT: FAMILY, PEERS, AND SCHOOL 11, 12–19 (Ashley E. Maynard & Mary I. Martini eds., 2005).

[90] *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH 225–27 (2004); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 37–45 (1987); ROBIN WEST, CARING FOR JUSTICE *passim* (1997); Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1045– 66 (1992); Minow, *supra* note 20, at 15. Fineman has now shifted her analysis from dependency to vulnerability, s*ee* Fineman, *supra* note 82, at 1 (seeking "to develop a more complex subject around which to build social policy and law"), but one could argue that dependency is sufficiently broad to cover both her earlier conception of dependency and her current conception of vulnerability, *see id.* at 9–12 & n. 30.

[91] *See, e.g.*, FINEMAN, *supra* note 90, at 57–70, 162–74.

Conversely, legal conceptions of agency can harm those people (generally women) who are presumed to be acting freely when in fact their choices are constrained by societal structures that disproportionately assign caregiving duties to them.[92]

These critiques of the legal subject could easily be extended to argue for the recognition of children's subjectivity in some contexts.[93] After all, if autonomy and agency are legal fictions, or at best legal overstatements, then children cannot be denied subjectivity simply because they are dependent on adults in some ways.[94] Autonomy, defined as lack of dependency, cannot serve as the relevant distinction between adult and child if dependency exists throughout the life course. Children are therefore not as different from adult subjects as the law assumes, creating the possibility that children could indeed occupy positions as subjects in at least some contexts.

That feminist legal theorists generally have not extended their analysis to support notions of children's subjectivity could reveal that feminists, too, are dependent on the relation between adult and child to constitute the subject of much feminist concern, the subject of woman.[95] This construction of woman is similar to the construction of the legal subject described above. Like the category of adult, the category of woman comes into being in contrast to the category of child. Indeed, that dynamic may be even more salient in this context, as women are more likely than men to provide the daily care thought to be necessary for children's development into adults.

However, an additional step is required. The category of woman also acquires meaning against the category of man; woman as a sub-category of adult makes little sense unless contrasted with the sub-category of man.[96] Without that contrast, the category of woman would be no different than the category of adult. This additional step may make at least some feminists even more attached to a construction of child as object. Woman's relationship to man traditionally was a vertical relationship much like the parent-child relationship, with man occupying the position of subject at the top of the hierarchy and woman being the object of male desire and control. Although the relationship is now more horizontal, feminism may still need the relationship between woman and child in order to make possible women's subjectivity.[97] Women, at least as a theoretical or legal matter, may still feel relatively powerless in relation to men, making

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[92] *See, e.g.*, Catherine Albiston, *Anti-Essentialism and the Work/Family Dilemma*, 20 BERKELEY J. GENDER L. & JUST. 30 (2005); Tracy Higgins, *Job Segregation, Gender Blindness and Employee Agency*, 55 ME. L. REV. 241 (2003).

[93] *See, e.g.*, Barrie Thorne, *Re-visioning Women and Social Change: Where are the Children*?, 1 GENDER & SOCIETY 85 (1987).

[94] *Cf.* Minow, *supra* 8, at 297 (noting that the law could easily acknowledge that children need some forms of freedom but also need guidance, support and even control to protect them from harm).

[95] *See* Claudia Castaneda, *The child as feminist figuration: Toward a politics of privilege*, 2 FEMINIST THEORY 29 (2001).

[96] *See, e.g.*, Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS 515 (1982) ("Women through male eyes is sex object, that by which man knows himself at once as man and as subject.").

[97] *See* Castaneda, *supra* 95; Frug, *supra* note 90, at 1055 ("The maternalized female body triangulates the relationship between law and the meanings of the female body. It proposes a choice of roles for women.").

the parent-child relationship a more likely place for women to constitute their position as subjects.[98]

Family law scholars can similarly be viewed as dependent on the relation between adult and child to give content to the category of parent that constitutes much of family law's concern. This dynamic, too, is similar to the construction of the legal subject described above, because the category of parent is literally constituted by the relation between adult and child; the category would not exist but for relationships between adults and children. But the construction of parent also involves something more. As described in Part II, the law constructs the category of parent to recognize a particular adult-child relationship and, significantly, to position that relationship in opposition to both state control and other adult-child relationships. The category of parent therefore permits adults to exercise subjectivity and, in turn, to exert power over others. This power includes power over children, as illustrated by Patricia Williams' story, but also power over other adults and state actors who may wish to be a part of children's lives.[99] Such power is generally not base, as family law presumes that parents act in the best interests of their children and the state will intervene when they do not, but parents are given the power to define best interests in the first instance.

Family law, like feminism, therefore risks losing one of the subjects of its concern if it takes seriously the insight from feminist legal theory that complete autonomy and agency can never exist. If everyone is dependent on others, then it becomes more difficult to argue that children's dependency on adults completely justifies the power given to the category of parent. Parents' control over children is called into doubt and, perhaps more saliently, parental prerogatives with respect to other adults and the state are opened to critique and challenge. A consideration of children's subjectivity thereby threatens the meaning of much of family law, including the construction of the category of parent as well as the category of child. It is therefore not surprising that most considerations of the parent-child relationship in family law focus not on children as subjects but on children as subject to parental or state control.

However, there is another likely reason why family law has largely failed to consider children's subjectivity: the dependencies of children are often different, and at times very different, than the dependencies explored by critics of the autonomous legal subject. Some of these differences are a matter of degree. Children, like all household members, are dependent on the other members of their households, but they are generally

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[98] *Cf.*, Mary Becker, *Maternal Feelings: Myth, Taboo and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 203–23 (1992) (arguing that gender-neutral custody standards do not adequately protect women and proposing a maternal deference standard).

[99] *See* GOLDSTEIN ET AL, *supra* note 87, at 89; Buss, *supra* note 3, at 29; David D. Meyer, Lochner *Redeemed: Family Privacy After* Troxel *and* Carhart*,* 48 UCLA L. REV. 1125, 1163–69 (2001). Exceptions include state actors intervening in response to abuse and neglect, compelling school attendance, limiting children's labor outside the home, and subjecting children who violate the law to juvenile or adult criminal court. *See* Prince, 321 U.S. at 166–67; Gault, 387 U.S. at 17. State actors may also mandate medical tests for newborns and vaccinations for children. *See, e.g.*, Douglas County v. Anaya, 694 N.W.2d 601, 608 (Neb. 2005).

more dependent than the adult members of those households.[100] Other differences are a matter of kind. For example, children are dependent on others for the acquisition of basic skills; even teenagers can be engaged in the acquisition of basic skills that adults take for granted.[101] Still other differences are explicit consequences of the law. Legal rules prevent even capable children from engaging in certain activities that adults take for granted.[102]

All of these differences make simple analogies to adult dependencies unsatisfying. The specific nature of children's dependencies may therefore justify family law's refusal to consider children's subjectivity in many instances. But the fact that the dependencies of adults and children are not the same does not mean that they must in turn be viewed as radically different in all contexts. Children, on the whole, may be more dependent than adults, or at least dependent in different ways, but that differential dependency need not erase children's subjectivity altogether. Just as adults are viewed as subjects even though they are dependent on others, children could be viewed as subjects in some contexts despite their intense dependence on adults.

That family law has generally refused to look at the possibility of children's subjectivity in such a contextual manner may be due to the nature of rights discourse. The law generally recognizes subjectivity by conferring rights upon actors who are assumed to be autonomous and capable of agency.[103] Past attempts to remedy power imbalances between parents and children, or the state and children, have therefore been framed as issues of children's rights, as briefly discussed in Part I. Such an articulation tends to simplify the complexity of subjectivity. Children are assumed to be either autonomous in a given context and thus deserving of rights, or dependent and thus incapable of exercising rights, ignoring the complex nature of dependency described above. Such simplification can lead to contradictory and inconsistent portrayals of children.[104]

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[100] *See* Schall, 467 U.S. at 265 ("[J]uveniles, unlike adults, are always in some form of custody."); Reno v. Flores, 507 U.S. 292, 302 (1993) (quoting *Schall*).

[101] *See* Roper, 543 U.S. at 569–70; Belotti, 443 U.S. at 634.

[102] *See* Minow, *supra* note 20, at 18 ("Children are doubly dependent. Their dependency is constructed by legal rules and also is in their lives as lived.").

[103] *See id.* at 15 ("The rhetoric of rights dominant in legal discourse poses a choice between persons under the law being treated either as separate, autonomous, and responsible individuals entitled to exercise rights and obliged to bear liabilities for their actions, or else as dependent, incompetent, and irresponsible individuals denied rights, removed from liabilities, and subjected to the care and protection of a guardian – or the state."); Lee E. Teitelbaum, *Children's Rights and the Problem of Equal Respect*, 27 HOFSTRA L. REV. 799 (1999) (noting that under liberal theories, the capacity to claim rights either exists fully or not at all).

[104] For example, one scholar, in arguing that children should have a right against the state to express their identities in the manner of their choice, justifies his approach on the ground that children are "particularly vulnerable to the harmful effects of assimilation demands" while at the same time implicitly assuming that children possess identities that can in turn be suppressed by parents or the state. Lau, *supra* note 53, at 318–19. Children's dependence is thereby acknowledged and obscured at the same time, as children are portrayed as both not-yet-subjects (because they are particularly vulnerable) and subjects with identities and, hence, rights.

Of course, adults' subjectivity is also simplified for purposes of legal analysis. That simplification flows almost always in the direction of endowing adults with rights, and permitting adults to exercise those rights, even if they are dependent on others in multiple ways. The law therefore overlooks, and even denies, adult dependence for the purpose of bestowing rights, while simultaneously constructing the dependence of children as almost always present for the purpose of denying rights. By repeatedly placing children in the position of object, family law both creates more dependence than may be required and denies any possibility that children may be subjects with agency in some contexts even amidst dependence, particularly in the context of their horizontal relationships.

This Article begins a re-imagination of the parent-child relationship outside of this traditional form of rights discourse.[105] One way to move toward a more nuanced conception of children's subjectivity is to, first, un-tether the question of legal subjectivity from the issue of rights. If, as the constructions of child, parent and adult reveal, all subjects depend on an other to acquire meaning, and if subjects can otherwise be dependent on others in myriad ways while still maintaining their subject positions, then subjectivity need not be limited to those who are assumed to be capable of autonomous action in most contexts and thus deserving of rights. Children play a role in their own lives, and the lives of other children, in a way that does not have to depend on adult or state power yet which is also made possible by that power.[106] Indeed, children can create rich social worlds outside of the home or other parent-created spaces,[107] even as they are also dependent on the state or private adults for structuring the social contexts of schools and other youth organizations, and on parents or other adult caregivers for providing the material conditions (such as transportation, clothing and food), that enable them to take advantage of those contexts. The next Part explores how family law might better recognize these relationships between children in order to embrace children's subjectivity amidst dependence.

IV. Re-Constructing Children's Subjectivity

As the above analysis reveals, the categories of child, parent and subject do not reflect objective assessments of maturity, capacity or independence but instead are constructions that simultaneously simplify and shape the interactions of children, parents and other adults. This Part shows how those constructions might be altered if the law more fully embraced children's personhood by acknowledging and responding to a wider range of children's horizontal relationships. Children's personhood might also be explored through other points of entry, including by exploring children's legal

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[105] *Cf.* Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1, 52 (criticizing tendency "to perceive rights as a zero-sum game in which others' gains are our losses, rather than as a common enterprise in which each new right adds value to its neighbors").

[106] *Cf.* Alanen, *supra* note 83, at 58 (discussing how the "intentions and interests of children as participants in their own socialization are effectively excluded" in sociological discourse about children).

[107] *Id.* at 59–60 (describing how children show "remarkable competence . . . in constructing their everyday social relations"); *see also* THORNE, *supra* note 31, at 20.

emancipation from their parents, the state's prosecution of children as adults, the acknowledgment of "mature minors" in various medical contexts, including abortion, and ways lawyers might better represent children's views in abuse and neglect, custody or juvenile delinquency proceedings. Although each of those points of entry provides insight into children's lives, they tend to reinscribe current constructions of adults and children by focusing on contexts in which children might be permitted to occupy the category of adults. In addition, in each of those contexts, adults (in the form of judges, prosecutors, doctors or lawyers) determine that children have the capacity to exercise subjectivity, once again placing children in a vertical relationship with adults. In contrast, children's relationships with other children may enable children to perform as subjects outside of vertical relationships even while they are simultaneously subject to parental or adult control, thereby challenging current constructions of children, parents and subjects.

As discussed in Part I, most of children's relationships with other children are currently outside of the law's concern. Although many aspects of those relationships are likely to be viewed as appropriately outside of the law's concern – few, if any individuals, would embrace "birthday party law," for instance – the law ignores those very situations in which children are more likely to act as subjects with agency as opposed to objects of adult direction and care. The law's silence about this possibility therefore reinforces the current construction of childhood as a time of non- or pre-subjectivity.

This Part addresses three ways that scholars and reformers could better incorporate children's horizontal relationships into legal analysis, thereby more fully recognizing children's subjectivity amidst dependence. The first context takes family law on its own terms, exploring how children's horizontal relationships might be more fully recognized when allocating childrearing authority between parents and the state. The second context goes outside of family law, examining how states already facilitate the formation of children's horizontal relationships and proposing ways that states might do even more. The third and final context comes back to the family as shaped by family law, asking how state facilitation of children's horizontal relationships might ultimately change the interior of family life. In the end, these contexts are intended less as models for law reform and more as thought experiments designed to reveal how the law could better respond to, and shape, children's subjectivity amidst dependency.

A. *Thinking Within Family Law*

At first glance, family law's traditional focus on allocating childrearing authority between parents and the state seems to contain no room for children's horizontal relationships unless those relationships threaten the authority under consideration, as discussed in Part I. Once that authority is allocated, however, family law could do more to recognize the horizontal relationships that coexist alongside the vertical relationships governed by parents or the state.

For example, many states have already begun to do more to preserve sibling

relationships after the state assumes physical custody over children upon a finding of abuse or neglect.[108] In these situations, the parent-child relationship is at risk but children's relationships with siblings may still be healthy and robust. In recognition of the importance of such relationships, many states now mandate that caseworkers either keep siblings together when they remove them from the home or facilitate frequent visitation between them. These mandates signal that sibling relationships retain value even if the children are not connected through a parent living in the same home. Moreover, in a small but growing number of states, if a judge determines that the children cannot be reunited with their parents, state law permits siblings to assert their interests in maintaining sibling ties regardless of the nature of the state's petition to terminate parental rights or the outcome of that petition.

Recognition of children's horizontal relationships in this context softens some of the problems of family law's traditional approach to abuse and neglect, which tends to ask whether parents can make sufficient changes to regain custody or whether the state should find another permanent placement for the child, either through guardianship or termination of parental rights and a subsequent adoption. Courts generally do not consider children's interests apart from their interest in (healthy and safe) reunification with their parents until the very end of the process, when a judge is asked by the state to terminate parental rights. Otherwise, children's interests are assumed to coincide with those of their parents,[109] thereby reinforcing current constructions of both children and parents.

The increasing recognition of children's sibling relationships in abuse and neglect cases challenges the assumption that children's interests always overlap with parental prerogatives. Many of children's interests do indeed coincide with their parents' desires or conceptions of good childrearing, but children's horizontal relationships highlight the ways that children also have interests outside of that zone of alignment. In the context of abuse and neglect, states could do more to recognize this complexity by continuing to better acknowledge the value of sibling relationships independent of the parent-child relationship.[110]

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[108] *See* Ellen Marrus, *"Where Have You Been, Fran?": The Right of Siblings to Seek Court Access to Override Parental Denial of Visitation*, 66 TENN. L. REV. 977 (1999); Patton, *supra* note 41, at 19–37.

[109] Santosky v. Kramer, 455 U.S. 745 (1982); *see also* Michael H. v. Gerald D., 491 U.S. 110, 130 (1989) (assuming that daughter's interests coincided with interests of legally presumed father to exclusion of biological father); Yoder, 406 U.S. at 230–31 (assuming that children agreed with parents' opposition to mandatory secondary education); Troxel, 530 U.S. at 57 (assuming that children's interests coincided with mother's interests in limiting paternal grandparent visitation).

[110] States could do a better job by, for instance, permitting siblings who are not the subject of the termination proceedings to assert claims to a relationship with the child who is the subject of the proceedings. As discussed *supra* Part I.B.2, in some states sibling ties can be asserted only on behalf of the child whose relationship with the parent will be terminated, and the sole purpose of that assertion is to defeat the termination of parental rights. Therefore, the child can maintain sibling ties only by maintaining parental ties, creating the real possibility that the child's relationships with her siblings will become a pawn in the parent's struggle to maintain rights. Legal recognition of sibling relationships independent of the parent-child relationship would eliminate these potentially harmful incentives, creating avenues by which the law could facilitate sibling's contact with one another even after parental rights are terminated.

More broadly, laws governing removal of children from their parents' homes could also require states to consider ways removal might disrupt children's horizontal relationships outside of the home. If sibling relationships are recognized independent of the parent-child relationship, then traditional distinctions between sibling relationships and children's relationships with their peers begin to carry less analytical weight. By shifting the focus from parental ties to the nature of children's relationships, the category of sibling loses much of its unique meaning when compared to other horizontal relationships. Therefore, if a state recognizes the independent value of sibling relationships it logically could recognize the value of children's horizontal relationships with non-siblings as well.

States could respond to the potential importance of these other horizontal relationships in the context of abuse and neglect by attempting to minimize their disruption when children are removed from their parents' home. Removal from the home does not also have to mean removal from a child's school, neighborhood or other communities. Rather, laws governing removal could mandate that caseworkers keep children within their original school district and neighborhood, or facilitate visitation and ongoing connections with those communities. Such mandates would signal that children have lives outside of the parent-child relationship, and those lives go on even when the parent-child relationship is at risk.

Even if states embraced these means of better responding to children's horizontal relationships, however, they would have no practical effect on most children's lives. By working within family law's traditional frame of allocating childrearing authority between parents and the state, these proposals affect only those children whose parents have defaulted in their parenting duties, thereby ceding childrearing authority to the state. Most children, in contrast, remain in the sole custody of their parents. In that context, most of parents' childrearing decisions are protected from state interference by notions of family privacy and parents' substantive due process right to direct the upbringing of their children. Decisions about children's horizontal relationships fall squarely within that zone of protected childrearing authority. Indeed, if parents do not approve of their children's relationships with other children, they are generally thought to possess the right to prohibit those relationships (or at least attempt to) even if the state or others believe the relationships could be beneficial.[111]

This dynamic highlights the difficulties of extending protections enjoyed by adults to children. Not all horizontal relationships between adults are affirmatively recognized by the state, but all are protected against undue state interference through the

[111] *See, e.g.*, Troxel, 530 U.S. at 78 (Souter, *J.*, concurring) (stating that parents have the right to choose their children's social companions); Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 BYU L. REV. 605, 617 (stating that parental power "prevails[s] over the claims of the state, other outsiders, and the children themselves unless there is some compelling justification for interference"). This rights-based approach has two shortcomings from the perspective of this Article. First, it would recognize children's subjectivity only when children are sufficiently like adults, potentially reinforcing children's lack of subjectivity when they are not like adults.

right to intimate association.[112] Children have not been extended this right to intimate association,[113] likely in part because of the reasons described in the previous Part,[114] but also because such a right could directly conflict with the right to direct the upbringing of one's children that lies at the heart of the current construction of parenthood.[115] Therefore, even if states wanted children to engage in horizontal relationships more robustly, that policy could be thwarted by parents choosing to exercise the full range of their rights to direct the upbringing of their children. This potential for conflict highlights a fundamental difference between relationships between adults and relationships between children: in general, adult relationships require only limited assistance from the state, generally in the form of being left alone, whereas children's relationships can require both facilitation from parents and protection from undue parental interference. Such protection is inconsistent with the current frame for allocating childrearing authority between parents and the state.

Despite this consequence of family law's frame, states could carve out additional, albeit limited, protection of children's horizontal relationships that do not hinge on state actors trumping parental prerogatives. Specifically, states could abolish those aspects of "status offense" jurisdiction that permit parents to appeal to the state when they disapprove of their children's relationships.[116] Parents would therefore no longer be able to enlist the state to enforce their views about the appropriateness of their children's horizontal relationships. On a more symbolic level, those parents who would never think of asking the state to intervene explicitly in their families' lives would lose the state's tacit approval of their attempts to exert dispositive influence outside of the home. Instead, states would signal that they respect the ability of children to form relationships outside of the family home while also respecting the rights of parents to limit

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[112] Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L. J. 624, 629–37 & n. 26 (1979–80) ("The law, of course, largely ignores relationships among friends, but it is plain that the values of intimate association may be realized in friendships involving neither sexual intimacy nor family ties. Any view of intimate association focused on associational values must therefore include friendship.").

[113] However, some scholars have responded to the harm that may arise when parents do not permit children to pursue horizontal relationships that children find fulfilling by suggesting that older children be extended the right to maintain such relationships even in the face of parental disapproval, with the ability to appeal to a judge if parents fail to respect those rights. *See, e.g.*, DWYER, *supra* note 89, at 3–22; Meyer, *supra* note 42, at 1130 ("Where parent and child clearly concur with respect to the preservation or destruction of a relationship, state deference should be maximal. On the other hand, where a parent's control of a relationship is unambiguously resisted by the child, state deference to the parent's prerogative should be notably weaker."). As such, under these scholars' proposals, some children would enjoy a right to intimate association similar to the right adults enjoy. This Article does not suggest that children should simply be treated more like adults and thus be endowed with rights despite their actual or perceived dependence. Instead, for the reasons discussed in Part III, this Article attempts to move beyond such rights-based proposals.

[114] *See* Part III.B.

[115] *See* sources cited *supra* 62 and discussion in Part II.

[116] Some states have already abolished status offense jurisdiction. Those that have not still permit parents to claim that their children are "unruly" because they are dating or otherwise socializing with children their parents deem unsuitable. However, even in states without status offense jurisdiction, parents always have the option of pursuing private self-help, in the form of boarding schools or boot camps, for example. *See* Ryan v. Ryan, 677 N.W.2d 899 (Mich. App. 2004).

relationships that take place within the home.[117] States thus do not have to grant children rights, or otherwise give children the ability to call on state intervention in the home, in order to recognize children's relationships with other children.

Such an approach would be consistent with traditional family law analysis, but it would take scholars and reformers only so far toward more fully embracing children's subjectivity. By ceding control of the home to parents, this approach reinforces the idea of the home as a zone of privacy outside of state power.[118] Given the current construction of the parent-child relationship, this privacy usually amounts to parental autonomy, or the right of parents to speak for their children and to make decisions about their upbringing, free from state intrusion.[119] Therefore, this approach would likely strengthen the importance of vertical relationships in children's lives even as it recognizes the possibility of children's horizontal relationships existing outside of that context. Indeed, any approach that accepts family law's current frame of allocating childrearing authority between parents and the state would likely strengthen that authority even while attempting to address the complexity of children's lives outside of that authority. The next Section explores ways that scholars and reformers could move beyond that dynamic by working outside of family law.

B. *Thinking Outside of Family Law*

States already play a role in facilitating children's horizontal relationships outside of family law. Many of children's horizontal relationships are formed at school,[120] attendance at which is compelled by the state. Moreover, local governments frequently

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[117] As such, states would acknowledge that the zone of privacy attaching to the family home need not subsume all of the spaces or relationships of childhood. Instead, states would permit multiple influences, including those of children themselves, to flourish. For discussion of how this approach would also affect children's vertical relationships with adults who are neither the children's parents nor teachers, and might require some limited pluralism-enhancing regulation, see Rosenbury, *supra* note 14, at 891–97.

[118] This criticism can also be extended to my past work. *See id. passim*.

[119] Because family privacy exempts families from state power only, it does little to protect vulnerable family members, particularly children, from internal family disputes or other displays of power. *See, e.g.,* Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1174–80 (discussing how family privacy historically reinforced husbands' authority over their wives and children). Thus, children can be adversely affected by the legal exemptions that result from entity-based family privacy. Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1255 (1999); *cf.* Dolgin, *supra* note 2, at 346 ("[A]n evolutionary shift toward the recognition of adults within families as autonomous individuals became revolutionary in the last decades of the twentieth century. Society did not, however, comparably reconstruct its understanding of children, and it still views them as dependent and vulnerable."). Moreover, constitutional notions of privacy rarely endow children with rights that can be invoked against their parents. *See, e.g.*, Teitelbaum, *supra* note 103, at 810–15. Notable exceptions include the rights of adolescents, without parental consent, to obtain contraception, *see* Carey v. Population Servs. Int'l, 431 U.S. 678, 693–99 (1977) (plurality), and to seek an abortion upon a judicial finding of sufficient maturity, *see* Bellotti, 443 U.S. at 643, although these rights are generally viewed as claims against the state, *see supra* note 6. Minors may also seek emancipation from their parents as a matter of state law. *See, e.g.*, CAL. FAM. CODE § 7120 (West 2003).

[120] *See, e.g.*, ALLISON JAMES ET AL., THEORIZING CHILDHOOD 38–58 (1998); Sarah L. Holloway & Gill Valentine, *Spatiality and the New Social Studies of Childhood*, 34 SOC. 763, 770–76 (2000). Emily Buss has recognized this dynamic in the context of adolescence. Buss, *supra* note 34, at 1270–76.

make public spaces available for playgrounds and other recreational activities, and they either run after-school programs or make public schools and other public facilities available for such programs.[121] Federal law mandates that public schools hosting such programs do so equally.[122] Finally, state and federal law recognizes various youth groups as charities, and even shields some of those groups from state and federal anti-discrimination laws that are thought to interfere with their missions.[123]

The law's role in the facilitation of children's horizontal relationships reveals that children's horizontal and vertical relationships often overlap. Horizontal relationships do not occur in a vacuum but rather develop in contexts managed by adults to some extent, whether by local authorities establishing playgrounds and opening schools, teachers mediating classrooms, or parents planning play dates, for example. Unlike the consideration of family law's traditional frame, however, such overlap does not have to strengthen adult authority over children or eclipse the independent value of children's horizontal relationships. Instead, adult involvement can provide some of the conditions for horizontal relationships to flourish outside of vertical relationships.

Scholars and reformers therefore can more fully promote children's subjectivity amidst dependency by supporting increased facilitation of children's horizontal relationships. Currently, the law does not mandate that parents or state actors facilitate horizontal relationships and given the focus on the harm of horizontal relationships described in Part I, they often do not. For example, federal law does not require that public schools open their doors to after-school programs; instead, if public schools decide to open their doors, they must do so in an equal manner. Therefore, school officials hostile to gay-straight alliance student groups have attempted to close their doors to all groups rather than permit interested students to meet on school grounds.[124] Similarly, federal and state law recognizing youth groups as charities do not require that the groups listen to their youth members or otherwise foster their relationships. Rather, the adult leaders of the groups can impose their own views of appropriate relationships on their members.[125] Finally, state compulsory education laws do not mandate that children interact with other children at school. Parents can instead choose to educate their children at home, effectively removing them from horizontal relationships that are not under parents' direct control.[126]

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[121] For discussion of the important roles playgrounds and after school programs play in children's attempts to create their own social worlds, see Elizabeth A. Gagen, *Playing the Part: Performing Gender in America's Playgrounds,* in CHILDREN'S GEOGRAPHIES: PLAYING, LIVING, LEARNING 213, 213 (Sarah L. Holloway & Gill Valentine eds., 2000); Hugh Matthews et al., *The "Street as Thirdspace,"* in CHILDREN'S GEOGRAPHIES, *supra*, at 139, 143–48.

[122] Equal Access Act, 20 U.S.C. §§ 4071–74 (2000).

[123] *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 653–59 (2000); Chambers v. Omaha Girls Club, 834 F.2d 697, 702–05 (1988).

[124] *See, e.g.*, Boyd County High School Gay Straight Alliance v. Board of Educ., 258 F.Supp.2d 667 (2003).

[125] *Cf.* Dale, 530 U.S. at 650–56 (imposing view of appropriate vertical relationships on youth members).

[126] All states permit parents to home school their children, so long as they meet state requirements, but some states' requirements are more strict than others. For a critique of home schooling on grounds other

Given this reality, states can do more to foster children's horizontal relationships without subsuming them under adult authority. For example, states could adopt educational curricula that emphasize the benefits of children learning from one another. In fact, research about children's learning styles increasingly emphasizes the ways children may learn more from their classmates than from their teachers.[127] States could also require public schools to open their doors for after-school youth activities, including those run largely by other children instead of adults. Communities could create more playgrounds and other recreational spaces for children, and ensure their security and safety. And states could regulate home schooling in new ways, specifically requiring parent-teachers to facilitate opportunities for their children to engage in horizontal relationships outside of the home school environment.

Policies like these outside of family law would acknowledge that children can, and indeed do, create and sustain rich social worlds outside of the home and its parental oversight. More importantly, such policies would emphasize that children do not need direct and constant state supervision in order to bring such worlds into being, even in the face of parental disapproval.[128] Although the state may create the conditions that permit children's horizontal relationships to flourish, those relationships can exist largely outside of direct state regulation, in much the same way that the right of intimate association permits adults to form friendships and other relationships outside of state control. Looking outside of family law's traditional frame therefore provides a path for more fully recognizing those aspects of children's subjectivity that exist alongside yet separate from their relationships with adults.

C. *Returning to the Interior of the Family*

The analysis above reveals ways that children might experience increased opportunities to engage in horizontal relationships outside of the home, but much of children's lives will still be lived within the home. Moreover, most children experience family life in positive ways that are not completely defined by their dependence or their position as objects of parental direction and control. Instead, children can experience a range of emotions and subjectivities when interacting with their parents, most of which are not reflected in family law's construction of the parent-child relationship. Accordingly, any approach that seeks to embrace children's subjectivity amidst dependence must return to the interior of family life, where subjectivity and dependence constantly intersect.

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than the above, see Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123 (2008).

[127] *See, e.g.*, JOHN D. BRANSFORD ET AL., HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE AND SCHOOL (2000); Roger Passman, *Experiences with Student-Centered Learning and Teaching in a High Stakes Environment*, 122 EDUCATION 189 (2001).

[128] In this way, concerns that state actors will merely substitute for parents may be alleviated. *Cf.* Emily Buss, *Children's Associational Rights?: Why Less is More*, 11 WM. & MARY BILL RTS. J. 1101, 1102 (2003) ("As long as children depend upon adults to identify and assert their rights, we should have no confidence that affording children rights will translate into greater deference to children's needs.").

In traditional family law analysis, that intersection tends to be framed as parent-child conflict, with children's desires or subjectivities assumed to be at odds with parental prerogatives. With respect to some of children's horizontal relationships with non-siblings, such direct parent-child conflict may in fact exist, as concerns about peer pressure reveal. In other situations, parents' and children's interests may intersect in ways that are more complex. For example, when parents decide to move the family home, they often disrupt children's horizontal relationships for reasons exogenous to the parent-child relationship, or at least for reasons other than the uprooting of horizontal relationships.

Current notions of family privacy generally collapse any distinctions among these situations, labeling them all internal family matters outside of state concern barring parental default.[129] Scholarly attempts to examine those internal matters are thus often viewed suspiciously as a way to interject the state into the interior of the family, thereby eroding family privacy. For example, when considering relocation, some proponents of family privacy ask with near disdain whether children should be able to appeal to the state in order to veto their parents' moving decision. As such, family law's traditional frame for allocating childrearing authority between the parents and the state is re-asserted, with state authority the only path for robustly recognizing children's views.

That the analysis quickly turns to state intervention may not be surprising, given that the state, pursuant to principles of parental default,[130] often does intervene when a divorced or never-married parent with primary custody of a child attempts to relocate against the wishes of the non-custodial parent. States have developed varied approaches to addressing the rights of both parents in such cases, from respecting the relocating parent's right to travel, to evaluating only the child's welfare, to balancing both parents' rights against the best interests of the child.[131] Even in this context of state intervention, however, vertical relationships dominate the analysis, with little consideration of how relocation might affect the child's other relationships. Judges generally evaluate children's welfare or their best interests by considering what amounts to two factors: the potential benefits of the move and the child's ability to maintain ties with the non-relocating parent.[132] Although children in these situations will also be moving away from

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[129] Indeed, so-called "intact families" are often perceived as existing outside of the law. *See, e.g.*, Martha Albertson Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955, 966–67 (1991). As discussed *supra* note 119, this privacy usually supports robust notions of parental power. *See also* Hafen, *supra* note 111, at 617; Jane Rutherford, *Beyond Individual Privacy: A New Theory of Family Rights*, 39 U. FLA. L. REV. 627, 644 (1987).

[130] For a discussion of the various types of perceived family default, see Rosenbury, *supra* note 14, at 834–35.

[131] For a summary of these approaches, see Ciesluk v. Ciesluk, 113 P.3d 135 (Colo. 2005).

[132] This focus is generally true of the scholarly literature on relocation as well. *Compare* Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L. Q. 305 (1996) *with* Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 FAM. & CONCILIATION CTS. REV. 297 (2000) and Richard A. Warshak, *Social Science and Children's Best Interests in Relocation Cases:* Burgess *Revisited*, 34 FAM. L. Q. 83 (2000). For a recent and important exception, see Merle H. Weiner, *Inertia and Inequality: Reconceptualizing Disputes over Parental Relocation*, 40 U.C. DAVIS L. REV. 1747 (2007).

many other ties, including ties with other children, courts generally do not take those potential losses into account when making relocation decisions.[133] Children are often not even asked about their views of the move.[134] Parental interests therefore dominate, obscuring children's interests in maintaining friendships and other relationships outside of the family unit.

This analysis reveals that, despite fears to the contrary, appeals to the state rarely elevate children's views and subjectivities over those of parents.[135] State actors either reinforce parental views or substitute their own views for parents' views. Traditional notions of state authority therefore are unlikely to pave a path for more robust recognition of children's subjectivity amidst dependency, even if concerns about the erosion of family privacy could somehow be alleviated. But this limitation should not leave children subject to parental authority in all contexts, as some commentators have suggested.[136] Instead, new ways of thinking about the interior of family life in legal analysis – ways that go beyond the allocation of childrearing authority between parents and the state – could lead to new ways of embracing children as subjects with agency even as they are also subject to various forms of adult direction and control.

Bringing children's horizontal relationships into legal analysis may begin that re-conceptualization of the interior of family life and, in turn, of children's position within that interior. Importantly, the analysis in the previous Sections reveals that new visions of family life do not have to involve the erosion of family privacy even as relationships not previously analyzed by the law are acknowledged and promoted. Instead, the analysis shows how notions of parental autonomy and family privacy have simplified family life for purposes of legal analysis. That simplification affects state policies concerning families, as family law's traditional frame for allocating childrearing authority between parents and the state depends on it. That frame in turn shapes the interior of family life by protecting parental prerogatives from state intervention barring default. Acknowledging other influential parts of children's lives outside of parental control or state intervention would not have to radically alter that protection, but it would signal that the parent-child relationship involves more than direction and control.[137]

More specifically, by highlighting ways states might better recognize children's

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[133] Other scholars have emphasized that these approaches to relocation do not adequately address children's interests, *see generally* Edwin J. Terry et al., *Relocation: Moving Forward or Moving Backward?*, 31 TEX. TECH. L. REV. 983, 1023–25 (2000), but these scholars have not acknowledged the potential harm to children's relationships with other children. Recently, Linda Elrod has acknowledged this issue in the context of custody disputes, although children's horizontal relationships are not the focus of her analysis. Linda Elrod, *Client-Directed Lawyers for Children: It is the 'Right' Thing to Do*, 27 PACE L. REV. 869, 902–04 (2007).

[134] *See* Elrod, *supra* note 133, at 902–04; Weiner, *supra* note 132, at 1749.

[135] Emily Buss and Martin Guggenheim have each forcefully made this point in other contexts. *See* Buss, *supra* note 128; Guggenheim, *supra* note 20, at 639–45.

[136] As such, my analysis differs from that of Buss and Guggenheim, who both argue in favor of parental authority given the limitations of state authority discussed above. *See* Buss, *supra* note 128; Guggenheim, *supra* note 20.

[137] *Cf.* Wisconsin v. Yoder, 406 U.S. 205, 240–45 (Douglas, *J.*, dissenting) (suggesting that Amish children might be able to veto their parents' educational decisions).

horizontal relationships when children are in state custody, and better facilitate children's horizontal relationships outside of that custody, this consideration of children's horizontal relationships shows how states can shape some aspects of family life without directly intervening in that life. By supporting children's horizontal relationships, the state signals more than the importance of those relationships. The state also signals that children can create rich social worlds outside of adult control even as they rely on that control, and its corresponding protection and nurturance, in other ways. That subjectivity amidst dependence might be most visible within horizontal relationships, but it likely remains when children move back to the vertical relationships of family. The expressive effects of relatively unobtrusive state action could therefore both promote children's horizontal relationships and change children's experiences within families by emphasizing that children are not completely defined by their vertical relationships with parents. As such, children are not just creatures being raised by families,[138] but are also persons actively participating in society, both within the interior of family life and outside of it.

Some parents may already view children in this manner, but such views currently lie outside of family law discourse. By bringing them into family law, the expressive effects of state action might modify other parents' understandings of children's lives, in much the same way that the partnership theory of marriage has attempted to modify individuals' understandings of marriage without directly regulating the interior of family life.[139] Children may contribute to families in different ways than parents, but that contribution can be valued instead of being subsumed within the top-down parent-child relationship.

How family law might specifically value these contributions of children is difficult to determine, particularly within conceptions of family law as currently shaped by rights discourse. For example, children's contributions are generally not equal to those of adult family members, making simple analogies to spouses inappropriate. Children instead participate in the interior of family life as "social actors, albeit in unequal social relationships."[140] This characterization highlights the ways that children are not subsumed by the vertical parent-child relationship, but it sheds little light on ways that children could instead be constructed as persons within families.

Such difficulty also presents itself in another context, that of recognizing the extended care networks that are a reality of many children's lives.[141] Calls for such legal recognition have, up until now, been limited to the myriad adults other than legal parents who provide care and support to children. Although it is undisputed that these adults can play important, and often crucial, roles in children's lives, proposals for legal recognition

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[138] *Cf.* Pierce, 268 U.S. at 534–35 (emphasizing that children are "not the mere creature of the state," thereby implying that children are also "creatures" of parents).

[139] For one discussion of that theory, see Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death,* 2005 UTAH L. REV. 1227.

[140] Alanen, *supra* note 83, at 59.

[141] For an extensive discussion of such networks and the ways they are and could be recognized by the law, see Murray, *supra* note 14.

of this childrearing have generated much resistance.[142] This resistance, at bottom, is motivated by a fear that parents' rights will be eroded if the state recognizes or otherwise addresses the role of non-parental caregivers in children's lives or if the state is permitted to intervene in family matters to resolve caregiving disputes.[143] Questions about such proposals immediately center on whether the state would require legal parents to acknowledge, and maybe even accommodate, these other adults in their children's lives, thereby reducing parents' abilities to control the upbringing of their children. By framing the issue as a fight between adults, this discourse of parental rights ignores children's subjectivity altogether. Children are assumed to be subject to adults; the only relevant question is the identity of those adults.

This Article does not intend to provide a framework that squarely addresses the appropriate scope of parents' rights in relation to other adults. However, this Article's consideration of the complex nature of both children's and parents' subjectivity could change the nature of this debate, and the debate could in turn inform ways to embrace children's personhood within the family. By examining subjectivity through the lens of children's relationships with other children, this Article shifts the focus of the care network debates away from adult caregivers to the children receiving care. This focus on children in turn highlights the ways that children both receive and give care, from both adults and other children. Although children are assumed to receive much more care from adults than they give, a consideration of children's subjectivity reveals that the dynamic is more complicated.

First, a consideration of subjectivity in general highlights the ways that parents depend on children for their very existence as parents; the parent-child relationship is therefore not exclusively a top-down relationship. Second, a consideration of adult subjectivity highlights the ways that all people are interdependent on others, making both complete autonomy and complete control impossible. Finally, a consideration of children's subjectivity reveals that children are capable of giving care even as they receive it. This aspect of children's subjectivity is most obvious when children form relationships with other children, but there is no reason to assume that children automatically lose such capabilities when they form relationships with adults.

Conceptualizing the subjectivities of family members in this way begins to pave a path for better recognizing children's personhood within the interior of family life. If all family members are dependant on each other in some way, then personhood cannot be simply defined as autonomy or lack of dependence. Instead, each member's contributions to the family can be valued even if those contributions vary greatly.[144] As

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[142] *Id.*

[143] As such, some of this resistance might reflect a desire to promote pluralism between families. *See* Buss, *supra* note 3, at 32; Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 958–59 (1993); Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1371 (1994).

[144] Similarly, the partnership theory of marriage acknowledges that spouses contribute to marriage in different ways yet mandates that such contributions be valued roughly equally when the marriage ends. *See, e.g.*, Rosenbury, *supra* note 139.

such, the complexity of the last remaining vertical relationship within the realm of domestic relations might be finally acknowledged and embraced.[145] By constructing children as subjects even amidst dependence, family law could promote a new conception of children as persons before the law and in the world at large.

Conclusion

Children's subjectivity is complex, as is the relationship between that subjectivity and the subjectivity of parents. In the face of such complexity, simplistic portrayals of parents as subjects and children as objects are tempting. But such temptation leads to constructions of the world in which big dogs are just like small dogs, even to those who walk down the street at or below the eye level of big dogs. The law can do more for children, and for parents. Dependency need not eliminate all possibility for subjectivity, and subjectivity need not erase dependency. Instead, recognizing what lies between subjectivity and dependency can lead to new constructions of children, parents, and even family law itself. This Article has begun that process, but has by no means completed it. I hope more family law scholars will make children the subjects of their analysis, thereby theorizing additional ways to embrace children's subjectivity even as they are subject to parental and state control.

[145] For a discussion of the ways family law has eliminated or transformed the other vertical relationships historically addressed within domestic relations, see Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825 (2004).