

# INDEPENDENT CHILDREN AND THE LEGAL CONSTRUCTION OF CHILDHOOD

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*It's like this: You have to sacrifice things you want for your future, like study maybe, for the future of your family. But if you ask me, I want to help others. If I am to be asked, what have you done with your life, I want to say that I've helped others . . . like giving to those who have been deprived of something, giving them some affection, things like that.*

- Boy on the street in Morocco<sup>1</sup>

## I. INTRODUCTION

The law, and more generally the prevailing construct of childhood, envisions children foremost as part of a family. Indeed, the family has been recognized under international law as “the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children.”<sup>2</sup> Although there is consensus on this ideal, the reality for millions of children today is that they are spending significant portions of their childhood apart from, or independent of, the traditional family environment and the care of an adult. Globally, millions of children are operating in their daily lives as independent actors.<sup>3</sup> This

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1. U.N. Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the Protection and Promotion of the Rights of Children Working and/or Living on the Street*, ¶ 50, U.N. Doc. A/HRC/19/35 (Jan. 11, 2012).

2. *Convention on the Rights of the Child*, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) [hereinafter CRC].

3. See *infra* Part III.A.

phenomenon can include street children, unaccompanied migrant children, orphaned children (whether due to armed conflicts, AIDS, or other causes), and many others. While these children are forced to confront the world without an adult caregiver at critical times in their development, laws in many jurisdictions still idealize childhood and thus fail to properly account for independent children. The law often operates to marginalize independent children and expose them to further harm, instead of ensuring that they receive the care and support that they need.

This Article examines this special population of children and the implications that their experience has for the prevailing construction of childhood. It also explores how law and policy related to children must change in order to ensure the well-being of all children. Exploring the experiences of independent children and hearing their perspectives reveals a very different picture from the one traditionally associated with childhood. The dominant conception of childhood, in the United States and numerous other countries,<sup>4</sup> is that it is a period of dependency that precedes maturity.<sup>5</sup> The law typically reflects and reinforces that understanding by restricting the capacity of children to make decisions associated with maturity (e.g., to vote or to enter into a contract).<sup>6</sup> Yet independent children are often making very mature decisions under the most difficult circumstances. The maturity that independent children exhibit at times and the circumstances that they confront challenge traditional, idealized constructs of childhood.

Prior to eighteen years of age,<sup>7</sup> children are typically expected to reside in the family home, follow their parents' rules, attend school, and

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4. Independent children present challenges for all countries and are found nearly everywhere. Although this Article highlights examples from many countries, it focuses primarily on the United States in looking at how the law constructs childhood and responds to independent children.

5. For a discussion of historical constructs of childhood, see generally PHILIPPE ARIÈS, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* (Robert Baldick trans., Random House 1962); STEVEN MINTZ, *HUCK'S RAFT: A HISTORY OF AMERICAN CHILDHOOD*, at viii (2004) ("[C]hildhood is not an unchanging biological stage of life but is, rather, a social and cultural construct that has changed radically over time.").

6. See Jonathan Todres, *Maturity*, 48 *HOUS. L. REV.* 1107, 1118–46 (2012) (detailing maturity benchmarks in the law across numerous issues including voting, military service, employment, contract rights, marriage, criminal accountability, jury duty, and bodily integrity).

7. I use eighteen years old as the upper boundary of childhood, consistent with the internationally agreed-upon definition of the child. See CRC, *supra* note 2, art. 1 ("[A] child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."). However, it should be noted that in various jurisdictions and with respect

otherwise remain largely in the private sphere of society; as such, children are typically beyond the reach of law, except in cases of abuse and neglect.<sup>8</sup> Independent children challenge that baseline assumption. In examining the narratives and experiences of these children, we see that even though “children’s family status remains premised on the presence of one or more independent adults,”<sup>9</sup> many children live as autonomous individuals—that is, without a regular adult caregiver. Whether independent children are living on the street or migrating unaccompanied across international borders, they do not comport with the traditional notion of childhood. The result is that the two primary functions law advances vis-à-vis children—disciplining children who exhibit counterproductive behavior and aiding children in need—have a perverse impact on independent children.<sup>10</sup> First, the law’s punitive power is used to police independent children’s behavior and often to punish choices they make, frequently criminalizing them with little regard for the individual, family, or community circumstances that have thrust them into these autonomous roles. Second, the helping hand of the law often falls short of reaching independent children, because most services and assistance programs for children must be provided through a parent or legal guardian. As a result, in many cases, the law not only fails to serve independent children and to ensure their rights and well-being, but it actually facilitates harmful responses toward these children.

In prior work, I have explored legal and cultural constructs of maturity, detailing how the law’s delineation between childhood and adulthood creates a convoluted picture with benchmarks of maturity and thus autonomy differing among jurisdictions and issues.<sup>11</sup> Those

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to particular issues, children are permitted to engage in certain adult-like activities (e.g., employment outside the home) prior to age eighteen.

8. Although there are numerous laws that regulate education, health care, and other aspects of childhood, I argue that the overall legal framework operates from the presumption that children will remain in the home, largely out of the public sphere. Abuse and neglect law and other laws recognize exceptions to that ideal, but the prevailing legal framework still rests on traditional notions of childhood.

9. Elsje Bonthuys, *Legal Capacity and Family Status in Child-Headed Households: Challenges to Legal Paradigms and Concepts*, 6 INT. J. L. IN CONTEXT 45, 47 (2010).

10. Law does serve other functions for children generally (e.g., establishing and funding public schools and other services that children utilize), but those more general government functions are beyond the scope of this Article.

11. See Todres, *supra* note 6, at 1118–46 (2012) (exploring the various conceptions of maturity across issues, as well as within specific issues such as accountability and sex). For example, in the United States each state has a minimum age below which a child is deemed not mature enough to consent to sex with a boyfriend or girlfriend; yet in most states, if that child has sex with a stranger who

benchmarks limit, and indeed often fail to recognize, mature decisions made by children. Instead, the predominant legal framework in the United States and other jurisdictions is structured so that children can be punished for bad behavior but receive few, if any, rewards or incentives for positive, responsible behavior (other than avoiding criminal sanction).<sup>12</sup> This Article builds on that earlier work by focusing on the experiences and legal treatment of independent children.

If the overarching goal of the body of law related to children is to help foster their successful development while protecting and ensuring their rights and well-being, then the law in many jurisdictions falls short, particularly with respect to independent children. Too often, independent children are punished harshly and are unable to access needed care and services. Children are a dynamically diverse population, and independent children often act in ways that do not comport with traditional societal expectations. That independent children depart from the norm does not necessarily make them bad kids. As discussed in this Article, their actions are often aimed at ensuring their survival and that of their family.<sup>13</sup> The law needs to better account for their experience as well as the mature actions of other children.

This Article suggests that ensuring that law and policy fully account for independent children will require more than ad hoc exceptions to various laws. Ultimately, developing a more comprehensive construct of childhood is a critical first step toward producing law and policy that is more responsive to the range of realities facing all children, including independent children.

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pays a pimp, the child is now deemed mature enough to be criminally responsible for engaging in prostitution. *Id.* at 1110.

12. Jonathan Todres, Op-Ed., *Is There No Redemption for Children?*, ATLANTA J. CONST., Nov. 6, 2009, <http://www.ajc.com/news/news/opinion/is-there-no-redemption-for-children/nQY2F> (“No matter how well a child behaves, how mature and thoughtful his or her decision-making, [the law does] not allow them to vote, enter into contracts, serve on juries, drink alcohol, drive a car below a certain age or do any number of other things adults can do. . . . Yet when children make bad decisions and commit bad acts, [increasingly our laws] insist they were [sic] mature enough that they should suffer adult consequences.”).

13. In this context, family can mean both informal family relationships (e.g., those that form in child-headed households) and families with such limited means that the child might decide he or she needs to migrate unaccompanied in search of work in order to help support the family. In both instances, the “family” is one that does not comport with traditional notions on which the current legal construct of childhood is based.

This Article has three aims. First, I seek to contribute to the small body of literature that challenges the dominant narrative of childhood that underlies law and policy on children's issues.<sup>14</sup> The aim is to help expand and reshape the prevailing understanding of childhood so that it reflects the diversity of all children's experiences and actions. Second, as part of the call for a more inclusive construct of childhood, I argue that it is important to recognize independent children as a distinct category of persons. To date, independent children have received comparatively less attention from legal scholars than other categories of children, as both young children and adolescents in families have been examined in considerable depth.<sup>15</sup> Scholars who have focused on independent children have examined particular sub-populations, most notably unaccompanied migrant children,<sup>16</sup> but independent children have yet to be recognized or studied as a distinct category. I argue that this lack of recognition has made it easier for policymakers to view independent children as outliers and of insufficient numbers to merit reconsideration of the legal understanding of childhood. As such, the lack of recognition of independent children as a distinct group has hindered efforts to develop a legal framework that is responsive to their reality and that ensures their rights and well-being.<sup>17</sup> Third, by achieving greater recognition of independent children as a

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14. See, e.g., BARBARA BENNETT WOODHOUSE, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* 15–47 (2008); Annette Ruth Appell, *The Pre-Political Child of Child-Centered Jurisprudence*, 46 *HOUS. L. REV.* 703, 713 (2009) (“Although the United States provides very basic floors of education, child protection, and temporary aid to needy families, it is not deeply engaged with the question of what children might need, as children, to have autonomy (i.e., ‘actual choices’) as adults.”); Sarah Jane Forman, *Countering Criminalization: Toward a Youth Development Approach to School Searches*, 14 *SCHOLAR* 301, 373 (2011) (“[Schools’] disciplinary policies and practices should comport with their special role in the socialization of future democratic citizens; to this end, they should respect students’ autonomy, dignity, and individual rights.”).

15. See, e.g., *CHILDREN AND THE LAW: CASES AND MATERIALS* (Martin R. Gardner & Anne Proffitt Dupree eds., 3d ed. 2012) (focusing coverage on children in family, school, and juvenile justice settings); Roger J.R. Levesque, *The Internationalization of Children's Human Rights: Too Radical for American Adolescents?*, 9 *CONN. J. INT'L L.* 237, 248 (1994) [hereinafter *American Adolescents*] (describing adolescents as dominated by their parents); Roger J.R. Levesque, *International Children's Rights Grow Up: Implications for American Jurisprudence and Domestic Policy*, 24 *CAL. W. INT'L L. J.* (1994) [hereinafter *Int'l Children's Rights*].

16. See generally XIMENA URRUTIA-ROJAS & NESTOR RODRIGUEZ, *CHILDREN WITHOUT BORDERS: A MAPPING OF THE LITERATURE ON UNACCOMPANIED MINORS TO THE UNITED STATES* (1997).

17. I do not suggest that there is a one-size-fits-all response that will ensure the rights and well-being of every independent child but instead that independent children across many jurisdictions appear to share common experiences that the law can account for and respond to more effectively.

population and forging a more inclusive narrative on childhood, policymakers and child advocates can develop law and policy that better fulfills the rights and needs of all children.

In examining constructs of childhood and corresponding law and policy, this Article focuses primarily on the United States as a case study because a study of all countries' laws is beyond the scope of a single article. However, because independent children are found in almost every country, this Article draws upon examples from a range of settings to inform the discussion of the experience of independent children.

Part II explicates the prevailing construct of childhood; even though societal views on children have evolved and we are arguably in the age of children's rights,<sup>18</sup> more traditional beliefs about children continue to dominate both discourses on childhood and corresponding law and policy on children. Part II briefly discusses how the law reflects and responds to the dominant construct of childhood. Part III then introduces the population of independent children into the discourse on children and childhood, focusing primarily on street children as a test case. It demonstrates how, in many cases, the law's response to independent children not only fails to serve these children but actually facilitates harmful responses toward them. Recognizing that the law is not meeting the needs of this vulnerable population of children, Part IV seeks to achieve two aims. Foremost, given that independent children do not fit in the current construct of childhood, Part IV explores theoretical considerations that can reshape the prevailing construct of childhood in a way that better accounts for the realities that many children confront. Part IV then briefly discusses potential law and policy implications of rethinking our understanding of childhood.

## II. THE PREVAILING CONSTRUCT OF CHILDHOOD

Historically, children have been a population that was to be "seen and not heard."<sup>19</sup> Under the law, children were originally considered chattel, or

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18. The Convention on the Rights of the Child ("CRC"), adopted in 1989, is now the most widely accepted human rights treaty in history. One hundred ninety-three countries are party to the treaty; only Somalia, the United States, and newly independent South Sudan are not yet party to the CRC. *Convention on the Rights of the Child: Status of Ratifications*, U.N. TREATY COLLECTION (June 1, 2013), [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) [hereinafter Status of Ratifications].

19. Research has traced this phrase and concept back to the early 15th century. See OXFORD DICTIONARY OF PHRASE AND FABLE 206 (Elizabeth Knowles ed., 2000).

property of their parents, typically belonging to their fathers.<sup>20</sup> “Under [this] earlier patriarchal model, the father’s power over his household, like that of a God or King, was absolute.”<sup>21</sup> By the late nineteenth century, children in Europe and North America came to be viewed as a special population in need of protection.<sup>22</sup> “Child saving” became the goal of many social reformers, leading to the development of child welfare systems, juvenile courts, and other special arrangements for children.<sup>23</sup>

The international community and individual countries, including the United States, have only recently recognized children as rights holders.<sup>24</sup> In 1924, the League of Nations promulgated the Declaration on the Rights of

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20. Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1043 (1992) (“The notion of the child as property is at least as ancient as the Greek and Judeo Christian traditions identifying man as the procreative force.”); Rebeca Rios-Kohn, *The Convention on the Rights of the Child: Progress and Challenges*, 5 GEO. J. ON FIGHTING POVERTY 139, 140 (1998) (“For several centuries children were regarded as mere personal property, subject to the powerful authority of their fathers.”); *American Adolescents*, *supra* note 15, at 246 (“Children’s non-identity meant that they were exchangeable and replaceable property, a status which literally took centuries to change.” (footnote omitted)); Patricia Soung, *Social and Biological Constructions of Youth: Implications for Juvenile Justice and Racial Equity*, 6 NW. J.L. & SOC. POL’Y 428, 430 (2011) (“Until about 1830, social institutions regarded children primarily as property of their parents and a source of cheap labor. The notion of ‘childhood’ or ‘adolescence’ as a distinct state of life or a social category that afforded political and social rights was nonexistent.” (footnote omitted)). *See also* *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“[T]he interest of parents in the care, custody, and control of their children[] is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court].”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (recognizing the liberty of parents to determine the education of their children); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (recognizing the “power of parents to control the education of their own.”).

21. Woodhouse, *supra* note 20, at 1037. *See also* ARIÈS, *supra* note 5, at 413 (explaining how in the early modern era, “[f]amily and school together removed the child from adult society”).

22. *Int’l Children’s Rights*, *supra* note 15, at 199 (noting the evolution in the nineteenth century to considering children “a vulnerable class in need of protection”); Kathleen Alaimo, *Historical Roots of Children’s Rights in Europe and the United States*, in *CHILDREN AS EQUALS* 1, 13 (Kathleen Alaimo & Brian Klug eds., 2002) (noting the late nineteenth century recognition of children’s rights to have protection and services provided by parents, employers, and other adults).

23. Woodhouse, *supra* note 20, at 1038–39, 1052.

24. Rios-Kohn, *supra* note 20, at 140–41 (discussing twentieth century developments, from the Declaration of Geneva in 1924 to the United Nations General Assembly’s unanimous adoption of the CRC in 1989); David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L. J. 979, 988 (2002) (“The idea of children’s rights as human rights provides an approach to children’s rights centered on the personhood of children.”); Woodhouse, *supra* note 20, at 1056 (“Children’s rights spring from children’s essential nature. This way of conceptualizing rights echoed the women’s and abolitionist movements of the 1800’s. Faced with the similar task of elaborating why rights should be extended to ignorant women and slaves, these groups spoke in terms of each being’s right to develop innate capacities and talents.”). *See also* *In re Gault*, 387 U.S. 1, 13 (1967) (“[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.”).

the Child, known as the Declaration of Geneva.<sup>25</sup> Although the Declaration of Geneva is widely acknowledged as the first international declaration on the rights of the child, it spoke more of the duties of “men and women of all nations,”<sup>26</sup> rather than the rights of children, “regard[ing] children more as beneficiaries of child welfare than as subjects of law.”<sup>27</sup> Subsequent efforts produced expanded declarations on the rights of the child in 1948 and more significantly in 1959, with the adoption of the U.N. Declaration on the Rights of the Child.<sup>28</sup> However, support for a legally binding treaty on children’s rights emerged relatively recently, culminating in the adoption of the U.N. Convention on the Rights of the Child in 1989.<sup>29</sup> Today, the Convention on the Rights of the Child is the most widely accepted human rights treaty in history, forging an “age of rights” for children.<sup>30</sup> The recognition of children as individual rights holders marks an important shift in the understanding of children and childhood, as states are required to consider children’s rights and needs as distinct from others<sup>31</sup> and to ensure that children have a voice in decisions that affect their lives.<sup>32</sup>

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25. LEAGUE OF NATIONS, GENEVA DECLARATION OF THE RIGHTS OF THE CHILD (Sept. 25, 1924), available at <http://www.un-documents.net/gdrc1924.htm>.

26. *Id.*; Douglas Hodgson, *The Rise and Demise of Children’s International Human Rights*, FORUM ON PUB. POL’Y, Spring 2009, at 4–5, available at <http://forumonpublicpolicy.com/spring09papers/archivespr09/hodgson.pdf>.

27. Rios-Kohn, *supra* note 20, at 140.

28. G.A. Res. 1386 (XIV), U.N. Doc. A/RES/1386 (Nov. 20, 1959) [hereinafter U.N. Declaration of the Rights of the Child]; *Declaration on the Rights of the Child – 1948*, INT’L UNION FOR CHILD WELFARE, available at <http://www.crin.org/resources/infodetail.asp?ID=1309>.

29. CRC, *supra* note 2.

30. Every country in the world is a party to the CRC, with just three exceptions: the United States, Somalia, and South Sudan. *See* Status of Ratifications, *supra* note 18. *See generally* LOUIS HENKIN, *THE AGE OF RIGHTS* (1990).

31. Recognizing that children are distinct individuals and not merely wards or appendages of an adult does not mean ignoring the family context. Rather, it means ensuring that children’s rights and needs are not subsumed under the rights of others and subsequently ignored.

32. *See* CRC, *supra* note 2, art. 12 (“States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”). Giving children a voice does not mean necessarily allowing them to decide every issue. Indeed, evidence shows that many children want to participate in the decision-making process but do not necessarily want the final word. *See* Maria Grahn-Farley, *Human Rights & U.S. Standing Under the Obama Administration: The U.N. Convention on the Rights of the Child and the Forgotten History of the White House Children’s Conferences, 1909–1971*, 20 TRANSNAT’L L. & CONTEMP. PROBS. 307, 327 (2011) (“The right to participate does not give the child a right to make decisions. . . . [It] means that the child should be heard in all matters that concern the child . . . [and] includes the right of the child to participate in a meaningful way.”); Tamar Morag, Dori Rivkin & Yoa Sorek, *Child Participation in the Family Courts—Lessons from the Israeli Governmental Pilot Project*, 26 INT’L J.L. POL’Y FAM. 1, 4 (2012) (“[S]tudies indicate that children whose parents are going through a divorce are



Although we are now in the age of children's rights, in reality many beliefs of prior periods—e.g., that children are better understood as objects in need of special protection, and that parents have or should have complete control over children's lives—remain influential.<sup>33</sup> As the United States Supreme Court reaffirmed just over a decade ago in *Troxel v. Granville*, “it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”<sup>34</sup> Moreover, the concepts of rights and protection are not mutually exclusive.<sup>35</sup> For example, the right to be free from discrimination or from torture, cruel, and inhuman treatment requires protective measures by the government for children (as well as for adults).<sup>36</sup> Thus, even with recognition of children as rights holders, traditional perspectives on children retain significant influence.

Today, the prevailing constructions of childhood center on children's development and dependency. Somers, Herrera, and Rodriguez describe the development and dependency constructs of childhood:

The developmental construction presents childhood as a progression of cognitive and psychosocial development towards adulthood. The cognitive component of this construction revolves around two key concepts: understanding—the ability to comprehend information relevant to the

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usually interested in expressing their positions and their feelings regarding decisions that affect their lives, although in most cases they do not wish to be the ones making the decision.”).

33. *Troxel v. Granville*, 530 U.S. 57, 65–67 (2000); G.A. Res. 61/146, ¶ 17, U.N. Doc. A/RES/61/146 (Jan. 23, 2007) (recognizing various manners in which children should be protected, including in the home).

34. *Troxel*, 530 U.S. at 66.

35. G.A. Res. 61/146, Art. II, U.N. Doc. A/RES/61/146 (Jan. 23, 2007) (addressing the “[p]romotion and protection” of children and their rights). Nor are children's rights and parental authority necessarily conflicting ideas. See Barbara Bennett Woodhouse, *The Family-Supportive Nature of the U.N. Convention on the Rights of the Child*, in *THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION* 37, 38 (Jonathan Todres, Mark E. Wojcik & Cris Revaz eds., 2006) (“[T]he CRC is not a charter of children's rights to be free of parental authority and control. It is foremost a charter of children's rights to be free of abuse, neglect, and oppression by the state. . . . [T]he CRC recognizes parents' central role as guardians of their children's rights. . . . [H]uman rights are not a zero sum game. Giving rights to children does not take rights away from parents.”).

36. See CRC, *supra* note 2, art. 37(a) (“No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”); Comm. on the Rights of the Child, *General Comment No. 8*, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2007) (“The distinct nature of children, their initial dependent and developmental state, their unique human potential as well as their vulnerability, all demand the need for more, rather than less, legal and other protection from all forms of violence.”).

decision; and reasoning—the ability to use information logically to make a decision.

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The dependency construction presents childhood as a site for having the needs of the child met while also limiting the agency of the child. The dependency construction of childhood views children as needing others for their survival, and so others must provide food, shelter, health care, affection, and education.<sup>37</sup>

While other constructs of childhood exist,<sup>38</sup> the dominant view of children today is that they are adults in the making—that is, dependent individuals who are not yet capable of mature and autonomous thought or action and who need to be socialized to conform to the world.<sup>39</sup> Although recent research on brain development confirms important differences between children and adults (as any parent or teacher could tell you),<sup>40</sup> the

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37. M. Aryah Somers, Pedro Herrera & Lucia Rodriguez, *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL'Y 311, 325–26 (2010). See also Appell, *supra* note 14, at 708–10 (“Childhood is primarily a time-limited developmental category that contains children until they become adults. In other words, childhood is the developmental process of becoming an adult. . . . As a legal matter, these developing beings are minors and are dependent on others for care and decisionmaking from birth to the age of eighteen.”).

38. Somers et al., *supra* note 37, at 327–31 (describing the privacy, autonomous, and threatening constructions of childhood). The authors delineate several constructs as follows: “[t]he privacy construction presents childhood as a space that is absent from political engagement. . . . The autonomous construction presents childhood as a space of autonomy and agency. . . . [The threatening] construction presents childhood as a site that is threatening, burdensome, or disposable. The notion of being threatening reflects a puritan concept of the child born of original sin envisaged as evil or wicked.” *Id.* at 327–30.

39. Karin Heissler, *Migrating with Honor: Sites of Agency and Power in Child Labor Migration in Bangladesh*, in CHILDREN AND MIGRATION: AT THE CROSSROADS OF RESILIENCY AND VULNERABILITY, 209 (Marisa O. Ensor & Elzbieta M. Gozdzia ed., 2010) (observing that “[i]n most migration studies, children have either been overlooked or been considered passive appendages of their parents or guardians,” rather than recognized as independent actors who are capable of making rational decisions). See also Shahin Yaqub, *Independent Child Migrants in Developing Countries: Unexplored Links in Migration and Development* (Jan. 2009) (working paper) (on file with UNICEF Innocenti Research Centre, Working Paper IWP-2009-01), available at [http://www.unicef-irc.org/publications/pdf/iwp\\_2009\\_01.pdf](http://www.unicef-irc.org/publications/pdf/iwp_2009_01.pdf) (“These debates have included children mainly in terms of children’s needs as dependents, when they are left behind by migrants or when in migrant families. But the fact that many children are migrants who are substantially self-dependent, living without parents and adult guardians, is yet to gain attention.”).

40. See, e.g., Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1011–16 (2003) (reviewing psychology research on adolescent development and concluding that adolescents are less culpable than most adults due to diminished decision-making

idea that children are not capable of mature thoughts and actions does not reflect reality: “[t]he use of a bright-line rule to designate the end of childhood ignores individual variation in developmental maturity as well as varying maturity demands across the range of legal rights and responsibilities.”<sup>41</sup>

Still, the law relies on bright-line rules to demarcate a division between childhood and adulthood; adults are recognized as autonomous individuals under the law, while children are not.<sup>42</sup> Clearly established age benchmarks have some practical value.<sup>43</sup> It is not administratively feasible to decide every case individually, and doing so would create enormous backlogs and open the door to arbitrary decisions rooted in explicit or implicit bias.<sup>44</sup> Bright-line rules also serve notice and clarity functions, as individuals can readily ascertain whether or not the law applies to them.<sup>45</sup>

Responding, in part, to the need for bright-line rules, the law has marked a clear divide between children and adults. Across numerous issues—including civil rights (e.g., voting rights), employment rights, medical decision-making and other decisions affecting bodily integrity, contracts, and other areas—the law affords fewer autonomy rights to children than it does to adults (and, to some extent, reduces duties or

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capacity); Paul Arshagouni, “*But I’m an Adult Now . . . Sort of*”: *Adolescent Consent in Health Care Decision-Making and the Adolescent Brain*, 9 J. HEALTH CARE L. & POL’Y 315, 346–59, 359 (2006) (proposing that the various recent developments in adolescent psychology and brain development research suggest that there should be an expansion of adolescent decision-making for low-risk medical procedures “that do not involve potential adverse long-term consequences”).

41. C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 687 (2005).

42. See Todres, *supra* note 6, at 1121 (explaining how the age at which the line is drawn differs across issues and jurisdictions).

43. Clarke, *supra* note 41, at 686 (suggesting that the binary classification scheme makes it easier to determine maturity); Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 560 (2000) (“For most purposes, no great harm results from postponing adult legal status until the designated age, or from giving parents legal authority and thereby involving them in their adolescent children’s lives.”). See also Erwin Chemerinsky, *A Paradox Without A Principle: A Comment on the Burger Court’s Jurisprudence in Separation of Powers Cases*, 60 S. CAL L. REV. 1083, 1111 (1987) (“Clarity in the law matters.”).

44. See Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 836–37 (2003) (“Litigating the maturity [of a young offender] on a case-by-case basis is likely to be an error-prone undertaking, with the outcomes determined by factors other than immaturity.”).

45. See Chemerinsky, *supra* note 43, at 1111. Cf. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (stating that a statute “must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . .”).

obligations).<sup>46</sup> For a child, a parent's or guardian's consent is needed for everything from entering into contracts to receiving most forms of medical treatment.<sup>47</sup> As Devon Corneal writes, the law's sharp distinction between childhood and adulthood "has generally served either to deny children's rights entirely, to limit the scope of those rights when they are granted, or to refuse to grant children standing to assert their rights, placing them in the position of relying on adults to voice their rights for them."<sup>48</sup> In short, the presumption is that prior to age eighteen, children typically will remain subsumed within the family and largely out of the public sphere of society.

The law is structured to reinforce and respond to the idea that a child's natural place is as part of a family, in the private sphere of society. And that makes sense on many levels. There is widespread agreement that children should be raised in a caring family environment.<sup>49</sup> Historically, the law has deferred to parents and families in the raising of children.<sup>50</sup> Accordingly, the law ends up serving two primary functions vis-à-vis children and their families. First, the law reinforces parental authority by punishing deviant behavior by children that goes beyond the private family sphere. For example, laws on juvenile delinquency or truancy reinforce societal rules

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46. See Brief of Juvenile Law Center et al. as Amici Curiae in Support of Respondent at 5–6, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633) (listing activities for which law restricts youth rights, ranging from voting and abortion, to purchase of alcohol and cigarettes, to body piercing and tattoos).

47. Martha K. Presley, *The Constitutionality of an HPV Mandate and Its Implications for the Minor Patient*, HEALTH L., Dec. 2012, at 1, 5–6 (explaining that "[c]hildren by definition lack the capacity to give informed consent, and typically parents or guardians consent to their medical care" though exceptions exist for "mature minors" for select procedures); Todres, *supra* note 6, at 1125–28 (discussing limitations on minors' right to contract).

48. Devon A. Corneal, *On the Way to Grandmother's House: Is U.S. Immigration Policy More Dangerous than the Big Bad Wolf for Unaccompanied Juvenile Aliens?*, 109 PENN ST. L. REV. 609, 617 (2004).

49. See, e.g., CRC, *supra* note 2, Prml. (recognizing the family as "the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children").

50. See *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000) ("[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."); *Bellotti v. Baird*, 443 U.S. 622, 637 (1979) ("[A]n additional and more important justification for state deference to parental control over children is that '[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.'" (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925))); Cynthia Lee Starnes, *Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments*, 54 ARIZ. L. REV. 197, 216 (2012) ("When parents are married, the law assumes they will act in their children's best interests and so defers to parental decision-making absent evidence of abuse or neglect.").

that children need to learn. Such laws aim to redirect children back into traditionally acceptable spaces for children (e.g., the home and school) or at a minimum, if that fails, to remove them from the public sphere by sending them to juvenile detention facilities.<sup>51</sup> Second, the law provides a safety net for children without families or those with families who have limited means. The law relies upon and uses the family-unit structure as the vehicle through which this public assistance is distributed, with the goal of ensuring the well-being of children.<sup>52</sup>

Through these two functions, the law plays a subsidiary role to parents and other legal guardians, supporting families who either cannot or will not enforce generally accepted rules for their children and offering a safety net for families who are struggling to provide for their children. This legal framework also reinforces the idea that children should remain largely out of the public sphere of society until they reach adulthood and are deemed autonomous individuals.<sup>53</sup>

When children emerge from the private sphere and assert themselves as independent actors prior to adulthood, they act contrary to conventional expectations. Although this phenomenon has occurred with at least some children of every generation, and the numbers of independent children has increased significantly in recent decades,<sup>54</sup> most countries and most legal systems remain ill-equipped to handle these children. The two-pronged response of states—combining police powers with assistance measures—is

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51. See, e.g., Alicia N. Harden, *Rethinking the Shame: The Intersection of Shaming Punishments and American Juvenile Justice*, 16 U.C. DAVIS J. JUV. L. & POL'Y 93, 100–01 (2012) (noting that originally juvenile justice “laws sought to correct and protect” youth who went astray). *But see* Mary Sue Backus, *Achieving Fundamental Fairness for Oklahoma’s Juveniles: The Role For Competency in Juvenile Proceedings*, 65 OKLA. L. REV. 41, 53 (2012) (explaining how in the 1990s, state legislatures amended juvenile justice laws to “replace[] the goal of rehabilitation with punishment or accountability as the primary goal for the juvenile justice system, emphasizing, for instance, public safety, the seriousness of the offense, children’s obligations to society, and rendering appropriate punishment”).

52. See, e.g., OFFICE OF PUB. AFFAIRS, U.S. DEPT. OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, available at [https://www.acf.hhs.gov/sites/default/files/assets/acf\\_directory.pdf](https://www.acf.hhs.gov/sites/default/files/assets/acf_directory.pdf) (detailing assistance programs for families and children).

53. See Annette Ruth Appell, *Accommodating Childhood*, 19 CARDOZO J.L. & GENDER 715, 722–23 (2013) (“The legal child is disenfranchised, under the coverture of her parents or guardians, categorically excluded from a variety of activities and occupations, and subjected to obligations and limitations that would be exceptional, unlawful, or unconstitutional if directed at adults.”).

54. Nathan Koppel, *Child Immigration is Rising*, WALL ST. J. (May 7, 2012, 7:28 PM), <http://online.wsj.com/article/SB10001424052702303630404577390461260565008.html>; *Number of Homeless Students Hits New Record; Over 1 Million*, RT, Dec. 18, 2012, <http://rt.com/usa/homeless-number-children-percent-253>. See also ARIÈS, *supra* note 5, at 47 (noting that childhood only came to be widely recognized as a distinct category in the sixteenth and seventeenth centuries).

structured to work in traditional family environments. As Part III details, this legal framework of law falls short of ensuring the rights of, or providing needed assistance to, independent children and often has adverse consequences for them.

### III. INDEPENDENT CHILDREN

As Part II explained, the prevailing construct of childhood views children as inhabiting a state of dependence, which occurs prior to autonomy. It envisions children living at home, following their parents' rules, attending school, and otherwise remaining largely in the private sphere of society until they reach adulthood and become independent individuals. This binary approach has administrative value and other benefits (e.g., notice and clarity in the law), and indeed works for many children and their families. However, the binary approach does not correspond to the realities of life for millions of children today. Indeed, independent children challenge the dominant framework on childhood; they leave, or are forced to leave, the private sphere of the home and are very much in the public realm, whether or not they are wanted there.

This Part begins by defining independent children and examining how they live and function outside traditional family environments. The discussion then shifts to the research on street children as a case study. Street children, like other independent children, frequently act as autonomous or semi-autonomous individuals, often making very "adult-like" decisions. Finally, this Part looks at the law's punishment-heavy response to independent children, which appears to be misguided once structural issues are accounted for and is fraught with obstacles to delivering assistance to these children. Through an examination of the experience of street children, just one subcategory of independent children, it becomes clear that the dominant construct of childhood does not adequately account for the complexities and diversity of childhood, to the detriment of independent children.

#### A. WHO INDEPENDENT CHILDREN ARE AND WHAT THEY EXPERIENCE

##### 1. Overview

As used in this Article, "independent children" can include a range of individuals under eighteen years of age who spend the majority of their

day-to-day lives without a regular adult caregiver for a significant period of time.<sup>55</sup> Therefore, it includes children who, after suffering abuse in the home, have run to the streets and others who may have been thrown out of their home by their parents because of their sexual orientation or for other reasons. It also includes children from poor families with positive family relationships who have bravely decided to migrate unaccompanied in search of a better life for themselves and their families. In short, the population of independent children can include a broad range of young individuals—unaccompanied migrant children; children orphaned by armed conflict, AIDS, or other reasons; children in child-headed households; and street children, among others. Though these examples evidence a diversity of experiences, independent children share important commonalities and similar experiences with the law.<sup>56</sup>

In every armed conflict, refugee crisis, and natural disaster, children have been separated from their parents and families and thrust into the role of autonomous actors.<sup>57</sup> Even in the absence of a war or another calamitous event, children may find themselves living autonomously for meaningful

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55. This definition is intended as a rough guideline; exceptions exist (e.g., the baby who is the child of teenage parents is without an adult caregiver but may be part of a traditional, albeit young, nuclear family). The population that is the focus of this Article is children who are acting or living independent of adults. It should be noted that many of these children form family groups with other children, some of whom are older and serve as caregivers, but they are without a regular adult caregiver. Other terms might be considered for this group, such as unaccompanied minors. See Comm. on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, May 17–June 3, 2005, ¶ 7, U.N. Doc. CRC/GC/2005/6 (Sept. 1 2005), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/438/05/PDF/G0543805.pdf?OpenElement> (“‘Unaccompanied children’ (also called unaccompanied minors) are children . . . who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.”). However, I use “independent children” in part to emphasize the adult-like circumstances they confront and the often mature decisions they make.

56. The category “independent children” is a fluid one, as a child can be an independent child for a period of time, preceded or followed by time under the care of a parent or guardian.

57. EVERETT M. RESSLER, NEIL BOOTHBY & DANIEL J. STEINBOCK, UNACCOMPANIED CHILDREN: CARE AND PROTECTION IN WARS, NATURAL DISASTERS, AND REFUGEE MOVEMENTS 9 (1988). See also UNICEF, CHILDREN AND CONFLICT IN A CHANGING WORLD: MACHEL STUDY 10-YEAR STRATEGIC REVIEW: CHILDREN AND CONFLICT IN A CHANGING WORLD 19 (2009), available at [http://childrenandarmedconflict.un.org/publications/MachelStudy-10YearStrategicReview\\_en.pdf](http://childrenandarmedconflict.un.org/publications/MachelStudy-10YearStrategicReview_en.pdf) [hereinafter CHILDREN AND CONFLICT IN A CHANGING WORLD] (“In 2006, an estimated 18.1 million children were among populations living with the effects of displacement. Within that group were an estimated 5.8 million refugee children and 8.8 million internally displaced children.”). Indeed, armed conflicts around the globe have the potential to increase significantly the number of independent children; “[g]lobally, just over 1 billion children under the age of 18 live in countries or territories affected by armed conflict—almost one sixth of the total world population.” *Id.*

periods of time. AIDS has left more than fifteen million children orphaned.<sup>58</sup> Though many of these children are taken in by extended family or state-arranged alternative care, some end up on their own or in child-headed households.<sup>59</sup> For example, as of 2006, approximately 122,000 children in South Africa were living in households composed only of children.<sup>60</sup>

Other children make life-altering decisions to migrate unaccompanied due to poverty and other factors.<sup>61</sup> As Yaqub explains, “[a] common perception is that independent migration by under 15 year olds [sic] is unviable,”<sup>62</sup> but the reality is that often children’s movement is a result of their own decisions and efforts.<sup>63</sup> Many children autonomously decide to migrate or have substantial input into the ultimate decision.<sup>64</sup>

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58. See *Children Orphaned by AIDS (<18 Years Old)*, HENRY J. KAISER FAMILY FOUNDATION (2012), <http://kff.org/global-indicator/aids-orphans/> (last visited Nov. 7, 2013) (reporting that nearly 18 million children are orphaned due to AIDS); UNICEF, CHILDREN AND AIDS: A STOCKTAKING REPORT 2 (2007), available at [http://www.unicef.org/publications/files/ChildreanAIDSAStocktakingLoResPDF\\_EN\\_USLetter\\_15012007.pdf](http://www.unicef.org/publications/files/ChildreanAIDSAStocktakingLoResPDF_EN_USLetter_15012007.pdf) [hereinafter CHILDREN AND AIDS] (reporting that 15.2 million children have lost one or both parents due to AIDS).

59. See R. S. Drew, C. Makufa & G. Foster, *Strategies for Providing Care and Support to Children Orphaned by AIDS*, 10 AIDS CARE 9, 10 (1998) (recognizing that AIDS has led to an increase in “grandparent-headed households” and “adolescent-headed households”). See generally J. Heymann et al., *Extended Family Caring for Children Orphaned by AIDS: Balancing Essential Work and Caregiving in High HIV Prevalence Nations*, 19 AIDS CARE 337 (2007) (discussing impact of caring for orphans on extended family members).

60. See Helen Meintjesa et al., *Orphans of the AIDS Epidemic? The Extent, Nature and Circumstances of Child-Headed Households in South Africa*, 22 AIDS CARE 40, 43 (2010) (noting that by 2006 approximately 3.7 million children in South Africa alone had a parent who died as a result of AIDS); Linda M. Richter & Chris Desmond, *Targeting AIDS Orphans and Child-Headed Households? A Perspective from National Surveys in South Africa, 1995–2005*, 20 AIDS CARE 1019, 1023 (2008) (“The general image portrayed of child-headed households is groups of children living alone, but [in South Africa] only 18% of households without adults contain more than two children.”).

61. Yaqub, *supra* note 39, at 1 (“Until recently, trafficking or asylum-seeking, rather than migration, were thought to account for most children’s independent movements.”).

62. *Id.* at 35.

63. *Id.* at 1.

64. See Heissler, *supra* note 39, at 209–11; Yaqub, *supra* note 39, at 35 (“In places where children’s independent migration has been documented, it seems it is normal that a child can decide to do it, or play a substantial role in the decision. Sometimes migration is entirely initiated and executed by children.”); Agnes Zenaida V. Camacho, *Children and Migration: Understanding the Migration Experiences of Child Domestic Workers in the Philippines* 29–31 (Dec. 2006) (unpublished research paper), available at <http://www.childmigration.net/files/Camacho.pdf> (characterizing the decision-making process by children and parents as an active negotiation process engaged in by the child with her or her parents). In one study of migrant boys between the ages of ten and fourteen years old, twenty-five percent of children’s migration was completely autonomous, meaning these children’s decision to



Finally, street children are found in nearly every country, and UNICEF has estimated that the number of street children runs in the “tens of millions.”<sup>65</sup> Other organizations have questioned these estimates, noting that “there are understandable pressures for policies to be informed by aggregate numbers, [but] estimates of street child populations, even at city levels, are often hotly disputed and can distract rather than inform policymakers.”<sup>66</sup> Even though exact numbers might be difficult to obtain, there is widespread agreement that the number of street children is substantial and that homeless children exist on the street in the vast majority of countries.

Taken together, street children, orphaned children, unaccompanied migrant children, and other children living in independent arrangements constitute a sizable population. Although it is difficult to know with certainty the exact number of independent children at any point in time, given the size of some of the subpopulations of independent children, conservative estimates would suggest that they number in the millions and that they are found in most, if not all, countries.<sup>67</sup>

To illustrate the reality of independent children’s daily lives, this Part examines the lives and choices of one population in particular: unaccompanied street children.<sup>68</sup> In some cases, these groups overlap with each other, as some children orphaned by armed conflict or by AIDS

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leave home was made without any parental or legal guardian involvement, and that they made employment and shelter arrangements without the involvement of a parent. *See* Yaqub, *supra* note 39, at 36.

65. UNICEF, *STATE OF THE WORLD’S CHILDREN 2006*, 40 (2005) [hereinafter *STATE OF THE WORLD’S CHILDREN*].

66. CONSORTIUM FOR STREET CHILDREN, *STREET CHILDREN STATISTICS (2009)* (U.K.), [http://www.streetchildren.org.uk/\\_uploads/resources/Street\\_Children\\_Stats\\_FINAL.pdf](http://www.streetchildren.org.uk/_uploads/resources/Street_Children_Stats_FINAL.pdf).

67. *See supra* notes 57–66 and accompanying text.

68. This Article’s use of the term “street children” is intended to be descriptive and not stigmatizing, and it is shaped by the following understanding:

The term ‘street children’ is problematic as it can be employed as a stigmatizing label. One of the greatest problems such children face is their demonization by mainstream society as a threat and a source of criminal behaviour. Yet many children living or working on the streets have embraced the term, considering that it offers them a sense of identity and belonging. The umbrella description is convenient shorthand, but it should not obscure the fact that the many children who live and work on the street do so in multifarious ways and for a range of reasons – and each of them is unique, with their own, often strongly felt, points of view.

*STATE OF THE WORLD’S CHILDREN*, *supra* note 65, at 40. It is important to note that being a street child is an “event” with a beginning and an end, the latter of which is usually the transition to adulthood. *See* PHILIP KILBRIDE, ET AL., *STREET CHILDREN IN KENYA: VOICES OF CHILDREN IN SEARCH OF A CHILDHOOD* 8 (2000).

migrate or end up on the street, and many street children end up in child-headed households.<sup>69</sup> While all of these populations merit attention, focusing on street children covers a breadth of children's experiences and highlights many of the challenges facing governments and advocates who seek to ensure the well-being of all children.

## 2. Case Study: Street Children

Street children, or unaccompanied homeless children, spend significant portions of time both removed from adult supervision and engaging in adult-like decisions. "The phenomenon of street children is a worldwide problem involving both sexes, and is in no way limited to poor countries."<sup>70</sup> Certain low-income countries are particularly hard hit by high numbers of street children. However, wealthier nations are not immune. The United States, for example, has high numbers of homeless children; annually an estimated 1.6 million children between the ages of twelve and seventeen experience homelessness without a parent or guardian.<sup>71</sup>

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69. See, e.g., CHILDREN AND CONFLICT IN A CHANGING WORLD, *supra* note 57, at 161 ("In both emergency and postconflict contexts . . . [young girls] may migrate in search of safer environments or to gain access to shelter and basic services."); Lorraine Young & Nicola Ansell, *Fluid Households, Complex Families: The Impacts of Children's Migration as a Response to HIV/AIDS in Southern Africa*, 55 PROF. GEOGRAPHER 464, 464 (2003) (discussing children's migration due to HIV/AIDS and noting that "children are social actors in their own right and sometimes migrate separately from other household members"); K. Subbarao et al., *Social Protection of Africa's Orphans and Other Vulnerable Children* (2001) (working paper), available at [http://siteresources.worldbank.org/AFRICAEXT/Resources/African\\_Orphans.pdf](http://siteresources.worldbank.org/AFRICAEXT/Resources/African_Orphans.pdf) ("In 1996 in Kigali, Rwanda, an estimated one-third of the street children were orphans, and 60,000–85,000 households were headed by children, three-quarters of whom were girls." (citation omitted)).

70. Uché U. Ewelukwa, *Litigating the Rights of Street Children in Regional or International Fora: Trends, Options, Barriers and Breakthroughs*, 9 YALE HUM. RTS. & DEV. L.J. 85, 89 (2006).

71. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY & NAT'L NETWORK FOR YOUTH, ALONE WITHOUT A HOME: A STATE-BY-STATE REVIEW OF LAWS AFFECTING UNACCOMPANIED YOUTH 5 (2012), available at <http://www.nlchp.org/content/pubs/Alone%20Without%20a%20Home,%20FINAL1.pdf> [hereinafter ALONE WITHOUT A HOME]; Heather Hammer, David Finkelhor & Andrea J. Sedlak, *Runaway/Thrownaway Children: National Estimates and Characteristics*, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION 1, 2 (2002), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/196469.pdf> ("In 1999, an estimated 1,682,900 youth had a runaway/throwaway episode."). See also ELLEN L. BASSUK ET AL., NAT'L CTR. ON FAMILY HOMELESSNESS, AMERICA'S YOUNGEST OUTCASTS 2010: STATE REPORT CARD ON CHILD HOMELESSNESS (2011), available at [http://www.homelesschildrenamerica.org/media/NCFH\\_AmericaOutcast2010\\_web\\_032812.pdf](http://www.homelesschildrenamerica.org/media/NCFH_AmericaOutcast2010_web_032812.pdf) (reporting on homeless children with caregivers).

The population referred to as “street children” encompasses a very diverse group of individuals. Scholars and advocates often distinguish between children “of” the street and children “on” the street.<sup>72</sup> Children of the street “regularly sleep outdoors away from home.”<sup>73</sup> Children on the street are often there for portions of the day and then return to a home—that of their parents or other extended family members.<sup>74</sup> This Article focuses primarily on children of the street, although it recognizes that certain children on the street are acting with sufficient autonomy in their daily lives to be considered as independent children.<sup>75</sup> Although there are cultural and other differences across societies, street children in various countries evidence many similarities.<sup>76</sup> These similarities across cultures and jurisdictions reinforce the importance of recognizing independent children as a distinct category.

Street children, or unaccompanied homeless children, have been described as “miniature adults” who are “leaving home, handling money and making their own way in the world.”<sup>77</sup> This description indicates the degree to which street children, or homeless children, are making adult-like decisions on a daily basis, although it does not capture the reasons why they might feel compelled to leave home. These adult-like, rational decisions may be reflected in both their choice to leave home, as well as their decision-making processes once they are living on the streets.<sup>78</sup>

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72. See Mona Pare, *Why Have Street Children Disappeared? – The Role of International Human Rights Law in Protecting Vulnerable Groups*, 11 INT’L J. CHILDREN’S RIGHTS 1, 3–5 (2003); Eme T. Owoaje et al., *Socio-Demographic Characteristics of Street Children in Rural Communities Undergoing Urbanization*, 7 ANNALS OF IBADAN POSTGRADUATE MED. 10, 10 (June 2009) (recognizing “four categories of street children: children of the street; children on the street; children who are part of a street family; and those in institutionalized care” but noting that such “classification is too rigid”).

73. KILBRIDE ET AL., *supra* note 68, at 2.

74. See Pare, *supra* note 72, at 4–5 (citing UNICEF typology).

75. As I define independent children as those who spend the majority of their day-to-day lives without a regular adult caregiver for a significant period of time, certain children on the street could also fall into this category. See *supra* note 55 and accompanying text.

76. KILBRIDE ET AL., *supra* note 68, at 3.

77. Diane M. Hoffman, *Migrant Children in Haiti: Domestic Labor and the Politics of Representation*, in CHILDREN AND MIGRATION: AT THE CROSSROADS OF RESILIENCY AND VULNERABILITY 46 (Marisa O. Ensor & Elzbieta M. Gozdziaik eds., 2010).

78. See Soniya Wazed, *Migration and Street Children in Bangladesh*, 2 OIDA INT’L J. OF SUSTAINABLE DEV. 35, 36 (2010) (reporting research finding that “children in street situations were emotionally intact in their intellectual functioning, and achieved high levels of self-management”).

Children who end up on the street do so as a result of “[a] variety of complex, inter-related, and often overlapping push and pull factors.”<sup>79</sup> While some children are forced to move to the streets due to “death of their parents, poverty, sexual abuse, violence in the home, neglect, divorce in the family and the like,” others live on the streets voluntarily for economic reasons and perhaps even because of a sense of adventure.<sup>80</sup> In a number of contexts, including ones in which children suffer significant harm in the home, choosing a life on the street is “a rational choice when considering alternative options and risks.”<sup>81</sup> A fourteen year-old boy in Bangladesh explained why street life seemed to be a viable option at the time he was forced to leave his relatives’ home:<sup>82</sup>

Once I left home I could have gone to stay with my uncle and live with him because he has a big house and a good job. However, life with him would not have been so different from the life I wanted to quit. I did not trust adults any more and I did not want to be beaten by them for no reasons. . . . I could have gone to a relative’s house but I preferred freedom, living with friends on the street . . . [.] The street gives me enough [food] to survive but I could have had more living facilities with my relatives, but what I seek now is to enjoy life with my friends and have security.<sup>83</sup>

Another street child’s narrative reflects the profound reasons children choose life on the streets rather than their homes:

I did not leave my home for poverty. I left home because I was not able to inspire love and affection from my step-mother. I was ashamed to tell you before. When I say I’m on the street because my family was poor people look at me and I inspire sympathy from them. They nod saying they knew that poverty was the cause and then they give me coins. But if I say I’m on the street because my parents were violent, people blame me saying I was not a good boy.<sup>84</sup>

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79. Sheryl L. Buske, *A Case Study in Tanzania: Police Round-ups and Detention of Street Children as a Substitute for Care and Protection*, 8 S.C. J. INT’L. L. & BUS. 87, 95 (2011).

80. Julie Orme & Michael M.O. Seipel, *Survival Strategies of Street Children in Ghana: A Qualitative Study*, 50 INT’L SOC. WORK 489, 489 (2007). See also Alessandro Conticini & David Hulme, *Escaping Violence, Seeking Freedom: Why Children in Bangladesh Migrate to the Street*, 38 DEV. & CHANGE 201 (2007) (noting that in one study “97 percent of his sample of Colombian children in street situations had actively abandoned their house-holds due to non-conducive family environment”).

81. Conticini & Hulme, *supra* note 80, at 204.

82. See *id.* at 211.

83. *Id.*

84. *Id.* at 212.

In the United States, most youth who experience homelessness or end up on the street do so “because of family and interpersonal conflicts; these youth become runaway, throwaway, or systems youth (foster care or institutionalized).”<sup>85</sup> For many, access to foster care or other support systems may be only temporary fixes that leave them vulnerable to returning to the street, as one girl in San Francisco explained:

The day I graduated from high school my foster mom told me, “You’ve been emancipated. You can’t live here anymore.” My social worker showed up—I was still in my little graduation dress and heels, my flowers, my cap on. My social worker had never talked with me. [She just] told me, “I’ve called around and found a shelter for you. You have a bed for four months.”<sup>86</sup>

Once on the street, children engage in a wide variety of activities in order to make money, and “some children demonstrate remarkable enterprise.”<sup>87</sup> For example, one eight-year-old boy in Sudan reported buying leftover food from restaurants, eating a portion of the food and then selling the remainder to others for a profit.<sup>88</sup> Although engaging in theft is not uncommon, many street children refuse to engage in theft or do so only as a last resort.<sup>89</sup> Carrying trash, washing cars, guarding cars, and selling various items are just a few examples of activities street children engage in to earn money needed for survival.<sup>90</sup> The type of work in which street children engage varies by gender.<sup>91</sup> While boys were more likely to engage in the activities listed above, girls reported most often using begging, and

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85. Marisa J. Terry, Gurpreet Bedi & Neil D. Patel, *Healthcare Needs of Homeless Youth in the United States*, 2 J. OF PEDIATRIC SCI. 1, 4 (2010), available at [www.pediatricsciences.com/ojs/index.php?journal=jps&page=article&op=download&path%5B%5D=66&path%5B%5D=96](http://www.pediatricsciences.com/ojs/index.php?journal=jps&page=article&op=download&path%5B%5D=66&path%5B%5D=96).

86. HUMAN RIGHTS WATCH, MY SO-CALLED EMANCIPATION: FROM FOSTER CARE TO HOMELESSNESS FOR CALIFORNIA YOUTH 1 (2010), available at <http://www.hrw.org/sites/default/files/reports/us0410webwcover.pdf>.

87. Mustafa Kudrati et al., *Children of the Sug: A Study of the Daily Lives of Street Children in Kartoum, Sudan, with Intervention Recommendations*, 32 CHILD ABUSE & NEGLECT 439, 441 (2008); Orme & Seipel, *supra* note 80, at 492 (“Without exception all the children we interviewed worked or sought opportunities for work. Some children even had several jobs to support themselves.”).

88. See Kudrati et al., *supra* note 87, at 441.

89. See *id.*; Orme & Seipel, *supra* note 80, at 492–93 (“Begging for money or food was considered unacceptable behavior. A 16-year-old unemployed boy emphatically made it known that Ghanaians did not beg, even if they had nothing to eat and no place to sleep.”).

90. See KILBRIDE ET AL., *supra* note 68, at 71–72; Orme & Seipel, *supra* note 80, at 493.

91. See Kudrati et al., *supra* note 87, at 442.

sometimes sex work, as their main source of income.<sup>92</sup> In documented cases of street children who use begging as a source of income, these children knowledgeably target certain areas where foreigners and tourists stay on their visits.<sup>93</sup>

Street children often live and work in groups. For instance, the vast majority of street children surveyed in a study in Kenya indicated that they worked in groups, rather than alone.<sup>94</sup> Phillip Kilbride and his colleagues identify two primary reasons why street children work in groups. The first reason is economic.<sup>95</sup> Street children utilize relationships formed with other street children and those social networks to enhance their economic earning opportunities;<sup>96</sup> “to be successful in their work such as begging and washing cars, for instance, the children needed to plan their strategies and operations together” as a “survival technique[] . . . learned in order to deal with the challenges of street life.”<sup>97</sup>

The second reason street children form groups is social and psychological.<sup>98</sup> Street children form almost familial relationships with other street children and depend on one another for “money, protection, encouragement[,] and emotional support.”<sup>99</sup> After leaving home, street children likely “pay at least as much attention, and probably more, to the development of social relationships as they do to economic opportunities.”<sup>100</sup> These familial-like relationships allow street children to maintain a degree of stability, as well as personal autonomy through “social support from other street children in the form of acceptance, understanding

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92. See KILBRIDE ET AL., *supra* note 68, at 68; Kudrati et al., *supra* note 87, at 441–42.

93. See KILBRIDE ET AL., *supra* note 68, at 68.

94. See *id.* at 73 (reporting 93% of children surveyed indicated that they work in groups).

95. *Id.* at 74.

96. Conticini & Hulme, *supra* note 80, at 211 (“[S]upportive social networks can improve (in most cases unintentionally) children’s access to better economic opportunities in the future.”).

97. KILBRIDE ET AL., *supra* note 68, at 74.

98. See *id.* (“Like everyone else, these children need friendship. . . . [M]ost of the street children in our sample (88%) moved and worked in a group for purposes of friendship and mutual support. The peer support that they receive from one another by caring and sharing is not only substitute for what they needed and missed from their own families but is also psychologically gratifying. The social networks developed through friendship make them more psychologically prepared to cope with the insecurities of street life.”).

99. Orme & Seipel, *supra* note 80, at 493 (“They saw each other as family members and watched out for one another. They felt they could trust their friends, but were skeptical of adults and their intentions.”).

100. Conticini & Hulme, *supra* note 80, at 211.

2014] *Independent Children and the Legal Construction of Childhood* 283

and companionship.”<sup>101</sup> These family-like groups not only work together, but also eat together and sleep in groups, and even take care of one another if one child falls ill.<sup>102</sup> In the words of one street child: “[s]ometimes, if I don’t have money, they help me by giving me money to buy food to eat. Sometimes, if I am very ill then they will take care of me.”<sup>103</sup> Another child describes a particular group of street children rallying together to care for a sick companion:

He comes to his brothers [other street boys] and . . . we collect money from each person . . . [.] Then we take him to the hospital and buy medicine from the pharmacy[.] . . . We carefully look after the ill person. We bring him bananas, fruits, and oranges. One of us stays with him at the hospital, to serve him. [When he is released] we take the ill person to . . . [sleep] away from the sewage and rains.<sup>104</sup>

Children also often provide emotional support and encouragement to one another:

After a discouraging day of work a young man was ready to give up and go back home, but he changed his mind because of his friend’s encouragement. ‘If you give up you will not get your chop money (food money), so you have to go to work. You have to go . . .’ I decided to go back home, but I don’t go because my friend gives me courage to go on . . . so all of us talk and share an idea together.<sup>105</sup>

Much like adults would do for family members, part of a street child’s responsibility to his street family might include planning a funeral when a companion dies.<sup>106</sup> One child describes collecting money in order to provide a proper funeral for a friend who was hit and killed by a car:

In eleven days we collected 13,000 shillings in donations from street kids and the public. The priest went to Tanzania and had returned with [the deceased’s] parents while we stayed to collect money. After some days we had collected 22,000 shillings . . . We also gave [his family] money for a coffin and bought clothes for the funeral. Once there, we found many

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101. See Orme & Seipel, *supra* note 80, at 491.

102. See *id.* at 493.

103. *Id.*

104. Kudrati et al., *supra* note 87, at 445 (alteration in original).

105. Orme & Seipel, *supra* note 80, at 493.

106. See KILBRIDE ET AL., *supra* note 68, at 85.

“grandmothers” (relatives) waiting. As his friends, we were asked to dig his grave.<sup>107</sup>

In various countries, including the United States, when on the street, children form networks that operate like families. As detailed above, they provide support and care as adults do to children, and they have economic responsibility for themselves and sometimes other children within their “family” group. All of these are autonomous actions that are more akin to adults’ actions than those of children, and street children undertake such actions in spite of facing very trying circumstances.

The research on street children reveals a more nuanced picture of children that does not fit neatly within the dominant construct of childhood as a period of dependence before autonomy. While displaying many typical child-like behaviors, often street children are making profoundly mature decisions regarding their survival or care for other younger children. The fact that many street children often make very mature decisions does not make them adults; rather, it shows that the prevailing construct of childhood has failed to account for the experiences of many children.

## B. LEGAL RESPONSES TO INDEPENDENT CHILDREN

As noted above, the law is constructed with the assumption that children will remain largely in the private sphere and behave in traditional, non-autonomous ways. The punitive component of the law exists to ensure children behave appropriately, while the helping hand of the law aims to provide assistance to families to support their children. As applied to independent children, this framework often produces harmful results.

### 1. Law Enforcement

A state’s sanctioning power affects certain children much more than others. Indeed, disparate policing of particular groups is not a new phenomenon generally,<sup>108</sup> and children are no exception. This section looks

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107. *See id.*

108. *See, e.g.,* Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1047–48 (2010) (“Racially disparate policing has had dramatic and severe—and racially disparate—consequences. Blacks and Latina/os today are disproportionately represented among prison populations across the country—one of the few institutions in modern America in which these groups are over-represented as compared to their percentage of the general U.S. population.”); N.Y. CIVIL LIBERTIES UNION, STOP-AND-FRISK REPORT 2011, at 2 (2012), *available at* [http://www.nyclu.org/files/publications/NYCLU\\_2011\\_Stop-and-Frisk\\_Report.pdf](http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf) (“Young black and



at how independent children experience the law, focusing on street children as a case study. Their experience is a far cry from the historical narrative of the neighborhood policeman who helps kids across the street and ensures their safety.

Street children are targets of both formal law and law enforcement. Formal law constrains the actions of independent children, while enforcement of that law results in harm to many independent children. Many laws and regulations are aimed at keeping children out of public spaces. Status offenses, such as truancy or running away from home, are used to sanction otherwise innocent street children, whose actions are criminalized only because of their status as minors.<sup>109</sup> The definition of the term “status offender” in certain states of the United States explicitly provides that certain activity would not be a crime if committed by an adult.<sup>110</sup> Alabama’s juvenile code defines status offender as “an individual who has been charged with or adjudicated for conduct that would not, pursuant to the law of the jurisdiction in which the offense was committed, be a crime if committed by an adult.”<sup>111</sup> Similarly, Georgia defines status offender as:

[A] child who is charged with or adjudicated of an offense which would not be a crime if it were committed by an adult, in other words, an act which is only an offense because of the perpetrator’s status as a child. Such offenses shall include, but are not limited to, truancy, running away from home, incorrigibility, and unruly behavior.<sup>112</sup>

Other related statutes and legal definitions also stigmatize independent children as deviant when their actions may have been in response to

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Latino men were the targets of a hugely disproportionate number of stops. Though they account for only 4.7 percent of the city’s population, black and Latino males between the ages of 14 and 24 accounted for 41.6 percent of stops in 2011. The number of stops of young black men exceeded the entire city population of young black men (168,126 as compared to 158,406). Ninety percent of young black and Latino men stopped were innocent.”)

109. Buske, *supra* note 79, at 100; ALONE WITHOUT A HOME, *supra* note 71, at 9.

110. See, e.g., ALA. ADMIN CODE r. 12-15-201 (2013); GA. CODE ANN. § 15-11-2(11) (2013) (starting Jan. 1, 2014, the referenced legal definition of “status crime” will be moved to §15-11-381); ALONE WITHOUT A HOME, *supra* note 71, at 5 (“A small but significant number of jurisdictions define running away (16% or 9) and truancy (11% or 6) as status offenses.”).

111. ALA. ADMIN CODE r.12-15-201 (2013) (including the following in the definition of status offenses: truancy; violations of municipal ordinances applicable only to children; runaway; beyond control; consumption or possession of tobacco products; possession and consumption of alcohol, and driving under the influence).

112. GA. CODE ANN. § 15-11-2(11) (2013).

maltreatment. For example, under Tennessee law, the definition of an “unruly child” includes “a child in need of treatment and rehabilitation who . . . [i]s away from the home, residence or any other residential placement of the child’s parent(s), guardian or other legal custodian without their consent.”<sup>113</sup> Unlike other states’ definitions, Tennessee’s definition does not account for the child being away from home for good cause, such as trying to escape physical or sexual abuse.<sup>114</sup>

The United States is not unique in this approach to otherwise innocent children. A UNICEF study conducted in Eastern Europe and Central Asia revealed similar findings: “[C]hildren, in some countries, can be criminalized—arrested, detained and considered to be ‘in conflict with the law’—for offences that are classified as a crime only when committed by children. Such ‘status offences’ include running away from home, truancy and ‘being beyond parental control’.”<sup>115</sup> These laws provide the legal mandate that enables aggressive policing of otherwise innocent, or at least understandable, actions by children in many cases.

Enforcement of this law then exacerbates the harm to numerous already vulnerable children.<sup>116</sup> Although many law enforcement officers work diligently to protect children, “[c]hildren frequently experience violence at the hands of police and other law enforcement officials.”<sup>117</sup> Street children are treated as less than human—a nuisance that must be

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113. TENN. CODE ANN. § 37-1-102(b)(25)(A)(iv) (2012). In Tennessee, an “unruly child” also includes a child in need of treatment or rehabilitation who “[c]ommits an offense that is applicable only to a child.” *Id.* § 37-1-102(b)(25)(A)(iii). See also ALONE WITHOUT A HOME, *supra* note 71, at 79 (explaining that in Tennessee “[a]n unruly child may be subject to probation, a fine, or community service”).

114. Compare TENN. CODE ANN. § 37-1-102(b)(25)(A)(iv), with GA. CODE ANN. § 15-11-2(12)(D) (defining “unruly child” as a child who “[w]ithout just cause and without the consent of his or her parent or legal custodian deserts his or her home or place of abode. . . .” (emphasis added)).

115. HELEN MOESTUE, UNICEF, LOST IN THE JUSTICE SYSTEM: CHILDREN IN CONFLICT WITH THE LAW IN EASTERN EUROPE AND CENTRAL ASIA 16 (2008), available at [http://www.unicef.org/ceecis/Lost\\_in\\_the\\_Justice.pdf](http://www.unicef.org/ceecis/Lost_in_the_Justice.pdf).

116. See STATE OF THE WORLD’S CHILDREN, *supra* note 65, at 41 (“Street children often find themselves in conflict with the police and other authorities and have been harassed or beaten by them. They have been rounded up, driven outside city limits and left there. And they have been murdered by vigilantes in the name of ‘cleaning up the city’, often with the complicity or disregard of local authorities.”); Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RES. 217, 236 (2005) (“[A]dolescent views about the legitimacy of authority are influenced by procedural justice judgments about their own and others experiences with the police.”).

117. JO BECKER, HUMAN RIGHTS WATCH, EASY TARGETS: VIOLENCE AGAINST CHILDREN WORLDWIDE 3 (2001), available at <http://www.hrw.org/sites/default/files/reports/violence2001.pdf>.

“clean[ed] up” or “removed.”<sup>118</sup> There is a long history of police abuse and mistreatment of children on or of the street in particular.<sup>119</sup> Street children are frequently subject to police sweeps, where they might end up in detention centers or other correctional facilities, far from their homes or from any relatives.<sup>120</sup> While in police custody, many street children are subject to abusive treatment and sometimes torture;<sup>121</sup> “[i]n Northern Tanzania, the police routinely round-up street children and hold them in custody for days and weeks, only to be abused, neglected, and forced into physical labor. The round-ups are justified as a proper exercise of a colonial-era vagrancy ordinance and the penal code.”<sup>122</sup> Elsewhere, including Bulgaria, Guatemala, and Kenya, for example, human rights organizations have documented evidence of police targeting street children, subjecting them to beatings, sexual assaults, and even arbitrary

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118. See WORLD HEALTH ORG., PROGRAMME ON SUBSTANCE ABUSE: A ONE-WAY STREET? REPORT ON PHASE I OF THE STREET CHILDREN PROJECT 13 (1993), available at [http://apps.who.int/iris/bitstream/10665/62396/1/WHO\\_PSA\\_93.7.pdf](http://apps.who.int/iris/bitstream/10665/62396/1/WHO_PSA_93.7.pdf) (describing derogatory terms used for street children in various countries: “‘gamin’ (urchin) and ‘chinchés’ (bed bugs) in Colombia, ‘marginais’ (criminals/marginals) in Rio, ‘pajaro frutero’ (fruit birds) in Peru, ‘polillas’ (moths) in Bolivia, ‘resistoleros’ (little rebels) in Honduras, ‘scugnizzi’ (spinning tops) in Naples, ‘Bui Doi’ (dust children) in Vietnam, ‘saligoman’ (nasty kids) in Rwanda, or ‘poussins’ (chicks), ‘moustiques’ (mosquitos) in Cameroon and ‘balados’ (wanderers) in Zaire and Congo”); *Protecting Street Children: Vigilantes or the Rule of Law?*, Hearing Before the Subcomm. on Afr., Global Human Rights, and Int’l Operations of the H. Comm. on Int’l Relations, 109th Cong. 177 (2005) (statement of Andy Sexton, Int’l Coordinator, Children at Risk, OASIS Int’l).

119. BECKER, *supra* note 117, at 3; Caroline McHale, Note, *The Impact of U.N. Human Rights Commission Reform on the Ground: Investigating Extrajudicial Executions of Honduran Street Children*, 29 FORDHAM INT’L L.J. 812, 813–14 (2006) (“Human rights organizations cite cases in which Honduran law enforcement authorities have been responsible for arbitrary violence against street children. Law enforcement authorities have been accused of assaulting street children, forcing them to vacate certain areas, and stealing from them. Certain accounts allege that Honduran police officers have used torture tactics to punish street children, including electrocution, mutilation, and rape.”). On policing of youth in public spaces generally, see Brett G. Stoudt, Michelle Fine & Madeline Fox, *Growing Up Policed in the Age of Aggressive Policing Policies*, 56 N.Y.L. SCH. L. REV. 1331, 1341 (2011/2012) (reporting on disparate policing of minority youth in New York City and finding “[n]early 20% of the young people who were pepper-sprayed were not arrested or given a summons. Similarly, the suspect was innocent in both 60% of the stops in which police pointed a gun at the young person and 65% of the stops in which police drew a gun”).

120. See, e.g., HUMAN RIGHTS WATCH, SWEPT AWAY: STREET CHILDREN ILLEGALLY DETAINED IN KIGALI, RWANDA 2 (May 2006), available at <http://www.hrw.org/legacy/backgrounder/africa/rwanda0506/rwanda0506.pdf>.

121. BECKER, *supra* note 117, at 7.

122. Buske, *supra* note 79, at 88.

executions.<sup>123</sup> In the United States, policing of youth in urban public spaces, especially minority youth, often involves the use of very aggressive tactics in the name of maintaining public safety.<sup>124</sup>

As Sheryl L. Buske explains, “[t]he police, like many others, often have difficulty understanding or accepting that what appears to be poor decision-making by street children is often, in reality, very purposeful decision-making after they have considered their realistic options.”<sup>125</sup> The response instead is to use anti-loitering ordinances, anti-begging regulations, truancy and vagrancy ordinances, and other similar laws that criminalize actions homeless children take in order to survive.<sup>126</sup> Thus, the law is employed to “crack down” on the children who often need the most assistance.

Draconian laws provide the legal construct that facilitates this punishment of independent children. That some of the enforcement of these laws goes beyond what the written laws allow does not make this only an implementation issue. Thus, addressing issues with implementation of the law is necessary but not sufficient. Such issues also reinforce the importance of reexamining the underlying construct of childhood. In every country, the prevailing construct of childhood and dominant understandings of acceptable and unacceptable behaviors for children are not only enshrined in law but also absorbed by agents of the state, including law enforcement. By addressing both societal and legal constructs of childhood so that they better account for the experiences and needs of independent children, we can create a more inclusive framework on which law can be based and which can inform, and be used to train, state actors who come

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123. BECKER, *supra* note 117, at 14–16. See also M.O. Ribeiro, *Street Children and Their Relationship with the Police*, 55 INT’L NURSING REV. 89, 91–95 (2008) (discussing police abuse of street children in Brazil).

124. Stoudt, Fine & Fox, *supra* note 119, at 1332, 1336, 1340–41 (finding “furtive movements” to be the most common reason used by police in New York City to stop youth and that “[n]early all of the young people stopped in 2008–2009 were innocent”).

125. Buske, *supra* note 79, at 101, 102 (“As for running to the street, in the context of rapid urbanization, unemployment, and poverty, the decision of children to run to and use the streets as a way to improve their condition, and as a way of getting away from abuse, seems both pragmatic and sensible.”).

126. Don Mitchell, *The Annihilation of Space by Law: The Roots and Implications of Anti-Homeless Laws in the United States*, 29 ANTIPODE 303, 307 (1997) (“The intent [of these laws] is clear: to control behavior and space such that homeless people simply cannot do what they must do in order to survive without breaking laws. Survival itself is criminalized.”).

into regular contact with children, so that they are more responsive to vulnerable children's needs.

Ironically, the law—particularly child abuse and neglect law—aims to protect these children from the very harms that drive many of them to the street in the first place. Abuse and neglect laws provide the state with the authority to intervene on behalf of children who have suffered trauma.<sup>127</sup> When law enforcement or social services employees discover an abused child, a response protocol is triggered and frequently the child is removed from the dangerous setting, at least temporarily.<sup>128</sup> Yet, if the same child engages in self-help—in other words, exercises some autonomy and agency by leaving an unsafe family environment—that child may be deemed to have violated the law by running away or committing other status offenses.<sup>129</sup>

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127. See *Hatch v. Dep't for Children, Youth & Their Families*, 274 F.3d 12, 21 (1st Cir. 2001) (quoting *Thomason v. SCAN Volunteer Servs., Inc.*, 85 F.3d 1365, 1373 (8th Cir. 1996) (“[W]here a state official has a reasonable basis to suspect abuse, ‘the interest of the child (as shared by the state as *parens patriae*) in being removed from that home setting to a safe and neutral environment outweighs the parents’ private interest in familial integrity as a matter of law.”); Meredith L. Alexander, Note, *Harming Vulnerable Children: The Injustice of California’s Kinship Foster Care Policy*, 7 HASTINGS RACE & POVERTY L. J. 381, 389 (2010) (“Through its *parens patriae* power, a state has the authority and duty to intervene to safeguard children’s wellbeing and protect them from abuse or neglect at the hands of their parents.”); CHILD WELFARE INFO. GATEWAY, DEFINITIONS OF CHILD ABUSE AND NEGLECT (2011), available at [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/define.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/define.pdf) (providing a 50 state survey of state laws on child abuse and neglect).

128. See, e.g., MASS. GEN. LAWS ANN. ch. 119, § 51B(e) (West 2013) (“[W]henver the department has reasonable cause to believe that removal is necessary to protect a child from abuse or neglect, it shall take the child into immediate temporary custody.”); Katherine C. Pearson, *Cooperate or We’ll Take Your Child: The Parents’ Fictional Voluntary Separation Decision and a Proposal for Change*, 65 TENN. L. REV. 835, 846 (1998) (“During the investigation, if the law enforcement official believes he or she has sufficient cause to suspect child abuse by a parent, the official may make a warrantless emergency removal of the child and place the child in a shelter for a short period of time; however, an application for prompt judicial review must accompany this removal.”).

129. A similar pattern has been observed in the context of state responses to human trafficking and the essentializing of victims; the young female victim of sex trafficking is more likely to receive assistance if discovered or rescued by law enforcement than the trafficking survivor who engages in self-help to get out of a bad situation. See Dina Francesca Haynes, (*Not*) *Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promises of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 350 (2007) (“[T]he practice of the DOJ and DHS demonstrates their belief that a victim of human trafficking somehow is more legitimately a victim (or at least more likely to be perceived as a victim by them) if she happens to have been rescued by U.S. government officials. If she never receives the benefit of being rescued, as few victims do, but rather manages to free herself and then seek assistance, she is more likely to be perceived by law enforcement as not a victim. . . .”).

## C. SOCIAL SERVICES

State action toward children has a second component: it provides a helping hand. Independent children are almost always in need of assistance. In their research on homelessness among children in the United States, John Wong and his colleagues found that “[h]omelessness has devastating impacts on vulnerable children and youth in health, emotional growth, education, and many other ways.”<sup>130</sup> Given that most government assistance programs are typically need-based, one should expect that providing for independent children, who are vulnerable to a range of rights violations, would be a priority. That often proves not to be the case.

The law of nearly every country establishes some set of assistance programs for poor or low-income individuals and families. Depending on the jurisdiction, individuals and families might be eligible for various types of assistance including food, health care, and housing benefits.<sup>131</sup> Assistance programs aimed at ensuring child well-being are consistent with the long-standing principle of *parens patriae*, which provides that the state has an obligation to protect and provide for those individuals who lack the legal capacity to care for themselves.<sup>132</sup> Children who are homeless, migrate unaccompanied, or have been orphaned typically need assistance with food, clothing, shelter, and other basic necessities. Although the laws of numerous countries provide for social services, there are often constraints on social services that make it difficult for independent children to access such assistance. In the United States, while some barriers to

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130. John H. Wong et al., *McKinney-Vento Homelessness Assistance Act Subtitle B—Education for Homeless Children and Youths Program: Turning Good Law into Effective Education, 2008 Update*, 16 GEO. J. ON POVERTY L. & POL’Y 53, 58 (2009).

131. See Gillian Lester, *Can Joe the Plumber Support Redistribution? Law, Social Preferences, and Sustainable Policy Design*, 64 TAX L. REV. 313, 320–21 (2011) (describing welfare programs as including “cash benefits, health care, education, food, housing, and other goods associated with health and well-being”).

132. BLACK’S LAW DICTIONARY, *parens patriae* (9th ed. 2009); Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 43 (2006) (“The concept of family privacy is in tension with the concept of *parens patriae*. Family laws have expanded the state’s powers to protect children. But the expansion of the influence of *parens patriae* on rules of parenting and child welfare does not necessarily demonstrate a weakening of respect for parents’ rights and family privacy; instead, it demonstrates both (1) an increased recognition of children as full persons, themselves entitled to individual rights; and (2) the state’s own interest in its future citizenry. Indeed, *parens patriae* has not come close to superseding the concept of family privacy, especially that of the conjugal family.”). See generally JAY L. HIMES, *State Parens Patriae Authority* (Mar. 25, 2004) (unpublished manuscript), available at <http://apps.americanbar.org/antitrust/at-committees/at-state/pdf/publications/other-pubs/parens.pdf> (discussing the origins and scope of the *parens patriae* concept).

services have been removed, many remain for children on or of the street (as well as for other independent children).<sup>133</sup>

The most significant social services barrier confronted by independent children is the typical requirement that adult heads-of-household be the recipients of state assistance, even assistance provided specifically to aid children.<sup>134</sup> This leaves many independent children unable to obtain services for which they legally are eligible; because street children and other independent children are without an adult caregiver, they miss out on assistance established to help children in need.<sup>135</sup>

In the United States, homeless children confront a variety of obstacles to housing, education, social services, and health care.<sup>136</sup> This section focuses on housing and health care to illustrate some of the barriers independent children encounter. Due to their age and legal status as minors, homeless youth in the United States may not be able to contract for, or secure, housing.<sup>137</sup> Such barriers are rooted in a construct of childhood that does not recognize independent children's reality. In certain jurisdictions, housing options for homeless youth, who may have left home to escape abuse, include being housed in secure detention facilities, which means they are treated akin to criminals and put at risk of further trauma.<sup>138</sup> Other independent children, such as unaccompanied migrant children who arrive

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133. See ALONE WITHOUT A HOME, *supra* note 71, at 5–6.

134. See, e.g., David B. Thronson, *Thinking Small: The Need for Big Changes in Immigration Law's Treatment of Children*, 14 U.C. DAVIS J. JUV. L. & POL'Y 239, 247 (2010).

135. See *id.* (“In some instances, citizen children in immigrant families do not receive the needed benefits for which they are eligible as individuals. Benefits for children often are obtained only through a parent's initiative, and parents who are themselves ineligible may be inhibited in seeking benefits for which their children qualify.”). The United States is not unique in this regard. In South Africa, for example, the Child Support Grant is available to aid children under fourteen years of age. Social Assistance Act 13 of 2004 § 6 (S. Afr.). The catch is that the Child Support Grant is provided only to adult primary care givers, for them to provide for children in their care. *Id.* See also Bonthuys, *supra* note 9, at 50. This is problematic not only for independent children but also for orphans adopted informally by extended family. In South Africa, foster parents can receive state funds through a foster care grant, but most adults who absorb orphans into their families do so informally and not through the official state apparatus and thus do not get this funding. *Id.* Foster parents can receive such grants “if they can supply birth certificates for the children and comply with the other requirements. *Id.* Although the amounts available as child support grants are about a quarter of the amounts paid under the foster care grant, many people who informally foster children successfully apply for child support grants. . . .” *Id.*

136. Yvonne Vissing, *Homeless Children and Youth: An Examination of Legal Challenges and Directions*, 13 J. L. IN SOC'Y 455, 466 (2012).

137. ALONE WITHOUT A HOME, *supra* note 71, at 10.

138. *Id.* at 46 (reviewing Louisiana).

in the United States, often end up housed in poor conditions.<sup>139</sup> Their status as minors also constrains their ability to secure employment and earn money needed to secure housing.<sup>140</sup> In short, independent children's status as minors can hinder their ability to address the harms suffered as a result of living on the street. The lack of resources for additional shelters and other services are part of the problem, but the issue of resources is connected to the underlying legal construct. A more inclusive construct of childhood that fully recognizes the number of independent children and their experiences can lead to a reallocation of resources and other measures aimed at addressing barriers to services.

Health issues are also a common problem that homeless children confront in the United States.<sup>141</sup> As the National Law Center on Homelessness and Poverty reports, "[o]nly 34 jurisdictions enable unaccompanied youth under 18 to apply for health insurance coverage without the need for parental consent in at least some situations, but at least 15 require, formally or informally, a parent or adult guardian to apply."<sup>142</sup> In other instances, homeless children might be legally eligible for services, but other requirements effectively restrict or impede actual access. For example, the Children's Health Insurance Program (CHIP) program, which widens the safety net in the United States for children who are unable to afford health care, was expanded significantly in 2009 with the aim of reaching four million more children and adolescents, and ensuring their regular access to care.<sup>143</sup> CHIP, however, has its own limitations:

CHIP, on its face, includes [homeless children who are without a guardian]. However, due to administrative restrictions that require recipients to provide information regarding permanent residence, parental consent, and social security numbers (unless a state explicitly expresses that unaccompanied minors may act independently) many of these at-risk youth remain uninsured.<sup>144</sup>

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139. WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY 9–11* (2009), available at <http://www.refworld.org/pdfid/498c41bf2.pdf>.

140. See Todres, *supra* note 6, at 1128–32.

141. Wong et al., *supra* note 130, at 58.

142. ALONE WITHOUT A HOME, *supra* note 71, at 10.

143. GEORGETOWN UNIV. HEALTH POL'Y INST., CTR. FOR CHILDREN AND FAMILIES, *THE CHILDREN'S HEALTH INS. PROGRAM REAUTHORIZATION ACT OF 2009: OVERVIEW AND SUMMARY 1* (2009), available at <http://www.refworld.org/pdfid/498c41bf2.pdf> (“[S]tates are expected by 2013 to cover 4.1 million children who otherwise would be uninsured.”).

144. ALONE WITHOUT A HOME, *supra* note 71, at 131.



Children’s status as minors also means that they “lack legal standing to act on their own behalf in many respects.”<sup>145</sup> All of these issues present barriers to care that independent children should be entitled to and need. The lack of health insurance significantly increases gaps in care, which in turn have an adverse impact on the health status of children.<sup>146</sup>

Overall, the legal framework for independent children is a discouraging one. It is structured to facilitate condemnation of their actions, when often the same acts would not be illegal when committed by adults, and it embeds barriers to accessing assistance that could help independent children to meet their most pressing needs.

#### IV. PROTECTION AND AGENCY—TOWARD A FRAMEWORK THAT RECOGNIZES CHILDREN’S REALITY

The issues confronting independent children are many and complex. There are no easy solutions. This Article aims not for a quick fix, but rather to explore guiding principles that might assist policymakers in developing better responses to the needs of these vulnerable children. As currently constructed, legal responses to independent children fail to account adequately for both the vulnerability and the maturity of independent children. Thus, as a starting point, we need to reformulate our conception of childhood so that it better accounts for the complex interplay between vulnerability and maturity in adolescents and acknowledge independent children as a distinct population with unique needs.

##### A. ACKNOWLEDGING VULNERABILITY AND MATURITY

In rethinking how best to respond to the needs and actions of independent children, it might be best to start with the fundamental principle, articulated by Martha Fineman, that vulnerability is “a universal, inevitable, enduring aspect of the human condition.”<sup>147</sup> Every individual is vulnerable to some extent. As Fineman argues, vulnerability “must be at

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145. *Id.* at 131.

146. See Michael D. Kogan et al., *Underinsurance Among Children in the United States*, 363 *NEW ENG. J. MED.* 841, 845 (2010) (“[U]nderinsured children were significantly more likely to be without a medical home, to have delayed or forgone care, and to have difficulty obtaining needed specialist care.”); Paul W. Newacheck et al., *Health Insurance and Access to Primary Care for Children*, 338 *NEW ENG. J. MED.* 513, 514–16 (1998) (demonstrating that children with no health insurance are consistently less likely to receive adequate medical care).

147. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J.L. & FEMINISM* 1, 8 (2008).

the heart of our concept of social and state responsibility.”<sup>148</sup> An understanding of and attention to vulnerability is critical in the context of laws, policies, and programs directed at children.

Children are more vulnerable to harm and exploitation than adults.<sup>149</sup> Political and legal obstacles, such as not having the right to vote, and developmental issues, such as the more limited physical strength and verbal skills of younger children, make children more susceptible to exploitation and also leave them less capable of drawing attention to violations of their rights when they occur.<sup>150</sup> Given their political and developmental limitations, children typically must rely on an adult to advocate on their behalf and to ensure their well-being. Independent children, however, are frequently without an adult to protect them or advocate for them. For independent children, the loss of that advocate and source of care and protection exacerbates their vulnerability to harm and other adverse health consequences. Children living “in vulnerable circumstances are often left with no option when an emergency occurs”;<sup>151</sup> such a crisis moment “may be the determinant which ultimately sends the vulnerable child to the streets.”<sup>152</sup> Yet, despite the fact that independent children frequently end up without an adult caregiver due to circumstances beyond their control, societies judge them harshly. As detailed in Part III, street children are frequently demonized and categorized as law breakers, a view that fails to account for their heightened vulnerability and the courage they may have shown in escaping a harmful situation.

Recognizing the vulnerability of children, and the heightened vulnerability of independent children, is essential. Reflecting on their research on street children, Philip Kilbride and his colleagues remind us

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148. *Id.*

149. GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD xx (1995) (explaining that children are “easy targets” due to their vulnerability and arguing that “[m]any violations of children’s rights are only possible because of the invisibility of children,” in that they are “less able to draw attention to violations of their rights because they are disenfranchised and may lack the verbal skills or necessary contacts to make their protests heard”).

150. *Id.* See also Andrew I. Schoenholtz, *Developing the Substantive Best Interests of Child Migrants: A Call for Action*, 46 VAL. U. L. REV. 991, 999 (2012) (“[Children] are developing beings, both cognitively and biologically, in contrast with adults.”).

151. HANNAH JOHNSON ET AL., MKOMBOZI CENTRE FOR STREET CHILDREN, RESPONSES TO CHILD VULNERABILITY: WHY DO CHILDREN MIGRATE TO THE STREETS IN TANZANIA? 6 (2005), *available at* [http://www.mkombozi.org/publications/research\\_report/2005\\_09\\_research\\_report\\_child\\_vulnerability.pdf](http://www.mkombozi.org/publications/research_report/2005_09_research_report_child_vulnerability.pdf).

152. *Id.*

that independent children's vulnerability is apparent to those who spend time with them: "[f]irst and most importantly, it should be emphasized that street children are, in fact, children! Child behaviors like playing with toys, crying, and sucking of thumbs, for example, are likely to go unnoticed amongst routine 'adult' activities which are common among street children globally."<sup>153</sup> They are children. The best situation for them is a loving, caring family environment. The choice to exercise independence—whether it is to escape an abusive home or seek employment to help their families—does not change the fact that they are still young, inexperienced persons who are very vulnerable. The law should reflect that, rather than retain categories that stigmatize and punish them for circumstances they frequently did not create.

Recognizing vulnerability does not have to mean reverting to traditional conceptions of the child as an individual who needs special protection and nothing more. The challenges that street children, unaccompanied migrant children, and other independent children confront are not traditional circumstances. Moreover, children must be recognized as rights holders.<sup>154</sup> Human rights law establishes that children have a right to survival and development,<sup>155</sup> and to a family life.<sup>156</sup> Those rights impose an obligation on the state to ensure that all children have the support needed to realize their right to develop to the fullest potential and their right to a family. Law and legal constructs of childhood must recognize these new realities, while simultaneously honoring the vulnerability of children.

Significant progress has been made in recent decades in terms of recognizing the rights of historically marginalized individuals and new forms of family units.<sup>157</sup> These are instances in which societal views and laws have evolved based on an emerging understanding of particular individuals. We have been slow, however, to extend those ideas to reflect the reality of children's lives. Although recognition of varied family types

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153. KILBRIDE ET AL., *supra* note 68, at 1–2 (citation omitted).

154. *See* CRC, *supra* note 2; *In re Gault*, 387 U.S. 1, 13 (1967) (“[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.”).

155. CRC, *supra* note 2, art. 6.

156. CRC, *supra* note 2, arts. 7–9. *See also* Universal Declaration of Human Rights, art. 25, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

157. *See, e.g.*, CRC, *supra* note 2; Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 30, 1981, 1249 U.N.T.S. 13 [hereinafter CEDAW]; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD]; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3.

has expanded to include same-sex, single-parent, and unmarried families, “children’s family status remains premised on the presence of one or more independent adults.”<sup>158</sup> For example, as David Thronson explains, in the United States, immigration law’s definition of a child “emphasizes the conceptualization of children as passive objects in relation to adults, rather than independent persons exercising autonomy.”<sup>159</sup> Children’s rights and independent children challenge the traditional construct of childhood.<sup>160</sup> To develop a more inclusive concept of childhood, several steps are needed.

First, we need to recognize the maturity of independent children and other children, and not infantilize them; that is, they need to be acknowledged as individuals with rights and not solely appendages or wards of another.<sup>161</sup> Acknowledging that certain adolescents act with great maturity at times does not mean requiring that we treat them as equivalent to adults. Recognizing the maturity in independent children, however, can reshape our understanding of their choices and behavior. For example, viewing the choices of many independent children from their vantage point can change our perspective on the unaccompanied migrant child from runaway or illegal immigrant to a courageous young person seeking to help his or her family. A child on the street, instead of being seen as a delinquent or public nuisance, would be seen as brave young person who may have escaped an abusive environment and is working to survive and provide care for other young children on the street. Instead of labeling a child a runaway or status offender and seeking to punish the child, we might recognize that child as just the type of individual the law aims to protect and respond instead with measures that do no further harm and ensure that the child’s needs are met.

The reality is that children often demonstrate a thoughtfulness and maturity. Historically, many children have played mature, important roles

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158. Bonthuys, *supra* note 9, at 47.

159. Thronson, *supra* note 134, at 251.

160. On children’s rights, see, for example, Article 12 of the CRC, which establishes that children have a right to participate in decisions that affect their lives, consistent with their age and maturity. CRC, *supra* note 2, art. 12.

161. For example, under U.S. immigration law, the child does not exist by definition except in relation to a parent. David B. Thronson, *You Can’t Get Here from There: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL’Y & L. 58, 68 (2006) (citing 8 U.S.C. § 1101(b)(1)(B) (2006)). “The statutory definitions of ‘child’ require the satisfaction of qualifying conditions, generally the demonstration of a particular relationship between a child and a parent, such as birth in wedlock, creation of a stepchild relationship, ‘legitimation,’ or adoption.” *Id.* at 68.

in their families, communities, and nations.<sup>162</sup> As Barbara Woodhouse explains, “[c]hildren of all ages, but especially adolescents, have been key figures in American social justice movements, including the labor movement, the civil rights movement, the movement for gender equality, the movement for inclusion of persons with disabilities, and the struggle to secure equal access to education.”<sup>163</sup>

Not every independent child will be a key figure in a civil rights movement, but many independent children are taking on and managing adult responsibilities. For such children, childhood is a very different experience from the idealized version and incorporates both vulnerability and maturity.<sup>164</sup> It is important to recognize that these children have often made very mature decisions, yet are still very young. Our legal construct of childhood should reflect both of these understandings.

Second, recognizing the mature aspects of independent children might force adults to think differently about the choices independent children make once on their own. As discussed in this Article, many independent children form informal family-like relationships with other children (on the street, during migrations, etc.). Rather than see these relationships as temporary and insignificant, a law that respects the decisions of independent children might compel adults to see the true value of these relationships. Though children in a child-headed household may not be related, they frequently see each other as family.<sup>165</sup> Honoring these views can lead us to respond to such children in a way that enables them to maintain what might be the only sense of family they have at that moment.

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162. WOODHOUSE, *supra* note 14, at 136 (“Americans do not fully appreciate the enormous role played by children and youth [in the Civil Rights Movement] not only as innocent martyrs but also as fully engaged activists in the struggle for justice.”).

163. Barbara Bennett Woodhouse, *The Courage of Innocence: Children as Heroes in the Struggle for Justice*, 2009 U. ILL. L. REV. 1567, 1568 (2009).

164. Arguably, this is true for many other populations of children. For example, children in low-income families, though not living independently, still take on many “mature” or adult roles, such as contributing to the economic survival of the family by choosing to work or by caring for younger siblings so a parent can work.

165. CHARLOTTE PHILLIPS, CHILD-HEADED HOUSEHOLDS: A FEASIBLE WAY FORWARD, OR AN INFRINGEMENT OF CHILDREN’S RIGHT TO ALTERNATIVE CARE? 141 (2011), *available at* <http://www.charlottephillips.org/eBook%20Child-headed%20Households.pdf> (noting that another “important reason given for the formation of child-headed households is that children choose to remain together despite the lack of adult support, the primary motivations being that they do not want to be separated from their siblings, they wish to protect their late parents’ property, out of fear of being exploited or ill-treated by their potential carers and a promise to a dying parent to keep the family together”).

Respecting and sustaining those relationships in appropriate cases can provide valuable support that a vulnerable child needs to recover from any trauma experienced and to rebuild his or her life.

The United States Supreme Court has affirmed that “the Constitution prevents [the government] from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns.”<sup>166</sup> Independent children might be better off if the law recognizes not only their vulnerability but also the maturity of many of their decisions, including choices they have made in creating new “family” relationships.

Third, by recognizing the maturity of independent children, policymakers and child advocates are forced to redirect their focus to the root causes of the problems confronting independent children. If, instead of viewing a child on the street as a “bad kid” who has run away from home, we recognize the maturity in decisions to flee abuse for safety or to migrate to provide a better life for family members, then we are forced to identify and address what drove the child to leave home.<sup>167</sup> Honoring maturity in independent children reorients our focus away from select “bad” actors to the structural issues that create the conditions that compel a child to migrate or head to the streets.<sup>168</sup>

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166. *Moore v. City of E. Cleveland*, 431 U.S. 494, 506 (1977).

167. For example, in a 2012 Women’s Refugee Commission study including interviews with more than 150 unaccompanied migrant children from Central America, seventy-seven percent of children interviewed said violence—by authorities, gangs, and others—was the primary reason for migrating. WOMEN’S REFUGEE COMMISSION, *Forced From Home: The Lost Boys and Girls of Central America*, 7 (Oct. 2012), available for download at [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CC4QFjAA&url=http%3A%2F%2Fwomensrefugeecommission.org%2Fresources%2Fdoc\\_download%2F844-forced-from-home-the-lost-boys-and-girls-of-central-america&ei=e9k4Uv37LenSiwL9qoDYDQ&usg=AFQjCNGyUNrT-zl77L54Nx8eTSJh2PqO0g&sig2=dhIly-jdmpLli-xy4haF6A&bvm=bv.52288139,d.cGE](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CC4QFjAA&url=http%3A%2F%2Fwomensrefugeecommission.org%2Fresources%2Fdoc_download%2F844-forced-from-home-the-lost-boys-and-girls-of-central-america&ei=e9k4Uv37LenSiwL9qoDYDQ&usg=AFQjCNGyUNrT-zl77L54Nx8eTSJh2PqO0g&sig2=dhIly-jdmpLli-xy4haF6A&bvm=bv.52288139,d.cGE).

168. See Wazed, *supra* note 78, at 41 (examining research finding that “children move out of households to live on the street in Bangladesh not mainly because of economic poverty (a lack of access to food, income and basic needs) but because of domestic violence and the breakdown of trust in the adult members of their household (and community)”). Wazed highlights the policy implications:

Rather than trying to help children off the street, and assuming that economic growth and reduced income poverty will stem the flow of new children to the street, it suggests that policies to reduce street migration should focus on reducing the abuse of, and violence against children. Social policy, rather than economic policy, must take the lead. For Bangladesh society, this is an altogether less comfortable understanding of why children move to the street, and what needs to be done, than that provided by the dominant narrative.

*Id.*

By developing a more nuanced understanding of children, we can identify structural issues—at the family, community, and societal levels—that create the risk of harm to children. Moreover, by recognizing that maturity and vulnerability coexist in many children, especially adolescents, we can construct a theory of childhood that is more inclusive of the range of experiences lived by all children.

#### B. IMPLICATIONS FOR LAW AND POLICY

Recognizing both the vulnerability and maturity in children and adolescents means acknowledging a more complex picture of children's lives and rethinking the prevailing construct of childhood. This section offers three examples of how a reorientation of the dominant construct of childhood might implicate law and policy with respect to the law's punitive function, its assistance function, and the core principle of children's rights law.

First, a more inclusive construct of childhood would account for the experience of independent children such that their actions would no longer be deemed deviant by default. That is, the law can still recognize an ideal for children without punishing every child who falls outside of that ideal. At the levels of both law and law enforcement, policymakers should explore the merits of recognizing the special circumstances facing independent children. For example, the law can better reflect and account for a child's decision to run away from home, by allowing for the fact that it might not be the act of an "unruly child[.]" but rather a courageous act by a vulnerable child who has often been forced to make a very difficult decision due to structural factors beyond his or her control.<sup>169</sup>

The Dallas Police Department's response to commercial sexual exploitation of children provides an example of how law and law enforcement can be reshaped to account for the realities vulnerable children face. In 2005, after finding that eighty percent of juveniles it charged with prostitution had run away from home at least four times, the Dallas Police Department created a new unit, the Child Exploitation/High Risk Victims Trafficking Unit.<sup>170</sup> The unit then developed procedures to track these

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169. See MOSTUE, *supra* note 115. Allowing for good cause is an important threshold requirement. See *id.* However, the law can go further by not having the child presumed to be a runaway, unless he or she can establish good cause. See *id.*

170. Rami S. Badawy, *Shifting the Paradigm from Prosecution to Protection of Child Victims of Prostitution*, NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE at 1 (Nov. 8, 2010),

highly vulnerable children with a view toward ensuring that specially trained law enforcement officers would be responsible for handling their cases.<sup>171</sup> A major component of the program was to change how these children were viewed—from criminals to victims and survivors.<sup>172</sup> The Dallas model has limits; while juveniles are no longer charged with prostitution, they are still charged with lesser offenses, though these charges can be deferred.<sup>173</sup> Still, it represents a significant step in the right direction. Instead of viewing these children as criminals, even though they might appear uncooperative (due to previous trauma suffered at the hands of authority figures), the Dallas Police Department is reorienting its understanding of who these children are, recognizing that they have been victims of crimes and suffered other harms, and seeking to ensure they receive needed services. An important additional step is to ensure that the law is amended to reflect independent children's realities, so that these children do not need to rely on ad hoc developments in the implementation and enforcement of the law.

Marie Wernham distinguishes three types of children on the street: those in actual conflict with the law, those in perceived conflict with the law, and those in need of care and protection.<sup>174</sup> Although this might suggest a more rigid distinction than exists in practice (children in conflict with the law still need care and protection, and many children fluctuate among the three categories), these categories help highlight the need for a more nuanced response to street children's experiences. By recognizing and distinguishing among different children, it becomes easier to see that many children on or of the street simply need care, not punishment. It also makes it possible to see that many children are in conflict with the law, but not because they have done anything harmful (rather they have committed a status offense). Punitive responses to vulnerable children need to be reconsidered, as they have been by the Dallas Police Department, so that the law and its enforcement do not do further harm.

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[http://www.ndaa.org/pdf/Update\\_V22N8.pdf](http://www.ndaa.org/pdf/Update_V22N8.pdf).

171. *Id.* at 2 (“[T]he Unit uses a ‘child-first’ approach, focusing on the juvenile’s needs rather than attempting to gain information needed to charge the pimp/trafficker.”).

172. *Id.*

173. *Id.* (“[D]ue to an agreement with the juvenile court, prosecution of these lesser offenses is deferred if juvenile sex trafficking victims accept and complete a program implemented by a caseworker.”).

174. MARIE WERNHAM, AN OUTSIDE CHANCE: STREET CHILDREN AND JUVENILE JUSTICE—AN INTERNATIONAL PERSPECTIVE 14–15 (Consortium for Street Children, 2004).



Second, a more inclusive construct of childhood can lead to law and policies that remove the barriers that independent children face when seeking services. Until appropriate care arrangements can be made, the law should provide avenues for independent children to access needed services. South Africa has confronted the challenge of rising numbers of children living in child-headed households, primarily due to the children being orphaned by AIDS.<sup>175</sup> South Africa has responded by providing children in certain child-headed households with different status than that of other children, for example, a child-headed household headed by a child at least sixteen years old can be recognized as a distinct household.<sup>176</sup> South African law requires that the state approve the child-headed household following a best interests determination and identify an adult who is willing to provide some supervision, but it also empowers the children in unique ways, including by requiring that the child head of household sign off on expenditures and by allowing the child head of household to collect social assistance grants directly.<sup>177</sup> This recognition does not help all children (e.g., child-headed households led by fifteen year olds or younger children are not eligible for this status), nor does it grant total autonomy, but it provides a hybrid status that enables child-headed households to access services that otherwise would be unavailable because of the absence of an adult caregiver, while permitting children in the child-headed household to retain some amount of autonomy.<sup>178</sup> Such innovative solutions, even as temporary measures, merit further exploration as a means of ensuring that independent children are able to access services for which they are otherwise eligible and maintain positive relationships in their lives.

A final source of addressing the needs of independent children is children's rights law. The U.N. Convention on the Rights of the Child ("CRC"), the most widely ratified human rights treaty in history, is built on four foundational concepts: (1) every child has the inherent right to life, survival and development;<sup>179</sup> (2) the rights ensured to children shall be assured to all children without discrimination of any kind;<sup>180</sup> (3) children have the right to participate in decisions that affect their lives, consistent

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175. See *supra* notes 58–60 and accompanying text.

176. S. Africa, Children's Act of 2007, § 137(1)(c), available at <http://www.info.gov.za/view/DownloadFileAction?id=78580>.

177. *Id.* § 137(1)(d), (3)–(6).

178. *Id.* § 137(5), (6).

179. CRC, *supra* note 2, art. 6.

180. *Id.* art. 2.

with each child's age and maturity;<sup>181</sup> and (4) that "[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration."<sup>182</sup> In these four foundational principles of the CRC, the structure of children's rights is evident: the first three provisions are fundamental rights recognized as core rights held by all children, while the fourth provides a mandate as to the guiding principle for a society in all actions that concern children. Since the advent of the CRC, the international children's rights law framework has fostered positive changes in law, policies, and attitudes toward children in numerous countries.<sup>183</sup> However, the guiding principle of the CRC has a limitation that adversely affects many independent children: states are required to ensure the best interests of the child are only *a* primary consideration, not *the* primary consideration.<sup>184</sup> For unaccompanied migrant children, that their interests need only be a primary consideration leaves open the possibility that a government can decide that national security interests override the interests of the unaccompanied migrant child seeking a better life for his or her family.<sup>185</sup> Similarly a court could decide that "public safety" trumps the

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181. *Id.* art. 12.

182. *Id.* art. 3(1).

183. See UNICEF INNOCENTI RESEARCH CTR., LAW REFORM AND THE IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD (2007), [http://www.unicef-irc.org/publications/pdf/law\\_reform\\_crc\\_imp.pdf](http://www.unicef-irc.org/publications/pdf/law_reform_crc_imp.pdf); UNICEF INNOCENTI RESEARCH CTR., THE GENERAL MEASURES OF THE CONVENTION ON THE RIGHTS OF THE CHILD: THE PROCESS IN EUROPE AND CENTRAL ASIA (2006), <http://www.unicef-irc.org/publications/pdf/crcmeasures.pdf>.

184. See THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PRÉPARATOIRES" 131–33 (Jaap Doek, Nigel Cantwell & Sharon Detrick eds., 1992). There was considerable debate over this language in the CRC during the drafting of the treaty. *Id.* Early drafts stated that the best interests of the child shall be "the paramount consideration" but concern was raised by the United States and other delegations regarding situations when it may not be feasible or appropriate to prioritize children's needs (e.g., medical emergencies during childbirth). *Id.* Ultimately, drafters agreed upon "a primary consideration" which retains flexibility, but unfortunately has also created a significant loophole. See Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 175–77 (1998).

185. Even in instances where a minor is a U.S. citizen and living with his or her non-citizen parents, U.S. immigration law leans heavily in favor of deportation of the non-citizen parent, often separating the child from his mother or father. See Patrick Glen, *The Removability of Non-Citizen Parents and the Best Interests of Citizen Children: How to Balance Competing Imperatives in the Context of Removal Proceedings*, 30 BERKELEY J. INT'L L. 1, 33 (2012) ("[C]ontrary to the arguments of many who assume that a citizen child effectively will forestall the removal of the non-citizen parent, the US system currently provides for few avenues for relief and those that do exist, such as cancellation of removal, often have onerous eligibility requirements."). Cf. *Baker v. Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817 (Can.) (staying the deportation of a non-citizen mother of citizen

interests of children on or of the street and rule against the interests of street children. For unaccompanied migrant children, street children, and other independent children, “a primary consideration” may not be sufficient to ensure their best interests are realized.

International law might hold the answer to that problem. The International Covenant on Civil and Political Rights (“Covenant”) provides that a limited set of rights is non-derogable (e.g., the right to life; the right to be free from torture, the right to freedom of thought, conscience and religion, and other fundamental rights).<sup>186</sup> For all other rights, states parties to the Covenant are permitted to “take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation” but only “[i]n time of public emergency which threatens the life of the nation.”<sup>187</sup> In other words, for adults, certain civil and political rights can be temporarily suspended only when the life of the nation is threatened.<sup>188</sup> Yet the best interests of the child, and effectively the child’s right to a family in certain cases, can be trumped by the mere presence of another relevant consideration.<sup>189</sup> Elevating the best interests of the child and children’s rights generally to the level accorded civil and political rights of adults would provide better protection for independent children.

The above three examples are intended to be illustrative. Further research is necessary to determine the most appropriate legal and policy changes needed to reduce the harm imposed on independent children and to ensure that they have access the assistance they need. However, by rethinking our traditional perceptions of childhood and simultaneously accounting for vulnerability and maturity, we can better identify ways to reform law and policy to meet the needs of independent children.

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children because the immigration official had failed to conduct a best interests of the child analysis pursuant to the CRC).

186. International Covenant on Civil and Political Rights, art. 4(2), G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc.A/6316 (Mar. 23, 1976).

187. *Id.* art. 4(1).

188. The standard of “threat to the nation” is a very high threshold that does not include scenarios in which a particular government is threatened, but is limited to the rare instances when the existence of the state is threatened.

189. CRC, *supra* note 2, art. 3(1).

## V. CONCLUSION

Family law is in the midst of a dramatic period of change. Evolving conceptions of the family unit are challenging the law to provide recognition of the family status of relationships beyond those which law has historically recognized. Similarly, the field of children and the law is being challenged today by the reality of children's experience. Law that is rooted in a construct that envisions all children at home under the caring supervision of a parent does not address the reality of life for millions of children.<sup>190</sup> In contrast to current socio-political debates over the definition of marriage and other aspects of family structure, there is widespread agreement that children are better off in a caring family environment. Ensuring a secure, caring family environment for every child is an important goal. To achieve that goal, the law must do a better job of recognizing current realities and accounting more compassionately for the experience of independent children.

The issues confronting independent children are complex and numerous. Currently, in many countries, including the United States, law is constructed to make punishment of independent children easy to exact and assistance to independent children difficult to secure. The law should facilitate the opposite result. This Article aims to shed light on this ill-conceived and harmful response to independent children and to call for a broadening of our understanding of childhood so as to incorporate the realities that many children face. Building on a more inclusive construct of childhood, law and policy can be restructured to protect children from harsh punishment, while facilitating their access to needed services that will enable them to develop to their fullest potential and pursue better lives.

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190. Overall, research suggests that one in every five children in the United States suffers some form of maltreatment. *Child Maltreatment: Facts at a Glance 2010*, CTRS. FOR DISEASE CONTROL & PREVENTION (2010), <http://www.cdc.gov/violenceprevention/pdf/CM-DataSheet-a.pdf>.