

Childhood and the Limits of Contract

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Since the doctrine of freedom of contract first rose to prominence in nineteenth-century England, its proponents have argued that a legal regime grounded in voluntary contractual relations could displace status by birth and offer a radical new freedom of choice. Yet the simultaneous growth of a model of child development emphasizing the formative power of early experiences brought this promise into question. The conflict between freedom-of-contract doctrine and understandings of child development played out in the neglected arena of Victorian adoption disputes. These cases brought to the surface the tension between the model of the freely contracting, self-determining adult and that of the dependent, malleable child. This Article explores that tension, which has been long overlooked by legal scholars, and demonstrates its continued importance by offering a new interpretation of the celebrated Baby M case.

I. INTRODUCTION

It is widely thought that legal adoption did not exist in England until authorized by statute in 1926. This Article rescues the largely lost history of the legal practice of adoption in England for more than a century prior to that time, and of the judicial response to that practice. This legal history, in turn, helps to complete the intellectual history of freedom of contract. Analysis of Victorian England's adoption case law highlights a tension between two distinct but equally dominant theories that were ascendant in nineteenth-century England: freedom of contract doctrine and the environmental model of child development. Because these theories usually are kept apart, the tension between them—visible when they are brought together in the anomalous legal arena of adoption disputes—has largely been ignored.

From the inception of freedom-of-contract doctrine in nineteenth-century England, its proponents argued that a contractual legal regime could facilitate a potentially radical freedom of choice. Contract was presented as a tool that could transform the status-based society of the past into a more fluid society in which each adult could freely choose among contractual alternatives. Acknowledging that children continued to be

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under the control of parents and guardians they did not choose, contract theorists held up childhood as an exception that proved the freedom-of-contract rule, noting that children were unfree precisely because they lacked the capacity for rational choice that was the hallmark of contract. Because childhood was temporary, these theorists argued, it had no bearing on the contractual freedom of adults: as soon as children passed the threshold between unreason and reason that marked the boundary of adulthood, they were liberated from the temporary bondage of infancy into the new world of contractual freedom.

Just as freedom-of-contract doctrine gained prominence, English courts were faced with disputes in which adoptive parents asserted legally enforceable claims to the custody of children, claims that derived from private legal arrangements, such as contracts, wills, and deeds, purporting to transfer parental rights. This line of English adoption case law, which has received little scholarly attention, tells an important story about freedom of contract and its limits. The appearance of adoption contracts supports the notion that contract was on the rise in Victorian England, showing that individuals were indeed turning to private legal agreements to structure their lives. The judicial response to these contracts, however, signals a glitch in the new regime. Judges who for the most part favored letting individuals freely contract whatever agreements they chose, and saw their own role as simply to ensure that the agreements were honored, drew the line at enforcing contracts and other legal instruments that reconfigured parental rights. Faced with assertions by adoptive parents of contract-based rights to the custody of children, judges carved out a special area of law into which contract did not reach, a precursor to the field now known as “family law.”

Victorian courts refused to enforce these private legal transfers of parentage, but neither did they automatically refuse custody to the adoptive parents. Instead, they decided that such cases would be decided with reference not to parents’ legal rights, but to the best interests of the adopted children. By treating children as a special case requiring judicial paternalism, the best-interests-of-the-child standard appeared consistent with the notion that children were a necessary exception to the freedom-of-contract rule. The judicial application of that standard, however, was influenced by a theory of child development that was in tension with freedom-of-contract assumptions. This was the environmental theory of child development, which held that children are molded into their adult selves by their upbringing and early experience. As judges assessed children’s interests, projecting the future effects on a child of each proposed course of upbringing and education, they struggled with the tension between freedom of contract, which promised freedom of choice to all adults, and their recognition, in accordance with the environmental model of child development, that the influences of childhood continued

into adulthood, and in so doing limited the range of free choices available to each adult.

In this Article, I argue that Victorian adoption disputes show that the foundational model of adult freedom of choice that emerged in the work of early freedom-of-contract theorists is best understood in the context of the parallel emergence of the environmental model of child development. By showing the extent to which childhood experience circumscribes the adult self, the environmental model of child development brought into question any easy division between unfree children and freely contracting adults. Victorian adoption disputes made visible the tension between freedom-of-contract doctrine and the environmental model of child development by providing an anomalous legal instance in which the rights of adults and the experience of developing children, usually kept separate, overlapped. Because discussions of adult freedom of choice and of the formative role of childhood continue today to be segregated into separate realms governed by separate legal rules and norms, this fundamental tension remains largely unaddressed by contemporary legal scholarship.

To demonstrate the continued tension between the freedom-of-contract ideals and the understandings of child development that we have inherited from the Victorian era, I offer a new interpretation of the *Baby M* case.¹ Like Victorian courts that refused to enforce adoption contracts and instead decided adoption disputes by assessing the interests of the child, the appellate court in *Baby M* refused to enforce a surrogacy contract by which a mother gave up her parental rights, and awarded custody instead by assessing the child's best interests. Scholarly debate on *Baby M* has focused on the extent to which surrogacy contracts should stand as an exception to the freedom-of-contract rule. I argue that by focusing on the anomalous contract at issue in *Baby M*, this debate overlooks an aspect of the case that points to a fundamental weakness underlying freedom-of-contract assumptions more generally. In assessing *Baby M*'s interests, both the trial court and the appellate court took for granted that childhood matters precisely because it shapes the adult that a child becomes. Moreover, as the two courts assessed the future identity that *Baby M* was likely to acquire under each custodial outcome, they took for granted that because of the disparity in the socio-economic position of the two sets of parents fighting for her custody, the choice between them would determine the social station that *Baby M* herself would enter upon reaching adulthood.

Despite the considerable attention *Baby M* has received, no commentator has explored the courts' assumption that *Baby M*'s childhood would circumscribe the choices available to her as an adult. Yet

1. In the Matter of *Baby M*, 109 N.J. 396 (1988).

this assumption bears directly on the aspect of *Baby M* that scholars often do discuss—the limits the case poses to the freedom-of-contract ideal of freedom of choice. Like Victorian adoption disputes, the *Baby M* case brings together the usually disparate realms of contract law and child development. In so doing, it makes uncomfortably clear the disjunction between the freedom-of-contract promise of freedom of choice for all adults, and the extent to which the choices available to adults continue to be limited by the disparate circumstances of the family into which each adult happens to have been born.

In Part II, I describe the links between Victorian freedom-of-contract theory and Victorian adoption case law, and demonstrate that both the private turn to adoption contracts and the judicial refusal to enforce such contracts was consistent with freedom-of-contract norms. In Part III, I trace the concurrent emergence of the environmental theory of child development, and describe its influence on Victorian adoption disputes. Part IV examines the tension between freedom-of-contract doctrine and the environmental model of child development made visible by their convergence in Victorian adoption cases. Part V demonstrates the persistence of that tension by setting forth a rethinking of *Baby M*. Part VI concludes by assessing the implications of that tension.

II. VICTORIAN ADOPTION CASE LAW AND FREEDOM-OF-CONTRACT DOCTRINE

A. Freedom-of-Contract Theorists

1. From Status to Contract: The Age of Individualism and the Promise of Free Choice

Freedom-of-contract doctrine was a prominent feature of nineteenth-century English and American law.² As a principle of contract interpretation and enforcement, freedom-of-contract doctrine meant primarily that courts should treat contracting parties as autonomous agents, enforcing whatever contracts the parties had arranged between themselves, rather than policing the fairness of those arrangements.³ The

2. See generally P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979); GRANT GILMORE, *THE DEATH OF CONTRACT* (1974). Recent scholarship has noted the extent to which freedom-of-contract doctrine was limited by countervailing considerations even in the nineteenth century. See, e.g., Mark Pettit, Jr., *Freedom, Freedom of Contract, and the "Rise and Fall,"* 79 B.U. L. REV. 263, 299-352 (1999).

3. See ATIYAH, *supra* note 2, at 402-05 (according to classical freedom-of-contract theory, each of the parties to a contractual bargain "relies on his own skill and judgment, . . . neither owes any fiduciary obligation to the other," and "[i]t is not the Court's business to ensure that the bargain is fair . . . [or] to create or impose obligations on anybody from its own sense of justice"). In an oft-cited judicial formulation of the freedom-of-contract bias toward finding contracts enforceable, Sir George Jessel stated: "[I]f there is one thing which more than another public policy requires it is that

doctrine also surfaced in legal cases that did not directly involve contracts. For instance, both English and American courts justified the nineteenth-century fellow-servant rule, which denied workers the right to recover in tort for injuries received on the job from fellow employees, by noting that workers freely bargained for the conditions of their employment.⁴ And, in the United States, most famously in *Lochner v. New York* in 1905,⁵ courts struck down legislatively enacted wage and hour restrictions as an interference with the right to freedom of contract.

The influence of freedom-of-contract doctrine also extended to the political realm. Abolitionists and feminists in the United States pointed out the extent to which the prevailing laws of slavery, marriage, and women's property rights violated the freedom-of-contract ideal of individual freedom of choice.⁶ In England, the doctrine played a similarly prominent role in the debates that accompanied the great reforms of the Victorian age. It provided ammunition for arguments in favor of extending equal rights to women,⁷ and a bulwark against arguments in favor of social welfare legislation such as wage and hour regulation⁸ and poor-law subsidies.⁹

In mid-Victorian England, freedom-of-contract doctrine—often referred to simply as “contract”—was also elevated into a cultural symbol for individual freedom more generally,¹⁰ giving it a rhetorical power that continues to this day.¹¹ Freedom-of-contract doctrine was in this respect

men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.” *Printing and Numerical Registering Co. v. Sampson*, (1875) 19 L.R.Eq. 462, 465 (refusing to void as a matter of public policy a contract by which an inventor had assigned away any future patent rights he should acquire).

4. See *Priestly v. Fowler*, (1837) 150 Eng. Rep. 1030 (Exch.); *Bartonsill Coal Co. v. Reid*, (1858) 3 Macq. 266, 282 (H.L.) (“When the workman contracts to do work of any particular sort, he knows, or ought to know, to what risks he is exposing himself.”); *Farwell v. Boston & Worcester RR*, 45 Mass. 49 (1842); see also John V. Orth, *Contract and the Common Law*, in *THE STATE AND FREEDOM OF CONTRACT* 60 (Harry N. Scheiber ed., 1998).

5. 198 U.S. 45 (1905).

6. See generally AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT* (1998).

7. See JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 145-48 (Alan Ryan ed., 1997) (1869) [hereinafter MILL, *SUBJECTION*] (arguing that the Victorian legal regime extended freedom of occupational choice to all but women); MARY LYNDON SHANLEY, *FEMINISM, MARRIAGE, AND THE LAW IN VICTORIAN ENGLAND* (1989) (describing how feminist activists employed liberal theories of individual freedom of choice to advocate for legislation that would extend to women the same rights of contract and property ownership enjoyed by men).

8. See ATIYAH, *supra* note 2, at 541.

9. See *id.* at 524-28.

10. See, e.g., A.V. DICEY, *LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY* 190 (1905) (attributing the “extension of individual liberty” in England from 1825 to 1870 to “freedom of contract” principles); HENRY MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 169 (photo. reprint 1996) (1861) (characterizing the rise of “Contract” as having created “a phase of social order in which all . . . relations arise from the free agreement of individuals”).

11. See, e.g., Pettit, *supra* note 2, at 264 (noting that freedom of contract is a “very powerful concept to have on one side of an argument” because “the implication is that a loss of freedom of

closely linked with the popular Victorian political theory of laissez-faire.¹² Both doctrines associated a decrease in government regulation with an increase in individual liberty. Proponents of laissez-faire argued that a regime of minimal government interference with the mechanisms of a free market would most effectively foster individual freedom of choice and the maximization of individual preferences.¹³ Similarly, the hallmark of Victorian freedom-of-contract doctrine was the descriptive premise that modern democratic society offered individuals an unprecedented freedom of choice, and the related normative premise that courts and legislatures could best foster this individual freedom by “interfering” as little as possible with individual decisions and preferences.

The symbolic association of contract with freedom had its origins in late-seventeenth-century English political individualism, when social-contract theorists such as Thomas Hobbes and John Locke used contract as a metaphor for the freely given consent upon which sovereign power properly rests.¹⁴ For Locke, freedom was not only the origin of civil government, but also its goal: “[T]he end of Law is not to abolish or restrain, but to preserve and enlarge Freedom.”¹⁵ The Lockean juridical subject was a free agent who mobilized the law to exercise his individual will to “dispose, and order, as he lists, his Person, Actions, Possessions, and his whole Property.”¹⁶ Contract would eventually become an emblem of this sort of freedom as well. In the eighteenth century, as political individualism gave way in cultural dominance to the political economy of Adam Smith and, later, in the nineteenth century, of John Stuart Mill, the symbolic association between contract and freedom underwent a shift, and contract came primarily to represent not political freedom, but the freedom of the individual economic actor in a free-market society.¹⁷

The association of freedom of contract with individual freedom more

contract is a loss of freedom itself”).

12. Victorian legal scholar A.V. Dicey, looking back at the century out of which he had just emerged, argued that the dominance of laissez-faire political philosophy and of freedom-of-contract doctrine in mid-Victorian England reflected a cultural valuation of “individual liberty.” DICEY, *supra* note 10, at 149; *see also id.* at 126-210, 399-465. While criticizing Dicey for perpetuating the “myth” that the nineteenth century was actually an era of laissez-faire governance, Atiyah agrees with Dicey that a cultural norm of individualism dominated mid-Victorian England as an aspiration and as a public perception of the existing political regime, and that this norm corresponded with the popularity both of laissez-faire political philosophy and of the judicial doctrine of freedom of contract. ATIYAH, *supra* note 2, at 231-37.

13. *See generally* JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* (Jonathan Riley ed., Oxford Univ. Press 1994) (1848) [hereinafter MILL, *PRINCIPLES*].

14. *See* ATIYAH, *supra* note 2, at 39-52; STANLEY, *supra* note 6, at 4-6.

15. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 306 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) [hereinafter LOCKE, *TWO TREATISES*].

16. *Id.* at 305 (“Law, in its true notion, is not so much the Limitation as the direction of a free and intelligent Agent to his proper interest.”).

17. *See* STANLEY, *supra* note 6, at 12-13.

generally was crystallized in Victorian England.¹⁸ Over the course of the nineteenth century, as English political and legal institutions became increasingly democratic and egalitarian, contract was identified with England's perceived transition from a feudal, hierarchical society to a more fluid society that offered the possibility of social mobility and free individual choice. This argument was made most prominently by legal historian Henry Maine, in his 1861 best-seller *Ancient Law*.¹⁹ Maine noted the increasing tendency of English citizens to turn to private legal arrangements to structure their lives, and the accompanying onset of a legal regime in which the state would act primarily to enforce those arrangements. He heralded this development as evidence of "a movement from Status to Contract."²⁰ The movement from Status to Contract was, in Maine's view, a progressive one.²¹ Maine believed that Victorian England was advancing toward an unsurpassed state of civilization, and that this progress was marked by the resurrection of the legal doctrine of contract, which according to Maine had first arisen in ancient Rome; had been lost, "corrupted by contact with barbarism," during the "dark ages" of feudalism; but had recently re-emerged as the dominant feature of English law.²² By tracing the shift of Roman society from a "primitive" patriarchal society, in which all individuals were as slaves to the head of each family, to the beginnings of a more "progressive" contractual society based on individual rights,²³ Maine created a paradigm that equated the absence of contract with slavery, and contract with freedom.

In a move typical of nineteenth-century freedom-of-contract theorists,²⁴ Maine bolstered the association between contract and freedom by holding up the continued fact of slavery in the United States as one of the "few [remaining] exceptions" to the general rule of contract that prevailed in modern times, one that was "denounced with passionate indignation."²⁵ The second major exception to the rise of contract, in Maine's account, was the legal disability of married women under English law. According to Maine, married women, denied the right to contract, were thereby relegated to the position of their husbands' slaves.²⁶ Maine was one of

18. See ATIYAH, *supra* note 2, at 231-37; DICEY, *supra* note 10, at 126-210.

19. MAINE, *supra* note 10. *Ancient Law*, widely cited and reprinted ever since its initial publication in 1861, has been called "the only legal best-seller of that, or perhaps any other century." A.W.B. Simpson, *Contract: The Twitching Corpse*, 1 OXFORD J. LEGAL STUD. 265, 265 (1981).

20. MAINE, *supra* note 10, at 164.

21. *Id.* (describing the shift from status to contract as "the movement of the progressive societies").

22. *Id.* at 162.

23. *Id.* at 120-63.

24. See, e.g., HERBERT SPENCER, SOCIAL STATICS Ch. XIII § 2 (London, G. Woodfall & Sons, Printers) (1851) ("[T]rade restrictions are of the same race with . . . slavery.").

25. MAINE, *supra* note 10, at 295.

26. *Id.* at 154-60 (likening the "complete legal subjection on the part of the wife" under English common law to that of the son who "was practically assimilated to the slave" under the ancient Roman

several Victorian writers to suggest that when England extended full contractual rights to women, the shift from an age of bondage to an age of freedom would be complete.²⁷

The freedom that Maine claimed contract could facilitate was a radical one, extending even to individual freedom of self-determination. The argument behind Maine's "from Status to Contract" formulation was that with the rise of contract, England was shifting from a rigid feudal society in which each individual's identity was determined by birth to a more fluid society in which identity was a matter of free individual choice:

There are few general propositions concerning the age to which we belong which seem at first sight likely to be received with readier concurrence than the assertion that the society of our day is mainly distinguished from that of preceding generations by the largeness of the sphere which is occupied in it by Contract. Some of the phenomena on which this proposition rests are among those most frequently singled out for notice, for comment, for eulogy. Not many of us are so unobservant as not to perceive that *in innumerable cases where old law fixed a man's social position irreversibly at his birth, modern law allows him to create it for himself by convention.*²⁸

Despite the claim that contract enables each individual to "create . . . for himself" his own "social position,"²⁹ however, nowhere does Maine describe any actual contract that would provide this sort of radical freedom. Nonetheless, his "Status to Contract" formulation became a widely disseminated emblem of the proposition that with freedom of contract comes freedom more generally.

The power of individual self-determination that Maine claimed for the freely contracting individual was a theme of one of the paradigmatic texts of Victorian individualism, John Stuart Mill's 1859 *On Liberty*.³⁰ In his earlier *Principles of Political Economy*, Mill had influentially set forth the basic tenets of laissez-faire political theory, which favored minimal

rule of the *Patria Potestas*).

27. See, e.g., Frances Power Cobbe, *Criminals, Idiots, Women, and Minors*, 78 FRASER'S MAGAZINE 787 (1868) (arguing for an end to married women's legal disabilities by noting that "the right to hold property, to make contracts, to sue and be sued—no class . . . has ever been denied them since serfdom and slavery came to an end"); CAROLINE NORTON, CAROLINE NORTON'S DEFENSE: ENGLISH LAWS FOR WOMEN IN THE NINETEENTH CENTURY 14 (Chicago, Academy Chicago 1982) (1854) (arguing for extension of full contractual rights to married women by likening the disabilities of married women under English law to those of slaves in the United States); see also MILL, SUBJECTION, *supra* note 7, at 145 (arguing that but for the continued disabilities of women, "the peculiar characteristic of the modern world . . . is that human beings are no longer born to their place in life, . . . but are free to employ their faculties, and such favorable chances as offer, to achieve the lot which may appear to them most desirable").

28. MAINE, *supra* note 10, at 295 (emphasis added).

29. *Id.*

30. JOHN STUART MILL, ON LIBERTY (Alan Ryan ed., Norton 1997) (1859) [hereinafter MILL, ON LIBERTY].

governmental interference and a free-market economy.³¹ In *On Liberty*, Mill elaborated on the fundamental importance of individual liberty, especially liberty of thought and discussion.³² Although less optimistic than Maine about the degree of freedom actually available in mid-Victorian England,³³ Mill presented in *On Liberty* a utopian vision of the extent of individual liberty that would follow from a legal and social order that accorded individuals the maximum freedom consistent with preventing harm to others.³⁴

In setting forth “the appropriate region of human liberty,”³⁵ *On Liberty* provides a rhetorically powerful image of the extent of liberty that should, and presumably could, be available to all. Mill’s normative goal was a legal and political regime in which “[o]ver himself, over his own mind and body, the individual is sovereign.”³⁶ This vision entailed, first, liberty in “the inward domain of consciousness,” including “liberty of thought and feeling” and “absolute freedom of opinion”; second, a “liberty of tastes and pursuits,” including the liberty “of framing the plan of our life to suit our own character”; and third, liberty of “combination” among individuals.³⁷ What these added up to was the liberty of “self-cultivation,” or “self-development.”³⁸

Crucially, Mill believed that individual freedom of self-development was not only desirable, but possible, and that it would follow from a properly calibrated legal, political, and social regime of minimal interference. *On Liberty* thus casts governmental and societal intervention as forces that “cramp” and “dwarf” the “individuality” that would naturally exist in their absence,³⁹ an argument Mill develops by likening such interference to the pruning of a tree,⁴⁰ the construction of an artificial dam that would attempt to channel the free flow of Niagara Falls,⁴¹ and the

31. MILL, PRINCIPLES, *supra* note 13.

32. MILL, ON LIBERTY, *supra* note 30, at 48-83 (emphasizing importance of liberty of thought and discussion).

33. See, e.g., *id.* at 51 (noting “an increasing inclination to stretch unduly the powers of society over the individual, both by the force of opinion and even by legislation”).

34. *Id.* at 48 (“[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”).

35. *Id.* at 50. Both Dicey and Atiyah pointed to *On Liberty* as manifesting the high point of the Victorian idealization of individual liberty. See ATIYAH, *supra* note 2, at 235 (“[T]he belief in the extensions of freedom which marked mid-century England . . . reached their apogee in Mill’s *On Liberty* in 1859.”); DICEY, *supra* note 10, at 183 (“*On Liberty* . . . appeared, to thousands of admiring disciples, to provide the final and conclusive demonstration of the absolute truth of individualism, and to establish on firm ground that the protection of freedom was the one great object of wise law and sound policy.”).

36. MILL, ON LIBERTY, *supra* note 30, at 48.

37. *Id.* at 50.

38. *Id.* at 89-90.

39. *Id.* at 88-89.

40. *Id.* at 89.

41. *Id.* at 91.

binding of a “Chinese lady’s foot.”⁴² The implication of such images is that once the external pressures of law and society are lifted, the individuality of each person will be left free simply to “develop itself”—like a force of nature such as a waterfall or a tree—in accordance with its own “inward forces.”⁴³

Mill’s writings do not categorically associate less government with greater liberty. In *Principles of Political Economy*, for instance, Mill argues that certain restrictions on labor contracts would facilitate rather than hinder freedom;⁴⁴ that freedom requires each member of society be provided the minimal means of subsistence;⁴⁵ and that freedom would be facilitated by the subsidization of education by either government or private charity.⁴⁶ However, by elevating liberty to a fundamental principle, and associating it with the maximal possible absence of governmental restrictions, *On Liberty* popularized the notion both that the radical liberty it describes is attainable and that the way to attain it is by decreasing government action.

The same year that Mill published *On Liberty*, Samuel Smiles made the premises of freedom-of-contract doctrine and laissez-faire individualism a staple of popular culture with his genre-creating book *Self-Help*.⁴⁷ *Self-Help* is an encyclopedic compendium of stories of Englishmen who by their own efforts rose from “the humblest ranks” to positions of prominence and wealth.⁴⁸ With its figure of the self-made man who climbs the ladder of social mobility, *Self-Help* popularized an exaggerated version of the self-developing and sovereign individual described by Mill. Smiles was explicit about the normative implications of the stories of self-help he narrated, arguing that because all men are made, not by institutions or other external forces, but by their own actions, it was futile to enact legislation intended to change the condition of English citizens:

The spirit of self-help is the root of all genuine growth in the individual Even the best institutions can give a man no active help. Perhaps the most they can do, is to leave him free to develop himself and improve his individual condition Hence the value of legislation as an agent in human advancement has usually been much overestimated. . . . [I]t is every day becoming more clearly

42. *Id.* at 95.

43. *Id.* at 87.

44. MILL, *PRINCIPLES*, *supra* note 13, at 349-51 (presenting legislation restricting work hours as an instance “in which the interference of law is required, not to overrule the judgment of individuals respecting their own interest, but to give effect to that judgment”).

45. *Id.* at 354 (reasoning that “[e]nergy and self-dependence are . . . liable to be impaired by the absence of help, as well as by its excess”).

46. *Id.* at 341 (noting the role of education in “fostering the spirit of independence,” and presenting education thus as “help towards doing without help”).

47. SAMUEL SMILES, *SELF-HELP* (Peter W. Sinnema ed., Oxford Univ. Press 2002) (1859).

48. *Id.* at 28.

understood, that the function of Government is negative and restrictive, rather than positive and active⁴⁹

Self-Help became a best-seller,⁵⁰ providing an instruction manual by which a mass audience hoped to reap the implicit promise of Maine, Mill, and other Victorian writers that in an age of freedom of contract and laissez-faire individualism, anyone, by hard work and diligence, could become a self-made man.⁵¹

2. *Childhood Exceptionalism*

A lesser-told side of the freedom-of-contract story is the concomitant rise of childhood exceptionalism.⁵² Holly Brewer has recently begun to tell this story, arguing that the rise of a contractual legal regime that valued rational consent was accompanied in both England and the United States by the exclusion of children from the realm of law that governed adults.⁵³ Whereas prior to the seventeenth century, children were entitled to form all manners of contracts, over the course of the seventeenth and eighteenth centuries, the handling of children's legal affairs was relegated instead to their parents or guardians, as children were increasingly considered incapable of forming contracts on their own behalf.⁵⁴ Children at this same time were also increasingly exempted from the ordinary rules of criminal and civil liability.⁵⁵ The basis of this exclusion was the view that children could not exercise the free rational choice that by the nineteenth century had become the hallmark of contract law, and of legal authority more generally.⁵⁶

Similarly, the major theorists of the freedom-of-contract tradition presented childhood exceptionalism as the necessary counterpart to a legal

49. *Id.* at 17.

50. As Peter W. Sinnema writes in his introduction to the Oxford World Classics edition, "*Self-Help* was one of the most popular works of nonfiction published in England in the second half of the nineteenth century," selling over 20,000 copies within a year of its initial publication. Peter W. Sinnema, *Introduction* to SMILES, *supra* note 47, at vii.

51. It has been argued that Smiles's views were more nuanced than a reading of *Self-Help* suggests, and that he has been unfairly caricatured as unsympathetic to the plight of the working class. See, e.g., ASA BRIGGS, *VICTORIAN PEOPLE* 128-29 (Penguin Books 1967) (1955) (noting that "[u]nlike Alger or most of the other 'success' writers, Smiles" was initially involved in radical politics, and "turned to self-help . . . only when he saw the inadequacy of collective striving").

52. Philippe Ariès has famously argued that the concept of childhood as a distinct stage of life was itself a recent innovation of Western society, dating only from the late sixteenth century. PHILIPPE ARIÈS, *CENTURIES OF CHILDHOOD* (Robert Baldick trans., Random House 1962) (1960); see also LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800*, at 257 (1977) (pointing to English practices indicating "greater attention being paid to infants and children" in the late sixteenth and seventeenth centuries).

53. HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* (2005).

54. *Id.* at 230-87.

55. *Id.* at 181-229.

56. BREWER, *supra* note 53.

regime that facilitated the free rational choices of consenting adults. Locke, for instance, noted that because the liberty he advocated was grounded on the capacity of each individual to exercise reason—“[t]he Freedom . . . of Man and Liberty of acting according to his own Will, is grounded on his having Reason”—children, who lack this capacity, necessarily are excluded from the realm of liberty properly available to all rational adults.⁵⁷ Though born “to” freedom, children are not born “in” it, but instead initially are subject to the control of their parents. Upon the child’s attainment of “Age and Reason,” the “Bonds of this Subjection,” like the “Swadling Cloths” of infancy, “drop quite off,” and “leave a Man at his own free Disposal.”⁵⁸

Henry Maine’s Victorian picture of the age of contract similarly juxtaposes childhood unfreedom with the freedom of choice available to all rational adults. Maine holds up the treatment of children as an exception that proves the freedom-of-contract rule:

The apparent exceptions are exceptions of that stamp which illustrate the rule. The child before years of discretion, the orphan under guardianship, the adjudged lunatic, have all their capacities regulated by the Law of Persons. But why? The great majority of Jurists are constant to the principle that the classes of persons just mentioned are subject to extrinsic control on the single ground that they do not possess the faculty of forming a judgment on their own interests; in other words, that they are wanting in the first essential of an engagement by Contract.⁵⁹

Here Maine mobilizes childhood exclusion from contract, on the basis that children lack the capacity to exercise rational choice, to emphasize the extent to which contract facilitates the freely made choices of rational adults.

The point that children must be excepted from a freedom-of-contract legal regime was also made by Mill. In *Principles of Political Economy*, Mill presented children as a necessary limit to laissez-faire. The “foundation of the *laissez-faire* principle breaks down entirely,” Mill argued, in the case of children, who are either “incapable of judging or acting for” themselves or “though not wholly incapable, . . . of immature years and judgment.”⁶⁰ Whereas under laissez-faire “[t]he individual . . . is presumed to be the best judge of his own interests,” here “[t]he person most interested is not the best judge of the matter, nor a competent judge at all.”⁶¹ Thus, whereas freedom of contract generally facilitates freedom

57. LOCKE, TWO TREATISES, *supra* note 15, at 309.

58. *Id.* at 304.

59. MAINE, *supra* note 10, at 162.

60. MILL, PRINCIPLES, *supra* note 13, at 342.

61. *Id.*

of individual choice, where children are concerned the opposite is true: “Freedom of contract, in the case of children, is but another word for freedom of coercion.”⁶² Mill’s *On Liberty* likewise casts childhood as a necessary exception to the rule of individual liberty that in an ideal society would apply to all rational adults:

Over himself, over his own mind and body, the individual is sovereign.

It is perhaps, hardly necessary to say that this doctrine is only meant to apply to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected from their own actions as well as against external injury.⁶³

For Mill, as for Maine and Locke, because individual liberty is premised on the right of adults to freely exercise their faculties of decisionmaking and rational choice, it by definition cannot be extended to children, whose faculties are not yet mature.⁶⁴

B. Adoption Case Law: Freedom-of-Contract Doctrine and the Rise of the Best-Interests-of-the-Child Standard

The rise of freedom of contract in nineteenth-century England occurred alongside the parallel emergence of the “best-interests-of-the-child” standard, also termed the “welfare of the child” standard, in nineteenth-century English child custody case law. At first glance, these two developments might seem to have little in common—freedom of contract entails the judicial enforcement of contracts made by consenting rational adults; the best-interests-of-the-child standard entails the judicial assessment on a child’s behalf of which custodial outcome would best foster the child’s welfare. However, the emergence of the best-interests standard was shaped by, and was in many ways consistent with, the rise of freedom-of-contract doctrine.

Scholars discussing the early emergence of the best-interests standard in English case law have looked primarily at custody disputes between husbands and wives.⁶⁵ However, in the context of nineteenth-century inter-

62. *Id.* at 343-44.

63. MILL, ON LIBERTY, *supra* note 30, at 48.

64. *See, e.g., id.* at 50 (advocating individual liberty of combination with the caveat that “the persons combining being supposed of free age”); *id.* at 116 (excepting children from those able to assess risks of harm on their own behalf).

65. *See* SUSAN MAIDMENT, CHILD CUSTODY AND DIVORCE 89-106 (1984); Danaya Wright, *A Crisis of Child Custody: A History of the Birth of Family Law in England*, 11 COLUM. J. GENDER & L. 175 (2002); *see also* Sarah Abramowicz, *English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody*, 99 COLUM. L. REV. 1344, 1347-50, 1355-62 (1999)

spousal disputes, judicial assessment of the child's best interests was both subordinated to and clouded by judicial emphasis on mothers' and fathers' competing rights.⁶⁶ Throughout that period, English judges adjudicating custody disputes between husbands and wives tended to consider the "sacred right of the father"⁶⁷ to outweigh a child's best interests,⁶⁸ and often refused to consider a child's interests at all unless a father was so unfit that granting him custody would severely threaten his child's well-being.⁶⁹ It was not until the passage of the Guardianship of Infants Act of 1886 that judges were formally instructed to consider "the welfare of the infant" in adjudicating such disputes,⁷⁰ and it was not until the Guardianship of Infants Act of 1925 that the "welfare of the infant" was deemed the "first and paramount consideration" in custody disputes between husbands and wives.⁷¹ Moreover, as Susan Maidment has shown, judges continued even after 1925 to assess children's welfare with reference to both mothers' and fathers' competing rights and questions of marital fault.⁷²

Thus, this Article will set aside inter-spousal custody disputes, and will examine instead a series of custody disputes between what today we would call biological and adoptive parents, that is, between a child's original parent or parents and a third party who claimed to have formed a parental tie to the child. Unlike judges adjudicating inter-spousal disputes, those adjudicating adoption disputes began to rely on the best-interests-of-the-child standard beginning in the early 1800s, and continued to do so throughout the nineteenth century. Unhampered by a need to assert the superior rights of fathers vis-a-vis mothers, judges adjudicating disputes between parents and third parties were willing to deny custody even to fathers in the name of a child's interests.⁷³ Looking at nineteenth-century

(arguing that scholars who focus on maternal and paternal competing rights in nineteenth-century English child custody law tend to overestimate fathers' rights and thus to overlook the extent of judicial intervention into those rights).

66. See Abramowicz, *supra* note 65, at 1359 ("Where a claim to custody was cast as a dispute between mother and father . . . [t]he father's rights dominated."); Wright, *supra* note 65, at 242 ("Although the courts often reiterated the best interests rhetoric, they still deferred to paternal rights.").

67. *In re Agar-Ellis*, (1883) 24 Ch. D. 317, 329 (inter-spousal dispute).

68. See, e.g., *id.* at 337-38 ("[W]e must regard the benefit of the infant; but . . . [i]t is not the benefit to the infant as conceived by the Court, but it must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can.")

69. See, e.g., *id.* at 329 ("[I]n this case there is no charge of immorality of conduct which can authorize the Court to interfere between this father and his child."); *Rex v. Greenhill*, (1836) 111 Eng. Rep. 922 (K.B.); *Ball v. Ball*, (1827) 57 Eng. Rep. 703, 704 (V.C.) ("Some conduct, on the part of the father, with reference to the management and education of the child, must be shown to warrant interference with his legal right."); see also MAIDMENT, *supra* note 65, at 89-148.

70. Guardianship of Infants Act, 1886, 49 & 50 Vict., c. 27 (Eng.).

71. Guardianship of Infants Act, 1925, 15 & 16 Geo. 5, c. 45 (Eng.).

72. MAIDMENT, *supra* note 65 at 131-48.

73. As a result, a father was more likely to lose a custody dispute against his deceased wife's relatives than against his living wife. See Abramowicz, *supra* note 65, at 1358-59, 1383-91 (discussing

English adoption case law, we can thus trace the early emergence of the best-interests-of-the-child standard, and the relationship of that emergence to the concurrent rise of freedom of contract.

The history of legal adoption in nineteenth-century England has received little scholarly attention. As many have noted, while adoption was legalized in the United States beginning in the early 1850s by a series of state statutes that created formal adoption mechanisms,⁷⁴ legal adoption was not recognized in England until the Adoption Act of 1926⁷⁵ created a similar statutory adoption mechanism.⁷⁶ While largely accurate, this abridged version of English adoption history leaves out the story of the interplay between the rise of contract and the practice and judicial regulation of adoption. This Article will now proceed to tell that story. It will begin by showing that in eighteenth- and nineteenth-century England, private individuals began to turn to contracts, as well as to other legal instruments such as wills and deeds, to formalize their adoptive ties to other people's children. It will then trace the judicial response when adoptive parents came to court asking that their contractual rights to a child's custody be enforced.

1. The Private Turn to Adoption Contracts

The evidence of English adoption practice provided by the published accounts of English judicial decisions gives credence to Maine's claim that his Victorian compatriots were increasingly turning to "Contract" to structure their lives. Beginning in the eighteenth century, the English law

intervention of Court of Chancery into paternal rights prior to 1839, in cases that were not framed in terms of mothers' and fathers' competing rights); Wright, *supra* note 65, at 193-205 (distinguishing standard applied in disputes between mothers and fathers from that applied in disputes between fathers and third parties).

74. See, e.g., MICHAEL GROSSBERG, *GOVERNING THE HEARTH* 268-81 (1985); Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443 (1971); Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038 (1979); see also Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1080-81, 1088-1146 (2003) (arguing that historians of adoption have overemphasized the revolutionary effect of the enactment of the first American adoption statute by Massachusetts in 1851, and showing the continuity of this statute with earlier cultural and legal norms).

75. Adoption of Children Act, 1926, 16 & 17 Geo. 5, c. 29 (Eng.). For an account of the passage of the Adoption Act, see GEORGE K. BEHLMER, *FRIENDS OF THE FAMILY: THE ENGLISH HOME AND ITS GUARDIANS, 1850-1940*, at 272-315 (1998).

76. Thus, Grossberg writes: "Although adoption had long been part of Western legal culture in civil law nations, English common law had refused to accept complete transfers of parenthood. Civil-law adoption had its roots in Roman procedures designed primarily to aid the adopting patriarch. It enabled a man to avoid the extinction of his family and to perpetuate its religious rites. Although English legal historians Pollock and Maitland believed that early Britons also used a form of adoption, by the early modern era the stance of English common lawyers could be summarized in the terse statement of Glanville: 'Only God can make a heres [heir], not man.'" GROSSBERG, *supra* note 74, at 268; see also BEHLMER, *supra* note 75, at 272-73 ("[A]lthough legal adoption—the process by which parental rights and responsibilities become fully transferable—was not possible in England until 1926, children had been adopted *de facto* since time out of mind."); Presser, *supra* note 65, at 443, 448-95.

reports describe several instances in which parties had attempted by private legal arrangements—initially by wills and deeds—to transfer parental rights from a child’s original legal parents to third parties. The rights transferred included every aspect of what we now think of as “custody,” including not only the right to physical possession of the child, but also the right to control the child’s upbringing, education, and religious training. Evidence of such practices becomes more prevalent in the nineteenth-century law reports, when in addition to wills and deeds purporting to transfer parental rights, one begins to see attempts to achieve that same result through contracts of adoption. Because, presumably, only a small portion of adoptive arrangements made their way into court, and fewer still into the published law reports, the regular appearance in the eighteenth- and nineteenth-century law reports of legal instruments purporting to transfer parental rights suggests that others in that era were similarly asking their lawyers to draw up legal papers formalizing their adoptive arrangements.

The rewriting of parent-child ties through legal instrument was facilitated by the 1660 Tenures Abolition Act.⁷⁷ Prior to 1660, the English law of child custody consisted primarily of the feudal law of guardianship and descent, which dictated the right to control the person and the property of infant heirs whose fathers had died. Upon the father’s death, guardianship of these heirs devolved automatically, either to the higher-ranking lord from whom the father held his estate or to the Crown.⁷⁸ Guardianship, in part because it entailed the right to arrange a child’s marriage, was a valuable commodity, one that guardians could even sell on the open market.⁷⁹ A product of the struggle between the landed classes and the Crown,⁸⁰ the 1660 statute did away with the feudal system of descent and guardianship.⁸¹ It replaced that system by giving every father the legal right to “dispose of the custody and tuition” of his children under the age of twenty-one by appointing guardians to them either by will or by deed.⁸² The effect was to revolutionize English child custody practice⁸³ by opening the door to the use of private legal agreements to transfer parental

77. Tenures Abolition Act, 1660, 12 Car. 2, c. 24 (Eng.).

78. See, e.g., Abramowicz, *supra* note 65, at 1365-68.

79. See, e.g., FRANCIS HARGRAVE & CHARLES BUTLER, 1 NOTES ON LORD COKE’S FIRST INSTITUTE, OR, COMMENTARY UPON LITTLETON § 123 n.88b (London, J.&W.T. Clarke, 19th ed. 1832) (1787) (“[G]uardianship . . . being deemed more an *interest* for the *profit* of the *guardian* than a *trust* for the *benefit* of the *ward*, was saleable and transferable, like the ordinary subjects of property, to the best bidder.”); see generally JOEL HURSTFIELD, THE QUEEN’S WARDS (1973).

80. See HURSTFIELD, *supra* note 79.

81. See Tenures Abolition Act § 1; 2 WILLIAM BLACKSTONE, COMMENTARIES *77.

82. Tenures Abolition Act § 8.

83. See, e.g., *Ex parte Ilchester*, (1803) 32 Eng. Rep. 142 (Ch.) (“It is clear, by the Common Law a man could not by any testamentary disposition affect either his land or the guardianship of his children. The latter appears never to have been made the subject of testamentary disposition till the Statute Charles II [i.e., the Tenures Abolition Act].”).

rights.⁸⁴

Although the 1660 statute gave fathers alone the right to appoint guardians to their children by will, the practice was soon employed by third parties as well. For instance, wealthy benefactors who had taken over the custody and upbringing of children not their own began to appoint guardians to those children even though the parents were still alive, a practice that is evident from the legal disputes that arose when the benefactors died, the appointed guardians tried to take over, and parents contested their right to custody.⁸⁵ A typical case might involve a grandparent who devised his estate to a child and appointed guardians to care for the child's person along with the child's estate, giving directions that those guardians be allowed to control the child's education and upbringing.⁸⁶ Third parties continued to appoint guardians by will to other people's children throughout the eighteenth century, and into the nineteenth century as well.⁸⁷

In the late eighteenth century, these testamentary appointments of guardianship began to look increasingly contractual, as benefactors started to grant bequests to parents conditioned on the parents' express consent to relinquish their custodial rights.⁸⁸ The 1789 case of *Powel v. Cleaver*, for instance, involved the will of a wealthy uncle who during his lifetime had established a quasi-parental relationship with his eldest nephew.⁸⁹ The child had, with his parents' consent, been "brought up by, and at the expence of" his uncle,⁹⁰ and had even taken on his uncle's surname, substituting it for that of his father.⁹¹ When the child was still a minor, the uncle died, leaving the boy the bulk of his estate, and creating a trust to provide income for life to the child's parents.⁹² He did so, however, "upon

84. Cf. Abramowicz, *supra* note 65, at 1365-91 (arguing that the judicial regulation of testamentary guardians appointed under the Tenures Abolition Act opened the door to judicial regulation of fathers themselves by creating a tradition of court intervention in custody matters).

85. See, e.g., *Powel v. Cleaver*, (1789) 29 Eng. Rep. 274 (Ch.); *Blake v. Leigh*, (1756) 27 Eng. Rep. 207 (Ch.) (describing other, unreported instances of similar disputes); *Ex parte Hopkins*, (1732) 24 Eng. Rep. 1009 (Ch.).

86. *Blake*, 27 Eng. Rep. at 207 (noting other "instances where [a] grandfather has given his estate to [his] grandchild, and appointed guardians of his estate and person").

87. See, e.g., *Lyons v. Blenkin*, (1821) 37 Eng. Rep. 842 (Ch.); *Colston v. Morris*, (1818) 37 Eng. Rep. 849 (Ch.). Another legal device that third parties occasionally used to establish parental ties to other people's children was the marriage settlement. See, e.g., *Fagnani v. Selwyn*, (1817) 37 Eng. Rep. 852 (Ch.) (appointing as guardian a man who had provided a marriage settlement for a girl he had raised, on the condition that he be appointed her guardian); *Powel*, 29 Eng. Rep. at 274-75, 278 (arguing that uncle "acted as a parent" to his niece "both by his will, and by the provision on her marriage").

88. See, e.g., *Colston*, 37 Eng. Rep. at 849 (involving grandfather's bequest to child and parents, conditioned on parents' noninterference with the child's continued education and upbringing by the guardians the grandfather had appointed); *Powel*, 29 Eng. Rep. at 274.

89. *Powel*, 29 Eng. Rep. at 274.

90. *Id.* at 276.

91. *Id.* at 273 (indicating that the child, who was the son of William Roberts and the nephew of John Powel, had changed his name from "Arthur Annesley Roberts" to "Arthur Annesley Powel").

92. *Id.* at 274-75.

the express condition” that the uncle’s executors “‘have the care, guardianship, tuition, and management’” of the boy during his minority, and that the parents refrain from interfering in the upbringing and education that the uncle had arranged for the child.⁹³

Then, in the nineteenth century, outright adoption contracts began to surface in the published accounts of custody disputes.⁹⁴ An adoption contract typically would secure a promise of noninterference from the legal parent, in exchange for an agreement on the part of the adoptive parent to bring up and care for the child.⁹⁵ Another potential provision was an agreement by the legal parent to pay the adoptive parent as consideration for agreeing to adopt the child.⁹⁶ In the 1880s, the case law also began to show adoption contracts between parents and philanthropists who ran religious schools and orphanages. Many such cases⁹⁷ involved Thomas Barnardo, a founder of a system of Protestant foster homes and orphanages.⁹⁸ In some instances, Barnardo would first sign a contract with the biological parent, and then arrange for the child’s adoption by a private party with whom he would himself sign a contract transferring parental rights.⁹⁹ At the same time that adoption contracts started to emerge, courts adjudicating disputes between parents and third parties also began to consider the effect on parental rights of earlier inter-spousal attempts to turn to contract to formalize agreements about children’s custody and upbringing, such as separation deeds allocating custody¹⁰⁰ and prenuptial

93. *Id.* at 274 (quoting provision in will). Significantly, the Court viewed the uncle’s appointment of guardians to his nephew by will as the most convincing evidence of his intent to form a quasi-parental relationship with the child. *Id.* at 282 (“Suppose Mr. Powel had said, in terms, I mean to make myself a parent, he could not have expressed it stronger than by disposing of the guardianship.”).

94. *See, e.g.,* *Queen v. Barnardo [Jones’s Case]*, (1891) 1 Q.B. 194; *In re Boreham*, (1853) 22 L.J.Q.B. 116; *Hill v. Gomme*, (1839) 48 Eng. Rep. 1050 (Ch.).

95. The court in *Boreham* described the adoption contract at issue in that case as follows: “[A]n agreement was entered into between N. Boreham and E. Smith, by which, reciting that the wife [of N. Boreham], being dangerously ill, with the consent of her husband, requested Smith, her brother, in the event of her death, to take charge of and educate and bring up her infant daughter, which he had agreed to do on the condition that the daughter be permitted to remain with him until she was grown up and able to provide for herself, it was witnessed, that in consideration of the agreement by Smith, N. Boreham did solemnly promise and agree with Smith that he would permit and suffer the said [infant] to reside and live with the said Smith until she should be grown up and able to provide for herself, and that he would not in any way interfere with the said Smith in the bringing up and education of his daughter, nor remove nor seek to remove her from the care of the said Smith, but would at all times permit her to remain with him as his adopted child.” 22 L.J.Q.B. at 117.

96. *See, e.g., id.* (describing provision in adoption contract that the father “would pay to [the adoptive parent] 14s. per month for the support and education of” his daughter); *Hill*, 48 Eng. Rep. at 1050-51 (describing adoption agreement “reciting that [the adoptive father] had no child by . . . his wife, and had agreed, in consideration of £100 to be paid by [the child’s father], forthwith to take, maintain, clothe, educate, apprentice, and bring up [the child] . . . as if he were his own son”).

97. *See, e.g., Jones’s Case*, 1 Q.B. at 194; *Queen v. Barnardo [Gossage’s Case]*, (1890) 24 Q.B. 283; *Queen v. Barnardo [Tye’s Case]*, (1889) 23 Q.B. 305.

98. *See generally* GILLIAN WAGNER, *BARNARDO* (1979); *see also* BEHLMER, *supra* note 75, at 289-92.

99. *See Gossage’s Case*, 24 Q.B. at 283; *Tye’s Case*, 23 Q.B. at 305.

100. *See, e.g., Talbot v. Shrewsbury*, (1840) 41 Eng. Rep. 259 (Ch.) (considering effect, in

agreements about the religion in which a child was to be raised.¹⁰¹

Extensive discussion of an adoption contract appears in the 1839 case of *Hill v. Gomme*.¹⁰² In *Hill*, an unusual case, the plaintiff had discovered in his deceased father's papers a deed by which his father had arranged for him to be adopted by a neighbor whose wife had nursed the boy in his infancy.¹⁰³ Following this discovery, he brought suit to claim his inheritance rights as his adoptive father's heir. Although he initially had no knowledge or recollection of the adoptive arrangement, he had learned, upon investigation, that in his early childhood, the neighboring couple, who were childless, had grown attached to him, had arranged by contract to adopt him and to bring him up as their own, and had for a time done so.¹⁰⁴ As one former servant testified, "they called him Willy, and he called them daddy and mammy."¹⁰⁵ But the adoptive arrangement had eventually fallen apart, and the child had been returned to his biological parents.

Hill illuminates several aspects of the turn to legal adoption contracts. It shows, for instance, that the practice extended to adoptive arrangements within the working class. Even though the two sets of parents in *Hill* were not well off—the original father was an "agricultural implement maker," and the adoptive father was a "labouring brickmaker" who also ran a pub¹⁰⁶—they nonetheless turned to a solicitor to formalize the adoption they had arranged. Deposition testimony by the solicitor's nephew, recalling the drafting of the adoption contract years earlier, describes fairly extensive interactions between the solicitor and his clients in drawing up the agreement, as well as some disagreement about how best to structure it:

He proved that no pecuniary consideration was at first intended, 'that it was at first proposed that the consideration should be natural love and affection on the part of [the adoptive father],' but counsel raising some objection, it was ultimately agreed that the consideration for the deed should be the sum of £100; he said that the instructions were given by both parties, that his uncle saw them several times on the subject, that the interviews sometimes took place at his uncle's chambers, sometimes and more frequently at [the biological father]'s

custody dispute between a widow and her children's uncle, of custody provisions in separation deed made by widow and her late husband).

101. See, e.g., *Andrews v. Salt*, (1873) 8 Ch. App. 622 (considering relevance of prenuptial agreement in custody dispute between mother and third-party guardian); *Hill v. Hill*, (1862) 31 L.J. 505 (Ch.) (same); see also *In re Nevin*, (1891) 2 Ch. 299 (considering relevance for custody dispute over orphaned child of prenuptial contract between child's parents stipulating that she be raised a Roman Catholic).

102. *Hill v. Gomme*, (1839) 48 Eng. Rep. 1050 (Ch.).

103. *Id.* at 1050-51.

104. *Id.* at 1051.

105. *Hill v. Gomme*, *TIMES* (London), July 16, 1839, at 6.

106. *Hill v. Gomme*, (1839) 48 Eng. Rep. 1050 (Ch.).

house, and that his uncle [also] went two or three times to [the adoptive father]'s house¹⁰⁷

The result was a contract by which the child's adoptive father "covenanted" with the original father (the consent of the mother apparently being considered irrelevant, particularly at a time when married women could not contract), "in consideration of £100 to be paid to him . . . forthwith to take, maintain, clothe, educate, apprentice, and bring up" the child "as if he were his own son," and to leave the child his estate upon his death.¹⁰⁸

The *Hill* case illustrates the ways in which clients and attorneys struggled to articulate what adoption meant. Contrary to the parties' own view of the arrangement as motivated by the adoptive parent's "love and affection," the contract in *Hill*—on the solicitor's professional advice—was framed instead on the assumption that the benefit of the adoptive bargain went to the father who was relieved of the burden of raising and educating his child, rather than to the father who acquired a child to raise. By further providing that the adoptive father's estate would be shared in equal parts should he subsequently father children of "his own," the contract also seems to assume both that an adoptive parent might favor any such biological children over his adopted son, and that for him to do so would violate his promise to raise the adopted child "as his own son."

In addition, the case brings out some of the anxieties provoked by the prospect of allowing parents to contract away their parental rights. Thus, the lawyer opposing enforcement of the adoption deed argued:

[T]his was a contract contrary to the policy of the law, for thereby a parent was contracting for the relinquishment of his child, the father thus depriving his son of that parental care which by the law of nature he was entitled to, and relieving himself from those moral duties and obligations which a parent owed to his child. If such a contract were held valid, then, where a father in good circumstances contracted to abandon his child to a man of the lowest and meanest estate and condition, the Court might be obliged to enforce the contract.¹⁰⁹

This scenario of downward social mobility suggests an anxiety that the practice of allowing parents to rewrite parent-child ties would create an overly fluid social regime. In fact, while as in *Hill*, adoption was sometimes practiced between those of similar social status, adoptive parents tended to be somewhat wealthier than their biological counterparts, and it was only in works of fiction¹¹⁰ that "father[s] in good

107. *Id.* at 1052.

108. *Id.* at 1050-51.

109. *Id.* at 1053.

110. *See, e.g.*, GEORGE ELIOT, *SILAS MARNER* (Terence Cave ed., Oxford University Press 2009) (1861) (Victorian best-seller about a wealthy father who abandons his infant daughter and allows her

circumstances” “abandon[ed]” their children to be adopted and brought up by parents “of the lowest and meanest estate and condition,” let alone “contracted” to do so. While on the one hand indicating a fear of social instability, the hypothetical in *Hill* of an adoptive transfer between parents at opposite ends of the social spectrum also indicates a tendency to think about adoption by mapping out parental difference on the terrain of social and economic class. As we will see below, this same tendency would often cause courts and parties to exaggerate such differences in the cases in which they did exist.

2. *The Judicial Response: From Parents’ Rights to Child’s Best Interests*

The eighteenth-century courts¹¹¹ that first encountered these legal transfers of parentage spoke of parenthood as a right—typically, the father’s—that was as amenable as any other to contractual transfer. Prior to a contractual exchange, the right to his child’s custody belonged by “nature” to the father,¹¹² and he could not be deprived of it by the unilateral legal device of a wealthy benefactor: “[I]t cannot be conceived that, because another thinks fit to give a legacy, though never so great, to my daughters, therefore I am by that means to be deprived of a right which naturally belongs to me, that of being their guardian.”¹¹³ But the “parental right,” like any other, was one that the parent could “consent” to “waive.”¹¹⁴ Applying this logic, the Court of Chancery from the 1750s to the early 1800s denied custody applications by fathers who had accepted a legacy in exchange for relinquishing their rights over their children, holding that the fathers were bound to their bargains.¹¹⁵ Thus, for instance, in the 1818 case of *Colston v. Morris*—one of the later published opinions to apply this rule—a father argued that the court should void as *in terrorem* the condition that a £10,000 legacy to him be revoked should he

to be raised by a poor weaver).

111. In the eighteenth century and for most of the nineteenth century, most of the opinions to discuss such legal transfers of parentage were issued by the Court of Chancery, which exercised jurisdiction over testamentary guardians and their wards, and as a court of equity could exercise the power of the *Parens Patriae* to act in a child’s interests even in derogation of legal rights. The Judicature Act of 1873, 36 & 37 Vict., c. 66 (Eng.), merged the courts of equity with those of law, and in so doing provided that “[i]n questions relating to the custody and education of infants the Rules of Equity shall prevail,” *id.* § 25(10). Thereafter, the principle of the *Parens Patriae* was applied by courts of law and courts of equity alike.

112. See, e.g., *Ex parte Hopkins*, (1732) 24 Eng. Rep. 1009, 1009 (Ch.) (“The father is entitled to the custody of his own children during their infancy, not only as guardian by nurture, but by nature.”).

113. *Id.*; see also *Powel v. Cleaver*, (1789) 29 Eng. Rep. 274, 274 (Ch.) (“It is no where laid down that the guardianship of a child can be wantonly disposed of by a third person.”).

114. See, e.g., *Blake v. Leigh*, (1756) 27 Eng. Rep. 207, 207 (Ch.) (“The grandfather had no power to appoint guardians of his grandson, it being a right vested in the father; but any one can give his estate on what conditions he pleases; and the father has in this case submitted to the will. . . . [T]he father has waived his parental right; therefore here is not ground to alter what was done with the consent of all parties.”).

115. See, e.g., *Colston v. Morris*, (1818) 37 Eng. Rep. 849 (Ch.); *Powel*, 29 Eng. Rep. at 274; *Blake*, 27 Eng. Rep. at 207.

and his wife interfere in the management and education of their daughter by the testator's appointees.¹¹⁶ The court not only refused to void the condition, but, to ensure that the father would abide by his bargain, instructed that the sum be withheld from him until he signed an undertaking abandoning his custodial rights and promising not to interfere in the child's education.

In the early nineteenth century, however, courts began increasingly to express discomfort about treating parenthood as a freely alienable right that could be bought and sold like any other, and custody disputes as therefore hinging solely on the fact of parental consent. This discomfort was already latent in the 1789 *Powel* case, which involved a father who had accepted a legacy to himself and his son expressly conditioned on his agreement not to interfere in the child's custody.¹¹⁷ In their arguments before the Court of Chancery, both parties in *Powel* focused on whether the father had consented to relinquish his custodial rights, and if so whether this consent was binding. The attorney for the father argued that his client had not consented to a transfer of parental rights by accepting the legacy, because he had not properly understood its conditions, and thus that he was free to renounce the legacy and reclaim his child. Opposing counsel deemed this claim of ignorance "scarce credible," and asserted that the only question before the Court was whether a father who had not otherwise "abused his parental authority" had nonetheless "renounced his right of guardianship" and irrevocably "transferred" it to third parties by initially consenting to such a transfer.¹¹⁸

Rather than address the validity and relevance of the father's consent to a transfer of guardianship, however, Lord Chancellor Thurlow decided *Powel* by ruling obliquely that "[i]t is no where laid down that the guardianship of a child can be wantonly disposed of by a third person. The wisdom would be not to raise points on such a question, as the Court will take care that the child shall be properly educated for his expectations."¹¹⁹ Years later, Lord Chancellor Eldon, who was counsel in the *Powel* case, suggested that the Court's evasive language here was intentional: Lord Thurlow, he said, would not let counsel present arguments about the Court's jurisdiction to deny custody to a father who had allowed his child to be adopted by another and then changed his mind.¹²⁰

The outcome of *Powel* was consistent with the contract-like provisions

116. *Colston*, 37 Eng. Rep. at 849.

117. *Powel*, 29 Eng. Rep. at 277.

118. *Id.* at 276-77.

119. *Id.* at 279.

120. See *Wellesley v. Beaufort*, (1827) 38 Eng. Rep. 236 (Ch.) (Eldon, Lord Chancellor) ("There are a great many cases to be found upon the records of the Court, which do not appear in the reports. I was counsel in the case of [*Powel*], and Lord Thurlow would not allow us to argue the question of jurisdiction; and perhaps he was right.")

of the adoptive uncle's will: the father was permitted to retain the bequest that had been made to him on the condition that he relinquish his parental rights, and at the same time was prevented from reclaiming those rights by interfering in the education and upbringing that the uncle had arranged for the child. As Lord Chancellor Eldon later explained, however, the basis of Lord Thurlow's decision in *Powel* was not that he was enforcing the provisions of the will, but instead that he was acting in the child's best interests:

Lord Thurlow's opinion [in *Powel*] went upon this; that the Law imposed a duty upon parents; and in general gives them a credit for ability and inclination to execute it. But that presumption, like all others would fail in particular instances; and if an instance occurred, in which the father was unable, or unwilling, to execute that duty, and, farther, was actively proceeding against it, of necessity the State must place somewhere a superintending power over those, who cannot take care of themselves; and have not the benefit of that care, which is presumed to be generally effectual. . . . Lord Thurlow took upon him the jurisdiction on this ground, that he would not suffer the feelings of the parents to have effect against that duty, which upon a tender, just, and legitimate deliberation the parent owed to the true interests of the child; and his Lordship separated the person of the child from the father.¹²¹

Here Eldon, expanding upon Lord Thurlow, set forth an influential early version of the "interests of the child" standard, along with the notion that the Court of Chancery, in its equitable role as the "Parens Patriae,"¹²² or parent of the country, was empowered to exercise "a superintending power over those," such as children, "who cannot take care of themselves," even if this meant superseding a father's custodial rights.¹²³

The shift from a contractual to a best-interests model for resolving adoption disputes was completed in the 1821 case of *Lyons v. Blenkin*, which would be cited in such disputes throughout the nineteenth century.¹²⁴ In *Lyons*, the Court of Chancery for the first time explicitly employed the "interests of the child" standard, along with the theory of the

121. *De Manneville v. De Manneville*, (1804) 32 Eng. Rep. 762, 767 (Ch.). *De Manneville* was not an adoption dispute, but rather, a custody dispute between husband and wife. The Court refused to award custody to the wife, on the basis that to do so would condone her informal separation from her husband. But it at the same time interfered in the father's upbringing and education of his child as far as it thought necessary to protect the child's interests, for instance by forbidding the father to remove the child from England. *See id.* at 767-68.

122. *See id.* at 767.

123. *Id.* What was novel in *de Manneville* was the application of the "best interests" standard to intervene in the custody of a father himself. The standard had previously been used in cases regulating testamentary guardians. *See, e.g., Morgan v. Dillon*, (1724) 88 Eng. Rep. 361, 365 (Ch.) ("[Since] a testamentary guardian is under the control and inspection of a Court of Equity, as superintendant of all guardianships. . . . this Court . . . may compel him to do any . . . act which may be thought necessary for the benefit of the infant.").

124. *Lyons v. Blenkin*, (1821) 37 Eng. Rep. 842 (Ch.).

Parens Patriae jurisdiction, to deny custody to a father who had allowed his daughters to be raised and educated by an adoptive relative, and had then changed his mind.¹²⁵ Even as it awarded custody to the adoptive aunt, however, the Court rejected her claim that she had acquired a legal right to custody through the will of the children's grandmother. "As I understand the case," the Lord Chancellor found, "the grand-mother made her will, and by it gave a moiety of one estate, and some other estates, to these young ladies; and then, taking it for granted that she had power to appoint a guardian, expressly directs that their aunt shall be their guardian."¹²⁶ The Lord Chancellor then held the testamentary appointment void, finding that the grandmother thereby "attempts to do that which she could not lawfully do; namely, the father of her grand-children being living, she appoints a guardian during their minority." But "[u]nder such circumstances"—that is, where the father had initially allowed another to raise and educate his child, and had then changed his mind—rather than automatically returning the child to her father, "the Court would enquire what was most for her benefit."¹²⁷

The "interests of the child" standard would thereafter continue to prove the decisive element in adoption disputes throughout the Victorian period.¹²⁸ Although adoptive parents continued to assert rights to custody based on legal agreements such as contracts and wills, courts responded by holding that parental rights could not be transferred, even voluntarily, through legal instruments.¹²⁹ A contract purporting to terminate or otherwise limit the exercise of parental rights "is not a contract which the father has any legal power to make"¹³⁰—or, for that matter, the mother.¹³¹

125. See *id.* at 847 ("It is always a delicate thing for a Court to interfere against the parental authority; yet we know that the Court will do it where the parent is capriciously interfering in what is clearly for [his children's] benefit.") (citing *Powel v. Cleaver*, (1789) 29 Eng. Rep. 274 (Ch.)).

126. *Lyons*, 37 Eng. Rep. at 844.

127. *Id.* at 845.

128. See, e.g., *Queen v. Gyngall*, (1893) 2 Q.B. 232 ("The dominant matter for the consideration of the Court is the welfare of the child."); *In re McGrath*, (1892) 1 Ch. 143, 148; *Queen v. Barnardo*, [Jones's Case] (1890) 1 Q.B. 194 ("[W]e are bound . . . to consider what is on the whole for the benefit of the child."); *Queen v. Nash*, (1883) 10 Q.B. 454 (considering "the benefit of the child"); *Andrews v. Salt*, (1873) 8 Ch. App. 622 (assessing "benefit of [the] child"); *Dawson v. Jay*, (1854) 43 Eng. Rep. 300 (Ch.) (assessing which custodial outcome was most for "the benefit of the infant").

129. See, e.g., *Jones's Case*, 1 Q.B. at 194 (refusing to enforce adoption contract where mother gave up custody for twelve years, while noting that "[i]t cannot be, nor is it suggested, that the mother's consent was anything but a perfectly willing one, or that she was cajoled or overpersuaded into giving it. She fully understood what she was doing, and she desired to do it"); *In re Boreham*, (1853) 22 L.J.Q.B. 116 (refusing to enforce adoption contract by which father agreed not to interfere in his child's education and upbringing or to seek to remove her from adoptive parent's care); *Hill v. Gomme*, (1839) 48 Eng. Rep. 1050 (Ch.) (refusing to enforce inheritance provision of adoption contract, on the basis, *inter alia*, that the would-be adoptive father could not have enforced the contractual transfer of parental rights, had he attempted to do so).

130. *In re McGrath*, (1892) 2 Ch. 496, 508 (concerning effect of antenuptial agreement about religious upbringing on rights of adoptive parents of orphaned children); see also *In re Nevin*, (1891) 2 Ch. 299 (same) ("A father cannot bind himself conclusively by contract to exercise in all events, in a particular way, rights which the law gives him for the benefit of his children, and not for his own.").

But neither did courts simply return the adopted child to the original legal parent as a matter of course. Where a child had been adopted for only a short duration, the original parent's rights would control, and the child would be ordered returned to that parent.¹³² Where the child had spent a significant period of time under the care of the adoptive parent, however, courts would not disrupt that arrangement if to do so would be counter to the child's interests.¹³³ The result was that even as courts refused to enforce adoption contracts and other legal transfers of parental rights, they would often award custody to the adoptive parent nonetheless, on the basis that continuing in the care of the adoptive parent was in the child's best interests.

The judicial refusal to enforce adoption contracts was in fact largely consistent with freedom-of-contract theories of childhood and of the parental power. Freedom-of-contract theorists explained that parents retained control over their minor children only temporarily, and did so for the purpose of protecting and supervising the child until the child reached the age of discretion.¹³⁴ It followed from this that parenthood was not a property right that a parent could freely alienate, but a trust, created for the infant's benefit.¹³⁵ Because children were the exception to the freedom-of-contract rule that applied to rational adults, special paternalistic rules, rather than the usual freedom-of-contract regime, necessarily applied in cases where children's interests were at stake.

The "best interests of the child" standard by which judges resolved these adoption disputes was similarly consistent with the freedom-of-contract model. Freedom-of-contract doctrine, like *laissez-faire*, sought to maximize individual welfare by honoring, as much as possible, individual preferences as to each individual's happiness. Ordinarily, the calculation of each party's preferences was left to the free will of the contracting parties, and judges took on the neutral role of enforcing whatever agreements the parties had worked out among themselves. But, as judges in custody disputes often noted, children were in the anomalous position of being unable to assess their own best interests. For this reason, the task of assessing and protecting children's interests was assigned instead to their parents, whose love and affection for their children generally

131. See, e.g., *Jones's Case*, 1 Q.B. at 194 (refusing to enforce adoptive agreement between director of orphanage and biological mother).

132. See, e.g., *Boreham*, 22 L.J.Q.B. at 116; *Jones's Case*, 1 Q.B. at 194.

133. See, e.g., *Gyngall*, 2 Q.B. at 232; *Lyons v. Blenkin*, (1821) 37 Eng. Rep. 842, 847 (Ch.); see also *Hill v. Hill*, (1862) 31 L.J. 505 (Ch.); *Talbot v. Shrewsbury*, (1840) 41 Eng. Rep. 259 (Ch.) (refusing to enforce separation agreement by which deceased father had allocated custody to his wife, but looking to child's interests, rather than guardian's rights, in determining whether child should be allowed to remain with her mother or delivered over to her legal guardian).

134. See *supra* notes 57-64.

135. See, e.g., *Wellesley v. Wellesley*, (1828) 4 Eng. Rep. 1078 (H.L.) ("Why is the parent entrusted with the care of his children? Because it is generally supposed he will best execute the trust reposed in him; for that it is a trust, of all trusts most sacred, none . . . can doubt.").

rendered them best equipped to assess and protect their interests.¹³⁶ However, parents occasionally failed to fulfill this task properly, and acted in ways that threatened to “sacrifice” the interests of a child¹³⁷ to the parent’s own interests and desires.¹³⁸ When this happened, it fell to the judge to step into the parent’s place and to assess the child’s interests on his or her behalf, which entailed assessing the course of custody and upbringing “best calculated to promote” the child’s “welfare” and “happiness.”¹³⁹

But if the rise of the best-interests-of-the-child standard was thus consistent with the tenets of freedom-of-contract doctrine, the judicial application of that standard would bring those tenets into question. In treating childhood as the exception to the freedom-of-contract rule, contract theorists characterized childhood as a temporary and exceptional state with no bearing on the larger world of rational adults. As this Article will now discuss, this premise was in direct contradiction with the model of child development to which judges looked as they assessed children’s interests. This was the environmental model of child development, which held up childhood experience as the crucial determinant of the choices available to the adult self.

III. VICTORIAN ADOPTION CASE LAW AND THE ENVIRONMENTAL MODEL OF CHILD DEVELOPMENT

A. Theorists of Child Development

1. The Child as Tabula Rasa and the Importance of Parental Influence

The rise of freedom of contract in eighteenth- and nineteenth-century England occurred alongside the rise of the environmental model of child development, according to which children are molded into their adult selves by their early impressions and experiences.¹⁴⁰ The environmental model’s ascendancy made both childhood experience and parental control over that experience newly important.¹⁴¹ Childhood experience was seen

136. See, e.g., *id.* at 1084 (“[A] father is entrusted with the care of the children . . . because, it is to be supposed, his natural affection would make him the most proper person to discharge that trust.”); *De Manneville v. De Manneville*, (1804) 32 Eng. Rep. 762, 767 (Ch.).

137. See, e.g., *Creuze v. Hunter*, (1790) 30 Eng. Rep. 113 (Ch.) (“[T]he Lord Chancellor threw out that he would not allow the colour of parental authority to work the ruin of his child.”).

138. See, e.g., *De Manneville*, 32 Eng. Rep. at 767 (“In those cases there was a struggle between the feelings of the father and a due attention to the interests of the child.”).

139. *Id.*

140. See ARIÈS, *supra* note 52 (tracing the emergence, in seventeenth- and eighteenth-century Europe, of the notion that childhood is a formative stage); JAY FLIEGELMAN, *PRODIGALS & PILGRIMS* 11-35 (1982); STONE, *supra* note 52, at 254-56 (defining the “environmental theory” of childhood as the view that children are “malleable and open to being molded by experience,” and arguing that this view dominated middle- and upper-class circles in eighteenth-century England).

141. See ARIÈS, *supra* note 52; FLIEGELMAN, *supra* note 140; JAMES R. KINCAID, *CHILD-LOVING*

as shaping the adult self not only intellectually, but also emotionally, morally, spiritually,¹⁴² physically,¹⁴³ and psychologically.¹⁴⁴ Parents accordingly began to spend more time with their children, and to pay more attention to their upbringing and education.¹⁴⁵ Advice books on child-rearing and parenting became increasingly popular.¹⁴⁶ New schools for young children began to form,¹⁴⁷ as did the new industries of children's literature¹⁴⁸ and educational children's toys.¹⁴⁹ When, during the nineteenth century, reformers sought to improve the intellect and morality of the lower classes, they did so by creating schools that they saw as substituting for or counteracting parental influence.¹⁵⁰

John Locke, influential in epistemology as well as in political theory, is widely credited with popularizing the environmental model of child development, and thereby promoting the eighteenth-century English interest in child-rearing and education. Locke's environmental model likened the mind of a newborn child to a "white paper," or blank slate, on which ideas and principles were written by early experience and mental impressions. Locke first employed this model in *An Essay Concerning Human Understanding*,¹⁵¹ arguing that ideas and principles are not, as others believed, innate, but instead are acquired through experience. He further developed implications of the blank-slate paradigm in *Some Thoughts Concerning Education*,¹⁵² which provides advice on how to rear healthy, well-educated, and well-mannered children. Because children, Locke argues, are initially like "white paper, or wax," they can be "moulded or fashioned as one pleases"¹⁵³ by those who control their

61-103 (1992) (discussing Victorian interest in childhood, and its eighteenth-century antecedents); STONE, *supra* note 52, at 254-99; Margaret J. M. Ezell, *John Locke's Images of Childhood*, 17 EIGHTEENTH-CENTURY STUD. 139, 141 (1983); J. H. Plumb, *The New World of Children in Eighteenth-Century England*, 67 PAST AND PRESENT 64 (1975).

142. See, e.g., ARIÈS, *supra* note 52, at 412-13; KINCAID, *supra* note 141, at 61-103.

143. See, e.g., KINCAID, *supra* note 141, at 115-20.

144. The discipline of psychoanalysis was the product of the view that early childhood experience shapes the adult self. See generally CAROLYN STEEDMAN, *STRANGE DISLOCATIONS: CHILDHOOD AND THE IDEA OF HUMAN INTERIORITY 1780-1930* (1994) (tracing the nineteenth-century internalization of childhood, by which memories of childhood were newly conceived as the foundation of adult identity).

145. See, e.g., STONE, *supra* note 52, at 254-99.

146. See, e.g., KINCAID, *supra* note 141, at 87-89.

147. See Plumb, *supra* note 141, at 71-80.

148. See *id.* at 80-82.

149. See *id.* at 87.

150. See Richard Johnson, *Educational Policy and Social Control in Early Victorian England*, 49 PAST AND PRESENT 96, 110-16 (1970); cf. JACQUES DONZELOT, *THE POLICING OF FAMILIES* (Robert Hurley trans., Johns Hopkins Univ. Press 1997) (1977) (characterizing such reforms as part of a new "tutelary complex" that exercised social control by targeting the working-class family).

151. JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* (Roger Woolhouse ed., Penguin 1997) (1690).

152. JOHN LOCKE, *SOME THOUGHTS CONCERNING EDUCATION* (John W. and Jean S. Yolton eds., Clarendon Press 1989) (1693) [hereinafter LOCKE, EDUCATION].

153. *Id.* at 265.

upbringing and education:

I think I may say, that of all the Men we meet with, Nine Parts of Ten are what they are, Good or Evil, useful or not, by their Education. 'Tis that which makes the great Difference in Mankind: The little, and almost insensible Impressions on our tender Infancies, have very important and lasting consequences.¹⁵⁴

[T]he difference to be found in the Manners and Abilities of Men, is owing more to their *Education* than to anything else; we have reason to conclude, that great care is to be had of the forming Children's *Minds*, and giving them that seasoning early, which shall influence their Lives always after.¹⁵⁵

According to Locke, children are shaped primarily by their parents. Parents molded their children not only through formal education, but also by how they fed, clothed, disciplined, related to, and interacted with them. In addition, parents provided an "Example" or "Pattern" for children to copy, or, Locke argued, deprived their children of such an example by placing them in the care of servants or boarding schools.¹⁵⁶ Through the metaphor of the parent as a gardener who plants "seeds"¹⁵⁷ in the child's mind, Locke presents parenting's influence as largely irreversible. Parents, he warns, must beware lest they make child-rearing mistakes that are "too late" to undo, because "those Weeds, which their own hands have planted, . . . have taken too deep root to be easily extirpated."¹⁵⁸

Locke's environmentalist ideas and educational advice soon became common knowledge amongst the literate classes of English society; *Some Thoughts Concerning Education* was widely read and discussed in England throughout the eighteenth and nineteenth centuries, and was also published and highly influential throughout Western Europe and the United States.¹⁵⁹ In eighteenth-century England, Lockean imitators produced numerous treatises on child education and child rearing, and poets and novelists further popularized Locke's metaphors of parenting as cultivating a garden, molding wax, and writing on white paper.¹⁶⁰ Rousseau's *Emile*, a treatise on education published in France in 1762, famously disagreed with Locke's approach to education, arguing children should be taught to follow their "natural" instincts, rather than, as Locke urged, taught self-discipline and self-control. At the turn of the nineteenth century, the British Romantic poets, in particular Wordsworth, took

154. *Id.* at 83.

155. *Id.* at 103.

156. *Id.* at 127-33.

157. *Id.* at 162.

158. *Id.* at 104.

159. See FLIEGELMAN, *supra* note 140, at 12-29; STONE, *supra* note 52, at 279-80; Plumb, *supra* note 141, at 65-71, 91.

160. See generally Ezell, *supra* note 141.

Rousseau's side, arguing that Lockean educators, by focusing on rationality, destroyed the natural childhood impulses that provided the adult self's emotional and spiritual foundation. But the debate on how to form children only reinforced the widespread acceptance of the Lockean premise that childhood was a formative stage—or, as Wordsworth famously put it, that “the Child is father of the Man.”¹⁶¹

The rise of the environmental model of child development brought ever-greater attention to the role of parents role in shaping their children. By the mid-Victorian era, the topic of parenting had become so central to English cultural discourse that it was taken up by a number of prominent writers and political theorists, including the great popularizers of laissez-faire philosophy and freedom-of-contract doctrine. Samuel Smiles, for instance, today best remembered for the laissez-faire morality tales of *Self-Help*, also wrote extensively about parents' influence on their children. Smiles began his career by publishing *Physical education, or, the nurture and management of children*, a medical manual instructing parents on how to rear healthy children.¹⁶² He later discussed the moral and intellectual aspects of child development in *Character*.¹⁶³ In a chapter entitled “Home Power,” Smiles asserted that “the most important era of life is that of childhood,” because “[i]t is in childhood that the mind is most open to impression.”¹⁶⁴ It followed, according to Smiles, that each individual's “mind and character” are formed, above all, by that person's childhood home: “‘Home makes the man.’ . . . It is mainly in the home that the heart is opened, the habits are formed, the intellect is awakened, and character moulded for good or evil.”¹⁶⁵

Like Locke, Smiles used metaphors of cultivation and of gardening to emphasize the irreversible nature of child development, and thus the crucial importance of good parenting: “Those impulses to conduct which last the longest and are rooted the deepest, always have their origin near our birth. It is then that the germs of virtues or vices, of feelings or sentiments, are first implanted which determine the character for life.”¹⁶⁶

Even Herbert Spencer, that champion of freedom of contract and laissez-faire, expounded upon the importance of parental influence.¹⁶⁷ In

161. William Wordsworth, *The Rainbow*, in *THE MAJOR WORKS* 246 (Stephen Gill ed., Oxford University Press 2008) (1807).

162. SAMUEL SMILES, *PHYSICAL EDUCATION, OR, THE NURTURE AND MANAGEMENT OF CHILDREN* (Edinburgh, Oliver & Boyd 1838).

163. SAMUEL SMILES, *CHARACTER* (Chicago, Belford, Clarke & Co. 1871).

164. *Id.* at 19.

165. *Id.* at 19.

166. *Id.* at 20. *See also id.* at 22 (“As the character is biased in early life, so it generally remains, gradually assuming its permanent form as manhood is reached.”).

167. *See* Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 *TEX. L. REV.* 645, 666-69 (1985) (characterizing Spencer as an extremist proponent of individualism and laissez-faire). *But see* MARK FRANCIS, *HERBERT SPENCER AND THE INVENTION OF MODERN LIFE* 247-326 (2007) (criticizing as a misunderstanding the widely-held view of Spencer as an apologist for laissez-faire

Education, published in 1861, Spencer argued that parents necessarily play a crucial role in the physical, intellectual, and moral formation of their children.¹⁶⁸ While advocating that parents strive to make their children self-sufficient, Spencer acknowledged that “a system of complete laissez-faire” could not apply to child-rearing, because “every higher creature, and especially man, is dependent on adult aid” for mental as well as physical nourishment.¹⁶⁹ Where a child is left to its own devices, Spencer argued, the result is “the arrest of development”; he cited the famous example of the Wild Boy of Aveyron, who, after growing up alone in the wild, could not be taught even to speak.¹⁷⁰

The Victorian era was “an age in which education, and its improvement, are the subject of more, if not profounder study than at any former period of English history.”¹⁷¹ This observation was made by John Stuart Mill, who, like his fellow Victorians, recognized the private family as playing a crucial role in the education and formation of children. According to Mill, the family itself was a sort of “school.” Thus, in *The Subjection of Women*, he advocated extending equal rights to women on the basis that equality between husband and wife would render the family a “school of sympathy” rather than a “school of despotism.”¹⁷² Mill also wrote extensively on the proper relationship between families and actual schools. In *Principles of Political Economy*, he recommended that the government subsidize elementary education for poor children, but advised against establishing a national curriculum: “It is not enduring that a government should . . . have a complete control over the education of the people,” because “[a] government which can mould the opinions and sentiments of the people from their youth upwards, can do with them whatever it pleases.”¹⁷³ Mill reiterated the point in *On Liberty*, suggesting that government would best foster “individuality of character” by subsidizing education but “leav[ing] to parents to obtain the education where and how they pleased.”¹⁷⁴ The implication was that different parents would mold their children differently, producing a population of heterogeneous adults.¹⁷⁵

Mill’s strongest and most conflicted statement about the role of parents in shaping their children was his *Autobiography*, which detailed the effect

capitalism).

168. HERBERT SPENCER, *EDUCATION: INTELLECTUAL, MORAL, AND PHYSICAL* (London, D. Appleton & Co. 1861).

169. *Id.* at 68.

170. *Id.* at 69.

171. JOHN STUART MILL, *AUTOBIOGRAPHY I* (Jack Stillinger ed., Riverside 1969) (1873).

172. MILL, *SUBJECTION*, *supra* note 7, at 168.

173. MILL, *PRINCIPLES*, *supra* note 13, at 341.

174. MILL, *ON LIBERTY*, *supra* note 30, at 124.

175. *See, e.g., id.* (“A general State education is a mere contrivance for moulding people to be exactly like one another.”).

on Mill of his “unusual and remarkable” education at the hands of his father, the utilitarian philosopher James Mill.¹⁷⁶ Mill senior raised his son on a system of rigorous intellectual training from a very early age, thus carrying into practice his belief in “the formation of all human character by circumstances . . . and the consequent unlimited possibility of improving the moral and intellectual condition of mankind by education.”¹⁷⁷ Mill was critical of his father’s methods, which he felt rendered him initially “a mere reasoning machine,”¹⁷⁸ and thus contributed to a “mental crisis” he suffered in his early adulthood.¹⁷⁹ As he noted drily, thanks to his father’s teachings on religion, “I am . . . one of the very few examples, in this country, of one who has, not thrown off religious belief, but never had it.”¹⁸⁰ But by these very criticisms—and by the very act of writing an autobiography, a newly popular genre premised on the notion that childhood experience was “father of the man”—¹⁸¹ Mill gave credence to the environmentalist premise that his father had set out, in raising him, to prove: that upbringing and education can shape, or at least limit, the adult that a child becomes.

2. Parental Influence and Class Differentiation

From its inception in the late seventeenth century, English adherents of the environmental theory of child development showed a particular interest in the connection between upbringing and social class. Locke asserted that each child’s education and upbringing must necessarily vary by social station, or “Condition[.]”¹⁸² His own advice focused on the education and upbringing that would best prepare a child for a future as a “Gentleman”¹⁸³—a new status, propertied but not aristocratic, that became increasingly prominent with the rise of the middle class.¹⁸⁴ Locke reminded the reader that his advice was “designed for a Gentleman’s Son,” and that “I think a Prince, a Nobleman, and an ordinary Gentleman’s Son, should have different ways of Breeding.”¹⁸⁵ (Although Locke provided some advice on rearing girls,¹⁸⁶ he generally took for

176. MILL, AUTOBIOGRAPHY, *supra* note 171, at 3.

177. *Id.* at 65-66.

178. *Id.* at 66.

179. *Id.* at 80-110 (recounting “a crisis in my mental history” caused by an education that focused on rationality and logic while overlooking the aesthetic and emotional experiences that give meaning to life).

180. *Id.* at 27-28.

181. See generally RICHARD N. COE, WHEN THE GRASS WAS TALLER: AUTOBIOGRAPHY AND THE EXPERIENCE OF CHILDHOOD (1985).

182. LOCKE, EDUCATION, *supra* note 152, at 80.

183. See *id.*

184. See generally DAVID CASTRONOVO, THE ENGLISH GENTLEMAN (1987); ROBIN GILMOUR, THE IDEA OF THE GENTLEMAN IN THE VICTORIAN NOVEL (1981).

185. LOCKE, EDUCATION, *supra* note 152, at 265.

186. See, e.g., *id.* at 129 (praising the tendency to bring up daughters in “Retirement and

granted that the object of educational attention was male.)

Locke advised the parents of “Gentleman’s sons” to be vigilant in preventing their children from acquiring the manners and habits of the lower classes. Locke’s primary recommendation on this front was that parents keep their children from coming into contact with members of those contaminating classes.¹⁸⁷ The best way for a father to keep his child from the “taint” of “the meaner sort of People,”¹⁸⁸ according to Locke, was to educate his sons at home, rather than send them away to school, as was then the custom: for “what Qualities are ordinarily to be got from such a Troop of Play-fellows as Schools usually assemble together from Parents of all kinds, that a Father should so much covet, is hard to divine.”¹⁸⁹ Locke advised, as well, that when at home, children be kept away, as much as possible, from the “ill Examples, which they meet amongst the meaner Servants”:

They are wholly, if possible, to be kept from such Conversation: For the contagion of these ill precedents, both in Civility and Vertue, horribly infects Children, as often as they come within reach of it. They frequently learn from unbred or debauched Servants such Language, untowardly Tricks and Vices, as otherwise they possibly would be ignorant of all their Lives.¹⁹⁰

In addition, parents could protect children from lower-class contagion by keeping them in their own company, thus exposing the children to their “Pattern” and “Example” of well-bred conduct.¹⁹¹

Locke’s advice that parents protect their children from lower-class influence, repeated by eighteenth-century child-rearing experts and educators,¹⁹² was credited with the widespread popularity amongst eighteenth-century English nobility of tutoring children at home rather than sending them to school.¹⁹³ Aristocrats who did send their children away to school began to select elite schools such as Eton and Westminster, rather than the more heterogeneous schools that their children previously attended.¹⁹⁴

Another result of the fear of class contagion was the decreased popularity among England’s upper and middle classes of wet-nurses, the concomitant rise of maternal breast-feeding,¹⁹⁵ and a general move away

Bashfulness,” and recommending that sons likewise be trained to exhibit “Innocence and Modesty”).

187. *See id.* at 124-34.

188. *Id.* at 132.

189. *Id.* at 130.

190. *Id.* at 127.

191. *Id.* at 127, 143.

192. *See Ezell, supra* note 141, at 141-47.

193. *See STONE, supra* note 52, at 254-99.

194. *See id.* at 273.

195. *See generally* CAROL BARASH & SUSAN GREENFIELD, *INVENTING MATERNITY* (1999).

from delegating children to servants' care.¹⁹⁶ Historians of the family note that by giving parents an incentive to spend more time with their children, the Lockean notion of parental influence contributed to a strengthening of parent-child bonds.¹⁹⁷

The notion that class identity derives from childhood experience was taken up in the nineteenth century by a wide spectrum of political activists and reformers who sought to improve the lot of England's lower classes. Socialist industrialist Robert Owen, for example, argued that English society, with its system of harsh poor laws and criminal punishments, was unfairly built on the assumption that each man makes his own character. In fact, Owen claimed, "character is universally formed *for*, and not *by* the individual,"¹⁹⁸ such that criminals and paupers are "manufactur[ed]" by society.¹⁹⁹ Influenced by Locke and Rousseau,²⁰⁰ Owen saw childhood as playing a crucial role in forming adult character:

Children Can be Molded

Children are, without exception, passive and wonderfully contrived compounds; which, by an accurate previous and subsequent attention . . . may be formed collectively to have any human character. And although these compounds, like all the other works of nature, possess endless varieties, yet they partake of that plastic quality, which, by perseverance under judicious management, may be ultimately molded into the very images of rational wishes and desires.²⁰¹

Thus, Owen argued, the British government should direct its efforts to "the training and educating of the lower orders under the direction and at the expense of the country," which would promote "the well-being of the great mass of the people and of the empire" by eliminating poverty and crime alike:

I now therefore, in the name of the millions of the neglected poor and ignorant, whose habits and sentiments have been hitherto formed to render them wretched, call upon the British Government and the British Nation to unite their efforts to arrange a system to train and instruct those who, for any good or useful purpose, are now untrained and uninstructed; and to arrest by a clear, easy, and practical system of prevention, the ignorance and consequent poverty, vice, and misery, which are rapidly increasing throughout the empire; for,

196. See STONE, *supra* note 52, at 269-73.

197. See *id.*

198. ROBERT OWEN, A NEW VIEW OF SOCIETY AND OTHER WRITINGS 41 (Gregory Claeys ed., Penguin Classics 1991) (1813).

199. *Id.*

200. See Sheldon H. White & Stephen L. Buka, *Early Education: Programs, Traditions, and Policies*, 14 REV. OF RES. IN EDUC. 43, 44 (1987).

201. OWEN, *supra* note 198 at 41.

*“Train up a child in the way he should go, and when he is old he will not depart from it.”*²⁰²

Acting on these theories, Owen in 1816 created a pre-school for children of laborers working at the mill he managed—one of the first English pre-schools for working-class children—and publicized his efforts to encourage other industrialists to do the same.²⁰³

By the mid-nineteenth century, the notion that the lower classes could be improved by improving the upbringing and education of lower-class children often took on a more negative cast, as Victorian reformers worked to counteract what they framed as the contaminating influence of poor parents on their children.²⁰⁴ Educational reformers such as Sir James Kay-Shuttleworth saw education as a mode of “parental substitution” by which teachers of the poor “occupie[d], as it were, the father’s place,” and worked, often in vain, to counteract “the evil example of parent and neighbors and . . . the corrupting influence of companions with whom the children associate in the street and court in which they live.”²⁰⁵ At the same time, private reform initiatives sought to improve the lot of the poor by improving the parenting and housekeeping skills of poor mothers. Private charities sent female missionaries and nurses to visit lower-class homes to instruct women in caring for the moral and physical welfare of their husbands and children. Other charitable efforts included organizing “mother’s meetings” and establishing groups including “Mother’s Union,” by which upper-class mothers sought to “elevate the poor . . . out of their poor estate” by instructing their lower-class counterparts in mothering and child-rearing.²⁰⁶ These reform efforts exemplified the belief that the family was the “cradle of character.”²⁰⁷

At times, both private charities and public institutions even separated poor children from their parents in the belief that this would best ensure healthy development. Beginning in the 1850s, state-run “industrial schools” were established, where children deemed at risk of becoming criminal offenders were sent, on the theory they would benefit by being removed from their parents’ influence.²⁰⁸ In the 1870s, philanthropist and evangelist Thomas Barnardo established “orphanages” premised on the same idea.²⁰⁹ Barnardo persuaded parents to relinquish their children to his care in exchange for a promise to provide the children with an upbringing

202. *Id.* (emphasis added).

203. White & Buka, *supra* note 200, at 44-45.

204. See BEHLMER, *supra* note 75, at 31-73.

205. Johnson, *supra* note 150, at 111.

206. BEHLMER, *supra* note 75, at 62.

207. *Id.* at 74-75.

208. *Id.* at 234-37; see also HUGH CUNNINGHAM, *THE CHILDREN OF THE POOR* 133-63 (1991).

209. See CUNNINGHAM, *supra* note 208, at 135-42. See generally WAGNER, *supra* note 98.

and education better than the parents could afford.²¹⁰ In tracts describing the children he gathered from the London slums as “raw material,” and characterizing pauper parents as “parents who are no parents,”²¹¹ Barnardo argued that it was imperative to remove poor children from the poverty and crime surrounding them, and to place them in homes where they would learn the values and habits that would render them happy, productive adults.²¹²

In the late nineteenth century, child formation increasingly became perceived as biological and genetic, largely as a result of the popularization of the theory of heredity by the 1859 publication of Darwin’s *Origin of Species*.²¹³ In 1874, Francis Galton introduced the phrase “Nature vs. Nurture” to describe the relative influences of heredity and environment in forming the adult self; Galton believed heredity predominated.²¹⁴ Heredity’s role, though, only underscored the importance of parental influence: the question was no longer *whether* parents influenced children, but how. While some took the fact of heredity as reason to advocate eugenics rather than schooling to address poverty and crime, a child’s early upbringing and environment continued to be understood as playing a significant role in shaping the adult self, and some reformers saw genetics as more reason to improve the upbringing and education of poor children, so as to counter a parental influence that was the more powerful for being two-fold.²¹⁵

B. Adoption Case Law

1. *The Environmental Model of Child Development and the Application of the Best-Interests-of-the-Child Standard*

In assessing children’s “best interests” in custody disputes between parents and third parties, Victorian judges took for granted the basic premises of the environmental model. No judge explicitly articulated adherence to any particular theory of child development. But in struggling to assess which custody award would best serve a child’s interests, judges faced difficult questions about what makes someone a child’s parent, and why and how parentage matters. And in answering these questions, judges routinely assumed that children are molded into their adult selves by their

210. WAGNER, *supra* note 98, at 217-18. For a discussion of custody disputes arising from these arrangements, see *supra* text accompanying notes 97-99, 128-133.

211. WAGNER, *supra* note 98, at 141.

212. *Id.*; see also BEHLMER, *supra* note 75, at 289-92.

213. See John C. Waller, *Parents and Children: Ideas of Heredity in the 19th Century*, 27 ENDEAVOUR 51 (2003).

214. See Andrew Berry, *The Writing on the Slate*, 422 NATURE 814 (2003).

215. See, e.g., BEHLMER, *supra* note 75, at 240, 291 (quoting Thomas Barnardo that “If the children of the slums can be removed from their surroundings early enough, and can be kept sufficiently long under training, heredity counts for little, and environment counts for everything”).

upbringing and early experiences.

English judges recognized the formative role of child rearing and education as early as the early 1700s, in cases in which the Court of Chancery assessed whether testamentary guardians appointed under the 1660 Tenures Abolition Act were properly caring for children after a father's death.²¹⁶ In those cases, the Court took for granted that children were determined by birth to a particular "rank and station," and, "by way of analogy to the care and prudence of the natural parent,"²¹⁷ equated the "benefit of the infant" with ensuring that children were brought up in accordance with that rank and station.²¹⁸ Thus, in a 1722 case, the Lord Chancellor questioned a guardian's decision to send a "future peer of the realm" to a public school, wondering if this "may be thought likely to instil into him notions of slavery."²¹⁹ The Court also oversaw guardians' marriage arrangements for their wards, preventing children from being married below their rank, and reviewed marriage settlements—the financial arrangement made upon a child's marriage—to ensure that orphaned children, upon reaching adulthood, would be able to live "in a manner suitable to that rank to which their birth entitles them."²²⁰

But judicial discussions of why and how parentage mattered to a child—and in particular, of the effect on a child of upbringing and education—underwent an important shift in the late eighteenth and early nineteenth centuries, in custody disputes where biological parents sought to regain their children from adoptive parents, that is, third parties whom the parents initially had allowed to bring up and educate the children. In cases involving testamentary guardians, judges had assumed that a child's social identity was fixed for life by birth into a particular "rank and station." When faced with disputes between adoptive and biological parents, however, judges began to view children as having a more plastic quality, and to assess children's interests accordingly. Upbringing and education by an adoptive parent began to be seen as capable of transforming a child's "condition" or "status" altogether,²²¹ such that it might be more appropriate for a child to remain with the adoptive parent than to return to a differently situated birth parent.

The crucial factor in these cases was the extent to which the adoptive parent had altered the child's course of development by the time the

216. See *supra* text accompanying note 77.

217. *Smith v. Smith*, (1745) 26 Eng. Rep. 977, 978 (Ch.).

218. *Morgan v. Dillon*, (1724) 88 Eng. Rep. 361, 365 (Ch.). In testamentary guardianship cases, the class-infused "benefit of the infant" standard was often phrased in the negative—courts would prevent guardians from acting "to the prejudice of the infant." *Beaufort v. Berty*, (1721) 24 Eng. Rep. 579, 580 (Ch.); see also *Smith*, 26 Eng. Rep. at 978.

219. *Eyre v. Shaftsbury*, (1722) 24 Eng. Rep. 659, 661 (Ch.); see also *Beaufort*, 24 Eng. Rep. at 579.

220. *Smith*, 26 Eng. Rep. at 978.

221. *Hill v. Gomme*, (1839) 48 Eng. Rep. 1050, 1055 (Ch.).

custody dispute made its way into court.²²² Thus, as a preliminary matter, a child must have spent a considerable period of time with the adoptive parent to even trigger the “best interests” assessment. Where a legal and an adoptive father had executed a contract transferring parental rights and duties, and the father changed his mind “at a very early period”²²³ in the arrangement, the child was simply returned to the original father, on the basis that the adoptive parent had no enforceable legal right to the child. For instance, in a custody dispute from 1853, an uncle who adopted his five-year-old niece only six months earlier was ordered to return her to her father, adoption contract notwithstanding, without any discussion of her best interests.²²⁴

The Court of Chancery elaborated on the importance of the duration of an adoptive arrangement in *Hill v. Gomme*, discussed above,²²⁵ in which the Court refused to allow the plaintiff to inherit from a man who had contracted to adopt the plaintiff years earlier, but had changed his mind not long thereafter.²²⁶ At the crux of the Court’s decision was its finding that despite the adoption contract, “the Plaintiff’s condition was in no respect changed—his *status* remained as it was,”²²⁷ because “if taken from home at all, it was for a very short time, and no more altered his condition in life, than merely sending him out as a nurse child would have done.”²²⁸ Hypothesizing that the adoption arrangement ended as it did because the father “may have refused to part with his son, or having parted with him, may at a very early period have insisted on taking him back again,” the Court reasoned that if the father could reclaim his child, the adoptive parent could not be held to his part of the adoptive bargain.²²⁹ It suggested that the outcome would have been different had the adoptive parent “taken the boy home and brought him up” such as to “alter[] the condition in life of the boy,” noting that in that case, “I incline to think that this Court would not have permitted the father to take him back to his prejudice.”²³⁰

In the more typical custody dispute, the child had already spent a number of years being raised by the adoptive parent by the time litigation arose, thus triggering the “best interests” analysis. Courts in such cases

222. See, e.g., *Lyons v. Blenkin*, (1821) 17 Eng. Rep. 842, 844-45 (Ch.) (assessing “the course of education” that children “have hitherto had” with their adoptive aunt, and how a return to the father would “alter” this course).

223. *Hill*, 48 Eng. Rep. at 1055.

224. *In re Boreham*, (1853) 22 L.J.Q.B. 116.

225. See *supra* text accompanying notes 102-110.

226. *Hill*, 48 Eng. Rep. at 1050.

227. *Id.* at 1055.

228. *Id.* Children at the time were sometimes sent out to be nursed by women known as wet-nurses, see STONE, *supra* note 52, at 272-73, an arrangement Carol Sanger notes was not seen as severing the mother-child tie, see Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 395 (1996).

229. *Hill*, 48 Eng. Rep. at 1050.

230. *Id.*

equated protecting the child's interests with finding the custodial outcome that would provide the child with the greatest consistency. Central to this assessment was the notion of the child's "expectations," a term that appeared frequently in eighteenth- and nineteenth-century custody disputes.²³¹ An often-cited rule was that "the Court will take care that [a] child shall be properly educated for his expectations."²³² The term referred, literally, to a child's expected inheritance. But it also referred to the future identity that a child had been led to "expect" from being brought up and educated by an adoptive parent. Adoptive parents could alter children's "expectations" by bestowing an inheritance or other material benefits. But they could also alter them by instilling a set of "habits," "connections," and "views in life" that were "very different from what they would have been" otherwise.²³³ Where a child's expectations had been so altered that a return to the biological parent would constitute "a useless and vexatious break" in the child's development, courts would award custody to the adoptive parent instead.²³⁴

2. *Vectors of Parental Influence*

Courts assessing children's "interests" in light of the "expectations" created by the adoptive experience often focused on socioeconomic differences between adoptive and biological parents.²³⁵ Typically, the substitute parent was both wealthier and of a higher social station than the biological parent. Courts faced with this scenario would insist that the parents' relative wealth and social status were not proper considerations in awarding custody, for both policy and normative reasons. As a policy matter, courts were wary of creating a legal regime where a parent could lose custodial rights to any stranger with a superior fortune: "[I]t cannot be merely because the parent is poor and the person who seeks to have possession against the child is rich, that . . . the child ought to be taken away from its parent merely because its pecuniary position will be thereby

231. See, e.g., *Talbot v. Shrewsbury*, (1840) 41 Eng. Rep. 259, 264-65 (Ch.) ("Is it not according to the usual practice of the world that the expectant heir should be brought up with the person from whom he expects so much; that, as far as possible, he should be treated as the son of that person, and should look up to that person as his father?"); *Rex v. Isley*, (1836) 111 Eng. Rep. 1233 (Q.B.) (arguing that grandparents were "improper persons to have the custody of the[ir orphaned grand]children, moving in a sphere of life below that to which the children's expectations authorized them to aspire"); *Wellesley v. Beaufort*, (1827) 18 Eng. Rep. 236, 239 (Ch.) (arguing father was "likely to prevent [his children] from being brought up in a manner suited to their expectations in life").

232. *Powel v. Cleaver*, (1789) 29 Eng. Rep. 274, 279 (Ch.).

233. *Lyons v. Blenkin*, (1821) 17 Eng. Rep. 842, 845, 847(Ch.).

234. *Queen v. Gyngall*, (1893) 2 Q.B. 232; see also *Lyons*, 17 Eng. Rep. at 847 (finding a change of custody would effect a "break" in upbringing and education to which the children "have been habituated").

235. See, e.g., *Gyngall*, 2 Q.B. at 232; *Queen v. Nash*, (1883) 10 Q.B. 454; *Hill v. Gomme*, (1839) 48 Eng. Rep. 1050 (Ch.); *Lyons*, 17 Eng. Rep. at 842; *Fagnani v. Selwyn*, (1817) 37 Eng. Rep. 852 (Ch.); *Powel*, 29 Eng. Rep. at 274.

bettered.”²³⁶ Normatively, courts were loath to indicate that wealth was material to a child’s wellbeing: “The welfare of the child is not to be measured by money only, nor by physical comfort only. The word ‘welfare’ must be taken in its widest sense.”²³⁷

But custody was often awarded to the wealthier adoptive parent nonetheless, on the basis that while parental wealth was not itself a material ingredient of a child’s happiness, once a child had been brought up and educated in accordance with “expectations” of entering a certain “station in life,” it would harm the child’s “welfare” to interrupt that course of development by a return to a parent who inhabited a lower-class milieu.²³⁸ Thus, in *Lyons v. Blenkin*—the first case to explicitly apply the best interests standard to an adoption dispute—the Court framed the question before it as whether a father who had permitted his daughters to be raised for twelve years in their aunt’s more lavish household could reclaim custody when this meant removing them from the upper-class milieu to which they had become accustomed.²³⁹ The Court held he could not.²⁴⁰ While noting that children were not necessarily better off in a wealthier environment, the Court found that it would harm them to return them to their less-wealthy father once their upbringing and education “under the roof of their aunt” had “led them to form” an “expectation as to future station in life”²⁴¹ that “cannot be consistent” with the upbringing and education that their father could afford to provide.²⁴²

Judges conducted a similar analysis when faced with custody disputes between parents and third parties of different religions. Most such cases involved disputes between Catholics and Protestants. Prior to the nineteenth century, when English law discriminated against Catholics, including by prohibiting parents from appointing Catholic guardians,²⁴³

236. *Gyngall*, 2 Q.B. at 232; see also, e.g., *Lyons*, 17 Eng. Rep. at 845 (“Nobody can doubt that if I give a provision to your child, it does not give me or any one else a right to controul your care of her; not at all.”); *Powel*, 29 Eng. Rep. at 279 (“[I]t is no where laid down that the guardianship of a child can be wantonly disposed of by a third person.”); *Ex parte Hopkins*, (1732) 24 Eng. Rep. 1009 (Ch.) (“[I]t cannot be conceived that, because another thinks fit to give a legacy, though never so great, to my daughters, therefore I am by that means deprived of a right which naturally belongs to me, that of being their guardian.”)

237. *In re McGrath*, (1892) 1 Ch. 143, 148; see also, e.g., *Talbot v. Shrewsbury*, (1840) 41 Eng. Rep. 259, 265 (Ch.) (“I wish to guard . . . against its being supposed that the religious faith in which this child is to be brought up is to be a matter of barter in this Court.”); *Shelley v. Westbrooke*, (1817) 37 Eng. Rep. 850, 851-52 (Ch.) (holding that while “the pecuniary interests of the children may be affected” by denying custody to the father, “to such interests I cannot sacrifice what I deem to be interests of greater value and higher importance”).

238. This was the implicit rationale of *Powel*, 29 Eng. Rep. 274, and the explicit rationale of such cases as *Lyons*, 17 Eng. Rep. at 845, and *Gyngall*, 2 Q.B. at 232.

239. 17 Eng. Rep. 842, 845, 847.

240. *Id.* at 847.

241. *Id.* at 845.

242. *Id.* at 847.

243. Tenures Abolition Act, 1660, 12 Car. 2, c. 24, § 8 (Eng.) (prohibiting fathers from appointing guardianship to “any popish recusants,” i.e., Catholics).

judges tended to award custody to Protestant parents and guardians over Catholic ones.²⁴⁴ By the early nineteenth century, disabilities against Catholics had been largely removed, and judges took a neutral approach toward children's religion.²⁴⁵ Parents and guardians were to be prevented from raising a child with no religion,²⁴⁶ on the theory that "it would be the most fatal thing in the world for a child not to have a religious education."²⁴⁷ And there was some judicial reluctance to extend religious neutrality to custody disputes between Christians and either Muslims or Hindus.²⁴⁸ But, in custody disputes between Catholics and Protestants, or between members of different Protestant sects, courts refused to express any religious preference:

In these cases, the Court only considers what is most for the benefit of the infant. In the matter of religion, the Court holds that the Roman Catholic faith and the Protestant faith are, to this extent, equally beneficial to the child: That it considers the hope of eternal salvation does not depend upon the circumstance whether she entertains one faith or another, but upon the manner in which she fulfils her duties upon earth.²⁴⁹

These cases were complicated by the default rule that children were to be raised in the religion of their father, whether living or dead,²⁵⁰ or, in the case of an illegitimate child, of their mother,²⁵¹ and by the corresponding assumption that children should share the religious beliefs of those who raised them. But the parents' rights as to their children's religion were

244. See, e.g., *Blake v. Leigh*, (1756) 27 Eng. Rep. 207, 207 (Ch.) (awarding custody to Protestant grandfather over Catholic parent, and ordering "no person, not professing the Protestant religion, to have access to" the child).

245. See *Talbot v. Shrewsbury*, (1840) 41 Eng. Rep. 259, 259 (Ch.) (rejecting attempt to appeal to anti-Catholic bias, and noting that while "in former times, . . . vain attempt was made to influence the religion of families by penal statutes," "the law is now changed, and . . . it is now lawful to educate a child in the Roman Catholic faith"); see also *In re Clarke*, (1882) 21 Ch. 817 (describing efforts of deciding judge, in case involving child raised thus far as a Catholic, "to divest my mind of the bias which it naturally has in favour of the bringing up of an English boy, who is to succeed to an English estate, inherited by him from his father's Protestant family, in the Protestant faith"); *Lyons*, 17 Eng. Rep. at 846 ("After hearing so much about religious principles, it is proper for me to say that I cannot act upon those principles, unless they be such as are contrary to the law of the land.").

246. Thus, parents could lose or be denied custody on the basis they intended to raise children as atheists. See, e.g., *In re Besant*, (1879) 11 Ch.D. 508; *Shelley v. Westbrook*, (1817) 37 Eng. Rep. 850 (Ch.).

247. *Talbot*, 41 Eng. Rep. at 264.

248. Compare *Skinner v. Orde*, (1871) 14 Moore's Indian Appeals 309 (removing child from custody of Muslim mother) with *In re Ullee* (1885) 53 L.T. 711 (refusing to remove children from custody of Muslim guardians and return them to Christian mother) and *Queen v. Nesbitt*, in *ERSKINE PERRY, CASES ILLUSTRATIVE OF ORIENTAL LIFE AND THE APPLICATION OF ENGLISH LAW TO INDIA* 103 (London, S. Sweet 1853) (refusing to remove Christian boy from Hindu father) (discussed in *Queen v. Clarke*, (1857) 119 Eng. Rep. 1217, 1221-22 (Q.B.)); see also *In re Nevin*, (1891) 2 Ch. 299 (querying rhetorically, in a custody dispute between Catholic and Protestant guardians, whether judicial religious neutrality would extend to cases involving Muslims).

249. *Austin v. Austin*, (1865) 55 Eng. Rep. 634, 637 (Ch.); see also *Nevin*, 2 Ch. at 299.

250. See, e.g., *Clarke*, 119 Eng. Rep. 1217; *In re McGrath*, (1892) 2 Ch. 496.

251. See, e.g., *Queen v. Barnardo [Jones's Case]*, (1890) 1 Q.B. 194.

outweighed by the children's best interests. The best interests assessment was not triggered where a parent had merely placed a child in a religious school and then changed her mind.²⁵² But where a child had been raised by an individual parent-figure, courts would assess the child's best interests before ordering a return to a legal parent or guardian of a different religion.²⁵³

In cases of parental religious differences as in cases of parental socioeconomic differences, courts deemed it inimical to children's interests to alter their development once it had progressed too far.²⁵⁴ Courts worried that disruption of a child's religious upbringing could leave a child with no religion at all, a state that courts considered dangerous to a child's future psychological as well as spiritual well-being.

The crucial question, then, was whether it was "too late" for a child's religious education to change course. Children under seven were presumed too young to have been formed in a particular religious mold, and were thus returned to their legal parents or guardians despite any change in religious training this would entail.²⁵⁵ Children closer to adulthood, by contrast—for instance, a child fifteen years old—were more likely to be considered sufficiently developed to articulate religious beliefs and preferences to the presiding judge, who would consider them in awarding custody.²⁵⁶ The problematic cases concerned children in the borderline range of eight to twelve years of age.²⁵⁷ In these cases, judges would often interview the children in chambers, asking questions about their religious beliefs to assess the extent to which they had been formed into one or another religion.²⁵⁸

So frequent were judicial interviews of children in custody disputes between parties of different religions that, in the 1871 case of *Hawksworth v. Hawksworth*, the Court of Appeal in Chancery, affirming the lower court's refusal to interview an eight-and-a-half-year-old girl, expressed concern that this sort of analysis could even encourage kidnapping by religious proselytizers:

If . . . we were to reverse the decision [of the lower court] in this case, we must reverse it on the ground that the child herself would be

252. See, e.g., *Clarke*, 119 Eng. Rep. at 1217.

253. See, e.g., *Queen v. Gynghall*, (1893) 2 Q.B. 232; *Nevin*, 2 Ch. at 299; *In re Andrews*, (1873) 8 Q.B. 153 (Ch.); *Hill v. Hill*, (1862) 31 L.J. 505 (Ch.); *Stourton v. Stourton*, (1857) 44 Eng. Rep. 583 (Ch.).

254. See, e.g., *Nevin*, 2 Ch. at 299; *Andrews*, 8 Q.B. at 153; *Hill*, 31 L.J. at 505; *Stourton*, 44 Eng. Rep. at 583.

255. See, e.g., *Austin v. Austin*, (1865) 55 Eng. Rep. 634.

256. See, e.g., *Gynghall*, 2 Q.B. 232.

257. See, e.g., *Queen v. Barnardo [Jones's Case]*, (1891) 1 Q.B. 194; *Hawksworth v. Hawksworth*, (1871) 6 Ch. App. 539; *Hill*, 31 L.J. at 505; *Stourton*, 44 Eng. Rep. at 583.

258. See, e.g., *Hill*, 31 L.J. at 505; *Stourton*, 44 Eng. Rep. at 586. *But see Hawksworth*, 6 Ch. App. at 539 (affirming lower court's refusal to interview eight-year-old child to assess the extent to which her religious beliefs had already been formed by the caretaker who had raised her).

prejudiced from her having formed strong religious opinions which ought not to be disturbed. Now if we are going to regard the opinions of a child at that tender age, it appears to me it must be wholly immaterial how the child has acquired them: for instance, if a child had been stolen from its parents for the sake of proselytism, and had been brought up in a particular form of religion, I presume that, after a certain age, even in such a case, the Court would not compel the child to be educated in a different religion. . . . I fear that we should be doing much mischief if we were to hold out encouragement to persons to think that if they get hold of a child of tender years they may, by educating it for a longer or shorter period of time in their own religion, secure that the child shall be educated in that religion instead of the religion of the father.²⁵⁹

Despite fears of kidnapping—and the questions raised by the kidnapping thought-experiment about where to draw the line in allowing a child’s experienced upbringing to trump parental rights—English courts would continue, in the decades that followed, to award custody, as well as to make orders concerning children’s religious education, by assessing the extent to which it was “too late” for a child’s religious training to change course.

By the mid-nineteenth century, the judicial model of child development employed in adoption disputes was increasingly psychological. Discussions of children’s “expectations” were often replaced by Lockean imagery of parenting as a process that “plant[s] in the mind of the child” the beliefs and memories that become the foundation of the child’s adult self.²⁶⁰ In determining whether it was “too late” for a child’s development to change course, courts began to speak of the child’s earlier upbringing in terms of the “impressions” that a parent or parent-figure had made on the child’s mind.²⁶¹ Courts framed the central question as whether the initial “impressions” made on the child’s mind could still be “effaced” without incurring the “dangerous” situation of a child whose early impressions were “root[ed] up” too late for new ones to take hold.²⁶² When judges felt the impressions were sufficiently “deep,” they awarded custody to the parent who had made them, since returning the child to the legal parent “might end in unsettling his existing impressions and substituting no fixed impressions in their place.”²⁶³ The worst-case scenario that courts in these cases worked to avoid was that children severed from their primal recollections of parental nurture might grow up to become pathological,

259. *Hawksworth*, 6 Ch. App. at 539.

260. *Hill*, 31 L.J. at 505; *see also Stourton*, 44 Eng. Rep. at 586.

261. *Hill*, 31 L.J. at 512.

262. *Stourton*, 44 Eng. Rep. at 586, 588.

263. *Id.*

alienated adults.²⁶⁴

The culmination of this line of cases was the 1893 case of *Queen v. Gyngall*,²⁶⁵ which, drawing on the language of *Powel, Lyons*, and their progeny,²⁶⁶ articulated a version of the “interests of the child” standard that would be cited throughout the twentieth century by both English courts²⁶⁷ and American ones.²⁶⁸ As it ruled in favor of an adoptive mother over a biological mother, the *Gyngall* court implicitly defined parentage as the product, not of biology or law, but of a child’s course of development. Setting forth an early variant of the “psychological parent” rule often employed by modern American courts,²⁶⁹ the *Gyngall* court held that a judge determining custody should take into account the “ties of affection” that a child had formed, even if this meant denying custody to the original legal parent.²⁷⁰ The *Gyngall* court stated that while in general, “the best place for a child is with its parent,” this was not necessarily so once a child had already been raised by an adoptive parent.

Like its predecessors, the *Gyngall* court was attentive to differences of religion and wealth between the legal and the adoptive parent, even as it insisted that its decision was not based on any assessment of which custodian would provide the child with a better life:

[I]t cannot be merely because the parent is poor and the person who seeks to have it is rich, that, without regard to any other consideration, to the natural rights and feelings of the parent, or the feelings and views that have been introduced into the heart and mind of the child, the child ought to be taken away from its parent merely because its pecuniary position will thereby be bettered.

The court in fact exaggerated the socio-economic differences between the adoptive and biological mothers; while the former was merely a member of the respectable middle class, and the latter was a dressmaker, the court dramatized a story of rich versus poor by emphasizing the biological mother's former and more impoverished life as a lady's maid. The court observed as well that while the adoptive mother had raised the girl as a Protestant, the biological mother who sought her return was a Catholic.²⁷¹

264. See, e.g., *Hill*, 31 L.J. at 509 (noting that the children's deceased father had been unsettled and lacking in all conviction as a result of being severed at an early age from his "earliest impressions" of his mother, and refusing to inflict a similar fate on his children).

265. *Queen v. Gyngall*, (1893) 2 Q.B. 232.

266. *Id.* at 232.

267. See, e.g., *In re A*, (2000) 2001 Fam. 147 (Eng.) (one of dozens of recent English cases that continue to cite *Gyngall*).

268. See, e.g., *Johnita M.D. v. David D.D.*, 740 N.Y.S.2d 811 (N.Y. Sup. Ct. 2002) (citing *Gyngall*); *Finlay v. Finlay*, 240 N.Y. 429 (1925) (Cardozo, J.) (citing *Gyngall*).

269. See, e.g., *In re Wesley R.*, 307 A.D.2d 360, 360; 763 N.Y.S.2d 76, 76 (App. Div. 2003).

270. *Gyngall*, 2 Q.B. at 232 (quoting *In re McGrath*, (1892) 1 Ch. 143, 148).

271. *Gyngall*, 2 Q.B. at 232-40.

In deciding that the girl, now 15 years old, would be better off if left with the woman who had taken her in and educated her than if returned to her biological mother, the *Gyngall* court relied on the child's written narrative of her "recollections as to the history of her past life," which recounted her early unsettled existence with her transient and impoverished mother, and her subsequent flourishing under her adoptive parent. The court found that it would be counter to the child's interests to force her to return to "the life which the mother will probably be in future be compelled to lead."²⁷² Wealth and religion were not the basis of the court's decision, but they were constitutive elements of the differences in "atmosphere" that, in the court's mind, would render it a "serious dislocation of an existing tie" to remove the child from her wealthier, and Protestant, adoptive caretaker.

IV. TENSIONS BETWEEN FREEDOM-OF-CONTRACT DOCTRINE AND THE ENVIRONMENTAL MODEL OF CHILD DEVELOPMENT

A. Theorists: The Rise of Contract and the Fall of the Parent's Empire

The limited nature of "the empire of the parent"²⁷³ was a crucial aspect of English freedom-of-contract doctrine. Just as today freedom-of-contract theorists label contrary approaches "paternalistic,"²⁷⁴ early contract theorists characterized regimes that limited contractual freedom as imposing over rational adults a "parental" power to which only irrational children properly were subject. Thus, Locke framed *Two Treatises*, in which he formulated his models of social contract and individual liberty, in opposition to the patriarchalist views of Sir Robert Filmer, who in *Patriarcha* argued that citizens naturally owed their hereditary sovereign the same duty of obedience that children owe their fathers.²⁷⁵

According to Locke, the proper basis of political power was not, as Filmer would have it, an unchosen paternity, but instead freely given contractual consent. Characterizing Filmer as arguing that "Men are born in subjection to their Parents, and therefore cannot be free,"²⁷⁶ Locke countered that men are naturally free, and explained how this freedom could be reconciled with childhood subjection. While a child was indeed initially subject to his parents, when the child reached adulthood, the "Father's Empire" came to an end, and the child was liberated into the realm of "equality" and "freedom" applicable to all rational adults:

272. *Id.*

273. MAINE, *supra* note 10, at 120.

274. See Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983).

275. SIR ROBERT FILMER, *PATRIARCHA* (Peter Laslett ed., Blackwell 1949) (1680). For an account of the debate between Locke and Filmer, see generally GORDON SCHOCHET, *PATRIARCHALISM IN POLITICAL THOUGHT* (1975).

276. LOCKE, *TWO TREATISES*, *supra* note 15, at 144.

Children, I confess are not born in this full state of Equality, though they are born to it. Their Parents have a sort of Rule and Jurisdiction over them when they come into the World, and for some time after, but 'tis but a temporary one. The Bonds of this Subjection are like the Swadling Cloths they are wrapt up in, and supported by, in the weakness of their Infancy. Age and Reason as they grow up, loosen them till at length they drop quite off, and leave a Man at his own free Disposal.²⁷⁷

Crucial to Locke's argument that adults are "at their own Free Disposal," then, is his premise that the parental power "is but a temporary one."

If Locke's model of individual freedom in *Two Treatises* characterizes parental control as "temporary," his model of child development in *Some Thoughts Concerning Education* indicates that while parental *power* ends when a child reaches the legal age of adulthood, parental *influence* continues throughout the child's adult life.²⁷⁸ However, Locke touches only indirectly on the connections between his model of adult freedom and his model of child development. In *Two Treatises*, he argues that because children will eventually become emancipated, parental power does not extend to actions that would permanently deprive the child of his future liberty—for instance, ending his life.²⁷⁹ And in *Some Thoughts Concerning Education*, he recommends that parents diminish authoritarian discipline as their children mature, with the goal of raising children who will become independent, self-disciplining, and rational adults.²⁸⁰ But because *Two Treatises* focuses primarily on the proper form of government, and *Some Thoughts Concerning Education* on education and child-rearing, the discussion of childhood in the former is as brief, and undeveloped, as the discussion of adulthood in the latter. By segregating his discussion of the government of men and that of children into two separate works, Locke avoids exploring the extent to which his model of individual liberty in *Two Treatises* is contradicted by his argument, in *Some Thoughts Concerning Education*, that by the time a child reaches the age of adulthood, he has been irreversibly "moulded and fashioned"²⁸¹ by his parents.

By the Victorian age, the two paradigms set forth by Locke—the paradigm of individual liberty founded on contractual consent, and the environmental paradigm of child development—were both highly influential. They were also more than ever at odds with one another. Over the course of the eighteenth and nineteenth centuries, the Lockean association of individual freedom and freedom of contract evolved into the

277. *Id.* at 305.

278. See *supra* text accompanying notes 151-159, 182-192.

279. LOCKE, TWO TREATISES, *supra* note 15, at 311.

280. LOCKE, EDUCATION, *supra* note 152, at 110.

281. *Id.* at 265.

claim that in a laissez-faire regime offering contractual freedom, each individual enjoyed a radical freedom of choice, even as to social position.²⁸² At the same time, theorists of child development increasingly understood childhood experience, and parental influence on that experience, as variables that shaped all aspects of adult identity.²⁸³

This conflict was perhaps most visible in the Victorian work that most strenuously denied its existence: Henry Maine's *Ancient Law*, which claimed that "birth" no longer mattered, having been replaced by contractual freedom.²⁸⁴ According to the historical story told by *Ancient Law*, parents' influence on their adult children was a relic of the barbaric past that the rise of contract had supposedly replaced. Thus, in a section titled "Disintegration of the Family," Maine linked the rise of contract with a decline in importance of the family:

The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The individual is steadily substituted for the Family, as the unit of which civil laws take account Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seemed to have steadily moved towards a phase or social order in which all these relations arise from the free agreement of individuals.²⁸⁵

Central to Maine's argument is an opposition between the "despotic" power of parents in primitive society and the modern age of contractual freedom. Maine dwells at length on early Roman society, in which each individual was in "bondage" for life to the all-powerful father who ruled his family under the primitive paternal power of the "Patria Potestas." As Victorian legal historians liked to observe, the "Patria Potestas" included even the right to kill one's own children.²⁸⁶ *Ancient Law* argued that as society "progressed" toward a more "advanced" state of "civilization," this "despot enthroned by each hearthstone" was supplanted by contract.²⁸⁷

In writing about his own era, Maine framed what remained of parental power over children as a temporary exception to contractual freedom. No longer could the parent kill his child; instead, he was tasked with safely

282. See *supra* text accompanying notes 14-51.

283. See *supra* text accompanying notes 140-213.

284. MAINE, *supra* note 10.

285. *Id.* at 140.

286. *Id.* at 114.

287. *Id.* at 162.

shepherding the child to adulthood. At that age, the child was liberated from the parent's empire altogether.

What is striking about *Ancient Law* is the extent to which the supposedly all-but-obsolete parental power is central to Maine's portrait of contractual freedom. According to Maine, children are subject to parental power precisely because they lack the capacity for rational choice that is the prerequisite of contract formation: "[T]hey do not possess the faculty of forming a judgment in their own interests; in other words, . . . they are wanting in the first essential of an engagement by Contract."²⁸⁸ Subjection to parental power is thus the inverse of contract; the contours of one define the other.

Maine tried to diminish the continued importance of parental power by confining it to an exceptional, temporary, and thus irrelevant space of childhood. He described the modern experience of childhood only briefly and then simply as that time during which children lack "the faculty of forming a judgment in their own interests."²⁸⁹ Maine wrote without any attention to how children develop into their adult selves, as though the arbitrary legal age of adulthood neatly divided irrational children subject to parental control from rational adults free from parental bondage.

Ancient Law's extensive treatment of parents' tyrannical power in ancient times seems a displacement of Maine's concerns about a Victorian parental power that was not as obsolete as he insisted. Maine even modeled his legal-historical story on the metaphor of child development, telling how human society developed from its "infancy" by throwing off the "swaddling clothes" of the *Patria Potestas* to emerge into an adult state of freedom.²⁹⁰ Yet Maine failed even to mention the prevailing theory about how children actually develop. Given the larger context in which he wrote, and his extensive attention to parental power, Maine's silence on child development indicates the fault-lines of his argument. For Maine's claim that the rise of contract replaced the determining fact of "birth" with a radical freedom of choice was at odds with the widely espoused notion that parents influence the adults that their children become.

B. Adoption Case Law: Parental Influence and the Limits of Free Choice

Unlike Victorian contract theorists, judges faced with custody disputes did not have the luxury of setting aside childhood as an exceptional realm without implications for adult freedom of choice. They directly examined, and actively interfered with, childhood experience. And they did so with an eye to each child's future life as an adult. So influenced were nineteenth-century judges by the environmental theory of child

288. *Id.* at 164.

289. *Id.*

290. *Id.* at 25-26.

development that they automatically equated the “best interests” analysis with how parents shaped a child’s future self. Judges began by assessing the type of individual that the custodial parent had created thus far, and completed it by evaluating how a change in course would affect the adult that child would become. Contract theorists and judges deciding custody disputes agreed that children deserved special protection because they could not assert their own interests. But the judges went further, and were forced to acknowledge what the contract theorists tried to elide: that childhood mattered because of the formative role it played in shaping the adult self.

Deciding custody disputes elicited judicial discomfort and anxiety. Judges frequently complained that adoption cases were “distressing” and “painful,”²⁹¹ making them particularly “anxious to be right.”²⁹² It was “distressing” to remove a child from the custody of a parent, adoptive or otherwise. But these cases were distressing for the additional reason that they forced judges accustomed to the role of neutral arbiters to make affirmative decisions that would shape the direction of a child’s life. These decisions were “properly” made in “private”; children’s upbringing did not belong “in the hands of lawyers.”²⁹³ And they were more properly governed by “parental affection” than by judges forced to step out of their neutral, formal role and into “[the] parent’s place.”²⁹⁴

Judges frequently noted that the vital, formative choice of parental upbringing was not one that a child could ever make.²⁹⁵ If a judge even considered a child’s input, this was because the child was so close to adulthood that she had already been formed into a particular religion and social class, and developed a sense of herself as the adoptive parent’s child.²⁹⁶ Thus the paradox: by the time a child was old enough to voice her wishes about her custody, and about the course of her future, it was too late—she had already been formed.

Adoption cases were anomalies that highlighted every child’s lack of choice in the typical situation where custody was never contested. Adoption cases involving parents of widely different social classes—or parents framed as such—made visible the most prominent limit that parentage imposed on adult freedom: the variance in training, opportunity, and wealth resulting from birth. Clearly, a son born to a nobleman had greater opportunities than one born to a factory worker. Each would be

291. *Hill v. Hill*, (1862) 31 L.J. 505 (Ch.).

292. *Wellesley v. Beaufort*, (1827) 38 Eng. Rep. 236, 246 (Ch.).

293. *Wellesley*, 38 Eng. Rep. at 242-43.

294. *De Manneville v. De Manneville*, (1804) 32 Eng. Rep. 762, 767 (Ch.) (discussing *Powel v. Cleaver*, (1789) 29 Eng. Rep. 274 (Ch.)).

295. *See, e.g., Stourton v. Stourton*, (1857) 44 Eng. Rep. 583, 588 (Ch.).

296. *See, e.g., Queen v. Gynghall*, (1893) 2 Q.B. 232 (discussed *supra* at text accompanying notes 265-272).

raised differently, such that by the time of adulthood, each could attempt to counter, but could not simply choose to undo, the effects of his upbringing and education.

Religion, in particular, caused judges to struggle most directly with their recognition that adults are indelibly formed by childhood experiences they did not choose. Religious education was seen as a process that must take place during a child's early years, before the child developed the capacity for rational thought. Religious belief was necessarily "primal" and irrational, and could not take hold unless "rooted" in earliest memories.²⁹⁷ As judges showed by arguing over whether a child was too young or too old for a judicial interview on religion—worrying, for example, that young children had been "crammed" with religious doctrine they did not understand—Victorians believed that once a child had reached a certain point of intellectual maturity, it was "too late"²⁹⁸ to plant the seeds of new religious belief. Thus, religion—in proportion to its fundamental importance to the adult self—could never be a matter of free choice.

In *Talbot v. Shrewsbury*, one of the early Victorian cases clarifying the courts' stance on religious difference between parents and guardians, a Catholic uncle sought custody against a Protestant mother.²⁹⁹ The uncle sought to bolster his position by offering to educate his nephew in both religions, and then to allow the child to choose for himself at age eighteen.³⁰⁰ The court rejected his proposal, and with it the notion that a child could choose his religion, finding that "it is impossible that a child can be so educated as to keep him so aloof from one faith or the other as to enable him, at the . . . age of eighteen . . . , to decide for himself which he will then adopt."³⁰¹

The court in *Talbot* noted that while it did not matter in which religion the child was raised, "[e]veryone must admit that it would be the most fatal thing in the world for a child not to have a religious education at all."³⁰² The court simultaneously asserted that children could not choose their religious beliefs, and that religious belief was of the utmost importance. Choosing between competing parents thus meant choosing between religions—a decision judges viewed as determining a crucial aspect of the child's future self.

Adoption cases forced judges to decide, actively, the course of a child's future—her beliefs, social class, companions, occupation, and even religion. Judges felt deeply uncomfortable in this role, because the view of child development they expressed in so doing was at odds with their basic

297. See *Hill v. Hill*, (1862) 31 L.J. 505, 509; see also *Stourton*, 44 Eng. Rep. at 586.

298. *Stourton*, 44 Eng. Rep. at 586.

299. *Talbot v. Shrewsbury*, (1840) 41 Eng. Rep. 259 (Ch.).

300. *Id.* at 259-63.

301. *Id.* at 263.

302. *Id.*

freedom-of-contract belief that in the modern age, how each adult lived his or her life was a matter of free choice.

V. THE CONTINUED SCHISM BETWEEN FREEDOM-OF-CONTRACT IDEALS AND UNDERSTANDINGS OF CHILD DEVELOPMENT

A. Theorists

In England, the Victorian age was the pinnacle of what Patrick Atiyah has termed “the rise and fall of freedom of contract,” and of the individualistic and laissez-faire ethos that accompanied freedom-of-contract’s regime.³⁰³ In the 1860s, just as Henry Maine and others recognized the dominance of freedom-of-contract ideals, those principles were at their peak, on the verge of being dismantled, from the 1870s onward, by a growing public preference for the opposing principle of “collectivism.”³⁰⁴ By the end of the nineteenth century, England had moved away from the laissez-faire regime of which freedom of contract was both symptom and symbol, and toward its modern incarnation as a welfare state.³⁰⁵

In the United States, freedom of contract ideology has seen its doctrinal influence diminish, but it retains rhetorical power. Doctrinally, the theory’s most famous defeat came with the New Deal repudiation of *Lochner*.³⁰⁶ This reversal typified the shift from judicial formalism to legal realism, with its observation that a laissez-faire contract regime, rather than being neutral and liberty-enhancing, favored a particular set of economic interests. Nonetheless, freedom of contract—and the notion that with it comes freedom of choice—continues to influence legal decisionmaking,³⁰⁷ and is still a powerful rhetorical tool in legal arguments.³⁰⁸ Despite the social welfare legislation of the New Deal, the United States did not follow England, and other European nations, toward a full-fledged welfare state.³⁰⁹ A significant factor in the American resistance to the “slide toward collectivism” has been a continued idealization of individual freedom of choice, along with a continued

303. See generally ATIYAH, *supra* note 2.

304. DICEY, *supra* note 10, at 258.

305. See ATIYAH, *supra* note 2, at 231-37; DICEY, *supra* note 10, at 211-302.

306. For discussions of the decline of *Lochner*, 198 U.S. 45 (1905), see, for example, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 574-81 (2d ed. 1988) and Cass Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873 (1987).

307. For instance, Mark Movsesian argues that “freedom of contract is experiencing a revival in American law.” Mark L. Movsesian, *Two Cheers for Freedom of Contract*, 23 CARDOZO L. REV. 1530, 1530 (2002).

308. See Movsesian, *supra* note 307, at 1529-48; Mark Pettit, *supra* note 2, at 263-54.

309. See MARTHA FINEMAN, THE AUTONOMY MYTH (2004); see also Martha Fineman, *The Foundations of Law: The Social Foundations of Law*, 54 EMORY L.J. 201 (2005) (analyzing American aversion to European-style social welfare programs).

tendency to associate that ideal, as did early freedom-of-contract doctrine, with a laissez-faire regime.³¹⁰

The liberal premise of individual freedom of choice has been widely criticized as descriptively inaccurate. Behavioral economists have problematized the model of the free and rational legal actor, for instance with the notion of “bounded rationality.”³¹¹ Feminist scholarship on dependency and caretaking has further criticized that model. These scholars have noted that by figuring the legal actor as an untethered, atomistic individual, it ignores the family and the work that is done within it. As Susan Moller Okin, Robin West, and Martha Fineman have observed, the liberal state delegates to the private family the necessary social task of caring for children, but does not take dependency into account in its model of the free individual.³¹² By disproportionately burdening women with the costs of caretaking, this system fosters economic inequality and creates what Fineman calls the “derivative dependency” of the burdened caretaker.³¹³

But scholarly discussions of individual liberty often give scant attention to the role of childhood experience in limiting adult freedom. Legal scholarship on the problem of individual liberty typically considers an adult legal subject that, even if constrained by family relations, community, and other ties in the present, is untethered from any determining childhood past. Feminists have begun the project of theorizing liberty in a way that takes into account the family. My goal in attending to the historical and continued tensions between freedom and childhood is to continue that project, while shifting emphasis from the work of adult caretakers to the implications for adult freedom of each adult’s childhood past.

Today, as in Victorian England, the effect of childhood experience on the adult self is especially visible in cases where judges must select between parents who assert competing custodial rights. In the absence of any clear parental right, courts resolve such disputes by looking to the same “best interests of the child” standard employed by Victorian courts faced with adoption disputes. Like their Victorian predecessors, contemporary American courts assessing children’s best interests routinely

310. See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE* 132 (1981); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

311. See Melvin Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 *STAN. L. REV.* 211 (1995).

312. See FINEMAN, *THE AUTONOMY MYTH*, *supra* note 309; SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 110-69 (1989); Martha Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 *AM. U. J. GENDER SOC. POL’Y & L.* 13, 28-29 (2000); Robin West, *Reconstructing Liberty*, 59 *TENN. L. REV.* 441, 453-68 (1992); see also CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988).

313. FINEMAN, *THE AUTONOMY MYTH*, *supra* note 309, at 35.

assume that childhood matters precisely because it shapes the adult self.³¹⁴ Judges weighing alternative custodial outcomes examine the type of upbringing and experience each parent would provide for a child, and as they do so, take for granted that the way in which a parent raises a child determines the range of religious beliefs, educational opportunities, occupations, and social positions that will be available to the adult that the child becomes, as well as the way in which that future adult will exercise whatever choices he or she does have.³¹⁵ Courts faced with custody disputes thus acknowledge, as other legal discussions do not, that an unchosen childhood experience necessarily circumscribes each adult's freedom of choice.

By examining our notions of individual liberty and contractual freedom in light of the context in which they were crystallized in Victorian England, we can begin to understand the relation of those notions to the model of child development that rose to prominence at the same time. For we have inherited, along with these two sets of ideas, the tendency to split them off into separate realms. If we continue today to aim toward realizing the promise of free individual choice held out by early freedom-of-contract theorists, so too do we continue to cordon off childhood into an exceptional realm with little bearing on the liberty of the adults that children become. Much as in Victorian England, legal discussions of parental influence on developing children are exceptional and anomalous. Relegated to the special legal arena of family law,³¹⁶ these discussions are cordoned off from more general discussions of the freedoms available to adults, which in turn give scant attention to the constraints imposed on each adult by his or her childhood experience.³¹⁷

314. See, e.g., *In the Matter of Baby M*, 109 N.J. 396, 458 (1988) ("Best interests boils down to a judgment, consisting of many factors, about the likely *future* happiness of a human being.") (emphasis added); *In the Matter of Franklin Pierce*, 363 N.Y.S.2d 403 (N.Y. Fam. Ct. 1974) (assessing whether child's visitation with father would harm her "best interests" by "stunt[ing] and warp[ing] her maturation and development [into] an emotionally stable adult"); see also *Baby M*, 109 N.J. at 460 ("[A] best-interests test is designed . . . to create . . . a well-integrated person who might reasonably be expected to be happy with life.").

315. See *Baby M*, 109 N.J. at 396. (assessing which set of parents would best ensure a child's future ability to exercise "independence").

316. I am defining "family law" to include cases on the constitutional rights of parents to bring up and educate their children as they see fit. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). For a discussion of the ways in which this line of cases, like the custody disputes discussed above, recognizes the role of child-rearing and education in influencing a child's development into one or another type of adult, see Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 101 (2006).

317. The primary exception occurs in criminal law, insofar as an adult defendant's childhood experience can serve as a mitigating factor in a sentencing proceeding. See, e.g., Paul Litton, *The 'Abuse Excuse' in Capital Sentencing Trials*, 42 AM. CRIM. L. REV. 1027 (2005).

B. Rethinking Baby M

The model of individual freedom that emerged in Victorian England continues to play an important role in American law and culture. The environmental model of child development that emerged alongside it persists as well. The notion that “the child is father of the man” gave rise to the Freudian psychological precepts that today are widely accepted by a popular culture that, with its emphasis on memoirs and stories of childhood, takes for granted that identity is the product of our early memories and experiences.

The tension between these two paradigms also persists, as does the Victorian tendency to avert attention from that tension by cordoning off our discussions of adult freedom from those of childhood dependency. Just as this tension was played out in Victorian England in the anomalous legal arena of adoption disputes, its persistence today is visible in the modern American descendant of those disputes: the surrogate-mother case of *Baby M*.

Baby M, like Victorian adoption case law, follows the “best interests of the child” standard, and even cites to certain Victorian cases as the source of that standard. The case also shows the persistence of, and the ongoing conflict between, the ideology of freedom of contract that was burnished in the Victorian age and the concurrent notion that parents shape the adults that their children become.

Like Victorian courts that refused to enforce adoption contracts, and instead awarded custody on the basis of the child’s best interests, the Supreme Court of New Jersey, in the case of *Baby M*, refused to enforce a surrogacy contract under which a mother gave up her parental rights, and awarded custody instead by looking to the child’s best interests.³¹⁸ Like its British predecessors, the court awarded custody to the wealthier parent—the same one asserting the contractual right—while taking great pains to insist that a child’s best interests are not measured by money alone, and that children are not commodities that can be bought and sold.

The novel legal issue presented by *Baby M* was the enforceability of a surrogate contract under which a mother agreed, in exchange for \$10,000, to be artificially inseminated by a man who contracted for her services; to carry the child to term; and to transfer her parental rights to him after the child was born. After giving birth to a baby girl, the surrogate mother, Mary Beth Whitehead, decided that she could not part with her child. While she initially gave the child to the biological father, William Stern, and his wife, Elizabeth Stern, Whitehead, distraught, soon pleaded with the Sterns to allow her to take the infant to her home, and to spend a week with her there. The Sterns complied, but when Whitehead refused to return

318. *Baby M*, 109 N.J. at 396.

the child, they obtained a court order awarding them temporary custody. Accompanied by the police, the Sterns went to the Whitehead home to execute the order. Whitehead handed the baby to her husband out a back window, escaped, and hid in Florida for several months, until the Sterns tracked her down and had the baby forcibly removed by the Florida police. By the time the case came to trial, “Baby M” was a year old, and had spent the first four months of her life with the Whiteheads, and the eight subsequent months with the Sterns.

After a six-week bench trial, the Chancery Division of New Jersey Superior Court held the surrogate contract valid and enforceable.³¹⁹ Rejecting Whitehead’s arguments that the contract should be voided for unconscionability, unequal bargaining power, and lack of informed consent, the court noted that “[i]t is well settled that disparity of education or sophistication is not considered grounds for avoidance of a contract.”³²⁰ The court also engaged in a constitutional analysis, finding the right to enter into a surrogacy contract protected by the Fourteenth Amendment under substantive due process (as part of the rights to privacy and to procreate) and equal protection (because men were allowed to sell their sperm).³²¹ Strangely, the court even cited the long-discredited *Lochner* decision for the proposition that courts must protect “the right of the individual to his personal liberty to enter into these contracts.”³²²

Despite finding the contract enforceable, the trial court held that specific performance could be granted only if to do so was in the child’s best interests, agreeing with the child’s court-appointed guardian *ad litem* that “the child’s best interest is the only aspect of man’s law that must be applied in fashioning a remedy for this contract [or] for *any* contract that deals with the children of our society.”³²³ The court found that Baby M’s best interests required that she be delivered to the custody of her father and his wife, and that the mother’s rights be terminated, as the surrogacy contract had provided.

On appeal, the Supreme Court of New Jersey reversed the finding with respect to the surrogacy contract, but reached a substantially similar custodial outcome.³²⁴ The surrogacy contract, the court found, was void and unenforceable. It conflicted with New Jersey statutory prohibitions against paying for an adoption, and violated public policy, since even if the surrogate contract could be considered ““voluntary””—which the court questioned by surrounding the term with quotation marks—“[t]here are, in

319. In the Matter of Baby M, 525 A.2d 1128, 1166 (N.J. Super. Ct. Ch. Div. 1987).

320. *Id.* at 1160.

321. *Id.* at 1164–66.

322. *Id.* at 1165.

323. *Id.* at 1166.

324. In the Matter of Baby M, 109 N.J. 396 (1988).

a civilized society, some things that money cannot buy.”³²⁵ Implicitly rejecting the lower court’s reliance on *Lochner*, the court cited *West Coast Hotel*—which overruled *Lochner*—for the proposition that “[i]n America, we decided long ago that merely because conduct purchased by money was ‘voluntary’ did not mean that it was good or beyond regulation.”³²⁶ The court also rejected the lower court’s constitutional analysis, distinguishing the right to procreate from the right to enter into surrogacy contracts, and noting that “a person’s rights of privacy and self-determination are qualified by the effect on innocent third persons of the exercise of those rights.”³²⁷ After finding the surrogacy contract unenforceable, the court assessed Baby M’s best interests. While reversing the trial court’s decision to terminate Whitehead’s parental rights altogether, the appellate court agreed that the best interests test mandated awarding primary custody to the Sterns.

Scholarly debate over *Baby M* centers on the extent to which surrogacy contracts limit the general rule of freedom of contract and freedom of choice for all rational adults. Some have argued that surrogate mothers should not be held to their contractual bargains,³²⁸ typically on the grounds that a mother driven by economic duress to sell her child is not exercising any meaningful freedom of choice,³²⁹ and that the facts of child-bearing make it impossible for a mother to assess *ex ante* what it will mean for her to part with her child after it is born.³³⁰ Others have disagreed, arguing that surrogate mothers should be held to their agreements just as are parties to ordinary commercial contracts, whether because they are indeed as freely chosen as other contracts,³³¹ because refusing to treat them as such would

325. *Id.* at 440.

326. *Id.* (citing *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937)).

327. *Id.* at 449.

328. There are two variants of this position. Some scholars argue that surrogacy contracts entailing monetary payment should be void or even prohibited. *See, e.g.*, MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES 102-23 (2001); Alexander M. Capron & Margaret J. Radin, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, in SURROGATE MOTHERHOOD 59-76 (Larry Gostin ed., 1990) (arguing that surrogacy contracts should fall under the law regulating adoption, which typically prohibits payments that exceed a birth mother’s costs); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 898 (2000) (arguing the same). Others hold that while surrogacy contracts should be permitted, the agreement to turn over the child should not be specifically enforced. *See, e.g.*, Margaret Brinig, *A Maternalistic Approach to Surrogacy*, 81 VA. L. REV. 2377, 2381 (1995).

329. *See, e.g.*, SHANLEY, *supra* note 328, at 107-10; Margaret Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1909-11, 1917 (1987) (describing arguments that surrogacy should be prohibited on the basis that mothers may be coerced by poverty to sell their children, but noting the “double bind” that, as long as the conditions of poverty continue to exist, refusing to enforce such contracts in the name of protecting poor women in fact “might deprive a class of poor and oppressed people of the opportunity to have more money with which to buy adequate food, shelter, and health care in the market, and hence deprive them of a better chance to lead a humane life”).

330. *See, e.g.*, Brinig, *supra* note 328, at 2388 (“[S]urrogacy contracts are suboptimal because the surrogate cannot *ex ante* have perfect, or even minimally adequate information.”).

331. *See, e.g.*, Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81

reinforce an image of women as incapable of exercising rational choice,³³² or because it would withhold from women the right to benefit economically from one of the few resources that women possess, and men do not.³³³ In recent years, much of the scholarly debate on *Baby M* has engaged Margaret Radin's argument, in *Market-Inalienability*, that to enforce the surrogacy contract in *Baby M* would harm women and children generally by endorsing the commodification of women's bodies and children's selves.³³⁴

By focusing on the surrogacy contract, scholarly discussion of *Baby M* has analyzed the problem of freedom of contract, and freedom of choice generally, from the point of view of the parents who are parties to such agreements. But *Baby M* was, crucially, also about the effect of the parental dispute on the child herself. And that aspect of the case also bears

VA. L. REV. 2305, 2337 (1995) (arguing that surrogacy contracts should be evaluated under the same rules applicable to other contracts, and should be specifically enforced under the rules generally applicable to contracts for specialized goods). Those who support enforcing surrogacy contracts have tended to concede that the right to contract is necessarily limited by the interests of children, but to argue that the enforcement of surrogacy contracts is consistent with those interests. *See id.* at 2320-23 (taking into account "external effects" of surrogacy contracts on children's best interests).

Several legal scholars in favor of enforcing surrogacy contracts advocate that they be regulated by a special legal framework designed to ensure that the contracts are voluntary and fully informed, for instance, by requiring a mandatory opt-out period after the child's birth to correct for the surrogate mother's imperfect information *ex ante*. *See, e.g.*, MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 48-57 (1993); Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 527 (2005) (arguing that the law of surrogacy could better secure the birth mother's informed consent by requiring an opt-out period after the birth, providing birth mothers with free legal counsel, and obligating the parties to convey all relevant information to each other at the outset of the agreement).

332. *See, e.g.*, Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists, in* SURROGATE MOTHERHOOD, *supra* note 328, at 173 ("It would seem to be a step backward for women to argue that they are incapable of making decisions."); Marjorie Shultz, *Reproductive Technology and Intent-Based Parenthood*, 1990 WIS. L. REV. 297, 355 (1990) (arguing that the refusal to enforce surrogacy contracts on the basis that they are not voluntary treats women "as non-autonomous persons," and asserting that "however constrained the circumstances, . . . it is a vital affirmation of human dignity to believe and act on the conviction that some dimension of meaningful freedom always remains"); *see also* Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1238 (1998) (describing surrogacy contracts as creating a "dilemma of choice" by posing a "conflict between promoting women's autonomy and freedom of choice on the one hand, and protecting women from the harmful consequences of choices made under conditions of inequality on the other").

333. *See, e.g.*, Shultz, *supra* note 332, at 380 (noting that refusing to enforce surrogacy contracts reinforces the traditional view that women "do their women-things out of purity of heart and sentiment," which results in "women's inability to get adequate, or any, monetary compensation for the tasks and roles they solely perform").

334. *See generally* Radin, *supra* note 329. For recent installments of the pro/anti-commodification debate on surrogacy contracts that followed from Radin's article, *see, e.g.*, Martha Erman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N. C.L. REV. 1 (2003) (arguing for the application to the commodification debate of Viviana Zelizer's insight that monetary exchange is not necessarily hostile to intimate relationships, and can in certain social contexts be a way of marking and strengthening them) (citing VIVIANA ZELIZER, *PRICING THE PRICELESS CHILD* (1985); Viviana Zelizer, *The Purchase of Intimacy*, 25 LAW. & SOC. INQUIRY 817 (2000)); *see also* Hasday, *supra* note 331, at 491 (arguing that both "anti-commodification" and "pro-market" scholars overlook the extent to which the law already countenances economic exchange between intimates, and that the law should be reformed not to eliminate such exchanges, but to enable them to take place in a way that recognizes the dignity of intimate relationships).

upon freedom of contract and its limits. If we examine the question of freedom of contract from Baby M's point of view, we see that the case sheds light not only on the freedom of surrogate mothers and those who contract with them, but also on the problems for freedom posed by the fact of parental influence over children.

The *Baby M* case was unusual in that it concerned a custody struggle between two parents of different backgrounds—Mary Beth Whitehead and William Stern—who, despite very little contact, created a child together through contract and modern technology. As the trial court noted, Whitehead and Stern “are not former spouses,” as in the ordinary custody dispute, but “are strangers to each other,” with “different life styles, social values and standards.”³³⁵ Much of the public fascination with the case derived from how this story of parental conflict brought into question what makes someone a child's parent, and why and how parentage matters to a child. This aspect of *Baby M* plays out in the portion of the courts' decisions to which scholars have given relatively little attention: the best interests analysis.

The best interests assessment in *Baby M* shows the continued primacy of the environmental model of child development relied on by Victorian courts, and of the related premise that parents influence the adults that their children become. Because there was no clear priority of either parental rights or parent-child bonds, the case presented only one factor the court could look to in awarding custody: the future effect that each parental alternative would have on Baby M.

Eleven expert witnesses testified about Baby M's best interests—ten psychologists and psychiatrists, and one pediatrician—demonstrating that the environmental model of child development has, in the contemporary United States, become institutionalized and professionalized into a cadre of child-experts.³³⁶ These experts agreed not only that Baby M would be best off with her father, but also that parents, and the “psychological milieu and environment” they provide, play a crucial role in children's development.³³⁷ Echoing the notions of parenting and child development articulated by Locke, Mill, Smiles, and Spencer, these experts took for granted that the choice of parent would influence every aspect of a child's future self, from her emotional state and psychological stability to her interest in education, her attitudes toward “health, nutrition, and the avoidance of hazards and substance abuse,” and her ability to “become a productive member of society.”³³⁸

335. In the Matter of Baby M, 525 A.2d 1128, 1149 (N.J. Super. Ct. Ch. Div. 1987).

336. *Id.* at 1148.

337. *Id.* at 1153.

338. *Id.* at 1152.

Like Victorian courts assessing children's best interests, the New Jersey courts emphasized the socio-economic differences between the two sets of parents. The trial court in particular focused on the differences in the social, economic, and educational backgrounds of the Whiteheads and the Sterns. Although, as the appellate court would later note, "the Sterns are not rich and the Whiteheads not poor,"³³⁹ one would not learn this from reading the trial court's decision. The trial court opened its findings of fact by introducing the couples:

William Stern was born in Berlin, Germany, on January 27, 1946. . . . He became a United States citizen when his parents became citizens in 1954. His father, a banker in Germany, worked as a factory hand and a short-order cook. . . . Ultimately, Mr. Stern and his mother moved to New York where Mr. Stern began college. He graduated New York University and then attended graduate school at the University of Michigan. He has worked in the public sector and in private industry as a research scientist.

Mr. and Mrs. Stern met when they were both graduate students at the University of Michigan and began dating in 1969. The couple was married in East Lansing, Michigan, on July 27, 1974, by a minister friend of the family. By now each had earned a Ph.D.—Mr. Stern in bio-chemistry and Mrs. Stern in human genetics. . . .

Elizabeth Stern is presently 41 years-of-age. She was born and grew up in East Lansing, Michigan, where her father was a professor of bio-chemistry at Michigan State University. . . . After receiving her Ph.D., Mrs. Stern decided to go to medical school in order to work in a more people-oriented profession. She testified to being tired of "talking to test tubes." Her pediatric residency was completed in 1978. Mrs. Stern comes from a family background where religion and education have played important roles. As noted, her father was on the faculty at Michigan State University and was for a time, a lay reader at the family church.³⁴⁰

Here, by contrast, is the court's introduction to the Whiteheads:

Mary Beth Whitehead is presently 29 years old and is the sixth of eight children born to Joseph and Catherine Messer. Mrs. Whitehead decided to leave high school in mid-tenth grade at the age of 15½ against the advice of her parents. While in school, she held a part-time job primarily as a hand in a pizza-deli shop. She began working at her brother's delicatessen where she met Richard Whitehead. The Whiteheads were married on December 3, 1973. Mrs. Whitehead was 16 years old. Mr. Whitehead was 24 years old.

Richard Whitehead is 37 years old. He is employed as a driver for a

339. In the Matter of Baby M, 109 N.J. 396, 439 (1988).

340. *Baby M*, 525 A.2d at 1138.

waste carting company. He is one of four children born to Edward and June Whitehead. His parents separated eight years ago. His father, a retired police officer, lives in Florida. . . . Shortly after high school graduation, Mr. Whitehead was drafted into the United States Army, served 13 months in Viet Nam and was honorably discharged as a specialist 4th class in 1971. As a result of a non-alcohol related accident, Mr. Whitehead lost the sight in his left eye.³⁴¹

It is already clear—even before the oblique reference to a “non-alcohol related accident” (Mr. Whitehead was an alcoholic)—how the trial court will award custody, and why. The Sterns met while completing their doctorates; the Whiteheads, at a pizza-shop where Mary Beth worked before she became pregnant, dropped out of high school, and married at age 16.

If this introduction to the Sterns and Whiteheads left any doubt about how the court would award custody, it vanished with the portrait of the subsequent history and current state of the Whitehead household:

From the date of the marriage in 1973, until moving in 1981 to the home in which they now live in Brick Township, the Whiteheads resided in many places. Indeed, from the date of their marriage through 1981 the Whiteheads moved at least 12 times, frequently living in the homes of other family members.

In or about 1978, the Whiteheads separated, during which time Mrs. Whitehead received public assistance. The Monmouth County Welfare Board sued Mr. Whitehead to recover payments made to Mrs. Whitehead. An order for payment was entered against Mr. Whitehead. Eventually, after a warrant was issued for his arrest for non-payment, Mr. Whitehead repaid the monies owed to the Monmouth County Welfare Board.

The Whiteheads filed bankruptcy in or about 1983. . . . There are two mortgages on the Whiteheads’ residence. . . .

Mr. Whitehead has had various employments during the course of the marriage. Until obtaining his present employment in 1981, Mr. Whitehead has had seven different jobs in the last 13 years. There has also been at least one period during which time Mr. Whitehead collected unemployment compensation.³⁴²

While the court later acknowledges that Mrs. Whitehead’s other children were perfectly healthy and well-adjusted, and that the couple was neither neglectful nor impoverished, the opinion begins with details suggesting otherwise. Rather than focusing on how the Whiteheads settled down since 1981, the court—writing in 1987—reached back earlier to depict

341. *Id.* at 1140.

342. *Id.* at 1140-41.

them as transient, shifty, and financially unstable. This move is reminiscent of the House of Lords' decision in *Queen v. Gyngall*, where the court focused on the biological mother's unsettled early past, rather than on her more stable present, to exaggerate her poverty and instability and to contrast it with the comfort and stability provided by her adoptive replacement.

After setting up the Whiteheads and the Sterns at the opposite ends of the socio-economic spectrum, the trial court widened the dichotomy by noting the parents' different attitudes toward education. Mrs. Whitehead testified that "if she was given custody the infant would be taught kindness and understanding," and that "[s]he would be supportive of the child's educational wishes."³⁴³ Without commenting on the first proposition, the court expressed doubt about the second, "question[ing] the measure of this mother's emphasis about the importance of education in light of" her refusal to take expert advice on one occasion regarding her son's educational difficulties, and "her own limited high school experience."³⁴⁴ It then contrasted the Sterns' testimony that their town "has a good school system"; that they planned to enroll Baby M in a nursery school at age three; and that they would provide "music lessons and athletics."³⁴⁵ The court concluded the educational comparison by noting that "[w]ith the strong emphasis on education already exhibited by the Sterns, it is understood and expected that 'Baby M' would attend college."³⁴⁶

Although the trial court also took several other factors into account in awarding custody—including Mrs. Whitehead's volatile behavior during the custody struggle, her perceived "character trait problems," and Mr. Whitehead's alcoholism—the crux of its decision was the difference in the "environment" that each couple would provide, a difference that was largely socio-economic. Thus, for instance, the court "evaluate[d] the *climate* to which the child may be exposed with the Whiteheads," and in so doing noted the "history of economic and domestic instability" and "the reduced level of importance given to education in the Whitehead home"; deemed Mrs. Whitehead's untruthfulness to "establish a tarnished Whitehead *environment*"; and then noted again that "[e]ducation plays a subordinate role in the Whitehead's [sic] *milieu*."³⁴⁷ Based on this comparison of environments—and the difference each would make to the type of adult Baby M would become—the court, even while acknowledging that Mrs. Whitehead "is a good mother for and to her older children," concluded that "[s]he would not be a good custodian for Baby

343. *Id.* at 1147.

344. *Id.*

345. *Id.* at 1148.

346. *Id.*

347. *Id.* at 1169-70 (emphasis added).

M,” at least not in comparison to the well-educated, professional Sterns.³⁴⁸

Most telling about the “best interests” analysis in *Baby M* is the appellate court’s simultaneous agreement and discomfort with the trial court’s analysis. Like the trial court, the appellate court took for granted the central precept of the environmental model: that parental care determines the type of adult a child becomes. The result was a future-oriented approach: “Best interests,” the court explained, “boils down to a judgment, consisting of many factors, about the likely future happiness of a human being.”³⁴⁹ The court awarded custody to the Sterns because Baby M’s “prospects for wholesome, independent psychological growth and development would be at serious risk” if she were raised by her biological mother, while her “future appears solid, happy, and promising with” the Sterns.³⁵⁰

While reaching the same outcome, the appellate court expressed “concern” with the lower court’s reliance on socio-economic factors.³⁵¹ Delicately framing the focus on class difference as the trial court’s “emphasis” on “education,” the higher court took pains to note that

it should not be overlooked that a best-interests test is designed not to create a new member of the intelligentsia but rather a well-integrated person who might reasonably be expected to be happy with life. ‘Best interests’ does not contain within it any idealized lifestyle. . . . Stability, love, family happiness, tolerance, and, ultimately, support of independence—all rank much higher in predicting future happiness than the likelihood of a college education. We do not mean to suggest that the trial court would disagree. We simply want to dispel any misunderstanding on the issue.³⁵²

What is striking is that the appellate court, even as it purports to disagree with the trial court’s normative view that it is in a child’s best interests to be raised by wealthier and better-educated parents, is fully in accord with the trial court’s descriptive premise that a child will be formed in the model of those who raise her. The question is not *whether* the Sterns will mold Baby M into a “member of the intelligentsia” and provide her with a college education, but whether this fact matters.

Though the New Jersey Supreme Court indicated that only the child’s future “independence” matters, one must question, in light of the decision’s larger context, the sincerity of the court’s insistence that “independence” bears no relation to education and financial security. In analyzing the surrogacy contract, the court both presented the contract as

348. *Id.* at 1170.

349. *In the Matter of Baby M*, 109 N.J. 396, 460 (1988).

350. *Id.* at 459.

351. *Id.* at 460.

352. *Id.*

one for the sale of a child and a woman's body, and—quoting Radin's anti-commodification argument—indicated that because any mother who agrees to such a sale likely does so out of financial pressure, any such agreement cannot be considered “voluntary,” or even an “agreement.”³⁵³ If financial need drives mothers to sell “involuntarily” their own children, and if financial need correlates directly with education and parental background, how can the child's education, and her future social and economic station, be disassociated from her future “independence”?

Moreover, the appellate court exaggerated the parents' socio-economic differences in a way that suggests these factors are more important than the court admits. The court cautioned that the Sterns were not rich, and the Whiteheads not poor. Gone from the appellate opinion is the lengthy, class-laden story of the two couples' origins. But, in the context of the surrogacy contract, the notion of rich versus poor is revived almost as soon as it is dismissed: “one should not pretend that disparate wealth does not play a part simply because the contrast is not the dramatic ‘rich versus poor.’”³⁵⁴ And, in the best interests analysis, the appellate court in fact set up the same class dichotomy as the trial court. Both opened the analysis by pointing out the Whiteheads' financial problems and serial unemployment, and contrasting this with the Sterns' stability and “more than adequate” finances.³⁵⁵ This dichotomy is once again achieved through exaggerating socio-economic differences and selectively withholding details that would present a more complicated picture. Though the court notes in passing that Mrs. Whitehead has divorced Mr. Whitehead and remarried, it neither indicates nor takes account of the fact that the remarriage substantially improved the financial security of “Mrs. Whitehead,” as the court continued to refer to her, and rendered Mr. Whitehead's unemployment and alcoholism moot.³⁵⁶

The appellate court's discomfort with differences of parental wealth and social status seems linked to its characterization of the *Baby M* contract as the “sale of a child,” and can therefore shed light on the deeper resonances of the debate over surrogacy contracts. Like the Victorian courts that insisted, even as they awarded custody to wealthier parents, that money was neither the key ingredient of adult happiness nor a permissible basis for reallocating parental rights, so the *Baby M* court, in invalidating the surrogacy contract, but awarding custody to the Sterns nonetheless, proclaims proudly that “[t]here are, in short, values society deems more important than granting to wealth whatever it can buy, be it labor, love, or

353. *Id.* at 439-42.

354. *Id.* at 440.

355. *Id.* at 458.

356. *Id.* at 461 n.18.

life.”³⁵⁷ This suggests that behind the resistance to contractualizing or commodifying parent-child ties is a continued desire to idealize childhood as a realm protected from, and with no bearing on, the adult world of mortgages, financial bargains, and contracts—and therefore to look away from how each child’s experience bears directly upon the range of possibilities that will be open to her upon entering the adult world of markets and of contractual freedom of choice.

VI. CONCLUSION

By showing the continued tension between our understandings of child development and our ideals of contractual freedom, this Article invites us to reconsider our historically derived tendency to impose a rigorous legal and conceptual divide between the realm of incompetent children and that of freely choosing adults.

One possible implication of the recognition that an unchosen childhood shapes the adult self, thus limiting adult freedom of choice, is that we should rethink our commitment to treating adults as autonomous and free, as we do in the law of contract as well as in civil and criminal law more generally. However, there may be good reasons to treat adults as if they make free choices, even while recognizing that they do not. Treating adults as less than free would not necessarily bring us any closer to a regime in which they are more so.

Another implication may be that we should rethink our standards of child-custody decisionmaking to take into account the differential effects of childhood upbringing on adult choice. For instance, I have indicated that courts in custody disputes understand socio-economic deprivation to limit a child’s future freedom of choice and independence, but sometimes try to avoid stating this directly, out of a reluctance to countenance the view that money and other material benefits could outweigh parental love. Would we be better off if courts in such disputes more explicitly articulated their assumptions that children benefit from greater parental wealth and educational opportunities? Perhaps, but we should be wary of encouraging courts explicitly to favor wealthier parents. Although a more privileged childhood can indeed enhance future independence—and a more deprived one limit it—there is good reason for our valuation of parental affection over material wealth, and for a system that fosters pluralism by creating a default rule in which it is often clear which parents have the right to raise a child.

Perhaps the most useful lesson of the disjunction between the unchosen nature of childhood experiences and our ideal of adult freedom of choice is that the best way for us to enhance the freedom of adults would be to

357. *Id.* at 441.

attend more than we do to the conditions in which children are raised. In other words, perhaps the historical insight into the relation between our ideas about childhood and our ideas about freedom can be used to support arguments that we should compensate caretakers, and foster human flourishing,³⁵⁸ through programs such as childcare subsidies, health care, housing aid, and improved education. In addition to compensating caretakers, such programs would enable caretakers to provide their children with those opportunities and experiences that would most expand the range of choices available to them upon reaching adulthood. If we recognize the role of childhood in influencing adult freedom, and understand, as well, that children do not choose the situations in which they are raised, then we can think of such programs not as paternalistic or redistributive, but as freedom enhancing.

358. For an argument advocating the promotion of “human flourishing,” see Radin, *supra* note 329.