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**LOOKING FOR RIGHTS IN ALL THE WRONG PLACES:
RESOLVING CUSTODY DISPUTES IN
DIVORCE PROCEEDINGS**

Katherine Hunt Federle

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*Katherine Hunt Federle**

INTRODUCTION

Eleven-year-old Shane P. left the office of his court-appointed law guardian in tears.¹ Already upset by the escalating custody battle between his divorcing parents, Shane told his father that he wanted to "get rid of" his law guardian and subsequently sent her a letter notifying her that she was fired.² Influenced, in part, by the case of Gregory K.,³ Shane then retained the services of another attorney with funds provided by his father.⁴ Although the trial judge initially ruled that only the court could dismiss the law guardian who had been appointed to represent Shane's best interests,⁵ the judge subsequently permitted Shane to retain his own counsel.⁶ According to the

* Associate Professor of Law, Tulane Law School. I wish to thank my colleagues, Terry O'Neill, Alan Childress, Steve Griffin, and Tom Carbonneau for their comments, and my student researchers, William Coats and Thomas Dosik, for their assistance.

¹ This case was initially reported by *The Wall Street Journal* on October 29, 1992. Ellen J. Pollock, *Child's Right to Fire Lawyer Is Contested*, WALL ST. J., Oct. 29, 1992, at B1.

² *Id.* The divorce petition had been filed in a Brooklyn, New York trial court. Under New York law, children "who are the subject of family court proceedings . . . should be represented by counsel of their own choosing or by law guardians." N.Y. FAM. CT. ACT § 241 (McKinney 1993). The law guardian is unique to the New York courts. The law guardian was envisioned as both lawyer and guardian, although due process concerns have redefined that role in delinquency and status offense cases. *Id.* cmt.

³ *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993). The Gregory K. case has been the subject of intense public scrutiny. See, e.g., Mark Hansen, *Boy Wins "Divorce" From Mom*, A.B.A. J., Dec. 1992, at 16; Anthony DePalma, *Custody Decision Dividing Experts*, N.Y. TIMES, Sept. 27, 1992, at A27; Phil Long & Susan Bloodworth, *Child-Parent Divorce Case Goes to Court; Judge Will Decide 12-Year-Old's Fate*, HOUS. CHRON., Sept. 24, 1992, at A15. Although the trial judge ruled that Gregory K. had standing to seek termination of the parent-child relationship, an appellate court has since ruled that Gregory did not have the capacity to sue for termination. *Kingsley*, 623 So. 2d at 783-85. The court found the error harmless, however, because Gregory's foster parents, his guardian *ad litem*, and Florida's Department of Health and Rehabilitative Services had filed petitions on his behalf. *Id.* at 785. The appellate court set aside the subsequent adoption because the natural mother's appeal from the termination was pending at the time of the trial court's order. *Id.* at 789.

⁴ Pollock, *supra* note 1. Shane retained the services of Professor Martin Guggenheim at New York University School of Law. At that time, Professor Guggenheim would not discuss his fee arrangements.

⁵ *Id.*

⁶ The trial judge, although stressing that neither Professor Guggenheim nor the original law guardian had done anything inappropriate, nevertheless appointed a third attorney, Nancy Duncan, to represent Shane in order to avoid the appearance of conflict created by retaining

trial judge, a child has the right to independent counsel in a divorce custody proceeding and may ask a court to replace court-appointed counsel with an attorney of his own choosing under certain circumstances.⁷

Shane P.'s situation is remarkable for what it tells us, not only about advocacy for the child, judicial discretion, and the best interests of the child standard in the divorce custody context, but also, and more fundamentally, about our failure to ground rights talk in meaningful notions of power. When we speak of a zealous advocate, when we search for ways to guide and limit judicial discretion, and when we try to provide a contextual framework for best interests, we are, in essence, making implicit reference to some concept of a right and a rights-bearing individual. The difficulty in the divorce custody context, however, is that we speak as if the child were the rights bearer. I have argued before that Western theories of individual rights define the rights holder as a free being who has the necessary capacity to have and exercise rights but that that notion of rights is unnecessarily hierarchical and exclusionary in that it disadvantages those who most need recourse to rights.⁸ Thus for children, this insistence on capacity has confined rights theory in ways that make it extremely difficult to conceptualize children as rights holders in the first instance.⁹

Rights in their fullest sense, however, are valuable precisely because they account for power. To be a powerful individual in our society is to command respect, in the broadest possible sense, and to

Professor Guggenheim without the mother's approval. Shane indicated that he approved of the appointment. Arnold H. Lubasch, *Boy in Divorce Suit Wins Right to Choose His Lawyer*, N.Y. TIMES, Nov. 10, 1992, at B6.

⁷ *Id.*

⁸ For a more complete explanation of the role of capacity in rights theory, see Katherine H. Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 DEPAUL L. REV. 983 (1993).

This Article develops more fully my contention in *On the Road to Reconceiving Rights for Children* that capacity organizes rights theories in ways that disadvantage children. I argue here that the interest theory of rights, because it is grounded in notions of children's incapacities, actually disadvantages children in the divorce custody context. I then suggest some of the consequences of a rights theory that is grounded in the empowerment of children rather than in their incompetencies. Although this requires the outline of a new rights theory, I do not mean to propose the full details of that theory in this Article. That is an endeavor I have left for a forthcoming essay in this series.

⁹ *Id.* at 985. Put simply, if we tie having a right to the capacity to exercise that right, then capacity is a prerequisite to having a right. In this sense, capacity is exclusionary because it limits the class of rights holders to those individuals who have the requisite capacity. Thus, women and people of color have had to argue that they are competent beings in order to claim they have status as rights holders. Children, however, have had difficulty moving the debate about their rights beyond this point because there is no universal agreement about the competency of children. Thus, the debate focuses on whether children have capacity when it should center on the legitimacy of capacity as an organizing principle.

be taken seriously—to make claims and to have them heard, and to have independent value and worth as a being. But power also reinforces existing hierarchies and perpetuates inequality because it can be, and often is, exclusive: to be powerful suggests that some other is powerless. Any coherent notion of right, therefore, must recognize this connection between power, respect, and inequality. By insuring that the most powerless have rights is to accord them respect and acknowledge their value, to recognize and hear their claims; in turn, making claims mitigates exclusion and alters hierarchy.

Children's rights theories, however, are fundamentally inadequate because they fail to accommodate notions of power. By drawing on political and legal philosophies of individual liberty, children's rights theorists tie rights to a concept of a competent rights holder; this inevitably draws us into a debate about the competencies of children and forecloses a critical examination of the underlying assumption about capacity as a prerequisite to having and exercising rights. But even when we speak of children's rights as a set of interests, we define those rights in terms of children's needs and protection. Thus, we may identify a child's "right" to be cared for and nurtured, but we are not speaking of rights in the fullest sense I have said they must have to be coherent. Rather, if we think of children's rights in terms of their interests, we are acknowledging their incapacities and promoting their powerlessness.

It is my intention to claim here that protective rights are inadequate because they fail to remedy the powerlessness of children. I also contend that thinking of rights in this weak and imprecise way, and not in their fullest sense as a means to access power, has had profoundly negative consequences for children. In the divorce context, our impoverished rights talk has had obviously bad effects in the handling and disposition of custody disputes. The indeterminacy of the best interests standard, the conceptual confusion about the roles and responsibilities of the child's representative, and the use of custody as a bargaining chip in the resolution of property and financial issues suggest that children are little more than a valuable asset of the community requiring distribution. These outcomes compel us to acknowledge that "protective rights" are incoherent and, in fact, offer children little protection.

I propose to challenge the interest theory of rights and the concomitant notion of protective rights. The interest theory characterizes children's rights as a set of goods or needs in which no one interest is preferred, although interests may be ordered by their importance, and where any need may override the other if they con-

flict.¹⁰ From these interests flow duties and obligations, the performance of which is not contingent upon the request or waiver of the interest holder.¹¹ This idea, that the performance of an obligation does not depend upon the assertion or waiver of a right, originated as a direct response to the notions of right and obligation as characterized by the will theory, which held that the rights holder must have the requisite ability to obligate the performance of others.¹² Although the interest theory does remedy this problem, it is nonetheless impoverished as a rights theory in that, with its limited characterization of the rights holder as incompetent, it cannot account for power.

When interest theorists characterize rights as needs, they unsuccessfully justify the choices adults make for children by reference to rights concepts that are fundamentally inconsistent with paternalistic considerations; this has had results, particularly in divorce custody proceedings. This Article begins with an overview of three related concepts: the role of capacity in organizing rights theory, the will theory of rights, and the interest theory of rights. As I will argue in greater detail, the interest theory of rights is an inadequate response to the will theory because neither fully accounts for the hierarchical and exclusionary effects of capacity. I then attempt to concretize my objections to the interest theory of rights by reference to divorce custody proceedings. Specifically, I will examine the best interests standard, the roles and responsibilities of the child's representative, and the notion of bargaining, and will argue that the problems and confusions which arise stem from an impoverished conception of rights. Finally, I conclude by articulating two consequences of a coherent account of children's rights in the custody dispute: the abolition of the best interests standard and the mandatory appointment of independent counsel for children in all aspects of the divorce proceeding.

¹⁰ Neil MacCormick, *Children's Rights: A Test-Case for Theories of Right*, 62 ARCHIVES PHIL. L. & SOC. PHIL. 305 (1976); see also RUTH M. ADLER, *TAKING JUVENILE JUSTICE SERIOUSLY* (1985); Onora O'Neill, *Children's Rights and Children's Lives*, 98 ETHICS 445 (1988).

¹¹ MacCormick, *supra* note 10, at 305-07. MacCormick argues that rights flow from pre-existing interests and thus do not require that we identify either the obligation or the obligor. O'Neill, however, thinks obligations are more basic and argues that we should think in terms of obligations to children rather than rights because obligations are more easily constructed. O'Neill, *supra* note 10, at 456.

¹² MacCormick argues that the will theory of rights, most clearly articulated by H.L.A. Hart, cannot account for certain rights that children indisputably have, like the right to be cared for, because under the will theory, the right holder may waive the right. But, MacCormick argues, the child cannot waive her right to be nurtured; therefore, the will theory cannot account for the rights of children. MacCormick, *supra* note 10, at 306-07.

I. THE CONFINING EFFECT OF CAPACITY ON RIGHTS, DUTIES,
AND INTERESTS

For reasons that are primarily historical, capacity as a prerequisite to having and exercising rights has animated the development of theories of individual liberty.¹³ The earliest articulations of individual rights and freedom from governmental interference envisioned the rights holder as a competent and rational being possessing the necessary autonomy to command the respect of the state.¹⁴ Social contractarians like Hobbes, Locke, and Rousseau argued that individual liberty and state power may coexist because of the presence of a social compact between the individual and the state; this necessarily requires that the individual have the competence to consent for the contract to be valid.¹⁵ Similarly, utilitarians contended that governmental interference with an individual's pursuit of happiness is permissible only when the individual lacks the capacity to make rational choices.¹⁶ Even recent theories of individual rights are premised upon the capacity of the rights holder; thus, H.L.A. Hart argues that the power to undertake duties and impose obligations is dependent upon the capacity of the individual.¹⁷

Consequently, these theorists exclude children from the class of rights holders. Both Hobbes and Locke claimed that children are irrational and subject to parental governance; therefore, they have a corresponding duty to obey and honor their parents.¹⁸ For Rousseau, children are excluded from the social contract because they lack the capacity for self-preservation which motivates the formation of the contract in the first instance, and must depend upon their parents un-

¹³ Federle, *supra* note 8, at 987.

¹⁴ *Id.* Seventeenth- and eighteenth-century philosophers defined rights holders in terms of their capacities. In turn, these early articulations of individual liberty profoundly influenced this country's founders.

¹⁵ *Id.* at 987-95.

¹⁶ *Id.* at 995-99.

¹⁷ "Thus behind the power to make wills or contracts are rules relating to *capacity* or minimum personal qualification (such as being adult or sane) which those exercising the power must possess." H.L.A. HART, *THE CONCEPT OF LAW* 28 (1961).

¹⁸ Hobbes, for example, stated that children did not have the power to enter into the social contract because they lacked reason. Therefore, they had an obligation to obey their parents, who could teach them the difference between good and evil. THOMAS HOBBS, *LEVIATHAN* 73 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651). "Over . . . children . . . there is no Law . . . because they had never power to make any covenant, or to understand the consequences thereof; and consequently never took upon them to authorise the actions of any Sovereign, as they must do that make to themselves a Common-wealth." *Id.* at 187.

Locke claimed that the child existed in a temporary state of inequality because her irrationality required that she be restrained by her parents until she attained reason. JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT* 45, 49 (Henry Regnery Co. 1955) (1689).

til they are able to care for themselves.¹⁹ Bentham contended that children lack the capacity to know and to pursue their own happiness,²⁰ while John Stuart Mill argued that the state is justified in restricting the choices of children because the state cannot engage children, as it can adults, in rational discourse in an attempt to persuade them not to make certain decisions.²¹ Even Hart argues that rights are the exclusive province of the rational adult.²²

Moral rights theory also embraces capacity as an organizing principle. Kant, for example, argued that our moral worth as human beings springs from an innate right to freedom²³ which, in turn, creates rights recognized by the political state.²⁴ To have a right, however, means to have "the capacity to obligate others" and the power to compel performance of that obligation.²⁵ Drawing on the theories of Kant, as well as Locke and Rousseau, John Rawls contends that justice is the governing principle of any political society.²⁶ According to Rawls, however, to be entitled to equal justice, an individual must have the capacity to acquire a sense of justice and to have a conception of personal good as expressed by a rational life plan.²⁷

Children do have status as moral beings under these theories;

¹⁹ Rousseau asserted that the child was subjugated to adults "because others know better than himself what is good for him and what does or does not conduce to his preservation." JEAN JACQUES ROUSSEAU: HIS EDUCATIONAL THEORIES SELECTED FROM EMILE, JULIE AND OTHER WRITINGS 92 (R.L. Archer ed., 1964).

²⁰ Bentham argues that children suffer a "palpable and very considerable deficiency . . . in point of knowledge or understanding" that leaves them incapable "of directing [their] own inclination in the pursuit of happiness." JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 244-45 (J.H. Burns & H.L.A. Hart eds., 1970).

²¹ For John Stuart Mill, paternalistic concerns for the individual permit the state only to persuade the individual to alter her conduct, but they cannot restrain the individual's freedom to behave in a potentially self-destructive way. This doctrine, however, applies only to those individuals "in the maturity of their faculties. We are not speaking of children. . . ." JOHN S. MILL, ON LIBERTY WITH THE SUBJECTION OF WOMEN AND CHAPTERS ON SOCIALISM 13 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859). Consequently, the state has absolute power to compel minors to alter their conduct. *Id.* at 82.

²² In arguing about the existence of moral rights, Hart contends that children are excluded from the class of moral rights holders. Hart argues that if a moral right exists at all, it must be a moral right to be free and it is from this freedom that man may voluntarily limit his liberty to create moral rights. But since only adults are capable of limiting their freedom, children cannot have any moral rights. H.L.A. Hart, *Are There Any Natural Rights?*, in HUMAN RIGHTS 61, 61-62 (A.I. Melden ed., 1970).

²³ IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT? 54 (Lewis W. Beck trans., The Liberal Arts Press 1959) (1785).

²⁴ John Ladd, *Introduction* to IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE at ix, xxi-xxii (John Ladd trans., The Bobbs-Merrill Co. 1965) (1797).

²⁵ IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 45 (John Ladd trans., The Bobbs-Merrill Co. 1965) (1797).

²⁶ JOHN RAWLS, A THEORY OF JUSTICE 3 (1971).

²⁷ *Id.* at 505.

however, their incompetencies mandate that these rights be characterized as protective, rather than as legal or political, rights. Kant noted that while children have certain moral rights which spring from their innate right to freedom, like the right to be cared for by their parents,²⁸ they lack the moral capacity to obligate others and the power to compel performance of these duties.²⁹ Thus, children have neither the full panoply of rights accorded to adults because of their incapacity to obligate others, nor the ability to demand the rights they do have as children, and must rely on others for their enforcement.³⁰ Rawls recognizes that children have the potential for moral personhood requiring that they be treated in accordance with the principles of justice.³¹ But, according to Rawls, because children are "moral primitives"³² who must be protected from "the weakness and infirmities of their reason and will in society," justice requires that others act on children's behalf in a manner most likely to secure some future, but as yet unexpressed, conception of the good.³³

Capacity also orders notions of obligation and constrains the special relationship between rights and duties. The will, or choice, theory and the interest theory are two broadly different articulations of that relation between rights and duties,³⁴ yet neither fully accounts for the limiting effects of capacity. Under the will theory, the right holder chooses, through the exercise of her will, to compel performance by another of a duty or obligation.³⁵ But the notion of choice also means that the right holder may elect to waive performance, and the present ability to enforce or waive the right turns on the right holder's capacity for choice.³⁶ In this sense, the power to obligate others preexists the duty; that is, the performance of the obligation

²⁸ IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 114 (W. Hastie trans., Augustus M. Kelley 1974) (1887).

²⁹ Federlè, *supra* note 8, at 1000-01.

³⁰ LESLIE A. MULHOLLAND, *KANT'S SYSTEM OF RIGHTS* 8, 229 (1990). Mulholland tries to show how Kantian claims of rights may be justified.

³¹ RAWLS, *supra* note 26, at 505.

³² *Id.* at 462.

³³ *Id.* at 249.

³⁴ For a concise overview of the interest and will theories, see Jeremy Waldron, *Introduction to THEORIES OF RIGHTS* 1, 9-12 (Jeremy Waldron ed., 1984).

³⁵ *Id.* at 9. For a more complete account of the will or choice theory, see HART, *supra* note 17; H.L.A. Hart, *Bentham on Legal Rights*, in *OXFORD ESSAYS IN JURISPRUDENCE* 171 (A.W.B. Simpson ed., 1973); H.L.A. Hart, *Definition and Theory in Jurisprudence*, 70 *LAW Q. REV.* 37 (1954).

³⁶ Tom D. Campbell, *The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult*, in *CHILDREN, RIGHTS, AND THE LAW* 1, 17-18 (Philip Alston et al. eds., 1992). Campbell argues that a rights theory is defective if it cannot recognize the value and distinctiveness of rights for children. Additionally, challenging rights theories that cannot accommodate children's rights also may reveal how these accounts disadvantage other excluded groups. *Id.* at 3.

is conditional upon the right holder's capacity to demand performance.³⁷

The problem posed by a will theory that constructs rights in terms of the capacity of the individual is the confining effect it has on the articulation of children's rights. Hart's notion of a right as the power to obligate another, for example, is clearly incompatible with the extension of rights to the incompetent.³⁸ Since there is no definitive psychological, sociological, or legal statement about children's competence, the capacity of children to obligate others is centrally disputed by rights theorists.³⁹ Thus, while advocates Richard Farson and John Holt argue that children should have the same legal and political rights held by adults because children are competent,⁴⁰ opponents, like Bruce Hafen and Joseph Goldstein, contend that we should not extend political and legal rights to children because they are incompetent.⁴¹ Still others counter that we should presume the capacity of children⁴² or create a system of child agents who stand in as competent proxies to assert rights on behalf of children;⁴³ but even

³⁷ *Id.* at 4; MacCormick, *supra* note 10, at 306.

³⁸ Waldron, *supra* note 34, at 12.

³⁹ See, e.g., THE CHILD AND OTHER CULTURAL INVENTIONS (Frank S. Kessel & Alexander W. Siegel eds., 1983); CHILDREN, RIGHTS, AND THE LAW, *supra* note 36; HOWARD COHEN, EQUAL RIGHTS FOR CHILDREN (1980); RICHARD FARSON, BIRTHRIGHTS (1974); M.D.A. FREEMAN, THE RIGHTS AND WRONGS OF CHILDREN (1983); JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973); JOHN HOLT, ESCAPE FROM CHILDHOOD (1974); LAURA M. PURDY, IN THEIR BEST INTEREST?: THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN (1992); REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH (Gary B. Melton ed., 1987); WHO SPEAKS FOR THE CHILD: THE PROBLEMS OF PROXY CONSENT (Willard Gaylin & Ruth Macklin eds., 1982); Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. REV. 605; Irving R. Kaufman, *The Child in Trouble: The Long and Difficult Road to Reforming the Crazy-Quilt Juvenile Justice System,* 60 WASH. U. L.Q. 743 (1982); Gerald P. Koocher, *Different Lenses: Psycho-Legal Perspectives on Children's Rights,* 16 NOVA L. REV. 711 (1992); F. Raymond Marks, *Detours on the Road to Maturity: A View of the Legal Conception of Growing Up and Letting Go,* 39 LAW & CONTEMP. PROBS. 78 (1975); Gary B. Melton, *Developmental Psychology and the Law: The State of the Art,* 22 J. FAM. L. 445 (1983-84); Hillary Rodham, *Children Under the Law,* 43 HARV. EDUC. REV. 487 (1973); Ferdinand Schoeman, *Childhood Competence and Autonomy,* 12 J. LEGAL STUD. 267 (1983).

⁴⁰ FARSON, *supra* note 39, at 8; HOLT, *supra* note 39, at 18-19.

⁴¹ Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy,* 86 YALE L.J. 645, 645 (1977); Hafen, *supra* note 39, at 657-58.

⁴² Hillary Rodham, *Children's Rights: A Legal Perspective,* in CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES 21, 33 (Patricia A. Vardin & Ilene N. Brody eds., 1979). Rodham argues that we should rely on a more discriminating set of assumptions about children based on their variable capacities at certain ages.

⁴³ COHEN, *supra* note 39, at 74-90. Cohen does not dispute that children may lack the requisite capacity we associate with rights holders but contends that this should not be the basis for denying rights to children. Rather, he contends that children may borrow those competencies from others who have the requisite capacity. *Id.* at 57.

these constructs fail to challenge the legitimacy of a rights theory premised upon the capacity of the rights holder.

In this regard, the interest theory appears most promising to children's rights theorists because it purports to resolve the problem of having a right without having the present ability to exercise it. Under this account, certain individual interests give rise to rights, although not all interests will do so, and the theory leaves open the question of how to identify those interests that do generate rights.⁴⁴ As for duties, the interest theory holds that rights are not correlative to duties but rather that rights are merely interests we have identified as being worthy of protection by the imposition of some obligation.⁴⁵ This has the advantage of allowing us to say that someone has a right without having to identify the obligor⁴⁶ and without specifying all the duties imposed by the right.⁴⁷ As with rights, the questions of who has the duty, the nature of the obligation, and whether it may be waived are answered by reference to the identified interest and some substantive theory about which interests generate rights.⁴⁸

Several children's rights theorists have given substantive content to the interest theory by identifying those interests which give rise to children's rights. For Neil MacCormick, the child has an uncontested interest in being cared for, nurtured, and loved, and as such, that interest is worthy of protection as a moral, if not a legal, right.⁴⁹ Consequently, the right exists regardless of the obligor's identity or performance: if the child's parent has a duty to care for the child and the parent defaults, we still say that the child has the right; similarly, if being cared for and nurtured means the child has a right to education, the right still exists even though we are unsure who has the obligation to provide the educational opportunity.⁵⁰ Ruth Adler identifies a set of children's interests, of which freedom of choice is merely one, and argues that these interests may be ordered: basic interests like the

⁴⁴ Jeremy Waldron, *Criticizing the Economic Analysis of Law*, 99 YALE L.J. 1441, 1447 (1990) (reviewing JULES L. COLEMAN, *MARKETS, MORALS, AND THE LAW* (1988)). Waldron notes that the interest theory, as developed by Joseph Raz, does not imply that all rights give rise to interests. Only some interests are important enough to create rights.

⁴⁵ *Id.* Both Raz and MacCormick are critical of a positivist rights theory that sees legal rights in terms of legal duties. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 165-92 (1986); D.N. MacCormick, *Rights in Legislation*, in *LAW, MORALITY, AND SOCIETY* 189 (P.M.S. Hacker & J. Raz eds., 1977).

⁴⁶ MacCormick, *supra* note 45, at 200-04.

⁴⁷ RAZ, *supra* note 45, at 170-71.

⁴⁸ Waldron, *supra* note 44, at 1447.

⁴⁹ MacCormick, *supra* note 10, at 305. MacCormick uses children's rights as a "test-case" to prove how impoverished the will theory actually is.

⁵⁰ *Id.* at 313. MacCormick argues that because the will theory cannot account for the child's right to be cared for, it is untenable.

child's need for food, love, and shelter take priority over intrinsic interests like the need for education, play, and friendship.⁵¹ Tom Campbell identifies sets of interests that cluster around the various statuses of minors as persons, children, juveniles, and future adults;⁵² this has the advantage of identifying a broader spectrum of rights that are tied to the child's distinctive development and varying needs, as well as the pleasures associated with being a child.⁵³

Although the interest theory does have the advantage of permitting us to speak about the rights of children without reference to their power to obligate others, those interests specified as creating rights inevitably promote children's incapacities. Under this account, children have certain moral or legal rights, like the right to be nurtured or the right to love, because children are incapable of caring for themselves.⁵⁴ Concomitantly, the satisfaction of these interests must depend on some other capable being; in this context, that other is usually a parent or some other unspecified adult. Interests, then, at least as they are defined by children's rights theorists, are little more than a reaffirmation of the incompetencies of children and the perpetuation of paternalistic attitudes and practices. The interest theory thus confines rights by failing to challenge the centrality of capacity in the relation between interests, rights, and obligations.

The interest theory, therefore, cannot provide us with an adequate account of individual rights. To be coherent, a rights theory must accommodate notions of power.⁵⁵ Rights then become a means to dispute hierarchy and status by empowering the weak and the marginalized and, by insuring that the powerless are respected and their claims heard, rights also alter existing hierarchies and inequalities.⁵⁶ In this sense, the protective rights identified by the interest theory are incoherent because they promote children's incompetencies. Thus, the interest theory is insufficient as an account of rights precisely because it fails to accommodate the powerlessness of children.

⁵¹ ADLER, *supra* note 10, at 24-25, 109-10. In this way, Adler can accommodate notions of autonomy with paternalism. Thus, children should be given the freedom to make certain decisions but only to the extent that that freedom does not jeopardize more basic interests of the child.

⁵² Campbell, *supra* note 36, at 22. Campbell does not propose to list all the relevant rights of children at various stages, but suggests that we consider the unique development of children when determining their rights.

⁵³ *Id.* at 20. Thus, the child's right to an education is a right the child may have as a future adult, *id.* at 19; the right to play is a right the child has as a child, *id.* at 22; and the right to health care is a right the child has as a person, *id.* at 17.

⁵⁴ Federle, *supra* note 8, at 1015-16 and accompanying notes.

⁵⁵ *Id.* at 986.

⁵⁶ *Id.*

It can be argued, of course, that there is still some value in the notion of protective rights because they positively benefit children, but as I will contend, the interest theory obscures its impoverished account of rights and thereby permits the use of rights talk in ways that actively disadvantage children. One could hypothesize, for example, that rights for excluded groups evolve from paternalistic notions of the need to protect and care for the ignorant to fuller accounts that recognize autonomy and competency: this has been the experience of women and minorities and ostensibly, one could argue that they ultimately benefitted because white men were forced to consider their interests.⁵⁷ The analogy to children's rights is imperfect, however, because children have been unable to redefine themselves; thus, one could argue that a rights theory which rejects children's dependencies is definitionally inconceivable.⁵⁸ Alternatively, one could contend that this is as it should be, that children's powerlessness demands that we protect them and act in their best interests until they reach adulthood. But our attempts to protect children by relying on a weak notion of rights have been unsuccessful and compel us to reconsider the value of a rights theory that fails to account for power.

The best interests standard in the divorce custody context is one example of the way an impoverished account of rights disadvantages children. Although we cannot agree what is in children's best interests,⁵⁹ we do have a somewhat fuzzy notion that acting in their behalf is a positive good and that children have a right to expect some adult to protect their interests. When we speak of best interests in this way, we are using the language of rights to assert that children have certain interests that give rise to protectable rights. We also recognize that children lack the capacity to obligate others but, because we argue (under an interest theory) that rights are not correlative to duties, we can say that these duties exist regardless of the particular right holder's capacity to demand performance of the obligation. But the best interests standard poses two difficulties: we seem to be unable to give any determinate meaning to the term best interests, thus making it extremely difficult to identify the rights and duties flowing from those interests and, when we do provide some substantive content, we do so by reference to the rights of parents and the incapacities and needs of children.

⁵⁷ O'Neill, *supra* note 10, at 461.

⁵⁸ *Id.* O'Neill says the analogy between children and other oppressed groups is imperfect because the dependence of children is very different from the dependence of other oppressed groups. The dependence of children is inherent to the nature of childhood; thus children may escape their dependency by growing up.

⁵⁹ See *infra* notes 102-06 and accompanying text.

The next section of this Article illustrates the negative effects of an inadequate rights theory on children in the divorce custody context. The overweening consideration of the child's best interests now animates the custody decision but the substantive and procedural content of that standard has had three negative consequences for children. First, judges have neither the training nor the ability to give substantive content to the meaning of best interests without reference to some right, but the courts rely on notions of parental rights and fitness rather than on some articulation of the rights of children.⁶⁰ Second, the conceptual confusion about the role and responsibilities of the child's representative in the custody proceeding is directly attributable to the inadequacy of protective rights.⁶¹ Finally, the use of custody as a bargaining chip in the private resolution of matters ancillary to the divorce underscores the fragility of a rights theory that fails to accommodate notions of power.⁶²

II. THE IMPOVERISHED ACCOUNT OF CHILDREN'S RIGHTS IN THE DIVORCE CUSTODY CONTEXT

The meaning of the term "best interests" is vague and indefinite because the best interests standard rests on an impoverished account of children's rights that does not provide a principled rule for the resolution of interparental custody disputes. The resolution of custody disputes historically was made by reference to either a presumption favoring one parent or to a concept of fault. While the test today is one of the child's best interests, notions of parental fitness and rights continue to ground the custody decision.⁶³ This section will begin by reviewing the various presumptions that have guided judges in custody disputes with a particular emphasis on the evolution of a best interests standard. Next, this section analyzes those commentators who have criticized the best interests standard because it permits too much judicial discretion⁶⁴ and actively disadvantages women,⁶⁵ and who have proposed new rules of decision.⁶⁶ These proposals, however, give substantive content to the best interests test by reference to some notion of one parent's greater right to custody rather than to an expanded account of the independent rights of children.⁶⁷ This sec-

⁶⁰ See *infra* notes 68-100 and accompanying text.
⁶¹ See *infra* notes 170-205 and accompanying text.
⁶² See *infra* notes 206-24 and accompanying text.
⁶³ See *infra* notes 68-100 and accompanying text.
⁶⁴ See *infra* notes 102-12 and accompanying text.
⁶⁵ See *infra* notes 113-22 and accompanying text.
⁶⁶ See *infra* notes 141-65 and accompanying text.
⁶⁷ See *infra* notes 132-44, 166-68 and accompanying text.

tion concludes with the suggestion that parental rights will continue to guide the rule of decision in custody disputes unless we ground best interests in some stronger version of children's rights that accounts for the powerlessness of children.

Early rules of decision in custody disputes were firmly grounded in some notion of parental right. The father's obligation as the natural guardian to support and educate his children at common law mandated that he receive their services, earnings, and work; upon divorce, custody was the natural corollary to the father's right in and responsibility for his children.⁶⁸ By the nineteenth century, however, several courts were beginning to consider the fault of the parties and the grounds for divorce as a basis for awarding custody and rejected the absoluteness of paternal custody.⁶⁹ Of course, the innocence of a party to the divorce as a basis for the custody award often disadvantaged women, particularly those found to have committed adultery.⁷⁰ But the custody decision in these cases continued to be made without reference to the rights or interests of children, focusing as they did upon the relationship between the parents.

Other courts, however, indicated a willingness to award custody to the mother if the decision was in the child's best interest, but what was in that child's interest was defined tautologically as being in the custody of her mother. The focus of these courts was on young children, those of "tender years," and on girls, who were thought to benefit from a maternal placement because they needed to be cared for by their mothers.⁷¹ The doctrine became synonymous with a maternal preference because of the prevailing romanticized belief in the

⁶⁸ See, e.g., Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 432 (1990); Jay Einhorn, *Child Custody in Historical Perspective: A Study of Changing Social Perceptions of Divorce and Child Custody in Anglo-American Law*, 4 BEHAVIORAL SCI. & L. 119, 125-28 (1986); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107, 111; Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 233-34 (1975); Marcia O'Kelly, *Blessing the Tie that Binds: Preference for the Primary Caretaker as Custodian*, 63 N.D. L. REV. 481, 486-87 (1987); Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 235-36 (1982).

⁶⁹ Einhorn, *supra* note 68, at 126; Mnookin, *supra* note 68, at 234-35.

⁷⁰ JUDITH C. AREEN, *CASES AND MATERIALS ON FAMILY LAW* 433-35 (2d ed. 1985). Intemperance was also considered a reason to deny women custody of their children. Fineman & Opie, *supra* note 68, at 112.

⁷¹ Einhorn, *supra* note 68, at 126-27; Fineman & Opie, *supra* note 68, at 112; see also Crippen, *supra* note 68, at 433-34; Fineman, *supra* note 68, at 738; Mnookin, *supra* note 68, at 235.

mother's natural ability to care for and love her children and in the superiority of that love;⁷² by the middle of the twentieth century, the maternal preference doctrine had become firmly established as the guiding principle in interparental custody disputes.⁷³ The justifications for the maternal preference doctrine were similar in many ways to those proffered for the paternal preference rule in that parental superiority could be ascertained by reference to some natural law or principle,⁷⁴ and that the child's best interests could be equated to the rule identifying one parent as the better caregiver.⁷⁵ But the idea of a child's best interest itself began to develop as a rule of decision in interparental custody disputes.

Judges and lawmakers, faced with the challenge of finding the substantive content of the best interests standard, identified several factors to consider in awarding custody, but again, the deciding criteria emphasized parental fitness and the inherent qualities possessed by women as mothers. Characteristics peculiar to the child, like her age, sex, and health, were most often used to support an award of custody to the mother unless she was unfit; thus, the young child, the ill child, or the female child was most frequently placed with the mother because of her superior caregiving abilities.⁷⁶ Similarly, the child's preference was considered only when it conformed to the court's notion of who should receive custody.⁷⁷ Fitness of the parent became the decisive factor⁷⁸ and, in this regard, the courts considered the parent's love and affection for the child,⁷⁹ the ability to provide for the child's physical, mental, and financial needs,⁸⁰ and the parent's moral fitness.⁸¹ Again, the prevailing view of the superiority of maternal love

⁷² Einhorn, *supra* note 68, at 128-31; Mnookin, *supra* note 68, at 235.

⁷³ Howard A. Davidson & Katherine Gerlach, *Child Custody Disputes: The Child's Perspective*, in LEGAL RIGHTS OF CHILDREN 232, 234 (Robert M. Horowitz & Howard A. Davidson eds., 1984); Einhorn, *supra* note 68, at 128-31.

⁷⁴ Einhorn, *supra* note 68, at 131.

⁷⁵ Fineman, *supra* note 68, at 738. Fineman notes that the tender years doctrine developed as a gloss on a best interests standard which was vague and indeterminate. Thus, the tender years doctrine gave substantive content to the best interests standard by recognizing the value of women's caregiving. Custody was the "reward" for women's sacrifices and, in this sense, ownership of the child was transferred from the father to the mother.

⁷⁶ Alan M. Oster, *Custody Proceeding: A Study of Vague and Indefinite Standards*, 5 J. FAM. L. 21, 27-28 (1965).

⁷⁷ *Id.* at 26-27.

⁷⁸ *Id.* at 29.

⁷⁹ *Id.* at 32.

⁸⁰ *Id.* at 35.

⁸¹ Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 170 (1984); Oster, *supra* note 76, at 29-32; see also AREEN, *supra* note 70, at 433-36; Fineman, *supra* note 68, at 738; and Fineman & Opie, *supra* note 68, at 112, for the ways in which women were disadvantaged by patriarchal mores.

and the idealization of the mother-child relationship often justified an award of custody to the mother even, occasionally, when the mother had committed adultery.⁸² But in those cases where the mother's behavior violated societal norms about women's sexual freedom or motherhood, the courts did not hesitate to award custody to the father; thus, women who were considered promiscuous and multiply adulterous or who left the marital home and their children were denied custody.⁸³

The maternal preference rule and the tender years doctrine subsequently were abolished in favor of a degendered best interest standard which the courts found increasingly difficult to apply. The notion of a maternal preference was challenged by a legal argument that the rule discriminated against fathers,⁸⁴ social and psychological research questioning the superiority of maternal caregiving,⁸⁵ and feminist critiques of gender-specific rules.⁸⁶ Courts and legislatures abolished the maternal preference rule and the tender years doctrine and began to articulate a broader best interests standard that was ostensibly gender neutral.⁸⁷ There is evidence to suggest, however, that some courts still awarded custody to the mother, thus permitting the tender years doctrine to survive despite the articulated principle of

Others suggest that women continue to be disadvantaged by these same norms. See MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991) [hereinafter FINEMAN, *THE ILLUSION OF EQUALITY*]; LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985); Linda K. Girdner, *Child Custody Determination: Ideological Dimensions of a Social Problem*, in REDEFINING SOCIAL PROBLEMS 165, 175-76 (Edward Seidman & Julian Rappaport eds., 1986).

⁸² Oster, *supra* note 76, at 30-31.

⁸³ *Id.* at 29-34.

⁸⁴ Davidson & Gerlach, *supra* note 73, at 236; Fineman, *supra* note 68, at 738-39; Jay Folberg, *Custody Overview*, in JOINT CUSTODY AND SHARED PARENTING 3, 5 (Jay Folberg ed., 1984).

⁸⁵ For an extensive discussion about the merits of this social science literature, see David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984) [hereinafter Chambers, *Rethinking Substantive Rules*]; a response by Fineman & Opie, *supra* note 68; and Chambers's rebuttal, David L. Chambers, *The Abuses of Social Science: A Response to Fineman and Opie*, 1987 WIS. L. REV. 159.

⁸⁶ See, e.g., Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9 (1986); Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789, 821-22; Herma H. Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in DIVORCE REFORM AT THE CROSSROADS 6 (Stephen D. Sugarman & Herma H. Kay eds., 1990).

⁸⁷ Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 273-74 (1987); Davidson & Gerlach, *supra* note 73, at 236; Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 10 (1987).

gender neutrality.⁸⁸ These courts continued to give definition to the term best interest by reference to parental fitness and the superiority of maternal care but, in other cases, the acceptance of a gender neutral principle in custody decisionmaking left judges and attorneys uncertain about the meaning of best interests.

The development of a joint custody presumption was a direct response to a degendered custody process in which the child's best interests are considered paramount but, like previous rules of decision, the joint custody presumption is firmly grounded in notions of parental rights. Rather than awarding custody of the child to one parent, the court permits both parents to retain the legal authority to make major decisions regarding the child's welfare and to alternate physical custody where appropriate.⁸⁹ The justification for joint custody, however, rests on a familiar tautology: several state statutes provide for joint custody if it is in the child's best interest, but that interest is defined in terms of the benefit to the child from a continuing relationship with both parents.⁹⁰ Although most states now permit a joint custody award,⁹¹ the rule has been criticized because it may permit

⁸⁸ Charlow, *supra* note 87, at 274.

⁸⁹ Davidson & Gerlach, *supra* note 73, at 239.

⁹⁰ *See, e.g.*, CAL. FAM. CODE § 3080 (West 1994); CONN. GEN. STAT. ANN. § 46b-56a (West 1986); IDAHO CODE § 32-717B(4) (1983); MASS. GEN. LAWS ANN. ch. 208, § 31 (West Supp. 1993); MINN. STAT. ANN. § 518.17 (West 1990 & Supp. 1994); MISS. CODE ANN. § 93-5-24 (Supp. 1989); N.H. REV. STAT. ANN. § 458:17(II) (1992); N.M. STAT. ANN. § 40-4-9.1 (Michie 1989).

⁹¹ ALASKA STAT. § 25.20.090 (1991); ARIZ. REV. STAT. ANN. § 25-332(c) (Supp. 1993); CAL. FAM. CODE § 3080; COLO. REV. STAT. § 14-10-123.5 (1987); CONN. GEN. STAT. ANN. § 46b-56a; FLA. STAT. ANN. § 61.13(2)(b)(2) (West Supp. 1994); HAW. REV. STAT. § 571-46(1) (Supp. 1992); IDAHO CODE § 32-717B; ILL. ANN. STAT. ch. 750, para. 5/602.1 (Smith-Hurd 1993); IND. CODE ANN. §§ 31-1-11.5-21(f), (g) (Burns Supp. 1993); IOWA CODE ANN. § 598.41(2) (West Supp. 1993); KAN. STAT. ANN. § 60-1610(a)(4)(A) (Supp. 1993); KY. REV. STAT. ANN. § 403.270(4) (Michie/Bobbs-Merrill Supp. 1992); ME. REV. STAT. ANN. tit. 19, § 752(6) (West Supp. 1993); MASS. GEN. LAWS ANN. ch. 208, § 31; MICH. COMP. LAWS ANN. § 722.26a (West 1993); MINN. STAT. ANN. § 518.17(2); MISS. CODE ANN. § 93-5-24; MO. ANN. STAT. § 452.375(4) (Vernon Supp. 1993); MONT. CODE ANN. § 40-4-223 (1993); NEB. REV. STAT. § 42-364(3) (Supp. 1992); NEV. REV. STAT. § 125.480(1) (1991); N.H. REV. STAT. ANN. § 458:17(II); N.J. STAT. ANN. § 9:2-4 (West 1993); N.M. STAT. ANN. § 40-4-9.1; N.C. GEN. STAT. § 50-13.2(b) (1993); OHIO REV. CODE ANN. § 3109.04 (Anderson Supp. 1993); OKLA. STAT. ANN. tit. 43, § 109(B) (West 1990); OR. REV. STAT. § 107.169 (1991); 23 PA. CONS. STAT. ANN. § 5304 (1991); S.D. CODIFIED LAWS ANN. § 25-5-7.1 (1992); TENN. CODE ANN. § 36-6-101(a) (1991); TEX. FAM. CODE ANN. § 14.021 (West Supp. 1994); UTAH CODE ANN. § 30-3-10.2 (Supp. 1993); VT. STAT. ANN. tit. 15, § 665(a) (1989); VA. CODE ANN. § 20-107.2 (Michie Supp. 1992).

Under prior law, Louisiana specifically recognized a presumption of joint custody. LA. CIV. CODE ANN. art. 131(c) (West 1993). Recent amendments, however, now simply mandate an award of custody which is in the child's best interests. LA. CIV. CODE ANN. art. 131 (West Supp. 1994). Joint custody, while not a presumption, is still an option. LA. CIV. CODE ANN. art. 132 (West Supp. 1994).

the court to order joint custody over the objections of one or both parents.⁹² Women also may be disadvantaged by a joint custody presumption because their disproportionate contributions as primary caregivers during the marriage are not recognized in an award of joint custody.⁹³ Although these objections are parent-centered, joint custody also may have negative consequences for children because it may increase conflict for children who feel torn by divided loyalties.⁹⁴

The underlying rules of decision in divorce custody proceedings thus relate to some account of parental rights. Paternal preference rules, for example, authorized courts to award custody to the father because of an underlying principle that acknowledged the father as the unitary head of the household and its sole rights holder.⁹⁵ Custody awards based on the fault of the parties and the grounds for divorce rested on a broader principle that the innocent party had a right to custody because the blameworthy parent should not benefit from his marital misdeeds.⁹⁶ A mother's superior right to custody was vindicated by the maternal preference rule and the tender years doctrine while the rights of both parents justify the application of a joint custody presumption. The articulation of a best interests standard in relation to these rules without additional reference to a more determinate meaning, however, is tautological because it equates a parental right to custody with the child's welfare.

If, of course, the child's welfare can be determined by reference to a parental right to custody then, perhaps, we should not worry about the imprecise way in which we substantively equate best interests with some presumption about parental fitness; as a practical matter, however, these rules of decision neither enhance determinacy nor insure that the child's interests will be better served. Judges express a great deal of discomfort when resolving custody disputes⁹⁷ because they are uncertain about the legal standard they are to apply; this reduces the predictability of case outcomes and may increase the likelihood of litigation.⁹⁸ Judges, too, cannot know with any degree of certainty that their decisions are in the best interests of children. Research studying the children of divorced parents offers little guidance

⁹² Davidson & Gerlach, *supra* note 73, at 241-42.

⁹³ Fineman, *supra* note 68, at 769.

⁹⁴ Charlow, *supra* note 87, at 278.

⁹⁵ Davidson & Gerlach, *supra* note 73, at 233-34.

⁹⁶ Einhorn, *supra* note 68, at 126.

⁹⁷ See, e.g., Charlow, *supra* note 87, at 272; Jessica Pearson & Maria A.L. Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703 (1982-83); Thomas J. Reidy et al., *Child Custody Decisions: A Survey of Judges*, 23 FAM. L.Q. 75 (1989).

⁹⁸ Charlow, *supra* note 87, at 273; Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181 (1986).

to the court about which custody awards redound to the child's best interest because the studies themselves are incomplete, contradictory, or biased.⁹⁹ In any event, the reluctance to embrace the findings of any particular study stems from a larger concern about whether these findings can be generalized in the absence of any societal consensus about the meaning of best interests.¹⁰⁰

These difficulties primarily stem from the impoverished account of children's rights in which notions of best interests are grounded. Although we speak of the child's welfare in terms of the protective rights of the child and the obligations of some adult, we cannot use notions of best interests in the same ways we use rights. Rights create grounds for decisionmaking and minimize indeterminacy;¹⁰¹ they have substantive content and, in their most coherent form, challenge hierarchy and status by empowering those who have been excluded. But the best interests standard does not function like a right: it is indeterminate; it lacks substantive content; and it fails to provide judges with a rule of decision. And when we attempt to give meaning to the best interests standard by looking for rights, the rights we find belong to the adults involved and not to their children.

Significantly, criticism of the best interests test has tended to focus on the consequences of an indeterminate standard rather than on the failure to ground the rule in a more coherent version of children's rights. Central objections to the standard emphasize the vagueness of the term "best interest." Robert Mnookin and David Chambers, for example, contend that the rule is indeterminate because it is not grounded in a set of known and agreed-upon values about what is in a child's best interest;¹⁰² thus judges are given very little guidance and must rely on their own discretion to resolve custody disputes.¹⁰³ Even if, however, judges could state with some certainty what is in a child's best interest, they could not know which choices to make to insure a particular outcome in the absence of some theory that would yield predictions (not determinations) about alternative custody arrangements.¹⁰⁴ And if some theory were available, judges seldom have the

⁹⁹ Chambers, *Rethinking Substantive Rules*, *supra* note 85; Fineman & Opie, *supra* note 68.

¹⁰⁰ Mnookin, *supra* note 68, at 229.

¹⁰¹ Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2260 (1991).

¹⁰² Chambers, *Rethinking Substantive Rules*, *supra* note 85, at 481-82; Mnookin, *supra* note 68, at 229.

¹⁰³ Chambers, *Rethinking Substantive Rules*, *supra* note 85, at 481-82; Mnookin, *supra* note 68, at 255.

¹⁰⁴ Mnookin, *supra* note 68, at 258.

factual information needed to make such predictions;¹⁰⁵ in any event, it is questionable whether that information could be an accurate prediction of the parties' future relationships given the stress associated with divorce.¹⁰⁶

Other critics note that broad judicial discretion under a best interests standard has negative consequences. For Mary Ann Glendon, although discretion does maximize the opportunities for individualized justice by permitting judicial flexibility and creativity,¹⁰⁷ it asks too much of judges: that somehow they can assess the abilities of the parents at a time of significant stress and reach a conclusion about who will better serve the child's interests is little more than a "fantasy."¹⁰⁸ Furthermore, the rule does not discourage custody disputes because its vagueness creates an incentive to litigate.¹⁰⁹ Andrea Charlow agrees that the rule encourages litigation because it increases outcome uncertainty,¹¹⁰ but notes, too, that this may generate conflict between the parents because of incentives to contest custody.¹¹¹ Judges also are uncomfortable with the amount of discretion they have in custody cases and acknowledge that they rely on some intuitive sense of how the case should be resolved.¹¹²

Feminist objections to an indeterminate best interests standard, however, emphasize the ways in which women are disadvantaged and their experiences devalued. Martha Fineman, for example, argues that the best interests standard must be replaced¹¹³ because it has disempowered custodial mothers as a group.¹¹⁴ A best interests test operating in a degendered, no-fault divorce system actually favors fathers and disadvantages mothers because it neither recognizes nor rewards women for their experiences as primary caregivers.¹¹⁵ These gender-neutral custody rules create incentives that encourage men to

¹⁰⁵ Chambers, *Rethinking Substantive Rules*, *supra* note 85, at 482-83; Mnookin, *supra* note 68, at 257-58.

¹⁰⁶ Chambers, *Rethinking Substantive Rules*, *supra* note 85, at 483-84.

¹⁰⁷ Glendon, *supra* note 98, at 1167.

¹⁰⁸ *Id.* at 1181.

¹⁰⁹ *Id.*

¹¹⁰ Charlow, *supra* note 87, at 270.

¹¹¹ *Id.* at 273.

¹¹² *Id.* at 269-71.

¹¹³ Fineman, *supra* note 68, at 770.

¹¹⁴ *Id.* at 730.

¹¹⁵ *Id.* at 770-71; see also PHYLLIS CHESLER, *MOTHERS ON TRIAL* (1986); Nancy D. Polikoff, *Gender and Child-Custody Determinations: Exploding the Myths*, in *FAMILIES, POLITICS, AND PUBLIC POLICY* 183, 187-92 (Irene Diamond ed., 1983); Carol Smart, *Power and the Politics of Child Custody*, in *CHILD CUSTODY AND THE POLITICS OF GENDER 1* (Carol Smart & Selma Sevenhuijsen eds., 1989); Rena K. Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 *HARV. WOMEN'S L.J.* 107 (1978).

contest custody and to use this threat to extort greater financial concessions from women during the out-of-court bargaining process.¹¹⁶ These same incentives also increase the costs of litigation by encouraging the parties to hire experts,¹¹⁷ delay final resolution of the custody decision, and cause psychological harm to the child who may be forced to choose between parents.¹¹⁸

Other feminists view law as an instrument of social change and contend that a custody standard should promote a nonsexist approach to shared parenting.¹¹⁹ For these critics, law should not foster existing inequalities and statuses that disadvantage women but should foster nonhierarchical goals.¹²⁰ By emphasizing women's roles as primary caretakers, however, the law perpetuates traditional gender roles that ultimately disadvantage women and discourage men from participating in caregiving.¹²¹ Rules of decision governing custody cases, then, should reflect an ideology of nonsexist shared parenting by creating incentives for its continuation after divorce.¹²² Most often, these rules take the form of joint custody presumptions which recognize equal parental responsibility for caregiving.

Finally, some commentators argue that the best interests standard is limited and unjust. Jon Elster argues that this rule of decision is not only indeterminate¹²³ and costly¹²⁴ but may be overridden by some public policy, even if the outcome will be contrary to the child's interests.¹²⁵ In addition, by placing the interests of the child first, the rule does not accommodate the rights and needs of the parents except insofar as those rights and needs may serve the child's welfare.¹²⁶ The better test is one which recognizes that certain predivorce behaviors of parents relating to their child create cognizable rights that the court should acknowledge in awarding custody; such a rule, for example, would reward one parent (usually the mother) for the sacrifices she made as a primary caregiver during the marriage and yet would

¹¹⁶ Neely, *supra* note 81, at 177. Neely favors a primary caretaker standard.

¹¹⁷ *Id.* at 173.

¹¹⁸ *Id.* at 176.

¹¹⁹ Bartlett & Stack, *supra* note 86, at 41; Kay, *supra* note 86, at 35.

¹²⁰ Bartlett & Stack, *supra* note 86, at 28-35; Kay, *supra* note 86, at 35.

¹²¹ Bartlett & Stack, *supra* note 86, at 28-35.

¹²² *Id.*; Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 618 (1992). Scott, however, argues for a new custody rule which she calls an approximation standard. For further discussion of the standard, see *infra* notes 162-65 and accompanying text.

¹²³ Elster, *supra* note 87, at 12. Elster notes that his argument is an extension and elaboration of Robert Mnookin's critique of the best interests standard. See Mnookin, *supra* note 68.

¹²⁴ Elster, *supra* note 87, at 22-25.

¹²⁵ *Id.* at 26-28.

¹²⁶ *Id.* at 16-17.

also be consistent with the child's interests.¹²⁷ Chambers, however, rejects a notion of reward as a justification for custody but suggests that if primary caretakers suffer more upon losing custody, then this interest deserves consideration on the ground that it is desirable to inflict the least amount of emotional harm upon the family.¹²⁸ Although we should account for parents' interests when framing custody rules, we should consider children's interests paramount¹²⁹ and make decisions consistent with those wishes the particular child would express if able to do so¹³⁰ or with those of the "reasonable child" when an individual child's preferences cannot be known.¹³¹

My objection to these critiques lies not in what they identify as the limitations of the best interests standard but in their failure to recognize that indeterminacy and broad judicial discretion, and the consequences thereof, are the inevitable result of a rule of decision grounded in an impoverished account of children's rights. Although there are many ways in which judicial discretion is limited,¹³² constraints imposed by rights are, perhaps, most fundamental.¹³³ Rights demand the attention and respect of judges and provide grounds for decisions by mandating certain outcomes in specific cases; in this sense, rights limit the court's responsibility by articulating justifications for judicial decisions.¹³⁴ The best interests standard, however, does not limit judicial discretion precisely because it cannot articulate a coherent account of children's rights. Without being able to identify those interests we think are best for children, we can articulate neither those interests which give rise to rights nor the rights themselves. If children's rights cannot be determined with any degree of certainty, they cannot afford judges sufficient guidance in the exercise of their discretion. From this perspective, grounding best interests in rules of

¹²⁷ *Id.* at 17-18.

¹²⁸ Chambers, *Rethinking Substantive Rules*, *supra* note 85, at 502.

¹²⁹ *Id.* at 487.

¹³⁰ *Id.* at 493.

¹³¹ *Id.* at 494. It is not entirely clear what Chambers means when he suggests that judges should consider the child's own "expected experience," *id.* at 493, although he acknowledges that this idea cannot be fully developed in his article. *Id.* at 494. Chambers does say, however, that in considering the child's own expected experience, the court should rely on some form of substituted judgment when the child's preferences can be known and predicted, or on a reasonable child standard when there is insufficient information to assess the child's preferences. *Id.* at 493-94.

¹³² Schneider, *supra* note 101, at 2252-60. The limitations identified by Schneider include: who is selected to exercise discretion; the socialization and training of those decisionmakers; criticism of judges by scholars, lawyers, and other members of the bench; the decisionmaker's internal dynamics; jurisdictional constraints; constraints imposed by the litigants; internal and external procedures; and guidelines created by law.

¹³³ *Id.* at 2260.

¹³⁴ *Id.*

decision that limit judicial discretion by referring to the rights of parents is inevitable in the absence of a strong account of the rights of children.

Nor do feminist critiques promote a more coherent account of the rights of children under a best interests standard. Feminists have focused, understandably, on the ways in which law disadvantages women and devalues their perspective. In the divorce custody context, however, feminist analysis has narrowed the inquiry about the best interests standard to an account of its sexist and hierarchical effects. The remedies thus proposed by these critics give meaning to the best interests rule by articulating the greater rights of women in custody disputes rather than by providing a more complete account of children's rights and interests. I am not suggesting here that feminists are not concerned about the welfare of children but rather that they embrace a tautological definition that equates nonsexist custody rules with children's best interests.

This raises a larger issue about the relationship between women's rights and the rights of children. Feminist concerns about social relationships mask the power women have and may promote hierarchies that disempower children by emphasizing their need for such relationships.¹³⁵ In the context of a divorce custody dispute, the effect is subtle yet pervasive: feminists believe that nonsexist custody rules are good for children when, in fact, they may simply be good for women.¹³⁶ Even if we can identify with any degree of certainty the best interests of children, an interest theory is, at best, only a weak account of rights because it cannot accommodate notions of power. At best, a feminist critique of custody rules may engender a benevolent maternalism, but it will not redress the powerlessness of children.

Objections that the best interests standard does not adequately account for parental rights and interests might be valid if the rule were based on notions of children's rights. If we assume that the child has a set of known interests and that they are so important that we accord them rights status, then a custody rule might seem unjust if it precluded the courts from considering the rights of parents. This im-

¹³⁵ Federle, *supra* note 8, at 1020. I believe that if we ignore our own hierarchical position in relation to children, we will be unable to see how we accept notions of children's dependencies. If we cannot recognize the power we have over children, we will perpetuate hierarchies that disadvantage children.

¹³⁶ See FINEMAN, *THE ILLUSION OF EQUALITY*, *supra* note 81. Although Fineman is primarily concerned with the ways in which women have been disadvantaged by a degendered family law system, she also recognizes that this same rhetoric may hurt children. *Id.* at 79. See also SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* (1970). Firestone argues that children are as oppressed as women and we must recognize that as women we have the power to perpetuate that oppression. *Id.* at 118.

plies, however, that the rhetoric of custody decisionmaking, that is, that the child's welfare is paramount, is commensurate with its substantive content. The problem, of course, is that we cannot identify those interests which give rise to rights; even if we could, we would not expect to find them subordinated to other public policy considerations with the frequency that now presently occurs in practice. It is disingenuous, then, to argue that the best interests test disadvantages parents when it so effectively minimizes children's interests and rights.

Chambers's tentative proposal for a child's experience perspective also reveals the limitations of a rights theory that cannot accommodate the powerlessness of children. Although Chambers has not yet fully articulated his proposal, he does suggest that the custody decision is, itself, a form of Rawlsian paternalism¹³⁷ in which the judge takes into account the child's preferences and interests only to the extent that they express some rational conception of good that the child will likely embrace when she is mature.¹³⁸ Future-oriented consent, however, is largely self-fulfilling because the person who must later consent will be the product of those earlier paternalistic interventions.¹³⁹ Nor does a child's experience perspective ground the best interests standard in a more coherent account of children's rights because it does not challenge capacity as an organizing principle of children's rights theories. In this sense, the child's experience perspective promotes children's incompetencies and thus insures their powerlessness.

Other proposals about custody decisionmaking have proven disappointing. Some focus on the identity of the decisionmaker: these proposals range from enhancing parents' ability to resolve custody outside the courtroom through the use of mediation, negotiation,¹⁴⁰ or

¹³⁷ Chambers, *Rethinking Substantive Rules*, *supra* note 85, at 493 n.52.

¹³⁸ See Federle, *supra* note 8, at 1007-08. Note also that Chambers rejects a model based on the child's expressed preferences. Chambers, *Rethinking Substantive Rules*, *supra* note 85, at 490-91.

¹³⁹ Federle, *supra* note 8, at 1008. Assume that a child is brought up in a particular religious faith. It is likely that when the child becomes an adult she will be a member of that faith. From her adult perspective, therefore, she is likely to approve her parents' earlier decision about religious education.

¹⁴⁰ Francis J. Catania, Jr., *Accounting to Ourselves for Ourselves: An Analysis of Adjudication in the Resolution of Child Custody Disputes*, 71 NEB. L. REV. 1228 (1992); Jay Folberg, *Mediation of Child Custody Disputes*, 19 COLUM. J.L. & SOC. PROBS. 413 (1985); Rudolph J. Gerber, *Recommendation on Domestic Relations Reform*, 32 ARIZ. L. REV. 9 (1990); Nancy G. Maxwell, *Keeping the Family Out of Court: Court-Ordered Mediation of Custody Disputes Under the Kansas Statutes*, 25 WASHBURN L.J. 203 (1986); Mnookin, *supra* note 68, at 287-89; Jessica Pearson, *Child Custody: Why Not Let the Parents Decide?*, JUDGES' J., Winter 1981, at 4; Jessica Pearson & Nancy Thoennes, *Mediation and Divorce: The Benefits Outweigh the*

arbitration,¹⁴¹ to permitting the mature child to choose the custodial parent.¹⁴² Of course, these proposals do not give the term best interests substantive content and, when mediation, negotiation, or arbitration fail, or if the child cannot or will not choose a custodial parent, the court must still decide what is in the child's best interests. Still other proposals attempt to concretize the best interests standard by creating rules that enhance outcome certainty. Splitting siblings so that each parent receives custody is one such proposal, although it has received scant support because it is thought to cause emotional and psychological harm to the children.¹⁴³ Alternatively, one author has suggested that the parent who is most willing to minimize conflicts for the child's benefit should receive custody,¹⁴⁴ although this seems little more than a proposal to legalize King Solomon's approach.

There are, however, three other alternatives that are more central to the problem posed by the best interests standard. The first, the coin toss, proposes the least discretionary system for resolving custody disputes and is, therefore, the most controversial.¹⁴⁵ At its most basic, the custody determination is made by flipping a coin.¹⁴⁶ Although no commentator has seriously proposed the coin toss as an optimal rule of decision,¹⁴⁷ the randomized selection process has many of the same advantages as an automatic decision rule: decisions are reached quickly and the possibility of harm to the child caused by protracted

Costs, FAM. ADVOC., Winter 1982, at 26; Joseph P. Tomain & Jo Ann Lutz, *A Model for Court-Annexed Mediation*, 5 OHIO ST. J. ON DISP. RESOL. 1 (1989); Gary A. Weissman & Christine M. Leick, *Mediation and Other Creative Alternatives to Litigating Family Law Issues*, 61 N.D. L. REV. 263 (1985); Patricia L. Winks, *Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce*, 19 J. FAM. L. 615 (1980-1981). *But see* Robert Mnookin, *Divorce Bargaining: The Limits of Private Ordering*, 18 U. MICH. J.L. REF. 1015, 1024-31 (1984-1985). For a recent survey and critique of the literature on divorce mediation, see Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992) (arguing that mediation disadvantages women).

¹⁴¹ Alfred R. Belinkie, *Matrimonial Arbitration*, 65 CONN. B.J. 309 (1991); Robert Coulson, *Family Arbitration—An Exercise in Sensitivity*, 3 FAM. L.Q. 22 (1969); Jean E. Faure, *The Arbitration Alternative: Its Time Has Come*, 46 MONT. L. REV. 199 (1985); Gerber, *supra* note 140; Lawrence S. Kubie, *Provisions for the Care of Children of Divorced Parents: A New Legal Instrument*, 73 YALE L.J. 1197 (1964); Mnookin, *supra* note 68, at 289; Stephen W. Schlissel, *A Proposal for Final and Binding Arbitration of Initial Custody Determinations*, 26 FAM. L.Q. 71 (1992); Janet M. Spencer & Joseph P. Zammit, *Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 DUKE L.J. 911.

¹⁴² Mnookin, *supra* note 68, at 285. Mnookin himself raises questions about the child's choice being dispositive.

¹⁴³ Elster, *supra* note 87, at 39.

¹⁴⁴ Charlow, *supra* note 87, at 282-83.

¹⁴⁵ Elster, *supra* note 87, at 40-43; Mnookin, *supra* note 68, at 289-91.

¹⁴⁶ Elster, *supra* note 87, at 40; Mnookin, *supra* note 68, at 289-90.

¹⁴⁷ Although Elster has not proposed the adoption of a coin toss to resolve custody disputes, he has given the proposal serious treatment. Elster, *supra* note 87, at 41-43.

litigation is reduced.¹⁴⁸ A randomized selection process also treats each parent equally, although it cannot account for other considerations, like the emotional need of a particular parent who has strong psychological ties with the child;¹⁴⁹ nor will the coin toss increase certainty in the outcome of a custody dispute, although requiring the parents to flip a coin during the marriage at least has the advantage of minimizing bargaining.¹⁵⁰

The second proposal, adopted by several commentators, is the primary caretaker preference.¹⁵¹ The psychological parent doctrine as articulated by Goldstein, Freud, and Solnit is one of the earliest versions of the standard.¹⁵² The doctrine rejects the assumption of the joint custody rule that dual parenting is beneficial to the child and emphasizes the child's need to identify and bond with one parent.¹⁵³ The psychological parent is the person who, because of her daily interaction with and attention to the child, has the strongest emotional bond with that child.¹⁵⁴ Goldstein, Freud, and Solnit argue that continuity of the relationship between the child and the psychological parent is critical;¹⁵⁵ thus, the psychological parent should receive custody.¹⁵⁶

More recent versions of the doctrine place less emphasis on continuity and stress the need for a clear and definite rule of decision. Under the primary caretaker doctrine as currently articulated, the parent who has taken responsibility for the day-to-day care of the child will be awarded custody because that parent is thought to have established a reciprocal emotional bond with the child.¹⁵⁷ The advantage of the rule lies in its determinacy: the best interest of the child is equated to a placement with the primary caretaker which, in turn, reduces costs, opportunities for bargaining, and incentives to liti-

¹⁴⁸ *Id.* at 41.

¹⁴⁹ *Id.* at 43.

¹⁵⁰ Mnookin, *supra* note 68, at 290 n.254.

¹⁵¹ See, e.g., GOLDSTEIN ET AL., *supra* note 39; Chambers, *Rethinking Substantive Rules*, *supra* note 85, at 478-79, 559-68; Fineman, *supra* note 68, at 770-74; Neely, *supra* note 81; O'Kelly, *supra* note 68.

¹⁵² See Charlow, *supra* note 87, at 274-75.

¹⁵³ GOLDSTEIN ET AL., *supra* note 39, at 31-52.

¹⁵⁴ *Id.* at 19.

¹⁵⁵ *Id.* at 31. Goldstein, Freud, and Solnit also note three other principles upon which custody decisions should be based: the child's unique sense of time; the state's inability to supervise interpersonal relationships; and the limits of our ability to make long-range predictions. *Id.* at 31-52.

¹⁵⁶ *Id.* at 19-20, 53.

¹⁵⁷ Chambers, *Rethinking Substantive Rules*, *supra* note 85, at 527; Fineman, *supra* note 68, at 771; O'Kelly, *supra* note 68, at 509.

gate.¹⁵⁸ Although in practice more women will benefit from the rule because they tend to be the primary caretakers in our society, the doctrine is gender neutral and would not disadvantage a paternal primary caretaker.¹⁵⁹ Only one state has adopted the primary caretaker rule,¹⁶⁰ although other states consider the status of a primary caretaker as one factor in assessing the best interests of the child.¹⁶¹

The third proposal, the approximation standard, attempts to redress some of the problems raised by a best interests test. As proposed by Elizabeth Scott, the approximation standard structures future parental involvement on past parental roles and performance.¹⁶² Like the primary caretaker preference, the approximation standard thus takes into account the amount of time each parent has spent with the child, the parent's participation in decisions affecting the child, and the caretaking tasks each parent has performed;¹⁶³ unlike the primary caretaker presumption, this inquiry results in a fluid and more flexible structuring of the postdivorce relationship between parent and child. Thus, under the approximation standard, the court allocates time with, and decisional authority over, the child between the two parents on the basis of their predivorce relationship rather than through a qualitative determination of who is the better par-

¹⁵⁸ Fineman, *supra* note 68, at 770-74; Neely, *supra* note 81, at 186; O'Kelly, *supra* note 68, at 517-33.

¹⁵⁹ Charlow, *supra* note 87, at 274; Fineman, *supra* note 68, at 773; Neely, *supra* note 81, at 180.

¹⁶⁰ The West Virginia Supreme Court of Appeals adopted a primary caretaker preference in 1981. *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981). The court provided ten criteria for determining the primary caretaking parent:

- (1) preparing and planning of meals;
- (2) bathing, grooming, and dressing;
- (3) purchasing, cleaning, and care of clothes;
- (4) medical care, including nursing and trips to physicians;
- (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings;
- (6) arranging alternative care, i.e. babysitting, day-care, etc.;
- (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning;
- (8) disciplining, i.e. teaching general manners and toilet training;
- (9) educating, i.e. religious, cultural, social, etc.; and,
- (10) teaching elementary skills, i.e. reading, writing, and arithmetic.

Id. at 363.

The Minnesota Supreme Court also adopted the primary caretaker preference. *Pikula v. Pikula*, 374 N.W.2d 705, 713 (Minn. 1985). A statute subsequently enacted by the Minnesota state legislature, however, declared that primary caretaking was only one of many factors to be considered by the court when resolving custody disputes. MINN. STAT. ANN. § 518.17.

¹⁶¹ *See, e.g.*, LA. CIV. CODE ANN. art. 134(12) (West Supp. 1994); *Burchard v. Garay*, 724 P.2d 486, 492 (Cal. 1986); *Derby v. Derby*, 571 P.2d 562, 564 (Or. Ct. App.), *modified on other grounds*, 572 P.2d 1080 (Or. Ct. App. 1977); *Commonwealth ex rel. Jordan v. Jordan*, 448 A.2d 1113, 1115 (Pa. Super. Ct. 1982).

¹⁶² Scott, *supra* note 122, at 617.

¹⁶³ *Id.* at 637-38.

ent.¹⁶⁴ The advantage of the approximation standard, therefore, lies in its reconstruction of custody as the perpetuation of an intact familial structure. In this sense, custody is not a prize to be awarded the prevailing combatant but rather a method of promoting the child's welfare by enhancing stability and continuity while ensuring fairness to parents by recognizing their unique contributions to the family unit regardless of gender.¹⁶⁵

None of these proposals equates best interests with the rights of the child. Flipping a coin to resolve a conflict is possible only if there are two equally weighted interests; a coin toss neither acknowledges nor accommodates the possibility of a third set of interests that are held by the child. The primary caretaker presumption is merely another form of a parental preference rule and is subject to the same criticisms already made, namely, that it tautologically equates the placement with the child's best interests. The presumption also fails to minimize indeterminacy as more couples share parenting responsibilities¹⁶⁶ and may actually disadvantage children by directing courts to order placements that are not responsive to their special educational or health needs.¹⁶⁷ Without some basis in a coherent account of children's rights, it is inevitable that children's interests will be subordinated to those of their parents.

The approximation standard also suffers from the same failing as other reform alternatives in that its insistence on the replication of the predivorce intact familial structure perpetuates existing hierarchies that may disadvantage children in subtle yet powerful ways. By focusing on past parental relationships, the approximation standard more fully expresses parental rights than a best interests test, but subsumes children's separable interests into claims that their welfare is best served by approximating each parent's predivorce role. Of course, we cannot know that continuing the family structure beyond divorce is possible or even desirable for children, and we should be skeptical of sociological and psychological claims.¹⁶⁸ Sociologists and psychologists are the product of their culture and history and they bring their own notions of childhood to their theories and methods of inquiry.¹⁶⁹ The approximation inquiry also sounds very much like the

¹⁶⁴ *Id.* at 638.

¹⁶⁵ *Id.* at 642-43.

¹⁶⁶ *Id.* at 629.

¹⁶⁷ Crippen, *supra* note 68, at 491. Crippen argues that Minnesota's experience with a primary caretaker preference was a valuable one from which all of us can learn. *Id.* at 499-503.

¹⁶⁸ Chambers, *Rethinking Substantive Rules*, *supra* note 85; Fineman & Opie, *supra* note 68.

¹⁶⁹ See Marx Wartofsky, *The Child's Construction of the World and the World's Construction of the Child: From Historical Epistemology to Historical Psychology*, in *THE CHILD AND*

assertions of other reformers who argue for more determinate custody rules grounded in notions of parental rights, but these claims either fail to recognize the rights of children or overstate the degree to which parents are disadvantaged.

Without a more coherent account of children's rights, however, it is too easy to simply equate children's interests with those of their parents; inevitably, this leads us to search for rules that accommodate parental rights and interests. This also permits us to claim that we are acting in behalf of children when we may be disadvantaging them by failing to articulate their interests and rights. Certainly, a best interests standard cannot empower children, as it is grounded in notions of protective rights. This incoherency has not only created difficulties in the adoption and application of custody rules but has frustrated the development of a theory for, and standards of representation of, children in the divorce custody context. Whether the child should have a representative, who that person should be, and what interests that person represents are questions that cannot be resolved until we have a more complete account of children's rights. It is to these problems created by an inadequate and incoherent rights theory that this Article now turns.

III. THE CHILD'S REPRESENTATIVE IN THE DIVORCE CUSTODY CONTEXT

When we say that an individual has a right, we are acknowledging that she may assert and protect that right through the procedural mechanisms provided by the state. In our system, the court, as an adversarial arena, is one such device to which we submit our competing claims and contend that our possession of a right mandates a specific outcome. Lawyers, of course, play a crucial role in the adversarial system for which they are specifically educated and trained. Put simply, attorneys learn that to be competent, as well as ethical, they must be able to identify and assert the rights of their clients and pursue their clients' goals diligently and zealously. This, however, implies that the attorney can identify a set of rights and can articulate and pursue her client's goals.

These have proved to be troublesome issues for attorneys repre-

OTHER CULTURAL INVENTIONS, *supra* note 39, at 188, 202. Wartofsky contends that childhood is a reflection of our society and culture rather than a psychological or biological state. *Id.* at 193-94. Psychological theory and standards of inquiry also are the product of these social and cultural influences, and Wartofsky argues that we must develop a historical psychology which recognizes these influences before we can begin to understand childhood. *Id.* at 213-14.

senting children who are thought incapable of exercising the few rights they do have. In the divorce custody context, these problems are particularly acute because the best interests standard is grounded in an impoverished account of rights that neither adequately defines the rights of children nor sufficiently empowers them. Consequently, there is much debate and a great deal of confusion about the role and responsibilities of the child's representative when the nature of the child's right is so amorphous. Additionally, there is no consensus about who should be the child's representative, what the obligations of the representative are, and even which interests the representative should represent. The answers to these questions have varied among jurisdictions and commentators but ultimately none will prove satisfactory without reconstructing a more coherent theory of rights for children.

An impoverished account of rights that is indeterminate and tied to notions of capacity is the source of the confusion about the roles and responsibilities of the child's representative. As I have argued, the best interests test rests on notions of protective rights that are vague and disempowering, and our use of rights talk masks the incoherency of an account grounded in children's interests and incapacities. While the best interests standard is but one manifestation of this incoherency, so, too, is the conceptual confusion surrounding the child's representative in the divorce custody context. Various state statutes and proposals have attempted to clarify the roles and obligations of the child's representative but, in the absence of a children's rights theory that addresses issues of power and capacity, these laws and commentaries cannot provide a coherent account of representation for children in custody proceedings.

If the best interests standard were grounded in a strong version of rights that empowered the child, then we would expect to find state laws recognizing the child's independent right to legal representation; however, state statutes generally permit only the discretionary appointment of a representative who may not even be an attorney.¹⁷⁰

¹⁷⁰ ARIZ. REV. STAT. ANN. § 25-321 (1991); CAL. FAM. CODE § 3150 (West 1994); COLO. REV. STAT. § 14-10-116 (Supp. 1993); CONN. GEN. STAT. ANN. § 46b-54 (West 1986); DEL. CODE ANN. tit. 13, § 721 (1993); D.C. CODE ANN. § 16-918(b) (1989); HAW. REV. STAT. § 571-46(8) (Supp. 1992); IDAHO CODE § 32-704(3) (1983); ILL. ANN. STAT. ch. 750, para. 5/506 (Smith-Hurd 1993); IND. CODE ANN. § 31-1-11.5-28 (Burns Supp. 1993); IOWA CODE ANN. § 598.12(1) (West Supp. 1994); KY. REV. STAT. ANN. § 403.090 (Michie/Bobbs-Merrill 1984); LA. REV. STAT. ANN. § 9:345(A) (West Supp. 1994); MD. CODE ANN., FAM. LAW § 1-202 (1991); MASS. GEN. LAWS ANN. ch. 215, § 56A (West 1989); MICH. COMP. LAWS ANN. § 722.27(1)(e) (West 1993); MONT. CODE ANN. § 40-4-205 (1993); NEB. REV. STAT. § 42-358(1) (Supp. 1992); N.J. STAT. ANN. § 9:2-4; N.M. STAT. ANN. § 40-4-8(A) (Michie Supp. 1993); N.Y. FAM. CT. ACT § 241 (Consol. Supp. 1993); R.I. GEN. LAWS § 15-5-16.2(c)

Only nine states mandate the appointment of a child's representative in a divorce custody proceeding, but even these states require appointment only if certain conditions exist.¹⁷¹ One additional state has a court rule requiring such an appointment.¹⁷² In six of these states, the court must appoint a representative if there are allegations that the child has been abused,¹⁷³ and three states require the court to appoint a guardian *ad litem* when the judge believes that representation of the child's best interests, as opposed to the child's preferences, will better serve the child's welfare, or where the court has a "special concern" for the child's welfare.¹⁷⁴ Oregon, however, requires the court to ap-

(1988); S.D. CODIFIED LAWS ANN. § 25-4-45.4 (1992); TEX. FAM. CODE ANN. § 11.10 (West 1986); UTAH CODE ANN. § 30-3-11.2 (1989); VT. STAT. ANN. tit. 15, §§ 594, 669 (1989); VA. CODE ANN. § 16.1-266 (Michie Supp. 1993); WASH. REV. CODE ANN. § 26.09.110 (West Supp. 1994); WYO. STAT. § 14-3-211 (1986) (applicable to divorce proceedings by case law).

Two states permit the appointment of a representative for the child by court rule. OHIO R. CIV. P. 75(B)(2); PA. R. CIV. P. 1915.11(a).

¹⁷¹ ALASKA STAT. § 25.24.310(c) (Supp. 1993) (requiring appointment of a guardian *ad litem* when the court determines it would serve the welfare of the child); FLA. STAT. ANN. § 61.401 (West Supp. 1994) (mandating that the court appoint a guardian *ad litem* when allegations of child abuse or neglect exist); LA. REV. STAT. ANN. § 9:345(B) (West Supp. 1994) (directing the court to appoint an attorney when a prima facie case of child abuse is presented); MINN. STAT. ANN. § 518.165(2) (West 1990) (compelling the court to select a guardian *ad litem* where there is reason to believe the child is a victim of domestic child abuse or neglect); MO. ANN. STAT. § 452.423(1) (Vernon Supp. 1993) (instructing the court to appoint a guardian *ad litem* where abuse is alleged); OR. REV. STAT. § 107.425(3) (1991) (requiring the court to appoint counsel for a child where one or more child has requested such representation); VA. CODE ANN. § 16.1-266(A) (compelling the court to appoint a guardian *ad litem* where child abuse or neglect is alleged); WIS. STAT. ANN. § 767.045(1) (West 1993) (mandating that a court appoint a guardian *ad litem* where the court has special concern for the welfare of the child, or where legal custody of the child is contested); WYO. STAT. §§ 14-2-312 (Supp. 1993), 14-3-211(a) (requiring the court to appoint a guardian *ad litem* unless the interests of the child are already adequately represented, and compelling the court to appoint counsel when abuse or neglect is alleged).

Until 1992, New Hampshire required the court to appoint a guardian *ad litem* whenever custody or visitation was disputed. This statute was subsequently amended to leave appointment to the court's discretion. Compare N.H. REV. STAT. ANN. § 458:17-a(I) (1992) with N.H. REV. STAT. ANN. § 458:17-a(I) (Supp. 1993).

¹⁷² N.D. CT. R. ANN. 4.1. North Dakota further provides for appointment of a guardian *ad litem* at the court's discretion in other instances. See N.D. CENT. CODE § 14-09-06.4 (1991).

¹⁷³ FLA. STAT. ANN. § 61.401; LA. REV. STAT. ANN. § 9:345(B); MINN. STAT. ANN. § 518.165(2); MO. ANN. STAT. § 452.423(1); VA. CODE ANN. § 16.1-266(A); WYO. STAT. § 14-3-211(a). For a discussion of a child's need for independent representation in these cases, see generally Kerin S. Bischoff, *The Voice of a Child: Independent Legal Representation of Children in Private Custody Disputes When Sexual Abuse is Alleged*, 138 U. PA. L. REV. 1383 (1990); E. Bruce Nicholson, *When Child Abuse is Alleged in a Custody or Visitation Dispute the Child Deserves the Protection Provided by Independent Representation*, in LEGAL ADVOCACY FOR CHILDREN AND YOUTH: REFORMS, TRENDS, AND CONTEMPORARY ISSUES 38 (Howard A. Davidson & Robert M. Horowitz eds., 1986).

¹⁷⁴ ALASKA STAT. § 25.24.310(c); WIS. STAT. ANN. § 767.045(1)(a)(1); N.D. CT. R. ANN. 4.1.

point counsel only when the child requests an attorney.¹⁷⁵ Wisconsin, in addition to requiring appointment of a guardian *ad litem* when the court has a "special concern" for the child's welfare, mandates such appointment for a child when custody is contested.¹⁷⁶

These preconditions are inconsistent with a strong account of children's rights that would insure the empowerment of children through adequate legal representation. Mandating the appointment of a representative for the child only when abuse has been alleged suggests a greater congruence of interests between parent and child in other custody proceedings than a coherent account of rights would imply; this is not to say that parent and child never have similar interests, but that an adequate rights theory would not assume that correspondence. Additionally, requiring the court to appoint a guardian *ad litem* when the child's preferences diverge from her best interests is compatible only with a rights theory tied to notions of capacity and power. Although a statute which mandates the appointment of counsel upon the request of the child is not facially incompatible with a strong version of rights, it is disingenuous to suggest that such a statute is rights-based in the absence of some mechanism to ascertain whether the child is aware she has the right to counsel and wishes to assert that right. Finally, while statutes mandating the appointment of a guardian *ad litem* in contested custody cases broaden the scope of mandatory representation, they do not recognize the value of representation for the child during the pretrial stage of a divorce case nor do they accord the child a right to legal counsel.

There is little consensus among the states as to whether the child should have an attorney or a guardian *ad litem* and what that individual's role should be. Sixteen states and the District of Columbia have statutes allowing the court to appoint an attorney if, within the court's discretion, an appointment is deemed necessary.¹⁷⁷ Additionally, at least one other state has a court rule which allows appointment of an attorney,¹⁷⁸ and absent legislation, the Tennessee Court of Appeals has held that such an appointment may be appropriate.¹⁷⁹

¹⁷⁵ OR. REV. STAT. § 107.425(3).

¹⁷⁶ WIS. STAT. ANN. § 767.045(1)(a)(2).

¹⁷⁷ ARIZ. REV. STAT. ANN. § 25-321; CAL. FAM. CODE § 3150; COLO. REV. STAT. § 14-10-116; CONN. GEN. STAT. ANN. § 46b-54; DEL. CODE ANN. tit. 13, § 721(c); D.C. CODE ANN. § 16-918(b); IDAHO CODE § 32-704(3); IOWA CODE ANN. § 598.12(1); LA. REV. STAT. ANN. § 9:345(A); MD. CODE ANN., FAM. LAW § 1-202(1); MONT. CODE ANN. § 40-4-205; NEB. REV. STAT. § 42-358(1); N.Y. FAM. CT. ACT §§ 241, 242, 249 (Consol. 1987 & Supp. 1993); OR. REV. STAT. § 107.425(3); S.D. CODIFIED LAWS ANN. § 25-4-45.4; UTAH CODE ANN. § 30-3-11.2; WASH. REV. CODE ANN. § 26.09.110.

¹⁷⁸ PA. R. CIV. P. 1915.11(a).

¹⁷⁹ *Higgins v. Higgins*, 629 S.W.2d 20, 22 (Tenn. Ct. App. 1982).

Eleven states, including one pursuant to a court rule, permit the appointment of either an attorney or a guardian *ad litem*.¹⁸⁰ Nine states permit the court to appoint a guardian *ad litem*.¹⁸¹ Of those states that allow appointment of a guardian *ad litem*, five require that the guardian be an attorney.¹⁸²

The overwhelming majority of these states require the representative, whether an attorney or a guardian *ad litem*, to represent the child's interests,¹⁸³ although in most jurisdictions exactly what those interests are and what it means to represent those interests is unclear. Although some statutes implicitly identify the attorney's role as an advocate for the child's expressed wishes,¹⁸⁴ or the guardian's role as an advocate for the child's best interests,¹⁸⁵ other statutes envision the attorney as the guardian of the child's best interests¹⁸⁶ and the guardian as an attorney for the child.¹⁸⁷ Even within the same state, the

¹⁸⁰ ALASKA STAT. §§ 25.24.310(a),(c) (allowing a court, at its discretion, to appoint an attorney for a child, and requiring a court to appoint a guardian *ad litem* when it is in the child's best interests); ILL. ANN. STAT. ch. 750, para. 5/506; IND. CODE ANN. §§ 31-1-11.5-28(c),(e); MICH. COMP. LAWS ANN. § 722.27(1)(e); N.J. STAT. ANN. § 9:2-4(c); OHIO R. CIV. P. 75(B)(2); R.I. GEN. LAWS § 15-5-16.2(c); TEX. FAM. CODE ANN. § 11.10; VT. STAT. ANN. tit. 15, §§ 594, 669; VA. CODE ANN. § 16.1-266(D); WYO. STAT. § 14-3-211(a).

¹⁸¹ FLA. STAT. ANN. § 61.401; HAW. REV. STAT. § 571-46(8); KY. REV. STAT. ANN. § 403.090(3); MASS. GEN. LAWS ANN. ch. 215, § 56A; MINN. STAT. ANN. § 518.165(1); MO. ANN. STAT. § 452.423(1); N.H. REV. STAT. ANN. § 458:17-a(I); N.M. STAT. ANN. § 40-4-8(A); WIS. STAT. ANN. § 767.045(1); *see also* Kimmons v. Kimmons, 613 S.W.2d 110 (Ark. Ct. App. 1981) (remanding to consider appointment of a guardian *ad litem*); Gerber v. Peters, 584 A.2d 605 (Me. 1990) (determining that court-appointed guardian *ad litem* owed no duty to the child's father); Shainwald v. Shainwald, 395 S.E.2d 441 (S.C. Ct. App. 1990) (noting that the court has a duty to ensure that guardians *ad litem* perform their duties properly).

¹⁸² *See* ILL. ANN. STAT. ch. 750, para. 5/506; KY. REV. STAT. ANN. § 403.090(1); N.M. STAT. ANN. § 40-4-8; VA. CODE ANN. § 16.1-266(A); WIS. STAT. ANN. § 767.045(3). Several states allow for guardians *ad litem* to be attorneys. *See, e.g.*, ALASKA STAT. § 25.24.310(c); FLA. STAT. ANN. § 61.402 (West Supp. 1994); IND. CODE ANN. § 31-6-1-18 (West Supp. 1993); MO. ANN. STAT. § 452.423(5).

¹⁸³ *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-321; CAL. FAM. CODE § 3150; COLO. REV. STAT. ANN. § 14-10-116; CONN. GEN. STAT. § 46b-54(c); DEL. CODE ANN. tit. 13, § 721(c); D.C. CODE ANN. § 16-918(b); IDAHO CODE § 32-704(3); IOWA CODE ANN. § 598.12(1); LA. REV. STAT. ANN. § 9:345; MONT. CODE ANN. § 40-4-205; NEB. REV. STAT. § 42-358(1); N.Y. FAM. CT. ACT § 241; S.D. CODIFIED LAWS ANN. § 25-4-45.4; UTAH CODE ANN. § 30-3-11.2; WASH. REV. CODE ANN. § 26.09.110.

¹⁸⁴ *See, e.g.*, N.Y. FAM. CT. ACT § 241 (stating that the purpose of the law guardian is to protect the child's interests and to help the child express her wishes to the court).

¹⁸⁵ *See, e.g.*, N.D. CENT. CODE § 14-09-06.4 (stating that where the court appoints a guardian *ad litem*, this guardian "shall serve as an advocate of the children's best interests"); VT. STAT. ANN. tit. 15, § 669 (allowing a court to appoint a guardian *ad litem* "to represent the best interests of the child"); WIS. STAT. ANN. § 767.045(4) (providing that the guardian *ad litem* "shall be an advocate for the best interests of a minor child," and "shall consider, but shall not be bound by," the child's wishes).

¹⁸⁶ *See, e.g.*, WYO. STAT. § 14-3-211(a) (stating that court-appointed attorney shall also serve as guardian *ad litem* unless such guardian was previously appointed).

¹⁸⁷ *See, e.g.*, N.H. REV. STAT. ANN. § 458:17-a(II) (requiring the guardian *ad litem* to "re-

role of the child's representative may vary from region to region and court to court.¹⁸⁸

Proponents of independent representation for the child also seem to confuse the distinctive roles of the attorney and the guardian *ad litem*. Several commentators, for example, note that the attorney is free to present her own assessment of the appropriate outcome,¹⁸⁹ although this is in clear violation of professional norms that prohibit the attorney from expressing her personal viewpoint.¹⁹⁰ Still others contend that while the attorney must inform the court of the child's views and expressed preferences, she need not endorse them.¹⁹¹ A few advocates propose a more mixed role for the child's representative, one that combines the responsibilities and functions of a guardian *ad litem* with those of a lawyer.¹⁹² These representatives would act as

spect" all communications between the child and guardian and limiting disclosure of those communications).

¹⁸⁸ Carole R. Chambers, *The Ambiguous Role of the Lawyer Representing the Minor in Domestic Relations Litigation*, 70 ILL. B.J. 510, 511-12 (1982).

¹⁸⁹ See, e.g., *A Divorce Reform Act*, 5 HARV. J. ON LEGIS. 563, 584 (1968) (advocating the representation of the child's interests as they appear to the lawyer); Kim J. Landsman & Martha L. Minow, Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1179-80 (1978) (noting that the attorney's independent assessment is an important contribution).

¹⁹⁰ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-25 & DR 7-106(C)(3), (4) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(e) (1992). For an additional critique, see Martin Guggenheim, *The Right to be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 100-07 (1984).

¹⁹¹ JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE 712 (1986) (attorney should have a duty to advise the court of child's preferences, but if attorney disagrees with the preferences, the attorney should tell the court why the preference is ill-advised; if the child has a strong preference and good arguments support that preference, the attorney should withdraw); James K. Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565, 588-89 (1976) (child advocate should advance child's position but not usurp judge's role of determining best interests); Debra L. Norberg, Note, *"Mom, Dad, I Want to Introduce My Lawyer": The Development of Child Advocacy in Family Law*, 29 S.D. L. REV. 98, 103, 109 (1983) (the child's preference is seldom expressed, so the advocate must present the child's view to the court although this view need not bind the advocate); Edward Sokolnicki, Note, *The Attorney as Guardian Ad Litem for a Child in Connecticut*, 5 CONN. PROB. L.J. 237, 252, 255-56 (1991) (to the extent child's wishes are commensurate with best interests, attorney acting as guardian *ad litem* should consider child's view in determining best interests but need not adhere rigidly to the child's expressed preferences).

¹⁹² See, e.g., Tari Eitzen, *A Child's Right to Independent Legal Representation in a Custody Dispute: A Unique Legal Situation, A Necessarily Broad Standard, The Child's Constitutional Rights, The Role of the Attorney Whose Client is the Child*, 19 FAM. L.Q. 53, 68 (1985) (arguing for new legal entity to represent child which would include elements of advocate and guardian roles); Marvin C. Holz, *The Child Advocate in Private Custody Disputes: The Wisconsin Experience*, 16 J. FAM. L. 739, 741-42 (1977-1978) (guardian *ad litem* has all of the duties, powers, and responsibilities of counsel for a party but also must make an independent determination of the child's best interests); Carl E.K. Johnson, *The Role of the Guardian Ad Litem in Custody and Visitation Disputes*, 17 COLO. LAW. 1301 (1988) (role of attorney appointed as

independent factfinders and advocates and would take a more fluid approach to representing the child's wishes based on the child's interests, capacity, and maturity.¹⁹³

This role confusion is a direct consequence of the way we use rights discourse to describe the best interests of the child. As I have said, the best interests standard is grounded in notions of protective rights that are inadequate. But when we speak of children's interests in terms of rights we obscure the incoherency of the underlying rights theory that accounts for neither power nor capacity. In the particular case, the child is disadvantaged because the best interests standard is indeterminate and cannot provide guidance as to who is the child's representative and what interests she represents; thus, the attorney may find herself in the anomalous position of advocating a view contrary to the child's expressed preferences. The effects of an impoverished rights theory, however, are even more invidious in that attorneys themselves may practice in ways that are inconsistent with self-professed roles and obligations.¹⁹⁴

guardian *ad litem* is broader than that of lawyer and includes testifying in court and making recommendations, and acting as advocate and conciliator); Richard K. Schwartz, *A New Role for the Guardian Ad Litem*, 3 J. DISP. RESOL. 117, 139-40 (1987) (appointed guardian for children is to serve as family mediator to monitor and insure success of joint custody); John M. Specca & Robert L. Wehrman, *Protecting the Rights of Children in Divorce Cases in Missouri*, 38 UMKC L. REV. 1, 39-40 (1969-1970) (guardian *ad litem* has same rights as counsel for the parties but also acts as arbitrator and protector of children's best interests); James R. Devine, Comment, *A Child's Right to Independent Counsel in Custody Proceedings: Providing Effective "Best Interests" Determination Through the Use of a Legal Advocate*, 6 SETON HALL L. REV. 303 (1974-1975) (conflating attorney with guardian *ad litem*); Brenda M. Flock, Comment, *Custody Disputes Arising from Divorce: The Child's Need for Counsel in Pennsylvania*, 87 DICK. L. REV. 351, 366-67 (1983) (child's attorney must be more than an advocate: the attorney must also be a factfinder and arbitrator); Regina T. Makaitis, Comment, *Protecting the Interests of Children in Custody Proceedings: A Perspective on Twenty Years of Theory and Practice in the Appointment of Guardians ad Litem*, 12 CREIGHTON L. REV. 234 (1978) (discussing guardian *ad litem* as advocate, protector, and officer of the court).

¹⁹³ Robert I. Berdon, *A Child's Right to Counsel in a Contested Custody Proceeding Resulting from a Termination of the Marriage*, 50 CONN. B.J. 150, 165 (1976); Eitzen, *supra* note 192, at 68-71; Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 FAM. L.Q. 53, 63-67 (1992); Linda L. Long, *When the Client is a Child: Dilemmas in the Lawyer's Role*, 21 J. FAM. L. 607, 632-38 (1982-1983); Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 750 (1985); John M. Specca, *Representation for Children in Custody Disputes: Its Time Has Come*, 48 UMKC L. REV. 328, 332 n.23 (1979-1980); Flock, *supra* note 192, at 362-68; Robyn-Marie Lyon, Comment, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV. 681, 701-05 (1987).

¹⁹⁴ Landsman & Minow, *supra* note 189. The authors interviewed eighteen attorneys who routinely received appointments as counsel for children in divorce cases in New Haven County and Hartford County, Connecticut. The authors concluded that the attorney for the child should define her role in terms of her relationships to the child, the parents and their attorneys, investigative agencies, and the judge. *But see* Wallace J. Mlyniec, *The Child Advocate in Private Custody Disputes: A Role in Search of a Standard*, 16 J. FAM. L. 1 (1977-1978) (noting

Several commentators, for example, argue that the child does not need an attorney in a divorce custody proceeding because of a perceived congruence of interests between an adult, usually the parent, and the child. For these critics, separate counsel is redundant: as factfinder, the child's attorney will duplicate the presentations made by the parents' attorneys¹⁹⁵ and, as advocate, will usurp the judge's responsibility for ascertaining and protecting the child's best interests.¹⁹⁶ An independent representative for the child also may advocate some nonlegal professional's assessment of the child's best interests in lieu of her own opinion about which parent should have custody.¹⁹⁷ Although there is no reason why the expert's position should be represented by counsel, the court may be unduly influenced when the child's advocate agrees with the expert.¹⁹⁸ Under these circumstances, it is difficult to see how an attorney for the child adds anything to the process.¹⁹⁹

By conflating the interests of children and adults, these critiques reveal the poverty of a protective rights theory. Protective rights invariably reduce to concepts about children's needs and capacities; in the divorce custody context, this means that best interests are most often defined in terms of the child's need to be with one or both parents, a need that is determined by reference to some external notion of parental behavior like primary caretaking, for example. But this account leaves children peculiarly vulnerable to the vicissitudes of the divorce process because it enhances their powerlessness. Certainly, a strong rights theory would not countenance an argument that the child does not need separate representation because it would be duplicative. This kind of argument undercuts the very purpose and value of rights: that by allowing the powerless to access existing political and legal structures in order to make claims, they ultimately alter existing hierarchies.

There are those who contend that children do not need independent representation or whose preferences need not bind their advocates because they lack the capacity we associate with an autonomous

that until a more determinate standard for custody is implemented, the child advocate should act as a traditional attorney and represent the child's stated preferences).

¹⁹⁵ Robert F. Cochran, Jr. & Paul C. Vitz, *Child Protective Divorce Laws: A Response to the Effects of Parental Separation on Children*, 17 FAM. L.Q. 327, 350 (1983); Nanette Dembitz, *Beyond Any Discipline's Competence*, 83 YALE L.J. 1304, 1312 (1974) (reviewing JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973)).

¹⁹⁶ FINEMAN, *THE ILLUSION OF EQUALITY*, *supra* note 81, at 106; Cochran & Vitz, *supra* note 195, at 351.

¹⁹⁷ FINEMAN, *THE ILLUSION OF EQUALITY*, *supra* note 81, at 106.

¹⁹⁸ *Id.* at 107.

¹⁹⁹ *Id.* at 106.

rights holder. For these commentators, the child's incompetency precludes the child from making choices that are in her best interests; consequently, the child may instruct her attorney to take certain positions that are ultimately detrimental to her welfare.²⁰⁰ Similarly, the child may be incapable of providing her attorney or guardian *ad litem* with any kind of guidance, giving the attorney too much power to decide the scope and goals of the litigation²⁰¹ or the guardian too much freedom to ascertain the best interests of the child.²⁰² Additionally, there is little reason to believe that the child needs protection from her parents in a divorce custody proceeding.²⁰³ In most cases, the child's interests are not separable from those of her family²⁰⁴ and the potential for harm is not as great as it is in other cases where the child is accorded a right to counsel.²⁰⁵

Although it seems unobjectionable to argue that children do not need independent representation in a divorce custody proceeding because their parents will act in their best interests, it suggests that we assign less value to children. When capacity is so central to rights theory, it is easy to exclude children from the class of rights holders because of their incompetencies. If, therefore, children do not have rights, or if their rights are identified in terms of their incapacities, then children are not accorded the respect that comes with empowerment. This leaves children peculiarly vulnerable and prone to victimization by adults. As the next section suggests, parents also lose sight of the separable interests of their children during a divorce; for this additional reason, assuming that children do not need independent representation has profoundly negative consequences.

²⁰⁰ Jonathan O. Hafen, *Children's Rights and Legal Representation—The Proper Roles of Children, Parents, and Attorneys*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 423, 431 (1993). Hafen proposes an amendment to the Model Rules of Professional Conduct that creates a rebuttable presumption that parents have the right to direct the course of representation of their child. *Id.* at 462.

²⁰¹ Guggenheim, *supra* note 190, at 79, 93-107; Hafen, *supra* note 200, at 425. Guggenheim contends that very young children, whom he defines as under the age of seven, should not be represented by attorneys as a general rule in divorce custody proceedings.

²⁰² Martha L. Fineman, *The Role of Guardians ad Litem in Custody Contests*, in WHO SPEAKS FOR THE CHILDREN? THE HANDBOOK OF INDIVIDUAL AND CLASS CHILD ADVOCACY 81, 91 (Jack C. Westman ed., 1991).

²⁰³ Guggenheim, *supra* note 190, at 122.

²⁰⁴ FINEMAN, THE ILLUSION OF EQUALITY, *supra* note 81, at 96-97.

²⁰⁵ Guggenheim, *supra* note 190, at 119. Guggenheim argues that in delinquency, the adjudication decision pits the state against the child and may result in an out-of-home placement. In a divorce custody case, however, the child will end up living with one of her parents. The state's role in a divorce proceeding also differs in that the state's power derives from that of the parents and children have no right to challenge appropriate parental authority. *Id.* at 119-20.

IV. PRIVATE ORDERING AND CHILDREN'S PROTECTIVE RIGHTS

While an interest theory of rights does not empower children and, in fact, may actively disadvantage them in the adjudication process, notions of protective rights also have negative consequences for children when parents resolve their custody disputes privately through negotiation or mediation. Private ordering plays a substantial role in the resolution of divorce custody conflicts because most cases are settled through the bargaining process.²⁰⁶ Bargaining over custody, of course, is constrained by existing legal rules and norms, but these custody rules create incentives in the negotiation process that encourage parents to treat their children as chips that may be exchanged for other concessions.²⁰⁷ These custody rules, whether a best interests standard or a parental preference rule, encourage the parties to treat their children as property because they are grounded in an impoverished account of children's rights that emphasizes their incapacities and, consequently, their powerlessness; that is, bargaining occurs in the shadow of hierarchy and exclusion.

This section analyzes three ways in which an incoherent rights theory disadvantages children in the private resolution of custody cases. First, the elements of bargaining and the incentives created by custody rules reveal that while children should be the central concern of the parties during negotiation, their interests are inextricably tied to economic and property issues. Second, the attitudes and practices of many mediators, by emphasizing neutrality, children's incapacities, and parental autonomy, disempower children. Lastly, children and their interests and preferences are not represented in the negotiation and mediation processes by independent advocates. These practices suggest that children's interests are not treated with the respect one would expect if those interests were grounded in a strong account of rights that empowers children.

The elements of divorce bargaining and the nature of custody rules create incentives which permit the parties to treat their children as property. The issues before the parties in the private resolution of divorce cases essentially reduce to two central concerns: money and custody.²⁰⁸ But, because of parental preferences,²⁰⁹ posturing by the

²⁰⁶ Robert H. Mnookin et al., *Private Ordering Revisited: What Custodial Arrangements Are Parents Negotiating?*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 86, at 37, 38.

²⁰⁷ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950, 964 (1979) ("Economic analysis suggests that a parent may, over some range, trade custodial rights for money."); Jana B. Singer, *The Privatization of Family Law*, 1992 *WIS. L. REV.* 1443, 1550 (private ordering compromises children's interests by permitting parents to trade custody for financial concessions).

²⁰⁸ Mnookin & Kornhauser, *supra* note 207, at 963.

parties to gain a strategic advantage,²¹⁰ and constraints imposed by legal rules,²¹¹ the parties may exchange aspects of custody for economic concessions.²¹² Certainly, the degree of emotional conflict between the spouses will affect the character of the negotiation and may exacerbate strategic posturing.²¹³ In any event, children are treated as a bargaining chip for financial or emotional gains by their parents.

Incentives created by custody rules also encourage divorcing couples to treat their children as property. A best interests standard, for example, because it is so vague and indeterminate, imposes few legal constraints on the parties' bargaining behavior by enhancing outcome uncertainty.²¹⁴ In these situations, using the threat of custody to obtain financial concessions carries greater weight, particularly with a more risk-averse parent who is unwilling to gamble on the outcome of a judicial custody determination.²¹⁵ Under a joint custody presumption, where the outcome is more certain, there are still incentives to use custody as a bargaining chip, particularly where one party does not want to share custody.²¹⁶ Even adopting a custody rule that creates a preference for one parent over another does not alter the child's status as property but simply determines ownership more readily; in any event, a parental preference rule does not resolve the problem of visitation which may be bargained away for economic considerations.²¹⁷

²⁰⁹ *Id.* at 966-68. Mnookin and Kornhauser hypothesize that there is a range of parental preferences for custody which may predict the limits of the financial concessions parents are willing to make. Thus, a parent with little interest in custody may demand greater financial concessions from the spouse with a greater desire for custody.

²¹⁰ *Id.* at 972-73. That same parent who may have little desire for custody, however, may take the position during negotiation that he wants custody in order to obtain the concessions he wants from his spouse.

²¹¹ *Id.* at 968-70. Bargaining positions are determined in part by applicable custody rules. Thus, a position taken during bargaining must have some credible threat. For example, a father could not threaten a custody battle credibly in a jurisdiction with a maternal preference rule. Bargaining under a best interests standard, however, may encourage strategic posturing because of the rule's uncertainty.

²¹² *Id.* at 964.

²¹³ I think that there is always emotional upheaval surrounding a divorce and it is easy for the spouses to use their children as weapons. For example, during one separation, the father "neglected" to forward an insurance notice to his spouse and consequently, her insurance was cancelled. Two weeks later, the mother refused to permit the child to visit with his father on a weekend. She claimed she had no opportunity to spend time with the child during the week because of her work schedule. Although both parties denied these events were related, I think the connection is fairly apparent.

²¹⁴ Mnookin & Kornhauser, *supra* note 207, at 978-79.

²¹⁵ *Id.* at 979.

²¹⁶ Neely, *supra* note 81, at 183. Neely argues that many mothers find joint custody as unacceptable as no custody at all and this may permit further strategic posturing.

²¹⁷ See Mnookin et al., *supra* note 206, at 50. The authors studied 908 divorcing families in

The attitudes and practices of custody mediators reveal the extent to which children's interests may be compromised by private ordering. Although some mediators identify child advocacy as an important aspect of their role, others contend that they should be neutral facilitators for a parental resolution of the custody dispute.²¹⁸ In practice, this means that mediators may be willing to accept a settlement that clearly compromises children's interests.²¹⁹ Additionally, there is little agreement about whether children should participate in mediation. While arguably the child's participation is essential to the mediation process, few mediators routinely solicit the child's views and preferences.²²⁰

Mediators find themselves in what they may see as an untenable position because children are largely unrepresented in the divorce process. As noted previously, no state mandates the appointment of a child advocate in all custody cases.²²¹ Interestingly, although twenty-four states authorize mediation for divorce cases,²²² only two state statutes specifically recognize the value of an independent child advo-

two California counties between September of 1984 and March of 1985. The effects of bargaining on visitation could be discerned to some degree because California law differentiates between physical and legal custody. The authors concluded that both mothers and fathers engage in strategic posturing over physical custody issues. Thus, mothers may ask for sole physical custody although they would be satisfied with joint physical custody. Similarly, some fathers who wanted maternal physical custody asked for joint physical or paternal physical custody. For a full account of this study, see ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992).

²¹⁸ Singer, *supra* note 207, at 1552 n.504. There is no apparent consensus in the mediation community about the relationship between the mediator and the children.

²¹⁹ *Id.* at 1552-53. In one study cited by Singer, about twenty-five percent of the mediators surveyed indicated they would accept a custody agreement that denied children access to their favorite grandparents in exchange for financial concessions.

²²⁰ *Id.* at 1553. In a 1988 study, fewer than thirty percent of the mediators studied indicated that they always obtained the child's input during the mediation process. *Id.*

²²¹ See *supra* notes 170-76 & accompanying text.

²²² ALASKA STAT. §§ 25.24.060 (Supp. 1993), 25.20.080 (1991); ARIZ. REV. STAT. ANN. §§ 25-381.01, 25-381.01.24 (1991); CAL. FAM. CODE § 3170 (West 1994); CONN. GEN. STAT. ANN. § 46b-53(a) (West Supp. 1994); DEL. FAM. CT. C.R. (16)(b)(1) (Michie Supp. 1992); ILL. ANN. STAT. ch. 750, para. 5/602.1(b) (Smith-Hurd 1993); IND. CODE ANN. § 31-1-24-3 (Burns 1987); IOWA CODE ANN. §§ 598.41(2), 679.1-679.14 (West 1987 & Supp. 1993); KAN. STAT. ANN. §§ 23-601, 23-607 (1988); LA. REV. STAT. ANN. §§ 9:332-9:333 (West Supp. 1994); ME. REV. STAT. ANN. tit. 19, § 752(4); MICH. COMP. LAWS ANN. § 552.505(b) (West 1988 & Supp. 1993); MINN. STAT. ANN. § 518.619 (West 1990 & Supp. 1994); MONT. CODE ANN. §§ 40-3-101, 40-3-127 (1993); NEB. REV. STAT. § 42-360 (1988); N.M. STAT. ANN. § 40-12-5 (Michie 1989); OHIO REV. CODE ANN. §§ 3117.01-3117.08 (Anderson 1989); OR. REV. STAT. §§ 107.510-107.610, 107.755-107.795 (1991); 23 PA. CONS. STAT. ANN. § 5305 (1991); R.I. GEN. LAWS § 15-5-29 (1988); TEX. CIV. PRAC. & REM. CODE ANN. §§ 152.001-152.004 (West Supp. 1994); UTAH CODE ANN. §§ 30-3-19 to -31 (Supp. 1993); WASH. REV. CODE ANN. §§ 26.09.015, 26.12.190 (West Supp. 1994); WIS. STAT. ANN. § 767.11 (West 1993).

cate's participation in the mediation process.²²³ Several commentators argue that children should have input during the negotiation, either through an attorney or guardian *ad litem*, while others suggest the mediator is uniquely situated to ascertain the child's preferences as to custody.²²⁴ Without representation, however, it is difficult to see how private ordering in divorce cases will benefit children.

Tying rights to children's needs and incapacities, therefore, disadvantages and disempowers children in the nonadjudicatory dispute resolution process. Because an interest theory cannot accommodate children's powerlessness, parents are free to treat their children as property and to use them as bargaining chips with which they may obtain financial or emotional concessions. Nor do custody rules sufficiently constrain bargaining behaviors because these legal norms have meaning only by reference to some notion of a parental entitlement. This property metaphor runs deep below our notions of family integrity and autonomy and is reflected in the reluctance of many mediators to interfere with the parties' custody agreements, even when those resolutions suggest that children's interests have been compromised. The impoverishment of children's rights theories also explains why children have no independent representation in the bargaining process; without a rights theory that recognizes the value of claims made by children for themselves, children will not gain the respect and power that comes with being a rights holder.

V. LOOKING FOR SOLUTIONS

For children in the divorce process, there are several immediate consequences of a new rights theory. First, the child would be repre-

²²³ ALASKA STAT. § 25.24.060(c); WIS. STAT. ANN. § 767.11. Iowa, however, allows for the child's personal participation in the mediation process when the court determines that his or her participation is advisable. IOWA CODE ANN. § 598.41(2).

²²⁴ See, e.g., ATKINSON, *supra* note 191, at 706 (attorney for child can act as mediator for parents on issues involving visitation); Catherine M. Brooks, *When a Child Needs a Lawyer*, 23 CREIGHTON L. REV. 757, 773-74 (1989-90) (guardian *ad litem* for child may help parties negotiate settlement; mediation model a guide for guardian *ad litem*); W. Patrick Phear, *Involving Children Within the Divorce Mediation Process*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 205 (Howard Davidson et al. eds., 1982) (advocating the direct involvement of children in the mediation process); Schwartz, *supra* note 192, at 139-40 (mediator is a persuasive advocate for the child who is an innocent and powerless party to the dispute); *Standards of Practice for Family Mediators*, 17 FAM. L.Q. 455, 457 (1984) (mediator's function is to promote child's best interests); Flock, *supra* note 192, at 367 (child's attorney acts as factfinder, advocate, and arbitrator); Landsman & Minnow, *supra* note 189, at 1172-77 (citing with approval child attorney's role as mediator); Norberg, *supra* note 191, at 108 (child's advocate must be able to develop and mediate a settlement); Elizabeth J. Smith, Note, *Non-Judicial Resolution of Custody and Visitation Disputes*, 12 U.C. DAVIS L. REV. 582 (1979) (arguing children should have legal representation in mediation).

sented by a competent and independent attorney who would advocate the child's preferences and wishes about her future relationships with her parents. Based on my own experiences as counsel for children, I am persuaded that even very young children can articulate a preference if they so choose. But, because we do not listen very well, because we really do not respect children, they often do not tell us what they want because they recognize their own powerlessness. The value of counsel for the child, then, lies in the empowering effect independent representation will have for the child: if the child has an opportunity to be heard, I think the child will take that opportunity.

Counsel for the child also can play a crucial role in the negotiation process. It is easier for parents and mediators to treat children as bargaining chips when children's voices are not heard and their preferences are not considered. The child's attorney, however, can assure not only that parents and mediators will consider the child's perspective but that the child will participate in the structuring of a settlement. This should alter the overt practice of exchanging custody for financial concessions and may reduce the degree of acrimony between the spouses who are engaged in a spiteful custody battle. But if parents are the final arbiters of the custody arrangement, then bargaining over custody will continue despite the child's input.

Under a strong version of rights, however, hearing a child's voice and giving her input would mean more than simply permitting her participation in the process; it would also signify that any negotiated settlement would be approved and accepted by the child. This would require that the child have the same status as her parents in the bargaining process and that she have standing as a party in all divorce proceedings affecting her family. Giving the child the power of full participation in the divorce process would ameliorate the negative consequences of bargaining over custody because the child's preferences and wishes cannot be easily compromised. Additionally, the child's full participation in the process would reduce animosity between the spouses who would need to confront the effects of their behavior on the child. At the very least, this greatly reduces the risk that the child would become an emotional football.

Although existing standing rules and constitutional provisions may provide a sufficient basis for mandating the appointment of counsel for children,²²⁵ it is still too easy for courts to ignore their interests

²²⁵ See, e.g., Eitzen, *supra* note 192, at 60-63 (child has standing by virtue of her unique interest in outcome and independent due process right to counsel); George H. Russ, *Through the Eyes of a Child, "Gregory K.": A Child's Right to Be Heard*, 27 FAM. L.Q. 365 (1993) (advocating the use of the Bill of Rights and the need to accord the child standing as a party);

in divorce proceedings. Of course, we have become more sensitive to the status of children and, as a society, we seem more willing to accept the notion that children should have a voice in those cases which affect their interests. Lawyers for children should become more commonplace over time and we should expect to see fewer objections to their participation. But to guarantee every child the right to independent counsel, we must reconceive rights theories that perpetuate hierarchy and status. That new account must be broad enough to recognize the status of children as rights holders.

The best interests standard, too, would be abolished because there is no place for a legal norm that disempowers children by emphasizing their incapacities. The question, then, is whether we should create some alternative custody rule that will constrain bargaining and that will guide judicial decisionmaking when the negotiation process breaks down. I am unconvinced that additional constraints on bargaining will be necessary if children have equal party status and the right to independent counsel. Allowing parents and children to freely negotiate their future relationships is consistent with notions of family autonomy and privacy and permits a maximum amount of flexibility and heterogeneity. Whatever constraints currently exist are adequate because they are consistent with concepts of autonomy and individual rights; thus, we would set aside a negotiated bargain that would permit a parent to abuse the child or to batter a spouse.

In the adjudicatory process, however, judges will need some guidance about the weight to give the various rights of parents and children when they cannot resolve the custody dispute. This inquiry will depend, in large part, upon how we articulate a theory and identify the rights of children. That account of rights, at a minimum, must be able to accommodate notions of power and capacity and must recognize the value of empowering children. But it will also affect the way we view parents and their interests and may suggest new ways of resolving conflicts between various rights holders; it may no longer suffice to say that parents have a right to the custody of their children but rather that children have a right to the custody of their parents.

Flock, *supra* note 192, at 358-60 (children have a due process right to counsel); Paul K. Milmed, Note, *Due Process for Children: A Right to Counsel in Custody Proceedings*, 4 N.Y.U. REV. L. & SOC. CHANGE 177, 179-83 (1974) (arguing that children have a due process right to counsel); Maurice K.C. Wilcox, Note, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 HASTINGS L.J. 917 (1976) (child has a due process right to independent counsel in divorce custody proceedings under the Fourteenth Amendment). For one of the earliest articulations of a child's right to standing, see Harry H. Foster, Jr. & Doris J. Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343 (1972). *But see* Guggenheim, *supra* note 190, at 119 (arguing that no case accords young children the right to counsel in divorce cases).

Therefore, we must reconstruct our rights theories to accommodate children; we are looking for rights in all the wrong places when we tie children's rights to their incapacities.

In the final analysis, the interest theory is inadequate because it fails to account for power. When we define children's rights by a set of interests that relate to children's incompetencies and needs, we are not speaking of rights in their strongest sense. Rights are valuable precisely because they empower the weak and provide access to existing political and legal structures. Rights also demand the respect of the powerful by allowing claims to be made and heard that challenge existing hierarchies. It is misleading, however, to use the language of rights in a weaker sense because it permits us to speak as if children were rights holders and yet to act in ways that disadvantage them.

In the divorce custody context, an interest theory of rights offers children little protection. The best interests standard is so vague and indeterminate that it has little meaning when we attempt to speak of children's rights and interests; its substantive content, therefore, is often defined by reference to parental rights as if their interests equate with those of their children. An impoverished account of rights also makes it difficult to construct a child's right to independent representation in a divorce proceeding because of the way the best interests standard has been given meaning. But, even in those cases where parents' and children's interests diverge, children are so disempowered that we assign another adult the responsibility for determining the child's needs. Finally, protective rights do not improve children's status during the negotiation process where issues of custody are used as bargaining chips to obtain economic concessions and where children's wishes and preferences are unrepresented.

CONCLUSION

This Article has demonstrated that a weak understanding of rights has negative consequences for children in the divorce custody context. The best interests of the child standard does not provide a principled rule for the resolution of interparental custody disputes because it is grounded in a weak concept of children's rights that we can neither identify nor define without reference to notions of parental rights. The conceptual confusion about the roles and responsibilities of the child's representative also illustrates the incoherency of a theory that rests on a weak version of rights. Finally, the use of custody as a bargaining chip in the resolution of property and financial issues suggests that protective rights actually disempower children.

Until we can articulate a rights theory that can accommodate

notions of power and capacity, we will continue to speak of rights in terms of hierarchy and exclusion. While a complete theory of children's rights remains to be developed,²²⁶ I think that that account must acknowledge that rights are for the powerless and that defining rights in terms of exclusion has bad consequences for children. I also believe that the empowering effects of rights reduce victimization for they mandate that we respect the rights holder as a powerful being whose interests we cannot take lightly. This is not to say, however, that children need protection because they are weak but rather to suggest that children have protection because they are respected; this distinction is a significant one for rights theory because the consequences for children are likely to be better. Of course, it may not be possible to reconstruct rights without reference to some notion of capacity, but I think the potential of children's rights compels us to try.

²²⁶ A more complete account of a strong version of children's rights will be presented in a forthcoming essay.