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# THE REMOVAL OF ADAM'S RIB: THE CREATION AND POLARIZATION OF MALE AND FEMALE VIRTUES

Ana M. Novoa\*

## INTRODUCTION

Most societies have a clear division of labor based on gender for a large number of tasks.<sup>1</sup> Any particular task might be performed by men in one society and women in another society, except for the care of young children, which is performed by women in most societies. Those duties allocated to men, however, carry the greatest status regardless of what the duties are. Increased industrialization during the eighteenth and nineteenth centuries in the United States resulted in a separation, not only of tasks, but also of the female persona and the male persona. This split is of such proportion that we refer to the male and female components of society as separate *realms*. The private/female and public/male realms separate far more than the traditional gender separation of tasks. In fact, a large number of *attributes* became gender specific. The cooperative virtues were allocated to the private/home/female sphere and the competitive virtues to the public/business/male sphere.<sup>2</sup> Because the cooperative and nurturing virtues were divested from the male sphere, they were divested of societal status. The devaluation of cooperative and nurturing virtues, coupled with our dangerous myth of independence and self-reliance, and our acceptance of consumption as a positive attribute, have had a profound effect on our society as a whole, and, in particular, on our view of the care of children and other dependent members of our society.

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<sup>1</sup> VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 32 (1988).

<sup>2</sup> Arlene Skolnick, *Public Images, Private Realities: The American Family in Popular Culture and Social Science*, in *CHANGING IMAGES OF THE FAMILY* 297, 304-07 (Virginia Tuftes and Barbara Myerhoff eds., 1979).

## I. BEFORE THE SPLIT

Prior to the Industrial Revolution, the composition and character of the family were very different from today. The family was not a private, self-contained, inward-looking unit as it has become in the modern era. Families of the upper classes included servants, apprentices, children "bound out,"<sup>3</sup> slaves, and, occasionally, petty criminals placed with a family for rehabilitation.<sup>4</sup> Members of poor families tended to be part of wealthier units, and many poor children did not grow up with either parent.<sup>5</sup> The men, women, and children of the household worked side by side to advance the interests of the household business.<sup>6</sup> That is not to say they worked as equal partners. The upper class man was the absolute owner and ruler of the household, and the members of the household generally adhered to a gender-specific division of labor.<sup>7</sup> In the absence of her husband/father, however, a woman often managed the family business and ruled the household as a 'deputy' of the man/owner.<sup>8</sup> Despite some women's informal influence and power, all formal power was clearly held by men. Like power, status and wealth were centered in the landed white man. The status of each member of the household, including servants, was tied to that of the male head of the family.<sup>9</sup>

In addition to working in common endeavors, men and women, individually and as a family unit, had strong ties with the community.<sup>10</sup> The community was not apart or distinct from the family as it is now.<sup>11</sup> Separateness, privacy, and independence did not form barriers between the

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<sup>3</sup> Children were "bound out" to wealthier families. John Demos, *Images of the American Family, Then and Now*, in *CHANGING IMAGES OF THE FAMILY*, *supra* note 2, at 43, 47.

<sup>4</sup> See *id.*; Barbara Laslett, *The Significance of Family Membership*, in *CHANGING IMAGES OF THE FAMILY*, *supra* note 2, at 231, 237.

<sup>5</sup> In fact, as recently as 1940, ten percent of American children lived with neither parent, as compared to only one in twenty-five today. STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 15 (1992).

<sup>6</sup> Although many women worked primarily on domestic chores, others were involved with the family business. Some women who possessed what are now considered male virtues exercised them through the men in their lives.

<sup>7</sup> FUCHS, *supra* note 1, at 32.

<sup>8</sup> Martha Minow, *Forming Underneath Everything That Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819, 855.

<sup>9</sup> Demos, *supra* note 3, at 53 (true even if the male was absent).

<sup>10</sup> *Id.* at 46.

<sup>11</sup> *Id.* at 46-49.

family and the community.<sup>12</sup> Instead, interdependence among individuals and among households was an essential part of the social order.<sup>13</sup> Anything happening in the community was everyone's business. A strong network of personal relationships, including social and business obligations, existed.

The enlightenment theory posed that humans (while questioning whether women, slaves, Indians, and the lower classes were human)<sup>14</sup> "were rational beings whose self-interest could lead them to civic virtue without coercion or religious mystification by rulers."<sup>15</sup> At the same time, political theorists claimed a moral society could only be achieved by an attack on the paternalism of a society built on aristocracy and by freedom from economic and political dependency.<sup>16</sup> The free market required independence and self-reliance and would breed men who, through a clear sense of self-interest, would create civil order and security for all members of the community. This myth was based upon the idea that equality and justice would be secured because "success in the marketplace [would reflect] natural ability rather than socially constituted hierarchy."<sup>17</sup>

## II. THE CREATION OF THE SPLIT

With industrialization, the center of economic activity shifted from the home to the factory. Men continued to be at the center of all commercial activity, but the nature as well as the location of the activity underwent an important change. The primary market expanded from a local, personally-known, and within-personal-contact group to multiple, competitive, unfamiliar, and remote markets. As a result of the strong correlation between the expanded free market and competitive self interest, virtues related to

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<sup>12</sup> For an interesting discussion on privacy and community relationship, see Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 *BUFF. L. REV.* 237 (1987).

<sup>13</sup> Family historian John Demos noted that during this period "the family and the wider community [were] joined in a relation of profound reciprocity." Demos, *supra* note 3, at 46. Benevolence and gratitude were essential *public* virtues. GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 224-26 (1978).

<sup>14</sup> See *Dred Scott v. Sandford*, 60 U.S. 393 (1856); WILLS, *supra* note 13, at 218-28.

<sup>15</sup> COONTZ, *supra* note 5, at 48.

<sup>16</sup> *Id.* at 48. Interestingly, traditional family law history sees the last 150 years as a period of progress toward the liberal commitment to individual rights and away from the family as the last remnant of the feudal order. The progress, however, is framed by male (i.e. competitive market) standards of progress. Minow, *supra* note 8, at 833-35.

<sup>17</sup> Freeman & Mensch, *supra* note 12, at 245.

cooperation became deficits in men working in the public market.<sup>18</sup> Virtues previously exercised by both men and women became gender-specific. Self-reliance, independence, ambition, assertiveness, logic, and dominance became necessary attributes of the "self-made man" and lost acceptance when expressed by women. Interdependence, networking, cooperation, sensitivity, and related virtues lost their place in the market and concurrently became the basic virtues important to the cult of "true womanhood." The public arena became a jungle, and the home became the refuge of the weary warrior.<sup>19</sup>

The extreme individualism of men in the upper classes existed only in conjunction with the supportive domesticity of their women. Men were able to abandon interdependence and cooperation in the competitive market only because these traits were enshrined in their homes.<sup>20</sup> The private sphere and the home became the center of moral thought and behavior, and women became the embodiment of all "soft" virtues. Men retreated to the home and the nurturing and gentle natures of their wives after a day in the free market.<sup>21</sup>

The myth of the ideal family created a sense of urgency<sup>22</sup> that exacerbated the unrealistic burdens on both men and women, neither of whom were equipped to live up to society's unbalanced expectations.<sup>23</sup> Popular culture asserted that an imperfect home could lead to a man's failure in the marketplace<sup>24</sup> or the ruin of a child's future.<sup>25</sup> Women in the upper classes became increasingly delicate as men relied upon them as a means of escape.<sup>26</sup> Some men and women handled the division of labors and attributes well, and

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<sup>18</sup> COONTZ, *supra* note 5, at 10, 58; Demos, *supra* note 3, at 49-55.

<sup>19</sup> For a discussion of the home as refuge, protecting the women and children and refreshing the man from the demands of the competitive market, see Demos, *supra* note 3, at 49-59.

<sup>20</sup> "[U]se of the term *individualistic* to describe man's nature became acceptable only in the same periods, social classes, and geographic areas that established the cult of domesticity for women." COONTZ, *supra* note 5, at 53 (emphasis in original).

<sup>21</sup> Maintenance of the home as refuge was possible only among the upper and middle class because they were supported by the lower working class, slaves, other people of color, and ethnic immigrants, many of whom labored in the home. See COONTZ, *supra* note 5, at 65; Demos, *supra* note 3, at 45, 47.

<sup>22</sup> Demos, *supra* note 3, at 54.

<sup>23</sup> *Id.* at 53-55; Ann Douglas Wood, 'The Fashionable Diseases: Women's Complaints and Their Treatment in Nineteenth-Century America,' 4 J. INTERDISCIPLINARY HIST. 25-52 (1973).

<sup>24</sup> Demos, *supra* note 3, at 54-55.

<sup>25</sup> *Id.* at 55.

<sup>26</sup> *Id.* at 53-54; Wood, *supra* note 23, at 25-28.

some women adjusted by continuing<sup>27</sup> to exercise what had now become male virtues in the public pursuit of female ideals.<sup>28</sup>

It is unclear exactly when the cult of "true womanhood" emerged; it developed concurrently with the split between the public and private spheres in family law and was well enshrined by the mid-nineteenth century.<sup>29</sup> Interestingly, the limitations of domesticity were applied primarily to white women in the upper classes.<sup>30</sup> Slave women worked both in the homes and in the fields. Women in the working classes did not become frail and unable to work in the business market unless they were married.<sup>31</sup> In fact, unmarried women and children were heavily exploited by early industry. Working class women were employed as domestics whether they were married or single. The work of the poor women allowed the white women of the upper classes to be liberated from many time- and energy-consuming chores and to develop domestic virtues.<sup>32</sup>

### III. THE INCREASED PRIVATIZATION OF COOPERATIVE VIRTUES AND THE RISE OF CONSUMERISM

Personal, rather than communal, independence and the myth that we are individually self-reliant have taken deep root in our society.<sup>33</sup> Both have progressed to such an extreme that personal responsibility now means non-participation by the collective in the basic survival needs of individual

<sup>27</sup> Although women were not autonomous, they frequently exercised authority and what are now identified as male virtues, both in the home and in relation to the family business. Minow, *supra* note 8, at 826-27, 851-57.

<sup>28</sup> Women were seen as the repositories of human morals, not just in the private home but in society as a whole. *Id.* at 824.

<sup>29</sup> COONTZ, *supra* note 5, at 63; Demos, *supra* note 3, at 52.

<sup>30</sup> Even today, the concepts of femininity derived from the cult of domesticity are not generally applied to women of color. Black women are stereotyped as "independent, competent, worldly, and tough . . . [while] white women [are] . . . dependant and infantile." These traits are not viewed in any positive way, but are instead used to place "black women outside of any definition of womanhood." Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 394.

<sup>31</sup> COONTZ, *supra* note 5, at 156; Minow, *supra* note 8, at 874-77.

<sup>32</sup> COONTZ, *supra* note 5, at 11.

<sup>33</sup> In fact, upper and middle class families are not independent and self-reliant; they have received and continue to receive considerable subsidies. See PAULA M. COOEY, *FAMILY, FREEDOM & FAITH: BUILDING COMMUNITY TODAY* 27 (1996); COONTZ, *supra* note 5, at 72-73, 76-79; Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2205-06 (1995).

members.<sup>34</sup> We appear unable to recognize that we are part of a collective and that we are, have been, and will continue to be personally and economically dependent on, at the very least, our own community.<sup>35</sup>

Prior to the rise of capitalism, personal and social relationships were recognized as congruent and were an integral part of the lives of all individuals. Dependence on and participation in the community and recognition of that dependence and of the need for participation were the norm.<sup>36</sup> The household consisted of persons bound together through social and emotional ties. Likewise, each household and most members of each household were bound to others in the community through a system of personal and business gifts, favors, and obligations. These overlapping obligations were the threads that wove the community together. There was no concept, as there is now, of independence from the community. Even after the democratic revolutions, collective activities continued in the business community, and families "were not initially conceptualized as an alternative to such associations but were expected to work together with economic and political institutions in a system . . . that reconciled liberty with duty, self-interest with altruism, and male principles with female ones."<sup>37</sup> Self-reliance and independence were civic virtues, virtues of the collective community; today they are virtues of the individual.<sup>38</sup>

Soon after the rise of competitive capitalism, the public/business/political community began to shed its acceptance of the cooperative virtues, which therefore became acceptable only among women and the clergy. Further, in the nineteenth century, caring and emotional relationships were banished from the public arena so that men experienced them rarely outside the home. Women continued emotional relationships with other women outside the family, roughly until the early part of this century.<sup>39</sup> We have now, however,

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<sup>34</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.A.); Fineman, *supra* note 33, at 2193-94; Freeman & Mensch, *supra* note 12, at 239-40, 246.

<sup>35</sup> According to Freeman and Mensch, we are not only unwilling, but also unable, to live out our communal nature. Freeman & Mensch, *supra* note 12, at 245.

<sup>36</sup> COONTZ, *supra* note 5, at 93-121. See generally WILLS, *supra* note 13, at 218-28.

<sup>37</sup> COONTZ, *supra* note 5, at 54.

<sup>38</sup> See generally ROBERT N. BELLAH, HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985); COONTZ, *supra* note 5; WILLS, *supra* note 13.

<sup>39</sup> COONTZ, *supra* note 5, at 65-66.

“isolated family life as the primary setting—if not, in fact, the only one—for caring relations between people.”<sup>40</sup>

In the nineteenth century, morality and the “soft virtues” became identified with women and the home and were banished from the political and commercial spheres, but they were not yet perceived as private. In fact, the role of women was to give life to virtue in the entire community.<sup>41</sup> Women took on that role with great gusto and were primarily responsible for the formation of a great many social and charitable organizations.<sup>42</sup> It was not until this century that the soft virtues became private in the way we now understand privacy.<sup>43</sup>

For example, the virtue of nurturing is primarily associated with child rearing. In colonial times, as in many cultures today, caring for children was a communal duty.<sup>44</sup> In the United States today, fertility and parenting are private decisions in which a friend would not intrude.<sup>45</sup> Similarly, gift-giving, generosity, hospitality, and many other virtues have become private and unacceptable public communal expressions.

Concurrent with the increased privatization of the cooperative virtues, Americans have moved toward narcissism and have developed a cult of consumerism.<sup>46</sup> Although the enlightenment philosophy valued self-restraint and a devotion to the common good, industrialization and the emergence of the competitive national market required increased consumerism and materialism for growth. New market segments were created through instilling in the American people, through advertising, a perceived need for conveniences and luxuries. Advertising, which increased dramatically after the middle of the nineteenth century, increased by four hundred percent between 1945 and 1960.<sup>47</sup> By 1920, consumption was well established and

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<sup>40</sup> Demos, *supra* note 3, at 60 (emphasis in original).

<sup>41</sup> Minow, *supra* note 8, at 838-60.

<sup>42</sup> *Id.* at 877-80.

<sup>43</sup> COONTZ, *supra* note 5, at 93-121.

<sup>44</sup> See Ralph J. Crandall, *Family Types, Social Structure, and Mobility in Early America: Charlestown, Massachusetts, A Case Study*, in CHANGING IMAGES OF THE FAMILY, *supra* note 2, at 61, 66-69; COONTZ, *supra* note 5, at 210.

<sup>45</sup> Freeman & Mensch, *supra* note 12, at 238.

<sup>46</sup> RUTH SIDEL, *WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA* 101-02 (2d ed. 1992).

<sup>47</sup> COONTZ, *supra* note 5, at 171.



accepted as a positive, necessary, public, American trait.<sup>48</sup> Since the middle of this century, consumption has been synonymous with freedom and patriotism.<sup>49</sup> We exult in the almost limitless variety of products, and gladly shop until we drop. The import of American freedom is contained in consumer choices. We "have learned to experience liberation as . . . the freedom to choose everything at once."<sup>50</sup>

#### IV. A MODERN EXPRESSION OF THE POLARIZATION OF VIRTUES IN FAMILY LAW

A concrete example of the warped results from the polarization of male and female virtues is the apparent gender neutrality of current child custody decisions. Most states provide that custody of children between the parents will be decided without preference or regard to the gender of the person seeking custody. Mothers receive custody in the vast majority of divorce actions either because the fathers do not want custody or because the mothers have negotiated away property rights in order to maintain custody.<sup>51</sup> Where custody is contested by the father, however, the men are successful in a majority of cases.<sup>52</sup> The law purports to be neutral, yet, in effect, it applies standards based on male values,<sup>53</sup> with little regard for female values or for the actual and realistic differences between men and women. Women overwhelmingly perform the tasks of care-giving for children and the elderly in our society as in most, if not all, other societies.<sup>54</sup> Women expend more energy, both physical and emotional, in child care and place more importance on the parent-child relationship than men.<sup>55</sup> Yet, the courts apply the legal

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<sup>48</sup> *Id.* at 169-73.

<sup>49</sup> *Id.* at 171.

<sup>50</sup> *Id.* at 176.

<sup>51</sup> See Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107.

<sup>52</sup> *Id.* at 121.

<sup>53</sup> *Id.* at 119, 127, 128.

<sup>54</sup> Although we developed an ideal of equality and cooperation in the home, in fact, sharing of responsibilities is not taking place; women continue to be primarily responsible for household tasks, child care, and care of adult dependants. Janice Drakich, *In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood*, 3 CAN. J. WOMEN & L. 69, 83-87 (1989). See Fineman, *supra* note 33; Fineman & Opie, *supra* note 51; FUCHS, *supra* note 1; SIDEL, *supra* note 46.

<sup>55</sup> See MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991); FUCHS, *supra* note 1, at 4, 24, 45, 47, 60-74; Fineman & Opie, *supra* note 51; June Carbone, *Equality and Difference: Reclaiming Motherhood as a Central Focus of Family Law*, 17 L. & SOC. INQUIRY 471 (1992).

fiction that the parental "investment" is equal.<sup>56</sup> While male values are seen as natural and neutral, a "characteristic that is commonly attributed more to mothers than fathers . . . is viewed as gender biased"<sup>57</sup> and will generally not be used in determining custody. Further, if a man performs functions deemed to be the mere exercise of duty by women, he is considered to be extraordinary in his commitment to his children. Examples are the home-room father, the father who takes his children to well-baby appointments, and the father who gets up in the middle of the night with a sick ten-year-old.

#### V. CONCLUSION: THE EFFECTS OF POLARIZATION

Prior to the middle of the nineteenth century, only men existed as legal persons. Upon marriage, women were merged into the person of their husbands and did not exist independently of them.<sup>58</sup> When soft virtues were banished from the male persona, they were likewise banished from legal and public recognition; they became acceptable only in women, primarily in private.<sup>59</sup> Even after women gained legal recognition, they gained this recognition primarily in the exercise of their male virtues. The worth of women in the public sphere is still judged on the ability of women to express male virtues. Soft virtues have no legal, market, or public value.<sup>60</sup> Judith Hicks Stiehm recognized the split between the public sphere, which is the embodiment of male virtue, and the private sphere, which is the embodiment of female virtue: "a government succeeds when it acts dispassionately, avoids nepotism, and treats all citizens in the same way. Conversely, a family succeeds when it acts lovingly, favors its own, and accepts each member without reservation."<sup>61</sup> Unfortunately, we have recently begun to see modern society and law import public mores into the home.<sup>62</sup> This would not be a

<sup>56</sup> See Fineman, *supra* note 33.

<sup>57</sup> Fineman & Opie, *supra* note 51, at 121.

<sup>58</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 433-36 (1822); COOEY, *supra* note 33, at 17. See *Bradwell v. Illinois*, 83 U.S. 130 (1872); *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953).

<sup>59</sup> Fineman, *supra* note 33, at 2205.

<sup>60</sup> FUCHS, *supra* note 1, at 49-56, 122-26 (reporting on the gender gap in wages, that women earn less than men because they are women, and that this discrepancy is based not on individual decisions as much as on societal forces related to women's greater desire for and concern about children). See also *United States v. Dyce*, 78 F.3d 610 (D.C. Cir. 1996).

<sup>61</sup> Judith Hicks Stiehm, *Government and the Family: Justice and Acceptance*, in CHANGING IMAGES OF THE FAMILY, *supra* note 2, at 361, 362.

<sup>62</sup> As Martha Minnow states: "Legal writers traditionally have described the history of American family law as an evolution from the 'traditional' patriarchal family toward egalitarian

problem if the virtues of cooperation and interdependence were still publicly valuable.<sup>63</sup> With the intrusion of the public virtues of autonomy, personal rights, and individualism—and the public vices of consumerism, hedonism, and self-absorption—into the home, the ideals of cooperation, interdependence, and nurturing, have retreated, along with privacy, into the depths of the individual person. Many historians, sociologists, and legal scholars have called for a recognition of female virtues in the public arena.<sup>64</sup> This call has become more widespread as modern day prophets are frightened by the possibility that the virtues associated with interdependence and cooperation are losing viability in all spheres of modern American society.

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families whose members individually enjoy rights protected by the state.” Minow, *supra* note 8, at 828. “[T]his conception of individual rights for each family member is not progress.” *Id.* at 893. In a critique of *Bowen v. Gilliard*, 483 U.S. 587 (1987), Wendy Anton Fitzgerald observes a “child whose hunger threatens bare survival . . . [has no] recourse against the state. . . . [because] [u]nder our Constitution, the child is an autonomous individual, ultimately responsible for himself.” Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 28 (1994).

<sup>63</sup> I do not mean to minimize the importance of the use of individual rights to protect against or change patterns of domination, especially among family members. Rather, I am concerned the attributes associated with cooperation and assigned to women are at risk of being lost—not by women, but by all of American society. See Minow, *supra* note 8, at 894.

<sup>64</sup> See COONTZ, *supra* note 5, at 42; SIDEL, *supra* note 46; RUTH SIDEL, *ON HER OWN: GROWING UP IN THE SHADOW OF THE AMERICAN DREAM* (1990); Demos, *supra* note 3, at 56-58; Fineman, *supra* note 33; Minow, *supra* note 8, at 893-94; Mary E. O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 NEW ENG. L. REV. 437, 500 (1988); Francisco Valdes, *Diversity and Discrimination in Our Midst: Musings on Constitutional Schizophrenia, Cultural Conflict, and 'Interculturalism' at the Threshold of a New Century*, 5 ST. THOMAS L. REV. 293, 296 (1993); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993).