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REIMAGINING EQUALITY THROUGH THE LENS OF HUMAN RIGHTS: LESSONS FROM THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

*Barbara Bennett Woodhouse**

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INTRODUCTION

In *Reimagining Equality: A New Deal for Children of Color*, Professor Nancy Dowd makes a powerful case for attacking inequalities and hierarchies among children at their roots. She reimagines equality against the backdrop of the United States. As the book's title emphasizes, it is framed within a context of U.S. domestic history and culture, U.S. movements for social reform, U.S. political structures, and U.S. constitutional doctrine. This is as it should be, because context is essential. In using the case of black boys in the

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United States as her example, she shows how hierarchies of race, gender, and class are established even before birth and how entrenched subordination and discrimination operate to block the development of black boys, depriving them of a fair start. She argues that these burdens and barriers to maximizing the development of all children must be removed if we are to achieve true equality. Moreover, she calls for a comprehensive approach of intersecting programs to provide the supports that children need to enjoy true developmental equality. In her introduction to this issue of the *Fordham Urban Law Journal*, “Children’s Equality: the Centrality of Race, Gender and Class,” Professor Dowd highlights several questions that remain to be “explored, discussed and debated” in moving forward on the goal of achieving genuine equality among children. In this Essay, I will explore some of these questions in a different context, drawing upon a different framework: the United Nations Convention on the Rights of the Child (CRC).¹

The CRC is a comprehensive charter of children’s rights. It is also the most rapidly and universally endorsed human rights charter in the history of international law. Opened for signature in 1989, the CRC entered into force in 1990 and has been ratified by every nation in the world with one glaring exception — the United States.² The CRC begins from the baseline that children are entitled to all of the human rights of adult persons as recognized in international law.³ It adds additional rights and protections flowing from the unique needs of the developing child, defined as any person below age eighteen.⁴ While it is relatively unknown in the United States, the CRC is routinely applied by the highest courts in our peer nations.⁵ Because all of the member nations of the European Union are states parties, the CRC is foundational to the jurisprudence of the European Court of Human

1. G.A. Res. 44/25 (Nov. 20, 1989).

2. United Nations Treaty Collection, Chapter IV Human Rights: 11. Convention on the Rights of the Child (updated Apr. 11, 2019), <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf> [<https://perma.cc/E94S-EJMF>].

3. See G.A. Res. 44/25, *supra* note 1, at Preamble.

4. THE OXFORD HANDBOOK OF CHILDREN’S RIGHTS LAW (Jonathan Todres & Shani M. King eds., forthcoming Feb. 2020); G.A. Res. 44/25, *supra* note 1, Art. 1.

5. CHILD RIGHTS INT’L NETWORK, REALISING RIGHTS? THE UN CONVENTION ON THE RIGHTS OF THE CHILD IN COURT 10 (2019), https://archive.crin.org/sites/default/files/uncrc_in_court.pdf [<https://perma.cc/4C62-JS4E>] (collecting cases involving the CRC from courts around the world between 2009 and 2017 and noting that courts apply the CRC directly in approximately 25% of cases and in 60% use it as an interpretative guide).

Rights in Strasbourg, France.⁶ It has inspired children’s rights provisions in numerous modern constitutions, including that of the Republic of South Africa.⁷ The CRC’s approach to rights is markedly different from that of the U.S. Constitution, at least as currently interpreted by the U.S. Supreme Court. Yet it provides a valuable comparative perspective on how to move forward on the goal of reaching true developmental equality.

Dowd’s introduction to this special issue, in its final section, points out five concerns, each of which I will address and respond to in this Essay.⁸ The first is about the danger of universalizing the model rather than concentrating on children of color. My response will explore universality as an opportunity rather than a threat and describe the role of the human rights principles of indivisibility and interdependence of rights in mitigating the dangers of universalizing. The second and third points relate to the dangers of incrementalism and the challenge of establishing benchmarks for funding. I will draw upon the CRC to illustrate ways to justify and define appropriate levels of funding. The fourth point asks whether the “intrusive state” of contemporary family policy can be transformed into the “responsive state” required by her model. I will illustrate with examples from the European experience of how human rights principles can promote a responsive model of state engagement. The fifth point is about overcoming the public/private dichotomy that distorts current family policies in the United States. I will use the principles of the CRC to challenge the privatization of responsibility for children as a violation of children’s human rights. The CRC provides useful insights for avoiding the pitfalls Dowd identifies. Most importantly, it provides affirmation on a global scale that a developmental approach is essential to the full achievement of children’s rights.

6. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS & COUNCIL OF EUROPE, HANDBOOK ON EUROPEAN LAW RELATING TO THE RIGHTS OF THE CHILD 26 (2015) (“The fact that all EU and COE member states are parties to the CRC gives the CRC important standing at the European level. It effectively imposes common legal obligations on European states with a knock-on effect on the way European institutions develop and apply children’s rights.”). For an example of application of the CRC by the European Court of Human Rights, see *Maslov v. Austria*, Eur. Ct. H.R. No. 1638/03 (2008) (utilizing CRC definition of best interest of the child in deportation case).

7. Barbara B. Woodhouse, *The Constitutionalization of Children’s Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1, 37 (1999) [hereinafter Woodhouse, *Constitutionalization*].

8. Nancy E. Dowd, *Children’s Equality: The Centrality of Race, Gender, and Class*, 47 FORDHAM URB. L.J. 231, 249–51 (2020).

I. UNIVERSALITY: THREAT OR OPPORTUNITY

Dowd begins with a warning against universalizing her model: “First, it is critical to sustain the focus on racial equality. This is a model built on the problems and issues of children of color, specifically Black boys. They should remain ‘front and center’ and not be lost in a ‘universal’ model.”⁹ I can fully understand this concern. In the United States, our shameful and continuing history of racial oppression makes it imperative to keep children of color at the forefront. However, Dowd’s model, although anchored in our history of racism, cries out to be universalized to other international and local contexts. Wherever groups of children are marginalized and excluded, the lessons of her model apply. The developmental harms and developmental realities are the same. Discrimination blights the lives of Roma children in Europe, Muslim children in China, Catholic children in Northern Ireland, Dalit children in India, and Tutsi children in Rwanda.¹⁰ Differences of gender, religion, ethnicity, and physical or mental disability, often perceived rather than real, make them “children of a lesser God.”¹¹ In many places, including the United States, indigenous and refugee children are targeted for exclusion, subordination, and forcible assimilation.¹² On a global and

9. *Id.* at 248.

10. Ed Cairns et al., *Psychology’s Contribution to Understanding Conflict in Northern Ireland*, 1 PEACE & CONFLICT: J. PEACE PSYCHOL. 131, 133 (1995); *Dalit Children in India – Victims of Caste Discrimination*, INT’L DALIT SOLIDARITY NETWORK, https://idsn.org/wp-content/uploads/user_folder/pdf/New_files/India/Dalit_children_in_India_-_victims_of_caste_discrimination.pdf [<https://perma.cc/2SQB-Q3YA>] (last visited Nov. 11, 2019); *Roma Children*, UNICEF, <https://www.unicef.org/eca/what-we-do/ending-child-poverty/roma-children> [<https://perma.cc/Q77L-C6YE>] (last visited Jan. 20, 2020); Emmanuel Sehene Ruvugiro, *Rwanda: The Gruesome Plight of Children During the Tutsi Genocide*, JUSTICEINFO.NET (Oct. 11, 2017), <https://www.justiceinfo.net/en/tribunals/ict/34925-online-exhibition-pays-gruesome-tribute-to-child-suffering-in-rwandan-genocide.html> [<https://perma.cc/KVQ3-68JG>]; John Sudworth, *China Muslims: Xinjiang Schools Used to Separate Children from Families*, BBC NEWS (July 4, 2019), <https://www.bbc.com/news/world-asia-china-48825090> [<https://perma.cc/7BJ5-SARE>].

11. “Children of a Lesser God” is an American play by Mark Medoff. The title, taken from Alfred Lord Tennyson’s epic poem “Idylls of the King,” refers to children who because of accidents of birth are stigmatized as inferior. *What Does the Phrase Children of a Lesser God Mean?*, QUORA, <https://www.quora.com/What-does-the-phrase-children-of-a-lesser-god-mean> [<https://perma.cc/W3QW-L44H>] (last visited Nov. 19, 2019).

12. UNICEF, OFFICE OF RESEARCH — INNOCENTI, “NO MOTHER WANTS HER CHILD TO MIGRATE” 38–55 (2019), <https://www.unicef-irc.org/publications/pdf/Child-Migration-Horn-of-Africa-part-1.pdf> [<https://perma.cc/5XPU-644E>] (describing discrimination against migrant and refugee children in Europe).

even a national level, embracing a “universal model” should strengthen rather than dilute the power of the developmental equality approach.¹³

The universalizing process of human rights law enhances, rather than undercuts, the power of the specific.¹⁴ The CRC, while it is universal in application, addresses the specific needs of different groups of children in the specific contexts and environments in which they are embedded.¹⁵ There is no hierarchy of rights and no right trumps another, although different situations may call for balancing and harmonization.¹⁶

The CRC’s overarching antidiscrimination provision is stated in Article 2:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic, or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.¹⁷

Not only are all forms of discrimination prohibited; the child is also protected against discrimination with regard to any of the other rights set forth in the CRC. These rights include:

13. NANCY E. DOWD, REIMAGINING EQUALITY: A NEW DEAL FOR CHILDREN OF COLOR 53–65 (2018).

14. Human rights are the ozone layer of the law. BARBARA BENNETT WOODHOUSE, HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN’S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE (2008) [hereinafter, WOODHOUSE, HIDDEN]. The making of human rights law involves an interactive and evolutionary process in which a consensus forms that certain values are fundamental to human dignity and their contours gain specificity through negotiation, ratification and application of universal values in different local and global contexts. See *The Foundation of International Human Rights Law*, UNITED NATIONS, <https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> [<https://perma.cc/L3BB-A6K6>] (last visited Oct. 6, 2019).

15. BARBARA BENNETT WOODHOUSE, THE ECOLOGY OF CHILDHOOD: HOW OUR CHANGING WORLD THREATENS CHILDREN’S RIGHTS 211 (2020) [hereinafter, WOODHOUSE, ECOLOGY].

16. *Id.* at 220.

17. See G.A. Res. 44/25, *supra* note 1, at Art. 2.

- the right to survival and development;¹⁸
- the right to a name and to acquire a nationality and to be cared for by one's parents;¹⁹
- the right to identity and family relations;²⁰
- the right to family integrity and family reunification;²¹
- the rights to a voice in matters affecting the child and to participation in judicial or administrative proceedings;²²
- the rights of freedom of religion, conscience, expression and association;²³
- the right to protection from maltreatment, neglect, or abuse;²⁴
- the right to be protected from unlawful invasions of personal and family privacy and assaults on honor and reputation;²⁵
- the rights of refugee children "to receive appropriate protection and humanitarian assistance";²⁶
- special care and assistance for children with disabilities;²⁷
- the right to the highest attainable standard of health;²⁸
- the right to enjoy a standard of living adequate for the child's physical, mental, spiritual, moral and social development;²⁹
- the right to education aimed at equality of opportunity;³⁰
- the right to practice one's own culture and religion and to speak one's own language regardless of minority status;³¹
- the right to play and leisure;³²
- the right to be protected from economic or sexual exploitation;³³

18. *Id.* at Art. 6.

19. *Id.* at Art. 7.

20. *Id.* at Art. 8.

21. *Id.* at Arts. 9–10.

22. *Id.* at Art. 12.

23. *Id.* at Arts. 9, 12–15.

24. *Id.* at Arts. 19, 34.

25. *Id.* at Art. 16.

26. *Id.* at Art. 22.

27. *Id.* at Art. 23.

28. *Id.* at Art. 24.

29. *Id.* at Art. 27.

30. *Id.* at Arts. 28–29.

31. *Id.* at Art. 30.

32. *Id.* at Art. 31.

33. *Id.* at Arts. 32, 34.

- the right to protection from cruel, degrading or inhumane treatment;³⁴ and
- the right to fair treatment and rehabilitation for children accused of crimes.³⁵

This inventory of the rights protected by the CRC is more than a list of disconnected concepts. The CRC provides a developmentally and morally coherent catalog of what all children need in order to reach their full potential. How can there be true equality when a class of children is denied the right to an adequate standard of living or an education that opens the doors to opportunity? How can a class of children ever achieve true equality if they are deprived of the right to a family or the right to health care? As Dowd's book so beautifully illustrates, violations of children's rights to equal dignity and protection from discrimination implicate every aspect of a developing child's life.³⁶ Systemic inequalities in access to or enjoyment of any of the rights listed above reverberate throughout the entire ecology of childhood, often condemning children to a lifetime of inequality.³⁷

II. INDIVISIBILITY AND INTERDEPENDENCE OF HUMAN RIGHTS

As I explain in my book *The Ecology of Childhood: How Our Changing World Threatens Children's Rights*, a basic principle of human rights is that rights are "interdependent and indivisible."³⁸ Experts on human rights have written thousands of pages debating and discussing the exact meaning and application of this principle.³⁹ But for our purposes, it is enough to know that this principle is a bedrock feature of all human rights charters. As explained by UNICEF:

Human rights are indivisible. Whether civil, political, economic, social or cultural in nature, they are all inherent to the dignity of every human person. Consequently, they all have equal status as rights. There is no such thing as a 'small' right. There is no hierarchy of human rights. . . . The realization of one right often depends, wholly or in part, upon the realization of others. For instance, the

34. *Id.* at Art. 37.

35. *Id.* at Art. 40.

36. DOWD, *supra* note 13, at 79–94.

37. WOODHOUSE, *ECOLOGY*, *supra* note 15, at 220–21.

38. James Nickel, *Rethinking Indivisibility: Towards a Theory of Supporting Relations Between Human Rights*, 30 *HUM. RTS. Q.* 984, 985 (2008).

39. DANIEL J. WHELAN, *INDIVISIBLE HUMAN RIGHTS: A HISTORY* 1 (2010); James Nickel, *The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification*, 18 *YALE J. INT'L L.* 281, 281–95 (1993).

realization of the right to health may depend on the realization of the right to education or of the right to information.⁴⁰

Attempts to vindicate one right of the child while ignoring the interdependency of rights can lead to tragic unanticipated consequences. In one famous example, a bill introduced by U.S. Congressman Tom Harkin to ban importation of goods produced by child labor resulted in Bangladesh garment manufacturers laying off an estimated 50,000 child laborers. A study by UNICEF documented that many of these children were forced into far more dangerous work — including crime and prostitution — in order to survive.⁴¹ As this example illustrates, the rights to leisure, protection from exploitation, and education can have little practical significance to a child growing up in a family struggling to put food on the table and a roof over their heads. The reality for such children and their parents is stark: in order to survive, every member of the family must work.

Especially when it comes to children, we cannot treat economic and social rights as separate and independent from civil rights. The myths of rugged individualism fall apart when applied to children. Babies cannot be expected to “pull themselves up by their bootstraps” before they have learned to walk.⁴² And “it’s hard to tighten your belt when you are wearing diapers.”⁴³ The child’s right to survival is integrally related to her rights to access food and shelter. Her right to healthy development is integrally related to her rights to family, play, identity, and protection from abuse. Children’s rights must be regarded as a fabric of interwoven threads that stabilize and strengthen the whole.

40. *What Are Human Rights?*, UNICEF, <https://www.unicef.org/child-rights-convention/what-are-human-rights> [<https://perma.cc/8LQ7-JR55>] (last visited Jan. 29, 2020); WOODHOUSE, *ECOLOGY*, *supra* note 15, at 220.

41. Zehra F. Arat, *Analyzing Child Labor as a Human Right: Its Causes, Aggravating Policies, and Alternative Proposals*, 24 *HUM. RTS. Q.* 177, 179 n.8, 199 (describing the unintended consequences of the 1993 Child Labor Deterrence Act) (Citing to UNICEF, *THE STATE OF WORLD’S CHILDREN 1997 24–25* (1997) (regarding the developmental impacts of child labor)).

42. “‘Pull yourself up by your bootstraps.’ It’s a common phrase in American political discourse, particularly present in conservative rhetoric about self-reliance. The concept is simple: To pull yourself up by your bootstraps means to succeed or elevate yourself without any outside help.” Caroline Bologna, *Why the Phrase ‘Pull Yourself up by Your Bootstraps’ Is Nonsense*, *HUFFINGTON POST* (Aug. 19, 2018), https://www.huffpost.com/entry/pull-yourself-up-by-your-bootstraps-nonsense_n_5b1ed024e4b0bbb7a0e037d4 [<https://perma.cc/6K7M-CR7Q>].

43. This slogan comes from a black and white Children’s Defense Fund poster circa 1985 depicting a crying baby in diapers that decorated the wall of my first law school office; the poster was reduced to tatters as I moved from office to office, but the axiom still holds true.

This principle of the indivisibility and interdependency of rights may seem alien to lawyers trained in U.S. constitutional law. One of the peculiarities of our constitutional jurisprudence is its insistence on dividing rights into discrete categories that are then micromanaged through the application of distinct and separate tests. In my classes on U.S. constitutional law, I teach my students to be very careful in framing a claim. The Supreme Court has adopted different tests based on whether a right is framed as an equality right or a fundamental right. I use an example from the Civil Rights movement as Exhibit A for driving home the importance to my students of mastering these constitutional tests and understanding their strategic limitations. When advocates for equality challenged racial segregation of public swimming pools, the federal courts ruled that the 14th Amendment's Equal Protection Clause required that public pools be open to all regardless of color.⁴⁴ Many cities simply closed their public pools.⁴⁵ Equality problem solved: all children, white and black, were treated equally *badly* by being deprived of access to public swimming pools. Of course, we all know (as did the jurists who drew these lines) that affluent white children had many other options.⁴⁶ When pools and schools were closed, private swim clubs, country clubs, and the notorious "segregation academies" quickly took their place. These alternatives were open to the affluent, for a price, and sufficiently "private" to continue discriminating against children of color.⁴⁷

As this example illustrates, advocates for children's rights in the U.S. are forced to maneuver within some very strange and arbitrary boundaries. But in seeking to reform our constitutional doctrines, we can and should borrow insights from modern constitutions of other countries and from human rights charters that treat rights more holistically.

44. *Palmer v. Thompson*, 403 U.S. 217 (1971).

45. John A. Kirk, *Going Off the Deep End: The Civil Rights Act of 1964 and the Desegregation of Little Rock's Public Swimming Pools*, 73 ARK. HIST. Q. 138, 149–50 (2014) (discussing the closing of public pools by officials in Little Rock, Arkansas, following attempts by civil rights leaders to integrate the facilities in advance of expected passage of the Civil Rights Act of 1964).

46. *Palmer*, 403 U.S. at 223–25.

47. Marilyn Grady & Sharon C. Hoffman, *Segregation Academies Then and School Choice Configurations Today in Deep South States*, 2 CONTEMP. ISSUES EDUC. LEADERSHIP 1, 5–6 (2018).

III. INCREMENTALISM VERSUS MAXIMIZATION

Professor Dowd's second and third points concern the tensions between maximization and incrementalism. In her second point she asks: "[I]n addition to preventing the erasure of race, how can radical change be sustained," and "domestication" avoided, "meaning a less comprehensive or watered down version of the New Deal."⁴⁸ She cites the current enthusiasm for early childhood policies among presidential candidates as an example of the danger of sacrificing the big picture in order to achieve incremental change in one area.

Her third point is closely related: "[A]s a theoretical, constitutional argument, or policy argument, it is important to solidify justifying maximum support (development to every child's capacity) versus a minimum or adequate level. This is a domestication danger tied to arguments over resources that lead to sustaining hierarchy."⁴⁹ This question poses matters of strategy as well as matters of theory and is closely related to the question, discussed below, of "How much is enough?"

In these two points, Dowd raises important questions that are fundamental to any movement for social change. Strategies of incrementalism can result in damaging capitulation, and strategies of maximization can result in damaging backlash and failure.⁵⁰ Dowd's concern about the domestication danger of incremental change and her use of the phrase "minimum or adequate"⁵¹ calls to mind the continuing struggle to define and implement equality rights for children with disabilities.⁵² The movement was still celebrating a major victory in Congress when it suffered a major defeat at the Supreme Court, in the landmark 1982 Supreme Court case of *Board of Education v. Rowley*.⁵³ The *Rowley* case was the first from the

48. Dowd, *supra* note 8, at 249.

49. *Id.* at 249–50.

50. The history of social justice movements for racial equality and their defeats in legislatures and the courts is one example of this danger. Cases like *Dred Scott*, 60 U.S. 393 (1857), and *Plessy v. Ferguson*, 163 U.S. 537 (1896), marked dramatic setbacks for the abolition and desegregation movements. Cases like *Bradwell v. Illinois*, 83 U.S. 130 (1872), and *Minor v. Happersett*, 88 U.S. 162 (1875), denying women the right to practice law and vote, delayed the progress of women's rights for decades. As a law clerk in the mid 1980s, I recall how the Court's ruling in *Bowers v. Hardwicke*, 478 U.S. 186 (1986), became a roadblock that took almost 20 years to dismantle. See also *Lawrence v. Texas*, 539 U.S. 558 (2003); *Scott v. Sandford*, 60 U.S. 393 (1857).

51. Dowd, *supra* note 8, at 249–50.

52. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 192–94 (1982).

53. 458 U.S. 176.

Supreme Court to interpret the newly enacted Education for All Handicapped Children Act.⁵⁴ Ten-year-old Amy Rowley was born with a severe hearing impairment, and her parents were also hearing impaired. Cliff and Nancy Rowley had been educated at Gallaudet and were fluent in American Sign Language (ASL). Knowing how important sign language had been to their own intellectual development, Amy's parents fought hard to ensure her not just the free public education to which she was entitled under the new law but one that would equip her to achieve her full potential.⁵⁵ Initially, a sign language interpreter had been part of her IEP (Individualized Education Program).⁵⁶ However, the Hendrik Hudson School District discontinued her classroom sign language interpreter, and substituted in her place a very loud hearing aid. The school board argued that the expense of a sign language interpreter was excessive since Amy was learning enough to pass from one grade to the next.⁵⁷ Although Amy missed most of what was taking place in the classroom, the school board fought Amy's case all the way to the Supreme Court. The school lost in the District Court for the Southern District of New York and again in the Court of Appeals for the Second Circuit because it was clear from the evidence that Amy was performing far below her natural potential in merely passing from grade to grade.⁵⁸ The Supreme Court, in a five to three decision, reversed the lower courts and held that Amy was "receiving an 'adequate' education, since she performs better than the average child in her class and is advancing easily from grade to grade" while also receiving "personalized instruction and related services calculated by . . . school administrators to meet her educational needs."⁵⁹ In other words, as long as Amy was receiving "some benefit," she was not being denied her statutory right to a free

54. Education for All Handicapped Children Act, 20 U.S.C.A. § 1400 (1975).

55. Amy's case drew massive media coverage, not only because it involved an appealing story about a spunky child but also because it was the first oral argument in the history of the Supreme Court by a hearing-impaired lawyer relying on computer technology to translate the spoken word into writing.

56. "The term 'individualized education program' or 'IEP' means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title." Education for All Handicapped Children Act, 20 U.S.C.A. § 1400(14).

57. *Rowley*, 458 U.S. at 185.

58. *Rowley v. Bd. of Educ. of Hendrick Hudson Central Sch. Dist.*, 632 F.2d 945, 953 (2d Cir. 1980); *Rowley v. Bd. of Educ. of Hendrick Hudson Central Sch. Dist.*, 483 F. Supp. 528, 532 (S.D.N.Y. 1980).

59. *Rowley*, 458 U.S. at 209–10 (quoting *Rowley*, 483 F. Supp. at 534).

appropriate public education.⁶⁰ Justice White, joined by Justices Brennan and Marshall, lodged an acerbic dissent:

It would apparently satisfy the Court's standard of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child," for a deaf child such as Amy to be given a teacher with a loud voice, for she would benefit from that service. The Act requires more. It defines "special education" to mean "specifically designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child."⁶¹

The *Rowley* case exemplifies what can happen when a revolutionary statute designed to maximize every child's capacity gets into the hands of skeptics with resource concerns. We can draft legislative proposals but what happens next depends on federal and state legislatures, governors and presidents, state and federal agencies, the judiciary, and countless other players.

IV. HOW MUCH IS ENOUGH?

There is a lot of space between "minimum or adequate" and "excessive." "How much is enough" when it comes to resource allocation appears in many guises. There is no way to escape this question; "maximization" is a strategy, not a metric. When the question is "how much can we afford to spend on children?," the CRC provides an answer that depends on who is asking the question. This answer makes a lot of sense and should prevail in disputes about the allocation of resources in any nation, especially one as rich as the United States.

CRC Article 4 provides:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures *to the maximum extent of their available resources* and, where needed, within the framework of international co-operation.⁶²

The basis in law and tradition of this standard is obvious. When determining what level of parental support is appropriate for

60. *Rowley*, 458 U.S. at 211 (White, J., dissenting).

61. *Id.* at 215 (White, J., dissenting) (quoting 20 U.S.C. § 1401(25) (1975)).

62. See G.A. Res. 44/25, *supra* note 1, at Art. 4 (emphasis added).

children, family courts look at the resources of the parent.⁶³ Dowd's New Deal is premised on the belief that all children are "our own" and that "we the people" through our government have a moral obligation to all of our nation's children.⁶⁴

Constitutional scholars would reply that, in contrast to the CRC and other human rights documents, the U.S. Constitution has been interpreted as a charter of "negative rights" — rights to be free from government interference.⁶⁵ They would argue that it does not protect "positive" or "economic, social and cultural rights."⁶⁶ This Essay argues that we must push back against this narrow interpretation of the rights protected by our Constitution. As Dowd's book makes clear, the boundary between positive and negative rights is difficult to defend analytically, since a failure on the part of the state to take positive action to correct abuses and address inequalities is tantamount to action. To the extent the state has responsibility for children's welfare, state inaction must be recognized as a form of neglect. In cases like *DeShaney v. Winnebago County*, the Court has limited the state's responsibility for children to situations in which the child is actually in state custody.⁶⁷ Even accepting the validity of the divide between public and private responsibility (which I will challenge in my subsequent remarks in Part VII), the question of "how much is enough" cannot be sidestepped. It is inherent to interpretation of congressional intent in statutory programs like the Education for All Handicapped Children Act at issue in *Rowley*. The question there was how to interpret the statutory mandate to provide "specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."⁶⁸ The Court rejected the more individualized, maximizing approach that had been endorsed by the district and appellate courts and held

63. The various models for computing child support all start with examination of the parent or parents' financial resources. *Child Support Guideline Models by State*, NAT'L CONF. ST. LEGISLATURES (Feb. 20, 2019), <http://www.ncsl.org/research/human-services/guideline-models-by-state.aspx> [<https://perma.cc/A8P5-WEAK>].

64. Dowd, *supra* note 8, at 241–42.

65. Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1989) (Posner, J.).

66. See WOODHOUSE, *ECOLOGY*, *supra* note 15, at 220–22; see also Cecile Fabre, *Constitutionalizing Social Rights*, 6 J. POL. PHIL. 219, 263 (1998).

67. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989) ("[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."). The *DeShaney* Court recognized that the state may have a constitutional duty to protect a child from harm "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself." *Id.* at 199–200.

68. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982).

instead that merely passing from grade to grade was an adequate measure of “educational benefit.”⁶⁹

But Amy’s story did not end with this defeat. When I clerked at the Supreme Court in the 1984 Term, I had the honor of taking Amy, by then in middle school, on a grand tour of the Court — an imposing marble palace she had never entered but whose geography she knew by heart. I had gotten to know Amy and her family when my son and Amy were in the same nursery school. Amy’s parents had not brought ten-year-old Amy to the Court for the oral argument in 1982 because of the media circus. By the time Amy visited me at the Court, her family had moved to a school district that agreed she needed access to a sign language interpreter. Amy already knew every detail of the courtroom — she pointed out the lectern where her lawyer stood and she ran behind bench, calling out the names of each justice as she passed his or her chair. She was surprised to find that the floor of the “highest court in the land” (as the clerks nicknamed the basketball court tucked under the roof of the building) was made of wood. She had thought it too would be made of marble. Amy went on to earn her doctorate at the University of Wisconsin, and she is currently an Associate Professor and Coordinator of the American Sign Language Program in Modern Languages and Literatures at California State University, East Bay.⁷⁰

This is a story about a deaf girl, not about the black boys that Professor Dowd chooses as her protagonists.⁷¹ But Amy’s story is still relevant to a book about developmental equality. It provides an example of how the answer to “how much is enough?” can change as societies evolve and as formerly excluded children write their own stories. Amy and her peers — the first generation of children to benefit from a right to education — have changed the debate. Thanks to their stories, the children we once referred to as disabled are increasingly seen as differently abled. Their story is part of a broader social movement for children’s liberty and equality that is integrally related to the advancement of children’s rights as human rights. Dr.

69. *Id.* at 202–03.

70. *Faculty Profile for Amy June Rowley*, CAL. ST. UNIV., E. BAY, <https://www.csueastbay.edu/directory/profiles/ml/rowlevamy-june.html> [<https://perma.cc/CRL4-3J9R>] (last visited September 4, 2019).

71. Disability is a form of diversity, but it is not the same as race, gender, and other socially constructed differences. “The complex, variable, and contingent nature of disability demands different approaches and different remedies than those apt for other identity markers.” Margaret Winzer & Kas Mazurek, *Diversity, Difference, and Disability: Conceptual Contradictions and Present Practice in Inclusive Schooling for Students with Disabilities*, 4 INT’L DIALOGUES EDUC. 225, 225 (2017).

Margaret A. Winzer, in her history of special education, traces the origins of the modern special education movement to the period of the French enlightenment.⁷² “The phenomenal growth of special education in the latter half of the eighteenth century was part of a wider movement that involved the abolition of social classes, the establishment of a just society, and the accession to full human rights of all members of that society.”⁷³ Despite setbacks like Amy’s early Supreme Court defeat, Amy and her peers have been freed to demonstrate their own amazing capacities when liberated from discrimination and its developmental effects. They are following in the footsteps of children like Fredrick Douglass, Helen Keller, and Willa Cather whose stories about liberty and equality I told in *Hidden in Plain Sight: The Tragedy of Children’s Rights from Ben Franklin to Lionel Tate*.⁷⁴

Recently, the Supreme Court decided another Individuals with Disabilities Education Act (IDEA) case turning on the definition of a free appropriate public education.⁷⁵ In *Andrew F.*, a case involving an autistic child, the Tenth Circuit Court of Appeals had applied a *de minimis* standard, based on the “some benefit” language of *Rowley*.⁷⁶ Advocates feared that the current, far more conservative, Supreme Court might decide a split among the circuits by endorsing the Tenth Circuit’s narrow standard.⁷⁷ In a unanimous decision written by Chief Justice Roberts, the Court found that “de minimis progress” was too low a bar.⁷⁸ Instead, in order “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s

72. MARGARET A. WINZER, *THE HISTORY OF SPECIAL EDUCATION: FROM ISOLATION TO INTEGRATION* 5 (1993).

73. *Id.* As Professor Dorothy Roberts points out, the Enlightenment notoriously excluded enslaved people of color from its social justice movement. DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* 28–32 (2011).

74. WOODHOUSE, *HIDDEN*, *supra* note 14, at 51, 159, 180.

75. *Andrew F. ex rel. Joseph F. v. Douglas Cty. School Dist. Re-1*, 137 S. Ct. 988, 991 (2017) (defining “free appropriate public education”).

76. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. Re-1*, 798 F.3d 1329, 1340 (10th Cir. 2015), *vacated*, 137 S. Ct. 988 (2017), *remanded to and vacated sub nom Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 694 F. App’x 654 (10th Cir. 2017).

77. *See, e.g.*, Brief for Children’s Law Center et al. as Amicus Curiae Supporting Petitioner, *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. Re-1*, 137 S. Ct. 988 (2017) (No. 15-827).

78. *Andrew F.*, 137 S. Ct. at 1001.

circumstances.”⁷⁹ It further clarified that a child’s “educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.”⁸⁰ This was not a complete victory for developmental equality. The Court avoided explicitly overruling *Rowley*, and it rejected the argument that an IEP must “provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.”⁸¹ But its endorsement of ambitious individualized educational plans with challenging objectives appropriate to the specific child’s circumstances was a far cry from *Rowley*’s anemic “some benefit.”⁸²

V. TRANSFORMING THE INTRUSIVE STATE INTO THE RESPONSIVE STATE

Dowd’s fourth point begins with the question: “[C]an the intrusive state become a responsive state?”⁸³ This point is well taken, and my answer to the question is “Yes, it can!”

The term “intrusive state” represents an accurate picture of contemporary U.S. relationships between the state and many families, especially those families in greatest need of support. Despite the explicit goals of protecting children, our child protection systems are highly punitive.⁸⁴ In representing poor parents and children, an attorney’s primary goal is often simply to get the state out of their client’s life.⁸⁵ In cases of abuse and neglect, jurisdiction over the family is established through a finding of “dependency,” which can

79. *Id.* at 1002.

80. *Id.* at 1000.

81. *Id.* at 1001.

82. *Id.*

83. Dowd, *supra* note 8, at 250.

84. See generally DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002); Barbara Bennett Woodhouse, *Making Poor Mothers Fungible: The Privatization of Foster Care*, in CHILD CARE AND INEQUALITY: RE-THINKING CAREWORK FOR CHILDREN AND YOUTH (Francesca M. Cancian et al. eds., 2002), <https://ssrn.com/abstract=305882> [<https://perma.cc/3RM2-BFV5>].

85. See generally Kathleen A. Bailie, *The Other “Neglected” Parties in Child Protective Proceedings: Parents in Poverty and the Role of Lawyers Who Help Them*, 66 FORDHAM L. REV. 2285 (1998).

trigger a cascade of negative consequences.⁸⁶ “The role of the parent’s attorney during the jurisdiction trial resembles that of the defense attorney in a criminal case.”⁸⁷ They prioritize defeating the state’s attempts to “help” because state intervention so often results in tearing families apart rather than building them up.⁸⁸ Americans have been so thoroughly indoctrinated in the belief that relationships between government and the “private” family are inherently antagonistic, that it has become a self-fulfilling prophecy. In a major Catch-22, “coercive” intervention is often a prerequisite to accessing services, because only when the state can justify piercing the shell of family privacy does its intervention trigger eligibility. Under typical child protection statutes, in order for a court to mandate that the state provide support services to a family, it must first find that the child is “dependent,” meaning lacking proper parental care and supervision.⁸⁹ In addition, when a child is declared “dependent,” a statutory clock starts ticking requiring the state to initiate a termination of parental rights unless the parent has succeeded in correcting the problem that brought the state into the family’s private space.⁹⁰ Often these problems are beyond the parent’s control, such as lack of housing, or are impossible to accomplish within the statutory time frame, such as recovery from addiction. Not surprisingly, the result of these punitive interventions is deep distrust of government. This distrust is the by-product of government’s repeated failure to treat families with dignity and respect. And that failure of respect is based on the presumption

86. See, e.g., JUDICIAL COUNCIL OF CAL., THE JUVENILE DEPENDENCY COURT AND YOU: A GUIDE FOR PARENTS 9 (2014), <https://www.courts.ca.gov/documents/juvenile-dependency-court-and-you.pdf> [<https://perma.cc/FP9B-KGNJ>].

87. Vivek Sankaran, *Representing Parents in Child Welfare Cases*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 579–615 (D. Duquette & A. Haralambie eds., 2010).

88. See Bailie, *supra* note 85, at 2286.

89. See, e.g., 42 PA. CONS. STAT. § 6302 (1986). See generally U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILDREN’S BUREAU, DEFINITIONS OF CHILD ABUSE AND NEGLECT (2019), <https://www.childwelfare.gov/pubPDFs/define.pdf> [<https://perma.cc/UYE7-6CK8>]. This language is typical of the phrases used in child welfare statutes to define a child who is “dependent” and therefore within the jurisdiction of the state or local child welfare agency. See, e.g., GA. CODE ANN. § 15-11-311 (2014).

90. See generally David Herring, *The Adoption and Safe Families Act — Hope and Its Subversion*, 34 FAM. L. Q. 329 (2000); Adrienne Whitt-Woosley & Ginny Sprang, *When Rights Collide: A Critique of the Adoption and Safe Families Act from a Justice Perspective*, 93 CHILD WELFARE 111 (2014).

that, in order to qualify for government services, the family must already have failed.⁹¹

On the other hand, my research in Italy over the past decade suggests the possibility of a very different relationship between the state and the family.⁹² In every village, town or city I visited, small automobiles labeled “*Servizi Sociali*” (social services) were a common sight. These cars are used by government health care and social service workers. Their job is to make the rounds of their community, delivering oxygen tanks to the elderly, physical therapy and education services to ill children and disabled or convalescent adults, and a wide range of voluntary in-home medical and social supports that are free of charge and free of stigma. Italy’s national health care system works relatively seamlessly in partnership with social services, generally without resort to coercive tactics. The same is true for situations involving delinquent children. Under Italy’s juvenile justice system, when a child under age 14 gets into trouble it is treated as a public health problem calling for provision of mental health and support services to the child and family. Criminal acts by youths aged 14 to 18 also trigger appointment of a team to identify appropriate family and community services, education, and rehabilitation. Detention of minors in locked facilities is a last resort, only considered appropriate when all other avenues have been tried and have failed.⁹³ Termination of parental rights in cases of abuse or neglect has also been a last resort. There have been cases involving unnecessary removals, but they tend to trigger fierce public outcry.⁹⁴

91. DANIEL L. HATCHER, *THE POVERTY INDUSTRY, THE EXPLOITATION OF AMERICA’S MOST VULNERABLE CITIZENS* (2016); ROBERTS, *supra* note 84.

92. From 2007 to 2019, I conducted a longitudinal, comparative study of systems of child protection, health care, juvenile justice, and family and child supports in Italy and the United States I describe and compare the two systems in my book *The Ecology of Childhood*, *supra* note 15.

93. Sayali Himanshu Bapat & Barbara Bennett Woodhouse, *Is There Justice for Juveniles in the United States, India, and Italy?: Towards a Framework for Transnational Comparisons*, in *THE FUTURE OF JUVENILE JUSTICE: PROCEDURE AND PRACTICE FROM A COMPARATIVE PERSPECTIVE* 37 (Tamar R. Birkhead & Solange Mouthann eds., 2016).

94. One such case, described in *The Ecology of Childhood*, involved a toddler whose mother had been deemed to have constructively abandoned him during a period when she was heavily involved with drugs. As a response to public outcry, he was allowed to remain with his mother in a therapeutic community that accepted family units. Another example of public outrage is the national scandal that erupted in July 2019 over allegations of inappropriate removals of children in Reggio Emilia. Alessandro Fulloni, *Bibbiano, Quattro Bambini Tornano Dai Genitori Naturali*, *CORRIERE DELLA SERA* (July 24, 2019), https://www.corriere.it/cronache/19_luglio_23/bibbiano-quattro-bambini-tornano-

In the case of Italy and under the CRC framework, the state is viewed as a partner in meeting children's needs rather than as an adversary. This is in stark contrast to the child welfare system currently in place in the United States. But Italy and other countries that have embraced children's rights as human rights can give us hope that change at the national level is possible.

VI. THE ROLE OF GRASSROOTS CHANGE

Dowd's fourth comment continues:

If the broad legislative solutions at the federal [level] such as I have sketched here are not possible because the idea of the responsive state is [not] embraced, or is deeply problematic, then other ways to accomplish this have to be devised. This suggests solutions geared toward facilitating grassroots, nongovernmental change rather than centralized federal programs.⁹⁵

I agree with Dowd that there are many other ways to effect change than in Washington, D.C. However, drawing upon lessons learned during the process of implementation of the CRC, I would argue that advocacy at the regional and grassroots level should not be viewed as a fallback position but as integrally related to the success of Dowd's New Deal.

Dowd's ambitious project calls for action at every level, not only at the federal level. This strategy has been essential to the spread of children's rights in nations around the globe. In the 30 years since the CRC's entry into force in 1990, many scholars, governments, and NGOs have documented best practices for winning support for the CRC's innovative principles. These practices have been applied in a wide variety of local contexts, in the European Union, Africa, Asia, the Americas, and Australia and New Zealand.⁹⁶ In my book *The Ecology of Childhood*, I explore how the new and potentially controversial principles of the CRC were "domesticated" in the best

genitori-naturali-ecbb0f06-ad31-11e9-aafc-ff288f0f153c.shtml?refresh_ce-cp [https://perma.cc/Y7ZG-ZF5J] (children's court returns four children to their homes after police investigation finds irregularities in documents submitted by psychologist and foster care agency).

95. Dowd, *supra* note 8, at 250–51.

96. See generally *UN Convention on the Rights of the Child*, NEW ZEALAND CHILDREN'S COMMISSIONER, <https://www.occ.org.nz/childrens-rights-and-advice/uncroc/> [https://perma.cc/38VW-GPLQ] (last visited Jan. 31, 2020) (discussing how New Zealand and Australia have incorporated the CRC); *About Children's Rights*, AUSTRALIAN HUM. RTS. COMMISSION, <https://www.humanrights.gov.au/our-work/childrens-rights/about-childrens-rights> [https://perma.cc/86SY-5LJQ] (last visited Jan. 31, 2020) (same).

sense of the word in the laws of Italy and Wales, and in many other nations of the European Union.⁹⁷ Success depended on a broad-based public education effort — which is an integral part of the CRC scheme since the CRC has many articles requiring education of children and the public concerning the rights of the child — and mobilization of support from NGOs, opinion makers, industry, nonprofits, and community-based organizations.⁹⁸

In addition, much can be learned by exploring American history regarding the process of entrenchment of rights in political culture and popular imagination. How did Roosevelt's New Deal generate regional and local support? Through what process did Medicare and Social Security become so deeply ingrained in the American experience that they are now referred to as the "third rail" of politics — meaning that if an unwary politician dares to touch them she can expect to die a swift and painful death? More recently, how did LGBTQ families go from being ostracized, closeted, and criminalized to achieving widespread visibility and support? It would not have happened without changes at the grassroots, nongovernmental level. Here is a story that powerfully illustrates the role of personal experience in promoting appreciation of rights. Thirty years ago, Supreme Court Justice Lewis Powell cast the deciding vote upholding criminal penalties for consensual sodomy in *Bowers v. Hardwick*.⁹⁹ At the time, he remarked to his fellow justices that he bore no animus towards "homosexuals" and did not think he had ever met one.¹⁰⁰ In fact, many of his law clerks over the years had been LGBTQ, including during the year when *Bowers* was decided. He was a kind and caring individual who loved his law clerks as if they were his children. As news of his comment spread around the Court, his gay clerks decided to come out to him. He later stated that he regretted his vote and would have voted differently. Hearts as well as minds are opened when we can see other people's children as our own.¹⁰¹

97. WOODHOUSE, *ECOLOGY*, *supra* note 15, at 225–59, 290–93.

98. *Id.* at 289–96; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

99. *Bowers v. Hardwick*, 478 U.S. 186, 197–98 (1986).

100. Linda Greenhouse, *Black Robes Don't Make the Justice, But the Rest of the Closet Just Might*, N.Y. TIMES (Dec. 4, 2002), <https://www.nytimes.com/2002/12/04/us/black-robos-don-t-make-the-justice-but-the-rest-of-the-closet-just-might.html> [<https://perma.cc/VZ7F-8V5M>].

101. My own personal experience with Justice Powell confirms this story. In the 1984 term, two years before *Bowers*, I clerked for Justice O'Connor. That year, two of Powell's four law clerks were gay. Justice Powell was clearly oblivious. I will never forget him introducing me to the partner of a female clerk during a reception in the

VII. MOVING BEYOND THE PUBLIC/PRIVATE DICHOTOMY

Professor Dowd's fifth and final concern is presented as "a corollary" to her question about the intrusive/responsive state. She asks, "can we imagine supporting families and parents instead of privatizing responsibility, or explaining or blaming families for structural inequalities?"¹⁰² Dowd continues, "[u]nder the guise of respecting families we have made privacy the support for inequality. Is our commitment to equality strong enough to support all families because they are essential to children?"¹⁰³

Dowd's comments about the pernicious effects of the public-private dichotomy ring true, as do her concerns about the possibility of transformation. She is pointing out the pitfalls and shoals that lie ahead. In the following Section, I will address her underlying question: How do we transform a culture from one that idolizes autonomy and condemns vulnerability to one that honors vulnerability and prizes solidarity?

First, as Dowd agrees, we must stop demonizing vulnerability and start accepting it as the most fundamental and inevitable aspect of the human experience. The work of our Emory colleague Martha Albertson Fineman and her Vulnerability and the Human Condition Initiative is leading the way in accomplishing that transformation.¹⁰⁴ Fineman urges that, far from marginalizing vulnerability as a form of individual failure, we should accept it as a sign of our common humanity and intrinsic value.¹⁰⁵ She calls for a responsive state that is committed to mitigating vulnerability and building resiliency for all its members including children.¹⁰⁶ Fineman's initiative has grown,

justices' dining room: "Barbara, have you met Mary's friend Jane?" (I am using pseudonyms). I replied that I had. We law clerks all knew that Jane and Mary had long been a committed couple. He went on, "Did you know that Jane took a leave of absence from her teaching position and moved all the way to Washington, D.C. to help Mary during her clerkship? Now isn't that a true friend!" Should I have corrected Justice Powell's misimpression instead of smiling at his naiveté? I often wonder if it would have made a difference.

102. Dowd, *supra* note 8, at 251.

103. *Id.*

104. Martha Albertson Fineman, *Equality, Autonomy, and the Vulnerable in Law and Politics*, in *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* (Martha Albertson Fineman & Anna Grear eds., 2013) (Fineman's initiative has grown during the decade since its inception into a movement with global impact); *see also* DOWD, *supra* note 13, at 84–85; WOODHOUSE, *ECOLOGY*, *supra* note 15, at 28, 285.

105. Fineman, *supra* note 104, at 16.

106. *Id.* at 24–27.

during the decade since its inception, into an international movement with global impact.¹⁰⁷

Second, reimagining equality for children calls for the ecological approach to understanding child development.¹⁰⁸ This is an essential tool in breaking down the artificial divide between public and private spheres. Pioneered by social scientist Urie Bronfenbrenner, the ecological model, which Dowd extolls and applies in her work, allows us to see children's development in social context.¹⁰⁹ Instead of imagining the child and her family in isolation from the rest of society, we see family and child as embedded in a matrix of intersecting microsystems (for example, family, neighborhood, school, faith community, peer group) that constitute the intimate (not private) spaces in which they live their lives.¹¹⁰ In the ecological model, these core spaces are encircled by rings of ecosystems.¹¹¹ These are places where the child may rarely go but which powerfully affect her well-being (such as the parent's workplace, the labor and economic markets, the healthcare system, the justice system, and the housing markets).¹¹² Surrounding and permeating the child's world is the macrosystem, that climate of ideas, values, prejudices and powers that reaches every level of the society.¹¹³ Just as water permeates the natural environment, so the macrosystem nourishes or poisons the child's environment. As this model reveals, the biggest challenge to children's developmental equality is reforming the American macrosystem. This is no easy task. Our macrosystem has long been dominated by unrestrained capitalism, individualism, and

107. *Vulnerability and the Human Condition Initiative*, EMORY UNIV., <http://web.gs.emory.edu/vulnerability/index.html> [https://perma.cc/A7DG-DSKT] (last visited Jan. 31, 2020).

108. WOODHOUSE, *ECOLOGY*, *supra* note 15, at 15–20; *see also* WOODHOUSE, HIDDEN, *supra* note 14, at 15–28; Barbara Bennett Woodhouse, *A World Fit for Children Is a World Fit for Everyone: Ecogenerism, Feminism and Vulnerability*, 46 HOUS. L. REV. 817, 821–22 (2009) [hereinafter Woodhouse, *Ecogenerism, Feminism and Vulnerability*]; Barbara Bennett Woodhouse, *Race, Culture, Class and the Myth of Crisis: An Ecogenerist Perspective on Child Welfare*, 81 ST. JOHN'S L. REV. 519, 529–32 (2007) [hereinafter Woodhouse, *Ecogenerist Perspective on Child Welfare*]; DOWD, *supra* note 13, at 58–60.

109. URIE BRONFENBRENNER, *THE ECOLOGY OF HUMAN DEVELOPMENT* 67 (1979) (discussing how events occurring in a child's environment shape his or her development).

110. Woodhouse, *Ecogenerism, Feminism and Vulnerability*, *supra* note 108, at 822–23.

111. *Id.* at 822–23.

112. *Id.*

113. *Id.* at 823–24.

materialism, and it continues to be poisoned by racism, sexism, violence and entrenched hierarchy.

But the tradition of transformation is also entrenched in our social and constitutional history. Many hierarchies formerly viewed as normal and natural have crumbled in the face of constitutional challenges. The constitution itself, despite what some might argue, is not immune to change. To quote the Notorious RBG, writing in *United States v. Virginia* in 1996, “A prime part of the history of our Constitution is the story of the extension of constitutional rights and protections to people once ignored or excluded.”¹¹⁴ As Ginsburg explains, the American story of change has “continued as our comprehension of ‘We the People’ expanded.”¹¹⁵ At the time of the *VMI* decision, the story of childrens’ emerging rights was already reflected in precedents rejecting discrimination against children of minority races¹¹⁶ and children born to unmarried parents.¹¹⁷ In the two decades since the *VMI* decision, this process of change has continued. We have acknowledged that application of the death penalty or life in prison without possibility of parole infringes on the rights of children to be protected from cruel and unusual punishments.¹¹⁸ And we have recognized that discrimination against same sex marriage unjustly punishes children growing up in gay and lesbian families.¹¹⁹ In each of these cases, emerging human rights have been cited by the Court and in amicus briefs, not as binding authority but as evidence of global transformations.

In *The Constitutionalization of Children’s Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, published shortly after Justice Ginsburg’s *VMI* opinion, I trace the path by which human rights, even in the absence of ratification of a specific treaty, can become incorporated into our domestic system of constitutional law.¹²⁰ I compare the provisions of the newly minted Constitution of the Republic of South Africa recognizing children’s rights (provisions that mirror the CRC, which South Africa had formally ratified) with the more gradual story of children’s emerging

114. *U.S. v. Virginia (VMI)*, 518 U.S. 515, 547 n.21 (1996) (citations omitted).

115. *Id.* at 557.

116. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

117. *See, e.g.*, *Trimble v. Gordon*, 430 U.S. 762 (1977); *Levy v. Louisiana*, 391 U.S. 68 (1968).

118. *See generally* *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

119. *See generally* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 744 (2013).

120. Woodhouse, *Constitutionalization*, *supra* note 7, at 3–5 (1999).

rights as reflected in the process of constitutional interpretation that Ginsburg highlights in *VMI*.

I used the case of *DeShaney v. Winnebago County* as my example of a disconnect between children's U.S. constitutional rights and children's human rights.¹²¹ That case involved some of the most problematic principles of U.S. constitutional law — the dichotomies between public and private and between state action and inaction.¹²² The question was whether the state child protection agency could be held liable for its failure to protect a child named Joshua.¹²³ Despite evidence of abuse, the state had released the child to the custody of his father, but under supervision by county protective services.¹²⁴ Ignoring cogent evidence of risk to the child, the agency failed to act to protect him.¹²⁵ Writing for a majority of six, Justice Rehnquist concluded that a state has no affirmative duty under the Due Process Clause to protect a child, even one under its supervision, against “private” violence.¹²⁶

As Justice Blackmun famously lamented:

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents, who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes . . . “dutifully recorded these incidents in [their] files.” It is a sad commentary upon American life, and constitutional principles — so full of late of patriotic fervor and proud proclamations about “liberty and justice for all,” that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.¹²⁷

Many years ago, one of my constitutional law students surprised me by challenging my statement that children are nowhere mentioned in the U.S. Constitution. Pointing to the Preamble, he argued, “Doesn't it say right here in black and white that its purpose is ‘to Secure the Blessings of Liberty to ourselves and our Posterity?’” I would argue that my student got it right. The framers chose those words to instruct us in our duty to use the document they created for

121. *DeShaney v. Winnebago Cty. Dep't of Soc. Services*, 489 U.S. 189, 199–200 (1989).

122. *Id.* at 205 (discussing state action and inaction).

123. *Id.* at 191.

124. *Id.* at 192.

125. *Id.* at 192–93.

126. *Id.* at 197–98.

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

posterity as well as for the specific ends they had in their limited field of view. They believed in liberty as a value in search of perfection, not as a static definition of existing rights. Professor Dowd has shown us the way as we continue to explore the open textured concepts of liberty, equality, and dignity as applied to persons of all ages and capacities. As I wrote 20 years ago:

[R]ecognition of emerging rights depends on a robust belief among judges and the people in the legitimacy of judicial interpretation. Judges must approach the written document as a “living” thing, not only open to interpretation, but positively designed to grow through judicial interpretation. Neither the amendment process nor the democratic process alone can provide meaningful avenues for growth and renewal when the emerging claims are those of isolated minorities or even of numerical majorities who have been systematically excluded from power.¹²⁸

My faith in the Supreme Court as an engine of progress in human rights has frayed since I wrote those words. Its stature as an independent coequal branch has been undermined by partisan efforts by the Republican-controlled Senate and Executive Branch to block the Court’s normal process of renewal and to pack both the Supreme Court and the federal judiciary with “originalists” committed to rolling back constitutional rights.

CONCLUSION

As I write, the Trump administration is also mounting a new attack on the very concept of evolving human rights. On July 8, 2019, the State Department announced the creation of a “human rights advisory panel” to examine the role of human rights in American foreign policy.¹²⁹ According to the top Democrat on the Senate Foreign Relations Committee, the argument for a human rights panel is absurd, especially in light of the fact that the Trump administration “has taken a wrecking ball to America’s global leadership on promoting fundamental rights across the world.”¹³⁰ As the British paper *The Guardian* reports:

[Secretary of State Mike] Pompeo said that the commission’s goal is to exclude “ad hoc” rights. While he does not elaborate on what “ad

128. Woodhouse, *Constitutionalization*, *supra* note 7, at 51.

129. Edward Wong & Eileen Sullivan, *New Human Rights Panel Raises Fears of a Narrowing U.S. Advocacy*, N.Y. TIMES (July 8, 2019), <https://www.nytimes.com/2019/07/08/us/politics/state-human-rights.html> [https://perma.cc/MFP9-GQM6].

130. *Id.* (quoting Sen. Robert Menendez).

hoc” rights are, he attacks “politicians and bureaucrats” who “create new rights”, and many of the members of the commission appear to have been selected in no small part because they also want to roll back human rights.¹³¹

I expect that children’s rights will be among the “ad hoc” human rights under attack. This is why I am extremely grateful to Professor Dowd for *Reimagining Equality* and for her recently published and totally brilliant articulation of a constitutional argument for children’s rights.¹³²

While my faith in the Supreme Court is shaken, I still have faith in the American people’s support for the proposition that the Constitution was written for the ages and will continue to evolve. It will be up to the young people — my children’s and grandchildren’s generation — to keep up the fight for human rights. Unfortunately, our young people have a lot on their plates right now.¹³³ Given the existential crisis of climate change looming over our nation and our planet, it may seem as if worrying about equality and children’s rights is like rearranging the deck chairs on the Titanic. I would propose a slightly different metaphor. Our collective survival depends on acknowledging our vessel’s vulnerability, seeing the iceberg we are approaching before it is too late, and providing seaworthy lifeboats for all children, not just the richest and most privileged.

131. Michael H. Fuchs, *Donald Trump Is on an Orwellian Mission to Redefine Human Rights*, GUARDIAN (July 18, 2019), <https://www.theguardian.com/commentisfree/2019/jul/18/trump-pompeo-human-rights-un-orwellian-mission-redefine> [<https://perma.cc/DEW5-4JYQ>].

132. Nancy Dowd, *Children’s Equality Rights: Every Child’s Right to Develop to Their Full Capacity*, 41 CARDOZO L. REV. (forthcoming 2020).

133. *See, e.g.*, *Juliana v. United States*, 2020 WL 254149, at *5 (9th Cir. Jan. 17, 2020) (denying Article III standing to group of young people alleging U.S. government violated substantive due process, equal protection, the Ninth Amendment, and the public trust doctrine by subsidizing and authorizing fossil fuel extraction and consumption, leading to harmful climate change).