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## ARTICLES

# IS THE FAMILY AT ODDS WITH EQUALITY? THE LEGAL IMPLICATIONS OF EQUALITY FOR CHILDREN

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### ABSTRACT

*The family seems to pose an insoluble dilemma for a liberal society, because it pits liberal values of freedom and equality against each other. When family life privileges adult freedom, children's life chances become unequal due to their parents' different choices and unequal circumstances. But any effort to enact equality of opportunity for children, it seems, would demand such heavy-handed state regulation of the family that it would end family life as we know it.*

*This is an old problem, and theorists who have grappled with it have found themselves caught between two unappealing alternatives: rampant inequality for children, on the one hand, and Brave New World-style institutionalized child rearing, on the other.*

*This Article revisits the liberal dilemma and suggests that one plausible version of liberalism can, at least in principle, combine wide diversity and freedom in family life with equal opportunity for children. But this conclusion arrives with two caveats. First, the theoretical compatibility*

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*of the family and equality of opportunity rests on three interpretations which remain contested even within liberal theory: the scope of parental autonomy, the meaning of equality of opportunity, and the functions ascribed to the liberal family. Second, the legal changes necessary to reconcile the family with equality would face practical and political difficulties. An egalitarian regime would require new redistributive programs and tax increases to fund them. A commitment to children's equality would also require revision of constitutional and state law doctrines that prize parental authority and family economic self-sufficiency and disclaim positive obligations of the state toward children.*

*The aims of this Article are primarily descriptive rather than prescriptive. The analysis here identifies strands within liberal political theory that can reconcile the liberal values of freedom and equality of opportunity, but it does not attempt to persuade readers either that liberalism is preferable to other normative views or that this particular interpretation of liberal ideals should dominate other interpretations. Nor does the Article attempt to offer a practical political program. Outside the United States, legal principles and initiatives such as those developed here might seem familiar. In the U.S. context, however, these reforms would require a thorough revision in legal institutions and in legal principles.*

## I. INTRODUCTION

Egalitarian liberalism aspires to equality of opportunity and despairs of achieving it. “[F]air equality of opportunity,” to use John Rawls’s term,<sup>1</sup> is central to the liberal vision: ideally, social and economic institutions should ensure that every individual has an equal chance to live a life of her own choosing. A society that offers the conditions of autonomy to some but not to all has failed to deliver on the liberal promise of equal respect.

But the family, theorists have concluded, subverts the liberal aspiration to equal opportunity.<sup>2</sup> Children reared in unequal conditions grow up unequally prepared for life. Poor children start life one step behind: reared with inadequate food, shelter, health care, and education, many face a meager set of life options compared to those open to richer children.<sup>3</sup> Even within the ranks of the middle class, family inequalities

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1. JOHN RAWLS, A THEORY OF JUSTICE 73 (1971).

2. *See id.* at 73–74.

3. For an overview, see, for example, the essays collected in CONSEQUENCES OF GROWING UP POOR (Greg J. Duncan & Jeanne Brooks-Gunn eds., 1997) (investigating the effects of childhood poverty on health, education, employment, and other outcomes).

shape children's life chances. The child of college professors may gain a head start on intellectual pursuits, while the child of a tennis ace or auto mechanic may have an advantage in athletics or engineering. Parents' tastes and talents shape family life and, with it, children's own talents and aspirations.

Despite the family's shortcomings from an egalitarian point of view, alternative institutions for child rearing strike us as horrendous. To standardize children's experiences, the state would have to separate children from their parents at birth and rear them in large-scale facilities. One's immediate associations with such strategies are not promising, to put it mildly. Plato's *Republic* advocates communal child rearing (for some children) to support a hierarchy with elite philosophers at the top.<sup>4</sup> Aldous Huxley's *Brave New World* deploys communal nurseries along with genetic selection and behavioral conditioning to demonstrate how a fascist dystopia might perpetuate its class system.<sup>5</sup> To be sure, a liberal approach could reject Plato's caste structure and Huxley's behavioral conditioning. Still, any form of standardized child rearing would seem to preclude family life as we know it: the family would no longer be a cherished sphere for adults to rear their children as they choose.<sup>6</sup>

Thus, the family seems to pose an insoluble dilemma for liberalism. The liberal vision seems to collapse into itself, with freedom for adults pitted against equality for children. Unless the state can achieve equality of opportunity for each new generation, the liberal promise of equality rings hollow. But equality seems to demand a heavy-handed interference in family life that could be cruel to children and certainly would deny to parents a cherished sphere for the exercise of personal freedom.

This Article reconsiders this classic problem and suggests that one plausible version of liberalism can, at least in principle, combine diversity and freedom in family life with equal opportunity for children. A liberal state might recognize that a diverse array of families can all meet children's two basic needs: emotional intimacy that cannot be accomplished in a large-scale setting and the experience of living in a family that has chosen its values and its way of life. On this interpretation, the state would not

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4. See PLATO, *THE REPUBLIC* 109–10, 154–69 (G.R.F. Ferrari ed., Tom Griffith trans., Cambridge Univ. Press 2000).

5. See ALDOUS HUXLEY, *BRAVE NEW WORLD* 20–32 (1932).

6. Fishkin notes the analogy to Plato and to Huxley and concludes that “[a]nything short of such a large-scale alternative to the autonomous nuclear family would probably provide only an imperfect barrier between the inequalities of the parental generation and the developmental processes affecting its children.” JAMES S. FISHKIN, *JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY* 64–65 (1983).

attempt to standardize child-rearing conditions or to offer each child precisely the same set of life options. Instead, an egalitarian liberal state would seek to secure each child's material well-being and to ensure that each family can meet its child's emotional and material needs. For their part, parents would understand their role as one of obligation as well as liberty: state constraints on parents (to consent to medical care, to send their children to school, and the like) would be construed as part of the liberal polity's collective obligations to children rather than as an infringement on parents' liberty to treat their children in any way they choose.

But the happy conclusion that the family can coexist peacefully with equal opportunity arrives with two caveats. First, the theoretical compatibility of the family and equality of opportunity rests on interpretations of liberal ideals which remain contested even within liberal theory: the meaning of equality of opportunity, the scope of parental autonomy, and the functions ascribed to the liberal family. This Article draws on two different strands of liberal theory—one addressing the nature of disability<sup>7</sup> and the other considering the claims of children on a liberal polity<sup>8</sup>—to demonstrate that, in principle, equality for children can coexist with liberty for parents. But, even within liberalism, these theoretical moves are not universally accepted. Thus, one aim of this Article is to show how the tension between equality and the family resurfaces if one adopts alternative liberal interpretations of equal opportunity, parental autonomy, or the functions of the family in liberal society.

The second caveat is that the legal changes necessary to reconcile the family with equality would face practical and political difficulties. Programs to equalize the material conditions of childhood would require significant financial redistribution and new administrative structures and would challenge the notion of family economic self-sufficiency. To ensure equal material provision for children, an egalitarian state would require transfer programs sufficient to attenuate the link between parents' financial circumstances and children's access to food, shelter, health care, and education. In addition, an egalitarian program would require supports for parental care, such as an enriched educational program that would include extracurricular activities, as well as institutions like paid family leave, parent counseling, substance-abuse rehabilitation, and other support services.

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7. BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 120–38 (1980); PHILIPPE VAN PARIJS, *REAL FREEDOM FOR ALL* 72–82 (1995).

8. *See infra* text accompanying note 31.

In addition, liberal equality for children would require a sea change in U.S. constitutional law and state family law, both of which privilege parental rights and disclaim any affirmative state obligation to secure children's well-being. The U.S. Supreme Court has interpreted the Constitution to endow parents with nearly unfettered freedom to control children's lives.<sup>9</sup> Similarly, state family law tends to privilege parental freedom over children's interests.<sup>10</sup> An egalitarian regime would face the task of wrenching these legal interpretations in a new direction to emphasize the obligations of parents (as well as their rights) and recast the state as having affirmative obligations to support children and to assist their families. Along the way, the demise of strong parental rights would reopen a host of hard problems. Reconceptualizing the role of the state in children's development would implicate issues including the First Amendment, separation of powers, and federalism.

It is important not to overstate the practical hurdles facing an egalitarian agenda for the family. Redistribution and constitutional change seem less alien than Plato's (sincere) or Huxley's (dystopian) proposals. Indeed, outside the United States, initiatives such as these might seem relatively familiar, though perhaps not on the scale necessary to achieve true equality. Nevertheless, in the U.S. context, these reforms would require significant legal change.

Thus, this Article continues my project of drawing out the legal implications of liberal egalitarian political theory.<sup>11</sup> The analysis here grapples with a dilemma internal to liberalism and aims to outline one solution to the tension between the family and equality—while also showing how different interpretations of liberal ideals tend to reintroduce the tension. This Article is thus descriptive rather than prescriptive: it does not attempt to persuade readers either that liberalism is preferable to other normative views or that this particular interpretation of liberal ideals should dominate other interpretations.

The Article proceeds as follows. After presenting the liberal dilemma in Part II, I describe the liberal ideals and legal innovations that could reconcile the family with equal opportunity in Parts III through VI. I then step back in Part VII to highlight the interpretive moves that permit the

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9. See *infra* text accompanying notes 77–86.

10. See, e.g., JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 2–3, 26–40 (2006).

11. See BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999); ANNE L. ALSTOTT, *NO EXIT* (2004); Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469 (2007) [hereinafter Alstott, *Equal Opportunity*]; Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L.J. 967 (1999).

reconciliation of the family with equality and to show how the dilemma reappears if one adopts alternative interpretations within the liberal tradition.

## II. THE LIBERAL DILEMMA

Egalitarian liberalism insists that equality and liberty can coexist.<sup>12</sup> The theory rejects the libertarian notion that individual freedom consists of doing as one likes with minimal intervention by the state. Instead, it insists on equal freedom for all, a vision that requires the state to distribute resources equally among adults and to remain neutral as to individuals' ideals of the good. Each person should be entitled to live a life of her own choosing, provided that her actions are consistent with the institutions necessary to ensure the same freedom to others.

But egalitarian liberalism seems resigned to a liberty-equality conflict when it comes to the family. In liberal theory, the family appears as a sphere of negative liberty, a protected realm for individual self-expression through relationships. This vision coexists with the ideals of equality and freedom as long as all of the family's members are adults. But the introduction of children revives the liberty-equality conflict. Family life is rife with inequalities that shape children's life prospects. Rich children inherit wealth and class advantage, while poor children suffer ill health, bad schools, and limited economic and social opportunities. Families also differ in other characteristics that produce unequal life chances for children. Parents' religious and social commitments and emotional and intellectual capacities can all affect the course of children's development. These differences have led liberal theorists to conclude that the aspiration to equality for children inevitably conflicts with the ideal of parental liberty.<sup>13</sup>

A classic statement of the problem appears in James Fishkin's 1983 book, *Justice, Equal Opportunity, and the Family*.<sup>14</sup> Fishkin posits an impossibility theorem; he aims to show that there is an insoluble conflict among three principles of liberalism: family autonomy, equal life chances

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12. See, e.g., RAWLS, *supra* note 1, at 250 (stating the first and second principles of justice); ACKERMAN, *supra* note 7, at 10–17 (outlining the principles of neutrality and equal respect). See also ACKERMAN & ALSTOTT, *supra* note 11, at 3–5 (arguing that the liberal tradition values liberty and equality).

13. See, e.g., JEFFREY BLUSTEIN, PARENTS AND CHILDREN: THE ETHICS OF THE FAMILY 13–14 (1982) (noting that “the family as we know it is an obstacle to the complete realization of a basic principle of social justice,” equality of opportunity).

14. FISHKIN, *supra* note 6.

for children, and the merit principle.<sup>15</sup> The ideal of family autonomy Fishkin describes corresponds closely to an ideal I will term “parental autonomy”: the central idea is that the family is a protected sphere for adults to live lives of their own choosing. On this view, the family’s function is to permit individual self-expression and self-determination, and the state should not interfere with family practices except to prevent “severe harm.”<sup>16</sup>

The dilemma arises when children enter the picture. Children cannot exercise reasoned choice among the lives they might wish to live. But children live with parents or other adults who do exercise choice about how to live their lives, and these choices may influence children’s development, shaping their future prospects without their consent.<sup>17</sup>

The tension thus seems to pit freedom for adults against equality, in the sense of equal opportunity, for children. Fishkin suggests that efforts to equalize child-rearing conditions would infringe unacceptably on parental prerogatives to structure family life: “Coercive interferences with the family would be required if advantaged parents were to be prevented, systematically, from passing on cognitive, affective, cultural, and social advantages to their children.”<sup>18</sup> The worry is that family background unfairly tends to send children toward predetermined positions in the social hierarchy.<sup>19</sup>

By tradition, liberal theory relies on two institutions external to the family to address the equality-liberty dilemma: redistribution and education. Programs to redistribute material resources promote equality by ensuring that every child has adequate food, shelter, and medical care. Public education is a second corrective for inequalities arising from differences in family background. A liberal education ideally would prepare children to choose among diverse visions of the good; such an education should, among other things, foster the capacity to reason and provide cultural opportunities that differ from the child’s family

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15. *Id.* at 4–6.

16. *See id.* at 35–43. He concludes that “[s]o long as no one is severely harmed, intimate consensual relations [defined to include ‘[r]elations between adults and children in a given family’] should be immune from coercive interference.” *Id.* at 42.

17. *Id.* at 30–35.

18. *Id.* at 64.

19. *Id.* at 30–35. Fishkin adds that the merit principle adds a third prong to form a “trilemma.” If jobs (or other social positions) were awarded without regard to merit, perhaps on a pro rata or lottery basis, children’s life chances would not be influenced by family circumstances, because one’s opportunities would not be a function of one’s skills or background. *Id.* at 19–30.

background.<sup>20</sup>

But these are incomplete remedies for family inequality, Fishkin suggests.<sup>21</sup> Even if the state could produce material equality, and even if the public schools were models of liberal education, family differentials remain a barrier to equal life chances. Families vary in class status and parental attributes, including tastes and talents, emotional openness, and so on, and these differences can leave children inadequately, and unequally, prepared for adult life. Children in high-status families benefit from parental skills and social networks. Children in well-functioning families, who have their emotional, intellectual, and moral needs met, tend to have a head start over those whose families are less functional. And children whose parents help school their tastes and talents may have a head start in certain pursuits.<sup>22</sup>

Schools can mitigate these inequalities but cannot eliminate them, in part because school performance depends on family involvement, so that educational institutions may replicate rather than redress inequalities in family competence. This intuition finds confirmation in the empirical evidence, which documents that family background matters for children's life chances.<sup>23</sup> Additional redistribution of wealth and improvements in the public schools could mitigate these disparities. But monetary redistribution cannot eliminate the effects of differences in family environment.<sup>24</sup>

Sociological studies suggest pathways by which class inequality affects school outcomes. For example, the sociologist Annette Lareau has documented how middle-class children are groomed for achievement from an early age.<sup>25</sup> Lareau's study details how middle-class children gain from

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20. See ACKERMAN, *supra* note 7, at 150–67.

21. See FISHKIN, *supra* note 6, at 67–82 (concluding that “[c]onsiderable evidence has recently accumulated that, while compensatory efforts can indeed improve the developmental opportunities facing the least advantaged, any realistic efforts will not be substantial enough to alter the basic pattern of conflict in the trilemma”).

22. See ANNETTE LAREAU, *UNEQUAL CHILDHOODS* 5–6 (2003); *infra* text accompanying notes 23–32.

23. For a summary of empirical evidence on intergenerational mobility, see W. Steven Barnett & Clive R. Belfield, *Early Childhood Development and Social Mobility*, *THE FUTURE OF CHILDREN*, Fall 2006, at 73, 87–91; Emily Beller & Michael Hout, *Intergenerational Social Mobility: The United States in Comparative Perspective*, *THE FUTURE OF CHILDREN*, Fall 2006, at 19, 23–27. Children's genetic endowments also help determine their life options; I do not consider that aspect of endowment in this paper. For one approach to the problem of justice in genetic endowments, see ACKERMAN, *supra* note 7, at 113–19.

24. SUSAN E. MAYER, *WHAT MONEY CAN'T BUY: FAMILY INCOME AND CHILDREN'S LIFE CHANCES* 2–3, 9–14 (1997).

25. LAREAU, *UNEQUAL CHILDHOODS*, *supra* note 22, at 5–6. See also ANNETTE LAREAU, *HOME ADVANTAGE* 1–11 (2d ed. 2000) (documenting the different approaches to primary education taken by

their families' superior economic resources as well as from a style of child rearing that she terms "concerted cultivation." Middle-class parents cultivate their children's abilities through after-school activities and intensive verbal interactions with their children.<sup>26</sup> They also model a sense of entitlement in interacting with school personnel, athletic coaches, and other authority figures.<sup>27</sup> This is not to say that the middle-class child-rearing style is perfect, merely that it confers certain skills. On the downside, Lareau finds that middle-class children tend to be dependent on parents, competitive with siblings, and distanced from extended family.<sup>28</sup>

By contrast, working-class and poor children sometimes face deprivation because their parents lack money and time, but they also experience a more relaxed style of nurture, which Lareau calls the "accomplishment of natural growth."<sup>29</sup> Lareau finds that poor and working-class parents aim to provide a space for children to develop on their own.<sup>30</sup> On average, these children experience less verbal interaction with their parents, and they spend long stretches of time with minimal adult supervision.<sup>31</sup> Working-class and poor adults and their children, Lareau finds, tend to be uncomfortable with middle-class authority figures, a barrier that can hinder parents' ability to obtain educational help for their children.<sup>32</sup>

Fishkin concludes that the problem of inequality is intractable. Even if society were willing to sacrifice family privacy, efforts to equalize child-rearing conditions would either be prohibitively expensive or trivial in their effects.<sup>33</sup> He suggests, in passing, that the only truly fair arrangement might be a "massive system of collectivized child-rearing," although such a system would require equally massive interference with the life plans of parents who seek to share their lives with their children.<sup>34</sup>

On the traditional view, then, the liberal state faces a double bind: If it protects individual liberty for parents, it dooms children to unequal life chances. If the state promotes equality for children, it damages a protected

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middle-class and working-class parents).

26. LAREAU, *UNEQUAL CHILDHOODS*, *supra* note 22, at 110–11.

27. *Id.* at 124–27.

28. *See id.* at 52–65, 241–45.

29. *Id.* at 32.

30. *See id.* at 2–3.

31. *See id.* at 140–46, 159–60.

32. *See, e.g., id.* at 208–17 (recounting a case involving a working-class child with probable learning disabilities).

33. FISHKIN, *supra* note 6, at 67–82.

34. *Id.* at 64–65.

sphere of liberty for parents. The state, it seems, can be liberal or egalitarian, but not both, when it comes to the treatment of children.

But this conclusion rests on two premises that are worth examining more closely. One is that equal opportunity requires a substantial degree of sameness in developmental conditions for children. The worry is that any differentials in family life will translate into an uneven playing field when children reach adulthood. A second implicit premise is that the family not only is, but ought to be, a sphere of privacy where adults should have the right to do as they like, including to rear their children in any way they like, provided they do not damage them severely.

The next three parts draw on different strands of liberal egalitarian political theory to suggest that, in theory at least, equality for children can coexist with liberty for parents in the realm of family life.

### III. WHAT DOES EQUALITY FOR CHILDREN REQUIRE?

For children no less than for adults, the central question is: what is equality? While there are many ideals of liberal equality, here I focus on the strand of liberalism that emphasizes equality of resources. It reflects the proposition that individual liberty and equality are paramount values. To make liberty meaningful for all, every human being should have a chance to choose the life she wants to live. While one's choices are always constrained, the idea of equality of resources is that scarcity should be apportioned so that each person has a fair share of the resources available for her generation.<sup>35</sup>

Because resource equality demands *ex ante* equality in the distribution of resources, resource egalitarianism is construed as an ideal of equal opportunity.<sup>36</sup> Generally speaking, resource equality takes the position that equal resources should be devoted to each person's life. I will not aim to capture every detail here; instead, I will quickly sketch some core commitments of resource equality and show how they can support a conception of equality that can coexist peaceably with the inherent

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35. On this view, resources are understood broadly to encompass one's genetic and bodily endowment, as well as the external resources available to shape one's life.

36. For instance, I understand Fishkin's analysis to invoke resource equality when it construes equal opportunity for children as "equal life chances." See FISHKIN, *supra* note 6, at 30–35. Some writers in this tradition describe their ideal as "equality of opportunity," though others use the term differently. Compare ACKERMAN & ALSTOTT, *supra* note 11, at 1–5, 31–34 (identifying resource egalitarianism with equal opportunity), with RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 86–92 (2000) (equating "equality of opportunity" with libertarianism, and rejecting it).

diversity and variability of family life.

The canonical examples of resource equality focus on the situation of adults rather than that of children. On Ronald Dworkin's desert island or Bruce Ackerman's spaceship, the task is to divide up resources among adults who come to the situation with their capabilities and values already set. Equal opportunity for children thus confronts a novel problem: *what kind of upbringing* offers each child the preparation she needs to step up to her fair share of resources, at the threshold of adulthood, as a free and equal citizen?

One view, which I take to be implicit in Fishkin's analysis, is that children require *exactly the same* developmental conditions; any variability in family background is problematic because it perpetuates inequalities.<sup>37</sup> In what follows, I draw on two principles of resource equality to suggest the contours of a different approach which rejects sameness of developmental conditions in favor of a more complex account of equality for children.

The first principle is that the equal moral worth of each individual and her life plan requires that society's material resources be distributed strictly equally among individuals. The familiar result is that each should receive the same share of society's physical resources and know-how. (The major exception is for people with disabilities, who should receive more than their pro rata share.) Thus, to take a simple example, if society has one hundred units of fungible resources and one hundred adults, each person should receive one unit of resources.<sup>38</sup>

The task of equal division among adults becomes complex when it comes to internal resources, because human diversity defies equality-as-sameness. Even in ideal conditions, people have different values, tastes, and talents. These differences inevitably produce inequalities in market earnings and in personal satisfaction. Some talents (say, the ability to do brain surgery) are scarcer and more highly remunerated than others. Even outside the market setting, a fortuitous match (or mismatch) in an individual's talents and inclinations may confer happiness (or unhappiness). The classic example compares two people who both love music, but one is musically talented while the other is not. The talented person derives pleasure from her aptitude, while the untalented person is

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37. See FISHKIN, *supra* note 6, at 64 (concluding that "if equality of life chances is to be achieved through processes consistent with the principle of merit, then conditions for the development of talents and other qualifications must be equalized").

38. See ACKERMAN, *supra* note 7, at 53-59; DWORKIN, *supra* note 36, at 66-71.

inconsolable, taking no solace from her other capacities (for mathematics, say).

The second principle addresses the distribution of talents. While resource egalitarians have taken different views, one notable view within the resource equality tradition is articulated by Ackerman, who offers a principle of “undominated diversity.” Ackerman’s core claim is that differences in talent, even substantial differences, are consistent with equality of resources.<sup>39</sup> His theory reflects the liberal ideal of neutrality: for the state to say that the musical person is superior to her peers would require a nonneutral (and therefore impermissible) judgment about the objective value of music.<sup>40</sup> The distinctive feature of undominated diversity is that it rejects piecemeal comparison of individual capacities and instead considers each person as a whole person.<sup>41</sup> If a person has talents and abilities that enable her to choose among and to live one or more ways of life that other people would reasonably consider good, then the person has received a fair—read *equal*—share of internal endowments.<sup>42</sup>

The theory of undominated diversity offers a rejoinder to resource equality theories that treat inequality in the distribution of talents as problematic. Rawls, and to some degree Dworkin, for instance, view endowments of talent as morally arbitrary, and they anticipate that a fair society would in some way redress such inequalities.<sup>43</sup>

By contrast, undominated diversity rejects equality of talents as a criterion for just distribution.<sup>44</sup> Ackerman’s theory locates equality in each person’s capacity for reflection, choice, and action.<sup>45</sup> Instead of prescribing that each person be capable of pursuing the same options, the theory highlights the importance of permitting each person to choose a life plan informed by her tastes and talents taken together. The demands of equality are met, on this view, if each adult receives an equal share of society’s external resources (including physical and technological resources), combined with an endowment of internal capabilities sufficient to meet the

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39. See ACKERMAN, *supra* note 7, at 120–38 (developing the concept of undominated diversity). See also VAN PARIJS, *supra* note 7, at 72–76 (adopting and extending Ackerman’s view). Cf. DWORKIN, *supra* note 36, at 85–92 (suggesting institutions to compensate for differentials in marketable talents). But see VAN PARIJS, *supra* note 7, at 68–72 (discussing deficiencies in Dworkin’s view from the perspective of resource equality); Alstott, *Equal Opportunity*, *supra* note 11, at 481–82 (same).

40. See ACKERMAN, *supra* note 7, at 123–24.

41. See *id.*

42. See *id.*

43. RAWLS, *supra* note 1, at 100–04; DWORKIN, *supra* note 36, at 85–92.

44. See ACKERMAN, *supra* note 7, at 120–24.

45. See *id.*

criterion of undominated diversity.

These two principles of equality for adults—equal division of material resources and the tolerance of wide differences in internal capabilities—suggest two analogous premises about the distribution of resources among children. First, fungible resources should be distributed equally. Because each child has equal moral status, there is no reason for granting some children superior access to material resources based on the accidents of birth—that is, being born to parents with low or high earning capacity.<sup>46</sup> Second, equality in the distribution of children’s capabilities should not require that each child develop—or even have the chance to develop—precisely the same set of skills or capacities. Rather, the metric for equality should be whether each child’s developmental conditions will leave her at the threshold of adulthood with a set of opportunities that meet the equality criterion and the capacity to exercise judgment and bring values to bear in the choice she makes.

I will call these two principles, taken together, an ideal of complex equality. The aspiration to equality is obvious enough. I add the modifier “complex” because I will shortly contrast the kind of family life admissible under this ideal with the stricter and less attractive vision of family life that would follow from an ideal of simple equality or equality-as-sameness.<sup>47</sup>

The distinction between external and internal resources seems robust in the case of children. Begin with external resources: since children too have equal moral status (at least with one another and with children across generations), they should be entitled to an equal share of the external resources (meaning material goods and technology) devoted to child rearing. This principle would require substantial equalization in children’s housing, nutrition, and health care.<sup>48</sup>

A harder question is whether a liberal regime should attempt to deny parents the benefit of housing, nutrition, and health care provided to their children. Nothing in the baseline argument justifies the distribution of additional resources of this type to parents: each adult has received her fair share already (by supposition), and the fact of having children does not (without further argument) merit an additional dip into the pool of social

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46. One might pursue the equality-of-what question here and ask what the right metric for equal division should be. Equal dollars per child? Equal access to nutrition, health care, and education?

47. For a discussion of the concept of simple equality, see MICHAEL WALZER, SPHERES OF JUSTICE 13–17 (1983).

48. Colin Macleod makes a similar point in an essay drawing on principles of luck egalitarianism rather than resource equality. See Colin M. Macleod, *Liberal Equality and the Affective Family*, in THE MORAL AND POLITICAL STATUS OF CHILDREN 212 (David Archard & Colin M. Macleod eds., 2002).

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resources. I have argued elsewhere that parental obligations are sufficiently stringent and long lasting so that parents may merit additional resources, but these (I suggest) should be of a type that would improve parents' long-term options; I reject the idea that parents should have greater consumption opportunities than other adults.<sup>49</sup>

This line of argument suggests that in an ideal setting (in which, *inter alia*, the parents' generation has enjoyed equality of resources), the provision of housing, nutrition, and health care to children should not improve their parents' lots. But even in an ideal setting, the indivisibility of at least the first two items in this list poses a practical problem. (Health care is different, of course; it is substantially divisible among individuals.) Parents and children share space and share food, and it is reasonable (indeed, desirable on most moral views) for children to be taught to share and to live in a regime of communal equality. The intimacy of family life would be disrupted if children eat well while parents starve, or if children live comfortably in rooms forbidden to parental access.

This suggests that to the extent resources for children are indivisible, parents should be permitted to share them. This conclusion would increase considerably the cost of providing equal material resources for children, because each child's own resources should not be diluted based on the number of adults she must share them with. (So, for example, a child with two parents in the household should not receive less food than a child with one, and indeed, such a family should probably receive more food to ensure that the second parent does not consume part of the child's share.)

The practical complications raised by these ideas multiply rapidly. For instance, what if parents who could provide food, shelter, and health care for their children decline to do so because the state will? What if parents stop buying food for themselves in order to eat on the state's budget—or begin to cram into households with children in order to claim the free food? What if parents abuse the state housing budget, choosing to lavish money on (say) their own bedroom or bathroom while slighting the children's space?

These represent three types of objections. The first is that the state may subsidize wealthy parents by providing equal support to rich and poor children. This claim reflects a baseline of family self-support, according to which parents should provide material support, and the state should step in only when parents fail. If we shift to treating material support for children

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49. ALSTOTT, *NO EXIT*, *supra* note 11, at 49–72.

as a collective (state) obligation, richer parents are not enriched (relative to the appropriate baseline of collective support).

The second and third cases represent a different abuse: indivisibility may require some sharing, but it should not serve to enrich parents by reducing their expenses for their own consumption. These would not be simple problems to solve, although they are familiar ones. Targeting mechanisms now used in social welfare and taxation address somewhat similar issues: the attempt is to detect parents who claim to be impecunious but who could afford to feed or house themselves. Still, one should not underestimate the magnitude of the practical problem: detecting erstwhile “parents” who are really freeloaders with no connection to the children would require monitoring of the family unit to see whose connections to the children are deep and lasting enough to merit the indivisibility benefit. Detecting parental misappropriation of funds meant for children would also require some monitoring device.

In principle, then, it seems that the state should guarantee children an equal share of material resources, whether parents’ actions reflect their values (they do not wish to use their resources for their children) or their financial status (they wish to, but cannot, provide adequate resources for their children). A denial of medical care to a child, for instance, would violate the ideal of equality whether it reflected the parent’s religious beliefs or parental poverty.<sup>50</sup> As we shall see shortly, the liberal ideal of child rearing would grant parents considerable leeway to share religious beliefs and other commitments with their children, but the ideal would also limit parental prerogatives in ways that current law does not. The standard of equal material provision is the first of these limitations: it implies that no child should fall beneath the baseline of state-provided resources, even if her parents would prefer to decline medical care, nutrition, or shelter.

When it comes to internal resources, once again the development of children’s capacities seems to map onto the principles that govern the distribution for adults. The equality-of-resources ideal would not require the development of identical capabilities in every child. Rather, it suggests that each child should develop the capacities needed to make reasoned choices among ways of life. This implies that children should have the

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50. The law in some states requires parents to provide life-saving medical care even when doing so runs counter to their religious beliefs. *See Walker v. Superior Court*, 763 P.2d 852 (Cal. 1988) (upholding prosecution of Christian Science mother for daughter’s death of meningitis when mother only provided treatment by prayer rather than medical care). *But see Hermanson v. State*, 604 So. 2d 775 (Fla. 1992) (overturning convictions of Christian Science parents for daughter’s death from complications related to diabetes for providing only spiritual treatment).

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cognitive, emotional, and moral capacity to identify and analyze different value commitments. Each child should also gain some experience of the practical satisfactions and frustrations of living a committed life, and she should be offered the chance to explore ways of life outside those lived by her parents.

Beyond these capabilities, which look to children's capacities to make private choices, each child should also develop the capacity needed to participate in the public life of an egalitarian society. The state and its institutions ought ideally to provide equal opportunities not only to children in this generation but to every individual in every future generation as well. Otherwise, equality would be a one-generation phenomenon. Implicitly, equality requires the persistence of the liberal state and its institutions. Thus, individuals should not only be trained to make choices about their own lives, but also to participate in a polity that requires tolerance of others' choices and the deployment of resources to enable future generations to live lives of their own choosing.<sup>51</sup>

In summary, then, an equal-opportunity state would mandate an equal distribution of material resources among children as well as additional institutions to foster cognition, emotional control, and moral discernment in children. Ideally, children's education (using this term broadly) would include experience of one committed way of life as well as exposure to alternative values, and would include schooling in the values of tolerance and equality embodied in the liberal state.

What institutions could best carry out these mandates? The family and the schools represent major attempts to shape children's capabilities. In the next part, I begin by asking whether the family should persist in an ideal liberal egalitarian regime, and later I consider schools along with other institutions that might attempt to enrich children's development.

#### IV. WHAT FUNCTIONS DOES THE FAMILY SERVE?

The family's role in child development has been little studied in some of the canonical sources that lay out the core principles of egalitarian

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51. For example, David Archard has argued that a "liberal state must be reproduced and this requires that it ensure its future citizens at least have the minimal capacities necessary to function as participating citizens." David Archard, *Children, Multiculturalism, and Education*, in *THE MORAL AND POLITICAL STATUS OF CHILDREN*, *supra* note 48, at 142, 153. Ackerman's dialogic conception of liberal justice, which emphasizes each person's actual capacity to defend his or her way of life in the public forum, leads him to identify communication and language development as important developmental goals. See ACKERMAN, *supra* note 7, at 143-46.

liberalism.<sup>52</sup> But a newer vein of scholarship reconsiders the liberal family from the child's point of view. Drawing on this literature, we can begin to see how the family serves several functions in a liberal system of child rearing.

First, families foster children's emotional development by providing continuous, intimate, and reliable care. The adults involved may be parents, grandparents, or unrelated to the child, but whatever their identity, these "parents" (defined in a functionalist sense) should persist in the child's care for a long period in order to provide the foundation for emotional stability and growth. Continuity of care fosters emotional development and also lays the emotional foundations for intellectual and moral growth.<sup>53</sup>

Families also provide moral instruction to children and help create a cultural identity. Parental authority and trustworthiness foster moral learning, as parents continually instruct children directly and by example in matters of morality.<sup>54</sup> Families may also choose religious and cultural institutions that convey moral messages and give the child a sense of a cultural community with distinctive values and practices.<sup>55</sup>

In addition, families serve to immerse children in particular moral practices and cultural traditions.<sup>56</sup> Ackerman suggests that families properly take responsibility for children's early nurture, providing discipline and an introduction to social life and morality—and, in the process, give children an early introduction to the family's chosen way of life. Ackerman argues that the family satisfies children's "need for cultural coherence"—a thick form of cultural identity which serves as the starting point for children's exploration of other life options.<sup>57</sup> "Family" in Ackerman's theory is understood rather expansively, since cultural coherence might, in principle, be established just as readily in a kibbutz or other communal setting. But cultural coherence does anticipate that families in whatever form will have deep attachments to particular ways of life, and that children will, in their early years, incorporate these moral and cultural traditions into their understanding of their own place in the world.

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52. Both RAWLS, *supra* note 1, and DWORKIN, *supra* note 36, devote very little attention to the child-rearing family. *But see* RAWLS, *supra* note 1, at 462–67 (considering the parent-child relationship as the source for certain moral understandings).

53. For an account of continuity of care, see JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 31–39 (new ed. 1979).

54. *See* RAWLS, *supra* note 1, at 462–67.

55. *See* Eamonn Callan, *Autonomy, Child-Rearing, and Good Lives*, in *THE MORAL AND POLITICAL STATUS OF CHILDREN*, *supra* note 48, at 118, 133–36.

56. *See id.*

57. *See* ACKERMAN, *supra* note 7, at 140–43.

In Ackerman's theory, family nurture is properly balanced, as children mature, by increasing exposure to other visions of the good.<sup>58</sup> Still, children's first experiences would inevitably differ, depending on their parents' ways of life.

In Ackerman's account, which dovetails to some degree with theories offered by other liberals,<sup>59</sup> the moral and cultural diversity associated with families plays a positive role in children's development, provided that children also receive guidance in considering alternatives to their family's way of life. A deep exposure to one particular way of life and repeated interactions with parents demonstrate firsthand how a committed life is lived—and the sacrifices involved. Liberal institutions should help older children discover alternatives and begin to expand their horizons.<sup>60</sup> Family influence may never be entirely erased by later education, so that children's autonomy is limited relative to a baseline of unlimited options. But theorists in this vein tend to prize cultural coherence over "rootlessness."<sup>61</sup>

To make the point concrete, consider the problem of inequalities in parental tastes and talents. Even in an ideal setting, parents will differ in their ways of life, and these may give some children a leg up. Some parents will fill their houses with music and encourage children to join in. Others will love sports and get their children out on the playing field at an early age. Some families will sit on the couch and watch television. The existence of a liberal education system could mitigate these differences in background (compared to the situation today) by offering a program of extracurricular activities to all. Still, family traits would give some children an advantage over others.

The criterion of complex equality suggests that these represent the kind of immersion in a way of life that the liberal ideal of the family takes as positive. The goal should not be (even if it were possible) to match every child with the family that best develops her own talents. In a neutralist liberal framework, it would be improper for the state to identify which of a child's potential talents represent the highest or best. A collectivist society may identify athletic ability or academic proficiency as talents to be developed in children for the greater glory of the state; think of the former Soviet bloc machinery designed to detect and train gymnasts from an early age.

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58. *See id.* at 146–54.

59. *See* Archard, *supra* note 51; Macleod, *supra* note 48.

60. *See* ACKERMAN, *supra* note 7, at 150–54.

61. *See* Archard, *supra* note 51, at 158.

But in a liberal society, whether particular parents' traits "advantage" a child depends on the child's own values as they ultimately develop. Human nature and the mediation of a liberal education will ensure that there is no guarantee that children come to endorse the values or traits with which they have been reared. When children do endorse their families' particular tastes as adults, and feel themselves to have been given a gift, that endorsement reflects a considered choice on the child's part to assign value to her upbringing rather than to reject it. In either case, the child has been immersed in a particular way of life and has seen firsthand the pleasures and strains associated with it.

On this view, the family's role is to give children the experience of a committed life. If specific cultural experiences, talents, or tastes developed in childhood turn out to be valuable to the child, this is because she has—after a process of structured deliberation fostered by a liberal education—chosen to adopt them as reflecting her own values. Within a wide range, then, a pluralist liberal society might tolerate parental tastes and talents just as it tolerates families' cultural attributes.

(Incidentally, this view implies new meanings for terms like "parent" and "family." The family in this sense need not be defined by a biological relationship between parent and child or by marriage (or a sexual relationship) between parents. Instead, parents are those adults who provide the child with continuous, intimate care, and who foster development of the child's emotions, intellect, moral life, and cultural identity.)

To sum up, families uniquely perform two principal functions related to child development. They foster emotional and intellectual development via continuity of care, and they foster moral development and cultural identity by living a committed way of life, with "commitment" understood in a neutralist sense, so that the commitment might be to nothing in particular.

Notable for its absence on this list is the conventional function of the family as provider of financial support. The absence of this function begins to suggest how controversial an egalitarian program might be in the present U.S. context. Consistent with the discussion of equality for children above, the family, in an ideal setting, would not be a primary provider of material goods. U.S. families today take primary responsibility for procuring food, clothing, shelter, and health care for their children. But parents' financial capacities differ depending on their market earnings capability, their choice of jobs, and their other life choices. The equality-of-resources ideal suggests that, within certain bounds, *adults'* access to material resources

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should vary depending on the choices they make. Indeed, the insistence on ex ante equality and the tolerance of ex post inequality represent hallmarks of resource equality, which holds that adults are properly responsible for the consequences of their values and choices.

But the same ideal suggests that society's tolerance of ex post economic inequality should not extend to children, who remain in a state of preparation and who—by reason of being children—cannot make economic choices for which they are properly held responsible. Thus, an egalitarian liberal state would attempt to engineer matters so that children receive an equal share of developmental resources, as discussed above.

One might object that material equality for children could undermine the emotional, cultural, and moral functions of the family. After all, many people associate their own upbringing with money and, in particular, constraints on money. Values and culture come into play when people make decisions about how to deploy scarce resources: with the same budget, one family may tithe, while another takes vacations, and a third sends the money to a needy relative. Parental control over scarce resources also provides an occasion for moral teaching: Do not steal or cheat, even if you lack money for things you need. Give money to the less fortunate, even if it means skipping a meal yourself. In many families, money takes on an emotional dimension as well. Parents' decisions to spend money on a child or to withhold it may be deeply involved with demonstrations of love, demands for discipline, and attempts to build self-reliance.

One might suppose that connections between money and family would still operate in a regime of equal material provision for children. They would simply operate with less force. Even if the state paid 100 percent of the costs of rearing children, scarcity would still exist. A typical family's budget would be less constrained under such a system than it is today, but the family would still face scarcity in the economist's sense of the term, and there would still be tradeoffs to be made: Contribute more to the church? Take more vacations? Reduce Dad's or Mom's working hours? Move to a bigger house?

While it is true that all of these decisions would continue to be value-laden, culturally situated, and drenched in emotion, the important point is that families would no longer be distinguished by the degree of economic desperation they face, or the degree of absolute deprivation their children experience. Instead, spending decisions at the margin would reflect parental values.

Could parents properly object that state-provided resources for

children would infringe their autonomy by denying them the freedom to act as financial providers? In the United States today, this may be one likely reaction by many parents, because the parental role today is so closely bound up with financial provision. When children's fortunes depend—as they do, today, in the United States—on parental success in the marketplace, it may seem that the “good” parents are the ones who do their best to struggle and succeed in that marketplace. But the egalitarian agenda suggested here would, in principle, sever the link between financial providership and parenthood. Parenthood would instead be a matter of providing nonfinancial resources: continuous care, moral instruction, and cultural coherence. This change in the nature of parenthood could strike U.S. readers as radical, and yet it probably strikes readers from more egalitarian European societies as relatively familiar. In Part VI, below, I suggest a principled rationale for treating this shift as an appropriate reshaping of the boundaries of parental freedom, rather than an impermissible infringement of parental liberty.

One outgrowth of this functional view of the family as an institution devoted to child development is that it begins to suggest why institutional child rearing would be undesirable in a liberal egalitarian regime. To be sure, liberalism has at times flirted with collectivization. Fishkin suggests in passing that a “massive system of collectivized child-rearing” might serve the ideal of equality for children.<sup>62</sup> It is worth pausing on that idea to deepen the distinction between complex equality and equality-as-sameness. What we shall see is that the impulse to standardization is misguided because the family (understood to encompass diverse forms, as discussed above) uniquely promotes the individual capabilities prized in a liberal society.

Communal child rearing could in theory be adapted to fit liberal criteria. Jeffrey Blustein points out that, instead of engineering developmental conditions to reproduce a caste system, communal methods might simply be used to ensure “uniform standards of competence [for adults engaged in rearing children], so that there could be no difference among children resulting from the differential abilities, intelligence, skills, and emotional capacities of individual parents.”<sup>63</sup>

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62. FISHKIN, *supra* note 6, at 64–65. He argues that “if equality of life chances is to be achieved through processes consistent with the principle of merit, then *conditions for the development of talents and other qualifications must be equalized.*” *Id.* at 64 (emphasis added). Fishkin does not endorse such endeavors, since he aims to illustrate the collision between the liberal principles of equality of life chances and family autonomy, and not to encourage the abandonment of family autonomy.

63. BLUSTEIN, *supra* note 13, at 213–14.

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The impulse toward standardized child rearing reflects a concern for equality. The idea seems to be that, if the state could devise a fair and humane system, it could avoid inequalities reflecting family differences. The child-rearing system could be staffed with qualified professionals, including nurses, teachers, social workers, doctors, and psychologists, for instance. Thus, the problem of differential competence among parents would subside. Class advantage would disappear as well, since these professionals would all hail from the middle class and would use expert methods and a standard developmental curriculum. Differences in parental tastes and talents would disappear as well, since every child would have access to a standard array of extracurricular enrichments: sports, music, and art, for instance.

The practical failings of such a system are obvious; the experience with public education illustrates the gaps between an ideal universal system and a real one structured by politics. But, in keeping with my method to this point, I want to suggest that a standardized system of child rearing would be undesirable even in an ideal setting in which the institution worked just as intended.

Begin with the illusion of sameness. Even heavily regulated, large-scale institutions would not, in fact, produce the same developmental conditions for children, whether measured by inputs (what children experience) or by outputs (what capacities children develop). The diversity of human beings means that even standardized developmental conditions would inevitably differ, and these differences could advantage some children over others. Even communal living conditions would inevitably differ from institution to institution, because adults differ. One headmaster (or teacher) might emphasize structured days full of reading, writing, and chores, while another might be laid-back and permissive. One facility might value its large soccer field while another tolerates a small, scruffy playground in order to maintain an up-to-date gymnasium. Relatively small differences could affect children's development. One child may thrive in the highly-structured routine while the same regimen leaves another child defiant and depressed. A child who loves tumbling but abhors team sports will find her niche in the institution with the gym more readily than in the one with the soccer field.

But even if diversity of experience could be purged from the system (by, say, substituting child-rearing robots for human teachers and requiring all facilities to adhere to a single physical layout, à la Wal-Mart), children's own differences in temperament and intellect would lead to different reactions to the same stimulus. Even robotic programming would display

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tendencies (to talk or to be silent, to be peppy and outgoing or quiet and passive, to enforce rules or to encourage innovation by the children) that would fit some children's needs better than others. There could be no neutral program that would fit every child's psychological needs, so children would emerge from the standard experience with very different capabilities. Some children would learn to work the system, while others would perceive themselves to be misfits, with positive or negative consequences for adult achievement. A child-rearing system that predictably advantaged (say) the outgoing over the introvert, the quick-witted over the slower and more thoughtful, and the manipulative over the straightforward would seem to violate any ideal of sameness.

At first, this conclusion seems to leave liberalism in a bind, because families also advantage some children over others. Parents' temperaments and ways of life may be well matched with those of their children, or continually at odds. If a standardized system would advantage some children and fail others, just as families do, then the liberal ideal of equality seems unattainable, even in theory. Liberals might debate whether families or a standardized regime would be better or worse, on balance, but both would appear to create morally arbitrary advantages for some children over others, depending on one kind of accident (the family to which one is born) or another (the institution to which one is assigned and the fits of its people and methods with one's temperament).

The mistake here is the tendency to interpret equal opportunity as aspiring to sameness of life options. If one accepts the ideals of undominated diversity and complex equality as I have presented them, sameness is not a core value. Liberalism seeks to recognize the moral worth of each individual, to make possible a variety of ways of life, and to remain neutral toward the whole range of lives that individuals might choose to live. Taking these values seriously, we can begin to see a close fit between family life—at least in its ideal form—and a different conception of liberal equality, which emphasizes the worth of the individual and the development of her capacity to select and to live a life of her own choosing, meaning a way of life that deploys her talents to pursue her values.

In an ideal setting, the family provides a degree of intimacy, partiality, and diversity that a standardized, communal system cannot. One of the few cross-cultural developmental findings is that children require lasting, close relationships with a small group of adults.<sup>64</sup> These adults might be

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64. See, e.g., JEFFREY TRAWICK-SMITH, *EARLY CHILDHOOD DEVELOPMENT* 174–81 (2000) (noting some cultural differences in the reactions of parents and infants to specific situations, but

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organized into families—or into kibbutzim or other communes—but the critical attribute is that emotional and intellectual development requires secure and long-term attachment to particular caregivers.

These attachments, characterized by long-term persistence and intimacy, cannot meet the criterion of sameness. The adults to whom children are attached cannot offer a standardized environment or a setting that develops all possible talents for which a child might have some genetic aptitude. Whether the adults love music or sports, art or food or religion, they will inevitably expose their children to certain tastes and ways of life that will preclude time and attention devoted to others. The differences among adults form part of the particularity of the emotional relationship between parent and child: *this person loves me*.

Blustein puts it this way: the human “capacity for deep personal relationships depends on early childhood experiences,” and in particular, the experience of the lasting and partisan love that a parent offers to her child.<sup>65</sup> The love of a parent for a child, and the persistence of the individual parent over time, demonstrates to that child her importance in the world and her singularity as an individual. A parent sees her child in a way that no other person does. In that child’s eyes, she sees the baby that was and the adult that will be, and she offers an unconditional commitment. The child experiences intimacy and recognition; she understands herself (eventually) to be separate from the parent and uniquely worthy of love. Over time, the child ideally develops a sense of her parents (and others) as unique and worthy in themselves. Parent-child love serves as the child’s first model, and in some respects the lasting model, for adult relationships and a sense of responsibility toward others.

The parent-child relationship also serves to give the child deep experience with one way of life and helps locate the child in a community or culture. Recall Ackerman’s theory, in which the family satisfies children’s “need for cultural coherence”—providing a thick form of cultural identity which serves as the starting point for children’s exploration of other life options.<sup>66</sup> Cultural coherence adds to the child’s sense of herself as an individual with a unique identity: *I come from X and have chosen X or Y*. Cultural coherence also serves an educational function by providing children with firsthand experience of whatever version of a

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suggesting that “responsiveness and warmth are important caregiving behaviors in all cultures, [although] how they are expressed varies greatly”).

65. BLUSTEIN, *supra* note 13, at 219.

66. See ACKERMAN, *supra* note 7, at 140–43.

committed life their parents have chosen. Children encounter the pleasures and limitations of one particular way of life and can build on that experience as they begin to branch out to consider what other ways of life might be preferable.<sup>67</sup>

The suggestion, then, is that family life uniquely contributes to at least one conception of liberal equality by fostering personal characteristics—including a sense of individual identity (fostered by the emotional intimacy and continuity of parental care) and the capacity to choose among diverse ways of life.

#### V. WHAT LEGAL REFORMS WOULD BE REQUIRED TO IMPLEMENT EQUALITY FOR CHILDREN?

The insight that the family plays a constructive role in child development does not resolve the conflict between equality and family life. Families that foster necessary qualities in children may reproduce inequalities as well. Even in ideal theory, families may differ in class status or in parental competence.

For example, consider class differences. As we have seen, in modern capitalist societies, class background correlates with children's life options. Children reared by middle-class families are more likely to remain in the middle class as adults than to fall in the social spectrum, while children reared in poorer households are likely to remain in poorer households as adults.<sup>68</sup> Growing up in a middle-class household today means that one is more likely than others to inherit financial wealth, a social network that confers economic options, and even personal traits (a sense of entitlement and ease with authority)<sup>69</sup> that may translate into management skills and ease entry into the professional world. True, individuals may reject or be unable to make use of their class capital. Dalton Conley, for example, has documented the substantial inequality experienced by siblings within families in every economic class.<sup>70</sup> But on average, growing up in a

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67. Other theorists also see affirmative value in exposing children to their parents' way of life. David Archard ventures a step further, positing that membership (in a cultural tradition) may be a good in the Rawlsian sense, something that ought to be fairly and universally distributed. Membership, in Archard's view, provides a child with a "firm and secure sense of her identity." Archard, *supra* note 51, at 158. Robert Noggle approves the family's role as providing a "default" value system for children, which a child can later choose to accept, reject, or modify. Robert Noggle, *Special Agents: Children's Autonomy and Parental Authority*, in *THE MORAL AND POLITICAL STATUS OF CHILDREN*, *supra* note 48, at 97, 110–15.

68. See *supra* text accompanying notes 23–24.

69. See *supra* notes 25–27 and accompanying text.

70. DALTON CONLEY, *THE PECKING ORDER: A BOLD NEW LOOK AT HOW FAMILY AND SOCIETY*

middle-class family represents an advantage if one takes access to eventual middle-class status to be an option that is valuable to many and can be discarded if one wishes.

The rejoinder, once again, is clear enough in principle, though likely to meet significant resistance in practice. Radical changes could—in principle—disrupt present class hierarchies. The critical point is that the villain in the story is not the family but the institutions that preserve class hierarchy and permit family class status to determine one's life options. A liberal society might attempt to promote a high degree of economic and social mobility so that class background would become a cultural artifact rather than a determinant of one's place in the hierarchy.

What would a program of this type look like? Once again, in theory, one can imagine its contours. For instance, a society might abolish inherited wealth and provide for each child to have good housing, nutritious food, and good health care, without regard to her family's cash position. A system of equal liberal education might, in principle, cultivate each child's academic potential as well as her talents via extracurricular activities. These schools would (again, in principle) help every child explore different ways of life and would introduce children to adults working in jobs and pursuits of interest to ensure that each child entered adult life with a social network. Such a society might also provide, in lieu of private inheritance, a financial stake or a basic income sufficient to give each young adult substantial independence in deciding where and with whom to live, and what financial and other projects to pursue.<sup>71</sup>

The unifying idea behind such reforms would be to diminish the impact of childhood class differences on adult opportunities. Mediating institutions like inheritance taxation, reformed public education, and stakeholding might mitigate financial differences and permit society to achieve the ideal of undominated diversity. Richer parents could still buy more extravagant houses or expensive lessons, to be sure, but (remain in theory for now!) all children would have good housing and extracurricular pursuits to school their own talents. Further, every parent, having been reared themselves in such a society, would have a story to tell about their own lives, and in such a society—even more so than today—many might disdain the kinds of lives necessary to gain riches.

Remaining in ideal theory for the moment, it would still be the case

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DETERMINE WHO WE BECOME (2005).

71. See ACKERMAN & ALSTOTT, *supra* note 11, at 4–5; Alstott, *Equal Opportunity*, *supra* note 11, at 489–96.

that richer or better-educated parents might open doors for their children that poorer or less-educated parents could not. But a neutralist liberal state would deny that such options are *better* than the alternative. Some readers of this Article (and indeed its author) may have difficulty setting aside the firm belief that the children of intellectuals have access to the best of all possible worlds—the world of ideas. But other adults might—and do—reject that view. They might insist just as sincerely that the godly life or the life of an athlete is the better road. Indeed, they might pity the children of the pointy-headed intellectual, whose family spends too much time indoors with their books and too little time pondering the will of God or practicing their basketball skills.

Complex equality for children thus rests on a particular interpretation of liberal neutrality: provided that every child receives equal material resources and a sound family upbringing, the criterion of undominated diversity is met. No one could complain that they were unfairly denied jet-set parents, intellectual parents, sporty parents, or God-fearing parents. Children may, when grown, embrace their parents' way of life or reject it. But in either case, the child has gained the experience of a committed life, and she can judge her own projects by their relationship to the life she lived with her family.

The critical move here, of course, is the assertion that the demands of equality are met if material equality and liberal schools produce children with capabilities sufficient to meet the criterion of undominated diversity. Undominated diversity has been controversial, reflecting the schism within liberalism between those who endorse “talent-pooling” and those who oppose it.<sup>72</sup> My point is not at all that one *should* accept undominated diversity—that argument would take quite another form. My point, instead, is that *if* one takes that road, certain conclusions about the family and child development follow logically.<sup>73</sup> (In Part VII.A, I consider the implications if one rejects undominated diversity.)

Even so, as soon as one constructs such an ideal, politics and administrative practicalities suggest objections. For instance, an egalitarian society might remain a market economy, but it would require controversially high levels of taxes. While one might debate the economic

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72. For background on talent pooling, see Anthony T. Kronman, *Talent Pooling*, in HUMAN RIGHTS: NOMOS XXIII, at 58 (J. Roland Pennock & John W. Chapman eds., 1981), and the discussion of the talent-pooling debate in Alstott, *Equal Opportunity*, *supra* note 11, at 479–85.

73. Interestingly, Fishkin's analysis adopts a version of resource equality without talent-pooling. FISHKIN, *supra* note 6, at 34–35. He does point out that incorporating talent pooling would make the task of equalization even more strenuous. *Id.* at 35.

effects of high taxation, the objection is difficult to answer definitively, given existing empirical evidence,<sup>74</sup> and the high political salience of tax levels suggests further difficulties in getting from here to there. Stakeholding, likewise, would be controversial even without the other measures. Universal preschool and school reform have proved difficult for complex reasons, and the dramatic inequalities of public schools today remain a sore spot for any egalitarian agenda.

One might also object that real-world parents are not all uniformly competent. What about children whose parents are disinclined or unable to provide the emotional care and cultural context that the liberal ideal imagines? In principle, an egalitarian state might adopt two measures to address that possibility. Ex ante, the state might, as Hugh LaFollette has proposed, screen parents in advance, denying to the incompetent, the negligent, and the troubled the opportunity to be parents.<sup>75</sup> It might also, ex post, offer material assistance and expert aid to enable parents to perform competently, with the ideal being that every child should have a family capable of performing its emotional and moral functions. For instance, the state might subsidize paid family leave for childbirth, and children's and parents' illnesses in order to improve care in some families. Improved access to rehabilitation services for drug and alcohol addicts, with intensive follow-up care, could also address one of the most common sources of parental failure. Additional services might be offered to support parents or children with disabilities.<sup>76</sup> At the same time, state funding for children's shelter, food, clothing, and health care could nearly eliminate neglect that is due to parental poverty (rather than to parents' physical or psychological inability to care for their child).

The LaFollette proposal remains controversial (to put it extremely mildly). Denying some the right to become parents would tread on constitutional guarantees to freedom of procreation and could evoke the practices of totalitarian regimes. The specter of racial and class inequality would be ever present, as would the possibilities for state corruption.

But an egalitarian liberal society need not adopt that approach to address the problem of differentials in parental abilities. In principle, the family ought to be understood as an institution for child rearing that is located alongside, and deeply entwined with, redistributive programs and a

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74. See Alstott, *Equal Opportunity*, *supra* note 11, at 496–501.

75. See Hugh LaFollette, *Licensing Parents*, 9 PHIL. & PUB. AFF. 182 (1980) (advocating the licensing of parents). See also DWYER, *supra* note 10, at 254–58 (outlining legal rules that would screen for parental incompetence).

76. See ALSTOTT, *NO EXIT*, *supra* note 11, at 117–37.

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reformed educational system, as well as an extensive system of family support services. This kind of program would be inherently controversial, politically difficult, and administratively challenging, of course, and it would require a degree of regulation and state competence that many may find implausible. And yet, in principle, it could be achieved.

After a brief summary and extension of the argument in Part VI, Part VII outlines the significant revisions in constitutional and state law governing parents' rights and state responsibilities that would be needed to implement an egalitarian approach.

#### VI. HOW WOULD AN EGALITARIAN LEGAL REGIME INTERPRET PARENTAL RIGHTS AND THE STATE'S AFFIRMATIVE OBLIGATIONS?

Begin with an empirical question: would parents object to the kind of egalitarian programs I have described to this point? After all, this account of family would accommodate a wide range of family structures and ways of life. The two functions of the family—emotional and intellectual growth via continuity of care, and moral instruction and cultural context—could be accomplished in a variety of ways. Within wide boundaries, parental efforts should be acceptable in such a regime. Further, if such a program were practically and politically feasible, it would support family life by guaranteeing each child equal material entitlements, a good education, and it would even expand family supports like paid leave. Some parents would object to the higher taxes they faced, but others would suffer fewer financial worries.

Still, even a liberal program would rule some parental choices out of bounds, and those parents might object that their freedom has been curtailed. A parent might object to liberal education, for example, if she does not wish her child to encounter alternatives to her family's way of life. This is the familiar case of *Wisconsin v. Yoder*, in which Amish families challenged a state statute requiring children to attend high school.<sup>77</sup> Another set of parents might object to the standards of care for children set by the egalitarian state. They might prefer prayer healing to conventional medicine,<sup>78</sup> or they might wish to cut off their children's relationship with grandparents, as in *Troxel v. Granville*.<sup>79</sup>

Present law has resolved such disputes in parents' favor on various

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77. *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

78. *E.g.*, *Hermanson v. State*, 604 So. 2d 775 (Fla. 1992).

79. *Troxel v. Granville*, 530 U.S. 57, 60–61 (2000).

grounds: *Yoder* rests on (probably outdated) Free Exercise grounds, but also on (probably still viable) parental autonomy principles.<sup>80</sup> *Hermanson v. State* rests on Due Process principles,<sup>81</sup> while *Troxel* invokes parental freedom and authority in invalidating a statute that permitted nonparents to seek visitation with children.<sup>82</sup>

Present law's deference to parental authority coexists with the doctrine that the state has few, if any, affirmative obligations to children. The Supreme Court has construed the federal Constitution, for example, to confer no right to welfare or even to protection from harm.<sup>83</sup> The canonical case is *DeShaney v. Winnebago County Department of Social Services*, which held that the state had no obligation to keep four-year-old Joshua DeShaney safe from his abusive father, even though the child had been flagged repeatedly as an abuse victim, and the state had been ineffectual in its efforts to address the situation.<sup>84</sup> The dissent offered the famous lament, "Poor Joshua!,"<sup>85</sup> but the majority declined to find any constitutional right to state protection for the boy whose father had beaten him nearly to death.<sup>86</sup>

All these doctrines and more would require new scrutiny in an egalitarian liberal regime. Limits on parental "horticulture" could call into question the results in *Yoder* and *Troxel*, as well as the results in other cases permitting parents to send children to private schools, to home-school them, and to deny them medical care.<sup>87</sup> And, contrary to *DeShaney*, an egalitarian state surely would owe affirmative obligations to children. According to the analysis above, these obligations would include equal material provision and a family capable of providing nurture and cultural coherence.<sup>88</sup>

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80. *Yoder*, 406 U.S. at 213–15. *See also* *Employment Div. v. Smith*, 494 U.S. 872, 881–82 (1990) (upholding against a Free Exercise challenge a law denying unemployment benefits to those fired for drug use during a religious ceremony, but pointing out in dicta that the *Yoder* holding rested, in addition, on a substantive due process rationale).

81. *Hermanson*, 604 So. 2d. at 776. *But see* *Walker v. Superior Court*, 763 P.2d 852 (Cal. 1988) (rejecting a parent's Free Exercise defense to a criminal prosecution for failure to obtain medical care for a child who died).

82. *Troxel*, 530 U.S. at 65–67.

83. *See* *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 201–02 (1989).

84. *Id.* at 191–93, 202.

85. *Id.* at 213 (Blackmun, J., dissenting).

86. *Id.* at 201–02 (majority opinion).

87. *See, e.g.,* *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (finding a right to private education). *Cf.* *Guardianship of Phillip B.*, 188 Cal. Rptr. 781 (Ct. App. 1983) (awarding guardianship of child to nonparents, but warning that the rationale was the parents' "emotional abandonment" of their son with Down's Syndrome, not their institutionalization of him).

88. *See supra* Parts III–IV.

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Put another way, present doctrine sidesteps many hard problems in child development. A liberal egalitarian regime could address the parental liberty objection, but in doing so would raise a host of new questions. In this part, I begin with a short theoretical sketch of parental liberty in an egalitarian regime, and I then consider how such a regime might revisit each of these four hard cases.

The basic idea is that a liberal egalitarian state would understand parental freedom as properly constrained by parental obligation. Thus, a parent could not object that a state requirement (say, to obtain medical care) infringed her freedom, because the proper scope of parental freedom would be circumscribed by the collective obligation to the child.

To see the point, begin with adult-to-adult interactions. Suppose that A sincerely believes in a vision of the good that mandates harming B. A liberal egalitarian society would prohibit A from abusing B, and would not consider A's freedom to be infringed by the prohibition. A could not complain that the state had prevented her from doing something she had a right to do, because the moral equality of persons implies that harming other individuals is not a legitimate exercise of one's freedom.<sup>89</sup> B is a person in her own right, and not simply an instrument to A's ends. Thus, it is uncontroversial that laws forbidding homicide help determine the legitimate scope of freedom; we do not say that there is a "fundamental conflict" between liberty and crime prevention.

In an egalitarian liberal society, the state would assume an obligation to ensure that each child arrived at adulthood with the capabilities needed to make and carry out a life plan. Liberal equality thus would impose an obligation on all adults to provide fair institutions for child development. When adults became parents, they would take on additional obligations to their child—to provide continuity of care and cultural coherence—and to refrain from interfering with the child's access to the liberal education and material resources provided by the state. These obligations would (properly) circumscribe adult liberty, just as the murder laws do.

What is the source of the collective obligation to equality for children? In prior work, I have suggested that the Rawlsian original position would produce a collective commitment to developmental conditions that would permit every child to develop the capabilities that underlie autonomy—

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89. The harm principle is associated with John Stuart Mill and has been elaborated by others. For a brief explanation, see David Brink, *Mill's Moral and Political Philosophy*, STAN. ENCYCLOPEDIA PHIL., Fall 2008, <http://plato.stanford.edu/archives/fall2008/entries/mill-moral-political>.

including a parental obligation to provide continuity of care.<sup>90</sup> Some theorists deploy principles of equality to the same result. Ackerman's ideal of dialogic equality ("I am just as good as you") leads him to reject parental "horticulture"—that is, the claim that parents ought to control fully their children's developmental conditions.<sup>91</sup> Parents, he suggests, must not stand in the role of "master gardeners" who can treat their children as they choose.<sup>92</sup> Instead, parents should be expected to help foster children's development (in part, by cooperating in state efforts to expand children's horizons).<sup>93</sup> Blustein invokes (among other ideals) the Kantian principle that human beings should be treated as ends rather than means to justify a child-centered theory which emphasizes parents' duty to develop children's autonomy and prepare them to participate in a just society.<sup>94</sup>

But translating these principles into law would require a 180-degree turn in constitutional and state law conceptions of the parental role and the role of the state. Consider *Wisconsin v. Yoder*, the 1972 case pitting a Wisconsin law mandating school attendance to age sixteen against the objections of Old Order Amish parents (including the Yoders).<sup>95</sup> The Yoders did not wish their children to attend high school. They cited the need for children to work on the farm as well as the harm done to their religious values by secular education and mixing with children from other backgrounds.<sup>96</sup> The Supreme Court ruled in favor of the Yoders.<sup>97</sup>

*Yoder* is a classic taught in both constitutional law and family law courses.<sup>98</sup> While the Free Exercise rationale for the *Yoder* decision has been eliminated by later case law, the parental-liberty rationale remains in place.<sup>99</sup> Particularly important in the present context is the understanding of parental liberty revealed by the Justices in the majority opinion: "[T]his case involves the fundamental interest of parents, as contrasted with that of

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90. ALSTOTT, NO EXIT, *supra* note 11, at 36–41, 56–58.

91. ACKERMAN, *supra* note 7, at 139.

92. *Id.*

93. *See id.* at 139, 143–46.

94. BLUSTEIN, *supra* note 13, at 120–36.

95. *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

96. *Id.* at 210–11.

97. *Id.* at 234.

98. For additional cases establishing parental rights over children's education, see *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (finding a right to send children to private school), and *Meyer v. Nebraska*, 262 U.S. 390 (1923) (overruling conviction of teacher for instructing child in a foreign language with the parents' permission).

99. *See Employment Div. v. Smith*, 494 U.S. 872, 881–82 (1990) (upholding against a Free Exercise challenge a law denying unemployment benefits to those fired for drug use during a religious ceremony, but pointing out in dicta that the *Yoder* holding rested, in addition, on a substantive due process rationale).

the State, to guide the religious future and education of their children. . . . This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”<sup>100</sup>

Liberal critics of *Yoder* have pointed out the detriment to the Amish children inherent in the Court’s decision.<sup>101</sup> A high school education would have expanded the children’s options outside the Amish community and would have given them the chance to interact with other cultural and moral communities and to envision themselves taking part in a different tradition.<sup>102</sup> These are, of course, precisely the experiences that the Yoder parents wished to avoid.<sup>103</sup> *Yoder* is thus typically framed as a conflict between parental liberty and children’s prospects for equality as adults.<sup>104</sup> Faced with a liberty-equality conflict, the Supreme Court opted to endorse parental liberty.<sup>105</sup>

How might a case like *Yoder* be analyzed under liberal egalitarian principles, which reject parental “horticulture”? In such a regime, the Yoders would not be entitled to oppose liberal education or to reject exposure to ways of life other than their own. Since a liberal regime would treat education and experience beyond the family as part of the state’s collective obligation to each child, such a claim would violate the Yoder’s responsibilities as parents, and denying their claim would not infringe their liberty; it would simply enforce their obligations as parents.

Still, adjudicating such cases would be no simple matter, even if it were politically palatable to deny parental “horticulture” claims. The ideal of complex equality suggests that the family’s role in child development deserves respect. While the Yoder parents should not be permitted to terminate their children’s education early, the state for its part should be obliged to engage with the parents to work out an educational solution that would treat the children and culture respectfully while also exposing the children to life options outside the Amish community.

Put another way, the abandonment of parental liberty as the (easy) criterion for decision would put the courts into the soup of deciding what was developmentally best for the Yoder children, but this is not necessarily

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100. *Yoder*, 406 U.S. at 232.

101. See Richard Arneson & Ian Shapiro, *Democratic Autonomy and Religious Freedom: A Critique of Wisconsin v. Yoder*, in *DEMOCRACY’S PLACE* 137, 158–59 (Ian Shapiro ed., 1996).

102. See *id.* at 147.

103. See *Yoder*, 406 U.S. at 210–11.

104. See, e.g., Arneson & Shapiro, *supra* note 101, at 149–52, 172–73.

105. See *Yoder*, 406 U.S. at 233–34.

a straightforward determination. Adolescence is a turbulent time, and the Yoders might have been concerned that simply dumping their children into a large, secular high school would leave the children confused and vulnerable. Teachers unfamiliar with Amish ways might treat the Amish children badly or discount their abilities due to language differences. Peers might bully them, taking advantage of their unfamiliarity with secular culture. Framed this way, the Yoder parents might *legitimately* challenge the state to provide a truly liberal education—one that arranges a sensitive and successful transition from children's early immersion in family culture to their later exposure to alternative ways of life.

One clear implication is that the doctrine of parental liberty currently has the side-effect of excusing the state from taking active responsibility in child development. It follows that abandoning the strong view of parental liberty would put the state—and the courts—to the task of evaluating institutions based on criteria of what is best for children. And this can be a contentious and unsettled matter, to put it mildly.

Put more concretely, the *Yoder* Court (and subsequent commentators) have framed the case as a hard-edged conflict between religious belief and the equality objectives of the state.<sup>106</sup> The Yoders appear as pressing an absolutist claim for religious freedom and parental liberty, while the state takes the absolutist position that the parents should face criminal penalties for violating the school-attendance laws.<sup>107</sup> Evaluating the case according to liberal egalitarian standards would require the state to look beyond the liberty-equality conflict and ask *what arrangements would have best served the Amish children during the developmental transition from family life to liberal citizenship.*

One might imagine very different views on such a question. For instance, it is not obvious that an egalitarian state should place the Amish children into large regional high schools, at least without transition and support mechanisms. There are a range of institutional options that might work, but many of them might require some accommodation for the children. The children might, for instance, benefit from transitional assistance, smaller schools-within-schools, neighborhood schools, or other planning options. The ideal would be to integrate children's need for cultural context in a family setting with their need for a gradually more

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106. See *id.* at 213–15; Arneson & Shapiro, *supra* note 101, at 146–49, 152–53.

107. See *Yoder*, 406 U.S. at 207–09. While the parents were fined only \$5 each, the statute permitted the imposition of up to three-month jail sentences. *Id.* at 207 n.2. According to the opinion, the state rejected out of hand an offer by the Amish to negotiate an alternative arrangement. *Id.* at 208 n.3.

challenging and diverse educational setting.

An approach of this kind raises a number of thorny constitutional issues. The Free Exercise holding in *Yoder* is probably obsolete under present doctrine, which holds that a generally applicable rule that does not discriminate against religious practice is valid.<sup>108</sup> Still, the issue of religiously motivated parental (mis)conduct is a thorny one in principle for a liberal regime, because the function of the family is thought to be parents' transmission of deep commitments to their children. When the state acts to limit parents' capacity to act on those commitments, *even in the cause of protecting children*, there is at least a potential conflict within the liberal ideal, as one function of the family (cultural coherence) conflicts with another (providing adequate nurture).

And there are still more difficult issues. Would accommodations for Amish (or other religious) children raise Establishment Clause issues? What level of government should administer the child development criterion: Should children's entitlement (or, correspondingly, the state's obligation) be constitutionalized and subject to judicial review? Should it instead be left to legislatures or school districts, perhaps with a mandate for judicial deference? And so on.

The point is not that such reengineering of state commitments is *impossible*, but simply that weakening the doctrine of parental rights would raise new questions that fall outside the U.S. constitutional tradition. Put another way, if the law were to expand the permissible scope for the regulation of family life, it would have to adopt new standards for determining what kind of regulations ought to be approved.

*Troxel*, a 2000 case, illustrates the challenges that would accompany a weakening of the doctrine of parental liberty.<sup>109</sup> In *Troxel*, the grandparents of two little girls petitioned for visitation rights, invoking a Washington State statute granting "[a]ny person" the right to petition for visitation with a child.<sup>110</sup> The *Troxel* grandparents sought to maintain contact with the children after their son (the children's father) committed suicide.<sup>111</sup> The children visited them regularly at first, but the children's mother, Tommie Granville, remarried and later wished to cut back on visitation.<sup>112</sup> Her reasons for opposing extended visits are not explored in the case; as far as a

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108. *Employment Div. v. Smith*, 494 U.S. 872, 881–82 (1990).

109. *See Troxel v. Granville*, 530 U.S. 57, 65–66 (2000).

110. *Id.* at 60–61.

111. *Id.*

112. *Id.*

reader can tell, there was no question of abuse or neglect by the Troxels. The trial court ruled in favor of the Troxels based on the “best interests” standard in the statute.<sup>113</sup> The grandparents apparently offered “cousins and music” and a counterbalance to the stepfamily formed by Granville and her new husband, where there were six children in addition to the two girls.<sup>114</sup>

The Supreme Court ruled in favor of Granville, striking down the state statute as incompatible with the substantive due process liberty rights granted to parents under the Court’s prior decisions.<sup>115</sup> The Court criticized the Washington statute’s broad grant of authority to the courts to decide visitation questions based on the child’s best interests, with no special weight given to the parent’s views.<sup>116</sup> *Troxel* thus exemplifies the primacy of parental liberty in present U.S. constitutional doctrine.

How might the legal inquiry differ if the standard were framed by reference to the functions of the family, as developed in Part IV?<sup>117</sup> Recall that families serve two functions: they provide continuity of care, and they foster moral development and cultural identity. The question, then, would be whether visitation for children with particular adults serves these functions or undermines them. Put another way, which people should be involved in a child’s life, and on what terms?

The difficulty, of course, is that the criterion of child development might suggest very different answers, depending on the facts and on the theory of development one adopts. A relationship with grandparents over a parent’s objection, for example, may look very different depending on the child’s stage of development. A young child might be confused and worried about a visit with grandparents that angers her mother. By contrast, an adolescent might value the chance to explore his identity beyond the nuclear family and could better tolerate a parent’s emotional reaction.

Although some theories offer clear-cut prescriptions, the theories themselves are controversial. For instance, Joseph Goldstein, Anna Freud, and Albert Solnit prefer legal rules that (in contested cases) vest complete

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113. *Id.* at 61–62.

114. *Id.*

115. *See id.* at 65–67 (noting that “[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court”).

116. *Id.* at 67.

117. Justice Stevens suggests that the child’s interests should be considered, but he seems to understand the child’s right as primarily a liberty interest in associating with her grandparents; he does not explore the equality dimension of a child’s developmental conditions. *See id.* at 88–90 (Stevens, J., dissenting).

authority over the child in one parent to the exclusion of all others, including the other parent.<sup>118</sup> On such a view, one might endorse *Troxel* as appropriately consolidating authority in the mother's hands.<sup>119</sup> But their view privileges one function of the family (continuity of care) over others (moral identity and cultural development).

I will not attempt here to examine how these elements might be weighed when they come into conflict. My point, instead, is simply that a legal analysis motivated by the ideal of complex equality would raise new questions and may be more complicated and difficult than an analysis motivated by a libertarian ideal of parental freedom.

Revisiting *DeShaney* invites further elaboration on the same theme. The facts in the case are horrendous. Joshua came to the attention of the local social services department after being treated, several times, in the emergency room for suspicious injuries.<sup>120</sup> Social services workers found insufficient evidence of abuse to remove Joshua from the home for more than a temporary period, so they returned him to the home and prescribed certain interventions (counseling for the father, preschool for the child, and encouraging a girlfriend to leave the home). The state failed to act even when Joshua continued to suffer suspicious injuries and when the family failed to implement the recommended changes.<sup>121</sup>

Ultimately, Joshua's father beat him so severely that he suffered brain damage severe enough to require lifelong institutionalization.<sup>122</sup> Despite Justice Blackmun's famous dissent lamenting "Poor Joshua!"<sup>123</sup> the Supreme Court majority held that the state had no affirmative duty to protect Joshua.<sup>124</sup>

What if *DeShaney* had come out the other way? Once again, the questions are not impossible to resolve, but they would be novel within the U.S. constitutional tradition. How extensive would the state's obligation to protect children be? What should be the standard of care imposed on the state? What if parents interfered with state efforts? And, once again, there

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118. See GOLDSTEIN ET AL., *supra* note 53, at 116–19.

119. Cf. Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v. Granville*, 2000 SUP. CT. REV. 279, 284 (noting that a variety of child-centered theories might endorse strong parental rights on instrumental grounds, and arguing that children are best served by constitutional protections for parents). Buss contends that *Troxel* attempts to walk an untenable middle line, asserting protection for parental rights while inviting future legislatures to infringe those rights. *Id.* at 285–86.

120. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 192–93 (1989).

121. *Id.*

122. *Id.* at 193.

123. *Id.* at 213 (Blackmun, J., dissenting).

124. *Id.* at 201–02 (majority opinion).

are structural and separation-of-powers issues: Should the state's obligation to children be made a matter of constitutional law rather than left up to the Congress and state legislatures? What should be the standard for judicial review? Should judges defer to the executive? And to what degree could or should judges be authorized to force the state to spend money in order to implement its affirmative obligation?<sup>125</sup>

#### VII. MOVING PIECES: HOW ALTERNATIVE LIBERAL INTERPRETATIONS OF EQUAL OPPORTUNITY, FAMILY LIFE, AND PARENTAL AUTONOMY RE-CREATE THE DILEMMA

Liberal egalitarian theories are not, of course, monolithic. Theorists differ on important matters including the nature of equality, the nature and significance of differentials in abilities, and the role of the family in a liberal state. To this point, I have highlighted just one set of plausible liberal commitments in order to show that family life and equal opportunity are not necessarily incompatible.

But the dilemma begins to recur if one adopts any of several alternative interpretations of key liberal values. The following discussion renders the argument in the preceding parts more transparent by summarizing its key moves. In addition, it broadens the earlier analysis to show how the liberal dilemma returns—and what form it takes—if one adopts alternative interpretations of three liberal ideals.

##### A. EQUAL OPPORTUNITY AND UNEQUAL TALENTS

The discussion in Part III adopts Ackerman's principle of undominated diversity to determine what kinds of abilities a human being needs to be able to participate fully in the liberal community. Ackerman offers undominated diversity to answer the question whether any citizens merit compensation from the collective when they find themselves endowed with different abilities. In essence, his question is when do differentials in the distributions of talents rise to the level of (compensable) disabilities. I adapt his theory to answer the different but related question of what baseline level of abilities a liberal state ought to aspire to guarantee to

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125. Some of these issues have been discussed in legal scholarship commenting on *DeShaney*. See, e.g., Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990); Jack M. Beerman, Essay, *Administrative Failure and Local Democracy: The Politics of DeShaney*, 1990 DUKE L.J. 1078; Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of DeShaney*, 57 GEO. WASH. L. REV. 1513 (1989). For another view, see Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359 (1992) (invoking the Thirteenth Amendment as grounds for ruling in favor of Joshua DeShaney).

children.

As I noted, however, undominated diversity remains one of several different approaches to the question of disability; even those writing in the resource-egalitarian or luck-egalitarian traditions take different positions on the nature of disability. Philippe Van Parijs, for instance, adopts undominated diversity.<sup>126</sup> But Rawls and Dworkin adopt the view that inequalities in the distribution of talents should (to some degree) alter the distribution of resources among individuals.<sup>127</sup>

The debate between those egalitarians who reject talent pooling<sup>128</sup> and those who endorse it is a deep and ongoing one, and I will not attempt either to summarize it here or to engage in a substantive argument for undominated diversity as against alternative views.<sup>129</sup> Instead, I want to point out the relationship between one's position on talent differentials and the nature of the liberal dilemma. Imagine that there is a spectrum of views, with undominated diversity at one end and complete talent pooling at the other. That is, one polar view is that wide differentials in abilities are compatible with equality, while the opposite view is that even minute differentials in abilities require compensation and redistribution (compared to a baseline of equal distribution).

The theory of undominated diversity, adapted for children, helps resolve the conflict between parental autonomy and equal opportunity by endorsing a very wide range of developmental conditions for children. Put another way, if children need only step up at adulthood with relatively minimal capabilities, then it follows that society can tolerate a high degree of parental autonomy in setting developmental conditions.

A more demanding conception of capabilities would tend to re-create the liberal dilemma in its classic form. Suppose, for example, that inequalities in adults' musical or athletic talents were considered compensable disabilities and suppose, moreover, that compensation is never perfect: the untalented might enjoy greater dollars or perhaps subsidized theater tickets or the like, but they could never be endowed with the actual talent they are lacking. On this view, it seems that the liberal

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126. VAN PARIJS, *supra* note 7, at 72–76.

127. For a summary, see the discussion in Alstott, *Equal Opportunity*, *supra* note 11, at 479–85.

128. For an article adopting that term and criticizing efforts to compensate for differential talents, see Kronman, *supra* note 72.

129. For a critical discussion of Ackerman's undominated diversity idea, see MARK S. STEIN, *DISTRIBUTIVE JUSTICE AND DISABILITY* 158–79 (2006). For a critical discussion of Dworkin's theory, see VAN PARIJS, *supra* note 7, at 68–72. And for a criticism of a wide spectrum of egalitarian views, see Elizabeth S. Anderson, *What Is the Point of Equality?* 109 *ETHICS* 287, 302–07 (1999).

dilemma recurs: because talent differentials represent inequality of opportunity, and because compensation is in principle inadequate, it would seem that society must either adopt standardized, communal child rearing (perhaps combined with intensive remediation to attack talent differentials early on), or else acknowledge that equality is unachievable.

There are, of course, middle grounds between pure undominated diversity and complete talent pooling. Still, the vector of the argument should be clear: the higher our standards for the capabilities people need to be equal to one another, the smaller the likelihood that a diverse range of parents can meet the standard while also exercising significant personal control over the developmental environment.

Another way to conceptualize the spectrum of views and their consequences is to acknowledge that the strand of resource egalitarianism on which I draw in this Article is more libertarian and less egalitarian than some other egalitarian liberal theories. A true libertarian theory faces no dilemma at all when it comes to the family, because it does not demand that children step up to adulthood with any particular set of capabilities at all. Because freedom lies primarily in self-ownership, then adults are equal even if they were reared in tremendously unequal material circumstances and even if they display enormous variability in their capacity to choose among visions of the good.<sup>130</sup>

The version of resource-equality liberalism I adopted in the preceding parts certainly demands more equality than the libertarian view. For instance, it requires equality in the ex ante division of material resources, a family functional enough to impart emotional and moral capacities, and a liberal education intended to foster tolerance and capacities for choice. And yet, the theory of undominated diversity occupies a space closer to the libertarian view than talent-pooling theories do.

#### B. THE TASKS OF THE FAMILY

The analysis of the liberal dilemma offered in the preceding parts also incorporates a theory of the family that makes limited demands on parents. The discussion in Part IV suggests that families should provide continuity of care and should demonstrate to children a commitment to some way of life. But the discussion is careful to add the caveat that commitment must be understood in a neutralist rather than perfectionist sense.

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130. For a critical discussion of self-ownership in libertarian theories, see Barbara Fried, *Left-Libertarianism: A Review Essay*, 34 PHIL. & PUB. AFF. 66, 67–68 (2004).

On this view, then, the liberal family serves its functions if parents remain with their children for the long term and include them in the parents' way of life. This view avoids the conflict between parental liberty and children's equality by preserving a wide space for parents to choose their own way of life, provided only that parents refrain from interfering with children's access to the material resources and liberal education provided by the state.

But one implication of the view adopted in this Article is that the system of liberal education must do a great deal of heavy lifting in developing children's capabilities: it must not only provide basic education, but must also help develop the habits of tolerance and participation necessary for liberal citizenship. The education system must also, on this view, exert considerable effort to expose children to alternative ways of life.

This view of the family is plausible and well represented in the liberal literature on the subject. Still, there are alternative conceptions of the family that would be consonant with liberal ideals, but have different implications for the liberal dilemma. A more demanding notion of the family would tend to lessen pressure on the education system—at the cost of re-creating the conflict between parental liberty and equal opportunity for children. For example, still operating within the liberal tradition, some theorists suggest that the family ought to be a first school for citizenship, and that families ought to inculcate in children particular values, including, perhaps, respect for authority, tolerance, and equality between the sexes.<sup>131</sup>

Raising the bar for families, however, tends to re-create the liberal dilemma, because it increases the number of parents who cannot (or will not) meet these standards. Unless the "school for citizenship" criterion is either meaningless or can be remediated completely by the liberal education system, then some X number of families will be unable or unwilling to perform that function. By implication, those families either must give up their children or be subject to interventions that alter family life in ways contrary to parents' wishes.

### C. PARENTAL AUTONOMY

The third moving piece in my effort to resolve the liberal dilemma is the interpretation of parental autonomy. In Part VI, I reject the

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131. See the thoughtful discussion in LINDA C. MCCLAIN, *THE PLACE OF FAMILIES* 50–84 (2006) (recognizing the conflict between parental autonomy and the ideal of families as "seedbeds of civic virtue").

interpretation of parental autonomy as whatever parents might wish to do. Instead, I argue that the scope of parental autonomy is justifiably circumscribed by parental obligations to provide continuity of care and cultural coherence, and to permit the child to partake of the liberal education and material resources provided by the state. There, I suggest that, just as the law requires citizens to choose ways of life that do not involve harm to others or a denial of equal respect, so too the law should require parents to exercise their autonomy within the constraints of parental obligation.

This move, however, may be relatively palatable because the argument here also sets a relatively low bar for parental duty: since parents are largely free to do what they want, the legal constraints I endorse would not drastically restrict, for most parents, the lives they wish to lead. Certainly, some parents might find their wishes at odds with the law, as the discussion in Part VI suggests: the Yoders, the Hermansons, even the Troxels might find themselves engaged with the state in a dialogue about child development, and with outcomes that constrain the lives they would like to lead. But because my argument adopts undominated diversity and requires families only to provide continuous care and cultural coherence, many parents would be able to continue to act just as they now do.

But it is worth noting that the argument I make about parental obligation constraining parental freedom could in principle reduce parental autonomy (relative to the baseline of what parents now do) far more significantly. To take an extreme case, suppose that the analysis in Part IV had concluded that children in a liberal state must be reared in institutions, or must be shipped off to new families periodically to ensure their exposure to several different ways of life. Many people would be horrified and would say that such measures infringe parental autonomy. What, precisely, they would mean by “parental autonomy” would require further analysis. One interpretation would be “the right to do anything they wish,” but another might be (for instance) “the right to conduct a lasting relationship with children built on a foundation of care and mutual respect.”

But the form of the argument I make does not depend even on the latter, more nuanced interpretation. The principle of parental obligation I offer in effect gives absolute priority to the children’s developmental needs over any claim about parental autonomy. Put another way, if one adopts the priority rule I suggest, there *is* no liberal dilemma at all: there cannot be a conflict between parental autonomy and children’s equality if parental autonomy occupies only the residual space left after the institutions necessary for children’s equality needs are created.

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The point, then, is this: these controversial moves go down rather palatably in my argument because they are combined with additional moves that leave quite a wide space for diverse and nonconformist families. But there remains a live issue for liberals whether parental autonomy ought to be a residual—occupying the space bounded by parental obligation—or whether instead there ought to be some absolute core of parental autonomy that ought not to be infringed by the state.

If one is inclined toward the latter view, then the liberal dilemma may or may not recur, depending on the interpretations of equal opportunity and family tasks one adopts. The vectors should, by this point, be clear: the greater the capabilities every child must have, the greater the expectations one has of the family for creating those capabilities, and the more expansive the interpretation of parental autonomy, the more likely it is that the dilemma will recur.

