

Law, Cultural Conflict, and the Socialization of Children

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Cultural politics in the last generation has prominently featured efforts to mobilize constituencies by focusing on the socialization of children. Typically, the strategy begins by stimulating fears that children will be socialized to "wrong" identities and values, and then offers to deploy regulatory law to control one or another aspect of the process of socialization. The stakes in such a contest, as portrayed by the political managers, are not only the welfare of children, but community morality and the authority of "true" values. A major theme in such a conflict, ever-present even when it is not acknowledged, is the status of the constituents' cultural groups.

This Article examines a number of such proposals for regulatory law presented by the proponents of cultural politics. First, the Article considers efforts to influence the socialization of children through legal restrictions on eligibility for adoption. The Article then turns to proposals to use law to regulate the socializing influences of institutions outside the family, such as schools or communications media, and considers the pernicious socializing effects of urban poverty. In all these settings, the capacity of regulatory law to produce cultural orthodoxy among children fails to live up to the political managers' promises. Despite this pervasive futility, the operatives of cultural politics continue on the same path. They portray opponents as enemies who threaten the constituents' morality, their cherished sources of authority, and their group's status. This political strategy is here to stay, and the Article concludes with a brief exploration of the reasons why.

INTRODUCTION

In the culture clashes of the last generation, political strategists have mobilized constituencies by sounding an emotion-laden theme: the use of regulatory law to influence the socialization of children.¹ The proposals range widely across arenas for lawmaking and administration (from legislatures to family courts to school boards), and range equally widely in the subjects of proposed legislation (from eligibility for adoption to

1. In a narrow sense, "Socialization is the process through which the individual grows into a role." VILHELM AUBERT, *ELEMENTS OF SOCIOLOGY* 91 (1967). I use the word in a broad sense that includes upbringing, acculturation, and introduction to adult roles in a culture or society.

regulation of the communications media). The modern political consultant's stock in trade prominently includes the capacity to stir up anxiety in the voters and then offer relief via a candidate or a proposed law. Today, a consultant skilled in cultural politics may prescribe not only the designation of an Enemy, but also the depiction of a Poster Child.

Surely adults have been anxious about children since before the invention of childhood as a social category.² We worry about our children's safety, threatened by cars and guns, and about their health, threatened by tobacco, alcohol, and other drugs. Fears about children's socialization, however, have provided fuel for recent cultural politics. First, there is anxiety about children's beliefs and identities: the hope that a child will continue to self-identify as one of Us, or at least not as one of Them. Second, there is anxiety about behavior: the hope that children will act in accordance with Our values, and the fear that they may not. Anxiety is often viewed as a state of mind strongly influenced by the beholder's own sense of self.³ In today's cultural politics, when a message links children's welfare with control over their socialization, the astute listener will ask whether the message may indicate as much about the cultural identities of the targeted audience as it does about the well-being of any child. Indeed, such messages illustrate three recurring strands of cultural conflict in our society. One strand consists of a cultural group's moral claims. Another consists of the group's sources of authoritative meanings. These two strands are woven around a central strand, which is the promotion of the cultural group's status. Status is central because it is the most important generator of conflict.

In this Article, I examine a number of settings in which law has become a focal point for intercultural conflict over the socialization of children. The analysis proceeds in three parts. I begin by focusing on the immediate family as an arena of socialization and use debates over gay and transracial adoption to illustrate the recurrent themes of intercultural conflict: morality, authority, and group status. Then, I turn to sources of socialization of adolescents outside the family: schools, youth culture and mass media, and urban poverty. In all these arenas, proposals for regulatory law governing children's socialization are debated with great intensity, as if the contending parties expected the laws in question to have important effects on the lives of real children. But this expectation turns out to be largely false. Many a proposed legal regulation would be ineffective as to children within its coverage, and some of the proposed laws would even be

2. PHILIPPE ARIÈS, *CENTURIES OF CHILDHOOD* 411-13 (1962).

3. For evidence supporting an analogous assertion in the context of abortion choice, see generally KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984).

unconstitutional.⁴ Given such futility, what explains all the sound and fury? This Article closes with a suggested answer to this question, drawn from examining these proposals in the setting where they have their greatest effects: electoral politics. When political operatives evoke fear about the socialization of children, their central purpose is to mobilize cultural constituencies. Once fears are aroused, a candidate can promise to save the children by using the socialization process, and on this basis seek constituents' support.

I

ADOPTION LAW AS A MEANS OF CULTURAL PRESERVATION

In today's cultural conflicts, the law of adoption has become a subject of two parallel disputes, both centered on the qualifications of would-be adoptive parents. The first issue is whether gay and lesbian applicants should be presumptively disqualified for adoptive parenthood. The second issue is whether the law should disfavor adoption across racial boundaries, particularly petitions for adoption of African American children by White parents. The case for presumptive disqualification of members of a racial group raises obvious constitutional issues, and I shall suggest that similar issues attend any such wholesale disqualification of persons defined by their sexual orientation. But, beyond these constitutional questions, both of these debates about adoption law illustrate the same three strands of modern cultural conflicts in the United States: morality, authority, and group status.

A. *Adoption by Gay or Lesbian Parents and the Themes of Intercultural Conflict*

Estimates for the number of American children living with at least one gay or lesbian parent range from one million to over six million.⁵ Increasingly, lesbian couples are giving birth, having arranged for voluntary sperm donors, in what has been called a gay-by⁶ boom. However, a few states forbid adoption by a would-be parent who is "homosexual,"⁷ and others

4. Furthermore, as we shall see, some of the proposed legal regulations would govern only a small number of children.

5. Judith Stacey, *Gay and Lesbian Families: Queer Like Us*, in ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY 117, 139 n.1 (Mary Ann Mason et al. eds., 1998) [hereinafter ALL OUR FAMILIES]. See also MARY ANN MASON, THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE AND WHAT WE CAN DO ABOUT IT 193 (1999). The upper limit of estimates was placed at nine million by E. O. Laumann, National Health and Social Life Survey (N.O.R.C. 1995), cited in American Academy of Pediatrics, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341 n.1 (2002) [hereinafter Laumann, *Technical Report*].

6. This rhymes with "baby." See Stacey, *supra* note 5, at 117.

7. The constitutionality of Florida's flat prohibition was upheld by a federal district court in *Key West. Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001). On the story of this couple, and recent

have enacted or considered a legal presumption disqualifying gay or lesbian adoptive parents.⁸ Measures like these reflect a particular morality, a particular set of authoritative meanings, and a particular concern about group status.

One legal scholar, Lynn D. Wardle, has made a claim that purports to be factual: that "homosexual parenting" is harmful to children.⁹ He asserts that a child's homosexual identity or behavior implies heightened risks of particular harms, such as running away from home, substance abuse, or even suicide.¹⁰ This prediction seems wildly inappropriate when the young

identity politics in Florida, see Dana Canedy, *Groups Fight Florida's Ban on Gay Adoptions*, N.Y. TIMES, Mar. 15, 2002, at A12.

The very term "homosexual," used so confidently in such legislation, is fraught with complexity, given that it can be used to refer to a self-identification, a form of behavior, some variety of fantasy, some romantic leaning, etc. The list could go on and on, because the idea of sexual orientation fragments into kaleidoscopic forms. See generally EVE KOSOFSKY SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET* (1990).

8. For a summary of such laws, and citations, see WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET*, app. B3, 362-71 (1999).

9. Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 [hereinafter Wardle, *Potential Impact*]. Wardle's proposal for presumptive disqualification extends beyond adoption to child custody. The following year saw a critical response, Carlos A. Ball & Janice Farrell Pea, *Warring With Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, along with a rejoinder, Lynn D. Wardle, *Fighting With Phantoms: A Reply to Warring With Wardle*, 1998 U. ILL. L. REV. 629 [hereinafter Wardle, *Fighting*].

Wardle's coinage, "homosexual parenting," might suggest that he has in mind some distinctive style of parenting, having to do with such matters as love and affection; day-to-day provisions of food, sleep, and adequate housing; schooling; or counseling. But the referent in his text is quite different. In Wardle's usage, "homosexual parenting" exists when a parent is engaged in "ongoing homosexual relations." Wardle, *Potential Impact*, *supra*, at 894. The latter term is not defined, but a homosexual parent who abstains from sex would seem to fall outside the proposed negative presumption. One wonders: what should officials do if a woman should adopt a child, and afterward begin living in a lesbian relationship? Should the state send a Celibacy Monitor to the bedroom, install a video camera, or ask the child to spy? In any event, this is Wardle's definition of "homosexual parenting," which will be continually referenced in the text.

10. Wardle, *Potential Impact*, *supra* note 9, at 854. In the same passage, Wardle links "homosexual behavior" with increased risk of HIV infection, making no distinction between gay males and lesbians. In fact, instances of female-to-female HIV transmission are vanishingly rare. *HIV/AIDS and U.S. Women Who Have Sex With Women (WSW)*, U.S. CENTER FOR DISEASE CONTROL NEWSLETTER, Aug. 1999, at 1. See also S. Y. Chu et al., *Update: Epidemiology of Reported Cases of AIDS in Women Who Report Sex Only with Other Women, United States 1980-91*, 6 AIDS 518-19 (1992); Meaghan Kennedy et al., *Assessing HIV Risk Among Women Who Have Sex with Women: Scientific and Communication Issues*, 50 J. AM. MED. WOMEN'S ASS'N 103 (1995). The high risk factors for AIDS among self-identified lesbians are drug use (about 25%) and sex with men (about 75%). U.S. Nat'l Institute of Health, *Women and Girls*, in FISCAL YEAR 2004: PLAN FOR HIV-RELATED RESEARCH, vol. X, 1 (2002). These two factors are most likely in cases of "homelessness, instability of relationships, lack of employment, or histories of incarceration." Such conditions are extremely unlikely among lesbians who apply for adoption and, in any case, would be independent grounds for denial of adoption. Vickie M. Mays, *Are Lesbians at Risk for HIV Infection?*, 2 WOMEN'S HEALTH: RESEARCH ON GENDER, BEHAVIOR, AND POL'Y 1 (1996).

The howler cited at the outset of this footnote comes from the same author who chides studies reaching conclusions opposing his own for their "sweeping generalizations" and "[b]road

person is living with gay or lesbian parents.¹¹ The stories in judicial opinions about gay teens who suffer from depression, run away from home, or contemplate suicide have featured young males who lived with parents for whom homosexual orientation was anathema, sometimes in the literal sense of the word.¹² Stories like these are anecdotal, but they appeal to common sense: gay and lesbian teenagers, like any teenagers, are likely to lead troubled lives if they fear or encounter rejection by their parents. In the case of gay or lesbian adolescents, this fear is likely to center on the parents' known hostility to persons who express gay or lesbian identity. Surely gay and lesbian parents, as a group, are not so likely to harbor such hostilities, and they are extremely unlikely to throw children out of their homes for being gay. Calling such predictions of harm "factual" is ludicrous. However, a comparable rhetoric of "fact" has currency throughout this arena of intercultural conflict over morality, authority, and group status.

1. Morality

For the opponent of "homosexual parenting," a second claim remains; the risk that a child raised by a homosexual parent is likely to "develop homosexual interests and behaviors."¹³ To the extent that this prediction purports to be "factual," the factual conclusion is highly debatable.¹⁴ More importantly, however, the assertion is that a homosexual

overgeneralizations." Wardle, *Potential Impact*, *supra* note 9, at 841, 849. A wholesale legal presumption against "homosexual parenting," however, is a generalization he is happy to embrace.

11. After a thorough review of research literature, the Committee on Psychosocial Aspects of Child and Family Health (2001-02) of the American Academy of Pediatrics reported that (1) "the weight of evidence gathered during several decades using diverse samples and methodologies is persuasive in demonstrating that there is no systematic difference between gay and nongay parents in emotional health, parenting skills, and attitudes toward parenting," and (2) "parents' sexual orientation is not a variable that, in itself, predicts their ability to provide a home environment that supports children's development." Laumann, *Technical Report*, *supra* note 5, at 341.

12. One story that illustrates all the events in this sentence is that of Donald Baker, the protagonist of *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982). On stresses associated with coming out to parents, rejection by parents, school-based homophobia, and victimization as contributing sources of self-destructive behavior by adolescents, see Stephen T. Russell et al., *School Outcomes of Sexual Minority Youth in the United States: Evidence from a National Study*, 24 J. OF ADOLESCENCE 111, 118-25 (2001).

13. Wardle, *Potential Impact*, *supra* note 9, at 852.

14. See, e.g., LESBIANS AND GAYS IN COUPLES AND FAMILIES: A HANDBOOK FOR THERAPISTS (Joan Laird & Robert Jay Green eds., 1996); Michael S. Wald, *Should Sexual Orientation Be a Consideration in Custody Proceedings? No.*, in MARY ANN MASON & EILEEN GAMBRILL, *DEBATING CHILDREN'S LIVES: CURRENT CONTROVERSIES ON CHILDREN AND ADOLESCENTS* 46 (1994); J. Michael Bailey et al., *Sexual Orientation of Adult Sons of Gay Fathers*, 31 DEVELOPMENTAL PSYCH. No. 1, 124 (1995).

Because we deal here with a subject that seems to touch the identities of some who are doing science, it seems especially important to be on the lookout for "committed scholarship." The most objective discussion I have seen is Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159 (2001). In a careful review of a large number of

self-identification is morally wrong.¹⁵ This imputation of sexual immorality has been visible on the surface of every major gay-rights dispute in our time. The Supreme Court's majority in *Bowers v. Hardwick* and its dissenters in *Romer v. Evans* correctly identified the antigay laws as legislation designed to enforce traditional morality.¹⁶ Other judges have made this point about sexual immorality with vivid explicitness.¹⁷ Without doubt, the assumed "evil" of homosexual behavior and homosexual identities, officially codified in the criminalization of sodomy in its changing definitions,¹⁸ is the historical root of the "traditional" legal bar to adoption by lesbians or gay men.¹⁹ And the presumed immorality of a homosexual

the leading studies, the authors find much to criticize. They identify a number of inherent problems in identifying "concepts, categories, and samples" in a field where (1) it is extremely difficult to gather demographic data (for example, the number of gay men and lesbians in society, the proportion of those who are parents, the number of their children); (2) there is little agreement on definitions of sexual identities; (3) current studies, necessarily centered on children of "a transitional generation" of gay or lesbian parents whose children came out of heterosexual marriages, cannot readily separate out various possible influences on a child (for example, a parent's sexual orientation, the divorce, the re-partnering, the process of coming out); and (4) given all the foregoing uncertainties, it is hard to construct random or representative samples of children. *Id.* at 164-67. These two writers oppose any presumptive disqualification of gay or lesbian would-be parents.

15. Why else, for example, say that a girl raised by lesbians would be "vulnerable" to developing homosexual attraction? See Wardle, *Potential Impact*, *supra* note 9, at 853 (citing Ghazala Afzal Javaid). I have suggested that this prediction is dubious. See *supra* text accompanying note 14. In this passage in the text I assume, for argument's sake, that the adopted child will develop a homosexual identity.

16. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986); *Romer v. Evans*, 517 U.S. 620, 645-48 (1996) (Scalia, J., dissenting).

17. A recent example is a concurring opinion of Chief Justice Moore of the Alabama Supreme Court. In a custody contest, the court reinstated a trial court's ruling against a lesbian mother, a Californian, who sought to regain custody of her teenage children on the ground that the Alabama father was abusive. The state court of appeals had ruled for the mother, but the supreme court invoked a rule favoring deference to the "fact" findings of the trial judge who heard oral testimony. Eight justices joined in a short opinion to this effect. *Ex parte H.H.*, 830 So. 2d 21 (Ala. 2002). Chief Justice Moore, however, took the occasion to deliver a ten-page essay on the "inherent evil" of homosexual conduct (or "homosexuality," for him a synonym). *Id.* at 26 (Moore, J., concurring). One passage of this essay provides a mini-thesaurus of opprobrium, nicely designed for the Chief Justice to mail to voters during Alabama's next judicial election. Homosexual conduct, he said, is considered "abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God upon which this Nation and our laws are predicated." *Id.* Furthermore, letting these children live with their mother would be destructive of "the family." *Id.*

18. For a summary of these laws criminalizing sodomy, see ESKRIDGE, *supra* note 8, at app. B3, 362-71. On the shadowy boundary zone between homosexual behavior and homosexual identity, see Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993). On the pompously ahistorical "history" of sodomy as a crime offered by Chief Justice Burger in *Bowers*, see Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073 (1988); Halley, *supra*.

19. See ESKRIDGE, *supra* note 8, at 212-14; see also Jennifer Gerarda Brown, *Sweeping Reform from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 MINN. L. REV. 363, 400-05 (2000) (discussing decisions of the past two decades in which judges, without supporting evidence, have taken judicial notice of the "moral deficiency" of lesbian mothers, in the face of expert

relationship is at the heart of the case for a presumptive disqualification for parenthood. Lynn D. Wardle, the leading proponent of such a legal presumption, remarks that the claims of gay or lesbian would-be parents are self-centered, not aimed at children's welfare.²⁰ Rather, he says, by seeking to raise children in an atmosphere more or less the equivalent of a bordello, these parents show their willingness to make children the "innocent victims" of their choice to "experiment for personal self-gratification with extramarital sexual relationships."²¹ Apparently, one who is squinting in this way can see a lesbian or a gay man not as a whole person, but as an abstraction, a walking gland.

Those who argue against an absolute or presumptive disqualification of gay or lesbian parents to adopt state a claim of constitutional dimension, as well as one of moral prescription. One day, it is fair to speculate, our courts will hold that a legal disadvantage based on sexual orientation is a "suspect" classification.²² This conclusion would require the state to demonstrate that any imposition based on sexual orientation is necessary to achieve a public interest of great importance. Once the Court requires any sort of persuasive justification, a simple majoritarian moral preference will not survive this heightened scrutiny. And gross generalizations, stereotypically fastened to an entire social group,²³ will have to give way to evaluations of the particular applicants for adoption. Furthermore, another basis for serious judicial scrutiny is available now: the importance of the familial relationship at stake.²⁴

If we put the Constitution to one side, we see that the opponents of a presumptive disqualification are making their own moral claim, founded on a morality of individual rights and responsibilities. Such a morality of nondiscrimination became familiar to all Americans during the civil rights movement, and it retains its appeal whenever law consigns a social group

testimony and other social scientific evidence showing that children raised by gay or lesbian parents function as well as children raised in other households).

20. Wardle, *Potential Impact*, *supra* note 9, at 897-98.

21. *Id.*

22. On the cultural changes that justify this prediction, see Kenneth L. Karst, *Constitutional Equality as a Cultural Form: The Courts and the Meanings of Sex and Gender*, 38 WAKE FOREST L. REV. 513, 538-52 (2003). The Supreme Court will soon provide an important indication whether the predicted change will come sooner or come later, in *Lawrence v. Texas*, cert. granted, 123 S. Ct. 661 (2002) (No. 02-102, Oct. Term 2002), reviewing *Lawrence v. State*, 41 S.W.3d 349 (Tex. Crim. App. 2001).

23. See *supra* text accompanying notes 9-21.

24. This claim is at its strongest in cases involving existing families, such as an application by a woman to adopt her lesbian partner's child. For relevant analogies, see, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (seeking permission to marry in order to legitimate expected child); *Moore v. East Cleveland*, 431 U.S. 494 (1977) (concerning extended family living arrangements); *Smith v. Org. of Foster Families*, 431 U.S. 816 (1977) (addressing foster parents' ties to foster children). But, however the disqualified class is defined, a wholesale presumptive disqualification for adoptive parenthood surely demands more than minimal judicial scrutiny under the Equal Protection Clause—or at least the tough version of minimal scrutiny that the Court employed in *Romer v. Evans*, 517 U.S. 620 (1996).

to a category marked for disadvantage or subordination. In the context of gay-rights litigation, Justice Kennedy captured both the constitutional claim and the moral claim when he remarked that protections against group-based discrimination are "taken for granted by most people" and are a normal part of "ordinary civic life in a free society."²⁵ But gay-rights advocates are also entitled to make a second claim about morality, one that meets antagonists on their own ground. The core of this claim is that a homosexual relationship is not per se immoral, any more than is a heterosexual relationship. We are in the presence of two bedrock moral postulates, utterly opposed and beyond compromise.²⁶

2. Authority

In addition to serving as a moral battleground, the gay adoption debate involves a conflict over authority. Opponents perceive the modern gay-rights revolution as undermining traditionally authoritative meanings of gender by blurring the gender line.²⁷ In this uneasy perspective, a "cross-dressing" young girl who cuts her hair short, wears sloppy jeans, and dreams of being an Air Force fighter pilot or a member of the U.S. soccer team, seems to some observers (including scholars)²⁸ to be risking the loss of her feminine gender identity and perhaps the loss of her heterosexual identity as well. One who infers these risks is not just concerned about morality, but also concerned about preserving the authority of a culturally defined worldview. In this view, gender is a crucially important marker of individual identity and social status, and the gender line must be sharply defined and vigilantly policed. A corollary is that both men and women must be seen as unambiguously heterosexual.²⁹ This view—it is fair to call

25. *Romer*, 517 U.S. at 631.

26. Perhaps gay-rights advocates can take heart from the steady "privatization" of family law. See Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443; Barbara Bennett Woodhouse, *Towards a Revitalization of Family Law*, 69 TEX. L. REV. 245 (1990) (reviewing MARY ANN GLENDON, *THE TRANSFORMATION OF AMERICAN LAW* (1989)). Family law has also retreated from earlier doctrines that sought to impose various versions of official morality. See Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985). Both of these developments appear to be responses to twentieth-century currents of egalitarianism in American society, and to the radical individualism turned loose by modern society's "pluralization of social life-worlds." See *infra* text accompanying notes 92-96.

27. I have discussed this political development at length in KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* 57-65 *passim* (1993) [hereinafter KARST, *LAW'S PROMISE*].

28. See, e.g., Wardle, *Potential Impact*, *supra* note 9.

29. I pursued these aspects of the ideology of masculinity in KARST, *LAW'S PROMISE*, *supra* note 27, at 31-37, 40-42. On the close link between antigay ideology and the prescription of a rigid gender line, see ESKRIDGE, *supra* note 8, at 222-28; ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 146-76 (1996); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 617-24 (1992); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187.

it an ideology³⁰—has nineteenth-century roots, but in recent American cultural politics, its most prominent advocates have been politicians and politically oriented ministers who want to mobilize religious conservatives as a constituency and keep them mobilized.³¹

These advocates draw on the authority of religion in both senses of authority: political authority, the legitimate exercise of power, and cultural authority, the authoritative definition of meanings.³² The latter notion of cultural authority has at least two dimensions. One kind of authority over meaning is, in form, descriptive; it explains “the way the world is.”³³ The other form of authority over meaning is explicitly normative, prescribing principles, or even rules, for right behavior. This is morality itself, and one rule regularly invoked to police the gender line is that homosexual sex is forbidden by the Highest Authority.³⁴ As such an invocation of the Bible makes clear, normative and descriptive claims to authority over meaning fuse together in the dispute over the call for a presumption against allowing adoption by gay or lesbian parents.³⁵

3. *Group Status*

Morality and authority are the main sources of rhetoric for those who oppose adoption by lesbian or gay parents, but it is the symbolism of group status that is mainly at stake in this dispute over adoption law. To say that gay and lesbian adoptive parents’ normative claims are principally “political”³⁶ is to demean these claims and deny their legal or moral authority, treating them as no more than an expression of a desire or a

30. See J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 224-34 *passim* (1998).

31. See KARST, *LAW’S PROMISE*, *supra* note 27, at 18-20, 31, 37-40.

32. See JEROME S. BRUNER, *ACTUAL MINDS, POSSIBLE WORLDS* 123 *passim* (1986); CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 13 *passim* (1973).

33. See NELSON GOODMAN, *WAYS OF WORLDMAKING* (1978).

34. See, e.g., Chief Justice Moore’s concurring opinion, with its repeated references to the law of God, supported by chapters and verses, specifically, *Genesis* 1:27, 2:24 and *Leviticus* 20:13 (King James). *Ex parte* H.H., 830 So. 2d 21, 33 (Ala. 2002).

35. Historically, much of the antagonism to homosexuality arises out of the view that the gender line is itself a division of authority, defining the husband as the head of the family formed by a heterosexual marriage. See Law, *supra* note 29, at 197-206. The confinement of women to the domestic sphere continues to be an ideal for many women and men of this persuasion, but most married women have chosen employment outside the home. See *infra* note 124. A less sweeping argument against “homosexual parenting” is that a child needs both a mother and a father in order to develop properly, because they bring different “gendered strengths” to the task. See Wardle, *Potential Impact*, *supra* note 9, at 857-64. We shall return to this point in discussing the moral disapproval recently heaped on young single mothers. See *infra* text accompanying notes 83-86 and 223-39. In another article opposing recognition of same-sex marriage, Wardle refers to “a universe of gender differences (profound and subtle, biological and cultural, psychological and genetic) associated with sexual identity.” Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 39 [hereinafter Wardle, *Critical Analysis*].

36. See Wardle, *Potential Impact*, *supra* note 9, at 840 (saying that advocates of “homosexual parenting” are guilty of a “manipulation of child-oriented rules of law for the political purposes and benefits of adults”).

demand. In another sense, however, it is accurate to acknowledge that these claims have a political dimension. The disposition of the dispute goes beyond the concerns of individuals to the concerns of groups. In this sense, any claim founded on a principle of nondiscrimination is political.³⁷ The claim may also carry symbolic importance, not just for the group represented by the claimant, but also for another group consisting of all other people.

Even Lynn D. Wardle, author of the proposed presumption against "homosexual parenting," accepts that the presumption should be rebuttable whenever the preponderance of the evidence shows that the best interests of children would be served in the families of gay claimants.³⁸ This concession recognizes the validity of individual claims without recognizing equal status for lesbians and gay men as a group. In states where most judges are not inclined to discriminate, this proposal might produce aggregate results not far different from those that have been reached in "second parent" adoptions.³⁹ In those cases, Wardle seems to have no objection to a continuation of the de facto family composed, say, of the biological mother, her child, and her lesbian partner.⁴⁰ This is a remarkable concession, given that a considerable proportion of the children living in lesbian families were born within marriages to women who "came out" after divorce.⁴¹ In some parts of the country, the partner-applicants for adoption in such cases have been winning.⁴²

Still, even if a second-parent adoption be denied, the couple is likely to continue living together. So, with or without legal recognition of second-parent adoptions, the living arrangements actually affected by the proposed presumption against gay or lesbian adoptive parents would likely be few in number. No foreseeable principle of regulatory law will keep a mother's children and her lesbian partner from living in the same household. The

37. Every complaint filed under California's public accommodations law, the Unruh Civil Rights Act, CAL. CIV. CODE §§ 51-52 (2003), for example, must identify a particular ground for the challenged discrimination that comes within the law's prohibition. Because of the principle of stare decisis, the success of such a claim carries a potential benefit for the group comprising all persons who share the trait in question: race, sex, religion, sexual orientation, etc.

38. Professor Wardle emphasizes the softness of his proposed presumption in Wardle, *Fighting*, *supra* note 9, at 637.

39. See Stacey, *supra* note 5.

40. Wardle, *Potential Impact*, *supra* note 9, at 880-82.

41. The figure was placed at 99% by David K. Flaks et al., *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, 31 DEV. PSYCHOL. no.1 105 (1995). That figure seems counterintuitive, and the "gay-by" boom, see *supra* note 6, gives us reason to doubt that the proportion is this large today.

42. See Ball & Pea, *supra* note 9, at 265; David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 540-41 (2000). For less sanguine views, see E. J. Graff, *The Other Marriage War*, AM. PROSPECT, Apr. 8, 2002, at 50, 52-53; Stacey, *supra* note 5. For the details on judges' reactions to second parent adoptions, see Joan Heifetz Hollinger, *Overview of Second Parent Adoptions* (2001) (unpublished manuscript, on file with author).

reality that a legal presumption will leave many cases of "homosexual parenting" intact does not leave such a presumption devoid of meaning. The chief concern of the presumption's proponents is not that some children will be raised by gay or lesbian parents, but that legislative or judicial acceptance of a nondiscrimination principle for such cases will legitimize "homosexual parenting" in general, making it "just as good as and legally equivalent . . . to heterosexual parenting."⁴³ This is a specialized expression of one side of a cultural conflict. It defends a set of cultural meanings attached to homosexuality that have long been dominant. This very dominance has served to maintain a traditional ordering of group status, giving ascendancy to those who self-identify as heterosexual.⁴⁴ Claims for legal recognition of gay and lesbian parents do, indeed, have a political dimension. The whole gay-rights agenda for nondiscrimination, from the repeal of sodomy laws to equal treatment in marriage and family law, is, among other things, an impressive exercise in group status politics.⁴⁵

The emotional energy for such an egalitarian political program lies mainly in the connection between group status and individuals' senses of their identities. The principal actors in the gay-rights movement are, of course, lesbians and gay men, who have much to gain, both materially and psychologically, from the adoption of a broad legal principle of nondiscrimination. But egalitarian reforms are never cost-free. A half century ago, the impending demolition of the Jim Crow segregation laws portended severe psychological costs for low-status White southerners.⁴⁶ In the aggregate, the attendant White fears were enough to sustain a major backlash

43. Wardle, *Potential Impact*, *supra* note 9, at 843.

44. On an existing group status hierarchy as a "baseline of expectations" threatened by an egalitarian movement, see J. M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2336 (1997). The same attitude toward group status relations can be seen in the claim that official recognition of gay marriage would debase the meaning or value of "true" (that is, heterosexual) marriage. Professor Wardle has frequently joined the chorus making this assertion. See, e.g., Wardle, *Critical Analysis*, *supra* note 35; Lynn D. Wardle, "Multiply and Replenish": *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J. L. & PUB. POL'Y 771 (2001). See also Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 BYU L. REV. 1189. To say that a gay or lesbian union is harmful because it is a nonmarital union by definition, see Wardle, *Potential Impact*, *supra* note 9, at 855-56, and then to oppose gay marriage would seem to offer a Catch-22.

45. I dealt with the subject of group status politics in KARST, LAW'S PROMISE, *supra* note 27, at 8-15 (in general), 58-61 (sodomy laws and gay marriage), 124-37 (antigay regulations in armed forces). For an excellent analysis of group status competition in the prism of American constitutional law, see generally Balkin, *supra* note 44. On the relation of group status concerns to the nondiscrimination claims of lesbians and gay men, with special attention to family law and child rearing, see ESKRIDGE, *supra* note 8, at 271-88. On the politics of respect in the context of homosexual orientation, see RICHARD L. ABEL, *SPEAKING RESPECT, RESPECTING SPEECH* 112-24 (1998).

46. The classic analysis of "gains" for Whites in the Jim Crow system is JOHN DOLLARD, *CASTE AND CLASS IN A SOUTHERN TOWN* (3d ed. 1957). On the "prestige gain," see *id.* at 173-87. On the keen awareness of Supreme Court Justices concerning the likely hostile reaction to school desegregation by southerners of lower social-economic status, see RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 678-99 (1975).

against the civil rights movement. The backlash was expressed not just in bombs and broken heads, but also in electoral politics. It is confined neither geographically (to the South) nor temporally (to the 1960s and 1970s); across the land today we still see vestiges of "massive resistance" and related forms of political opposition to racial equality.

Much of the emotion that feeds resistance to equality for gay and lesbian Americans also stems from individuals' anxieties about their own identities and their loss of status. Having expatiated on this theme in the past, here I merely cite those sources⁴⁷ and on that basis make a few bald assertions: The most virulent antigay sentiment originates in male self-doubt.⁴⁸ The anxieties of masculinity, largely founded in male rivalry, prominently include the fear of being considered "not man enough." This fear is first directed inward to a man's (or a boy's) sense of his own masculine identity. He then projects the fear as an attitude justifying subordination of women and of gay men.⁴⁹ This sentiment translates easily into acts of discrimination against these groups, both of which embody nervous men's (and boys') projected negative identities. Here, as elsewhere, fear provides fuel for group status and identity politics.

In discussing group status, we have not left the subjects of morality and authority. The gay-rights movement's effort to reorder the status of groups is inextricably bound up with efforts to vindicate the moral worth of lesbians and gay men and to redefine the authoritative meanings assigned to homosexuality. No public issues of morality, of authoritative meanings, or of status are raised when a person who self-identifies as gay or lesbian seeks to adopt a child, so long as the would-be parent remains "closeted," keeping his or her homosexual orientation out of public view. When the would-be parent comes out, all those intertwined issues arise at once, because now we enter the realm of public symbols. The enactment of regulatory law presuming the disqualification of gay and lesbian Americans as parents would mainly serve not to control the lives of real families, but to stand as a totem representing the status ordering of social groups.

47. See, e.g., KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 201-10 (1989); KARST, *LAW'S PROMISE*, *supra* note 27, at 31-37; Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 *UCLA L. REV.* 263, 275-79, 294-96, 302-05, 308-11, 318-22, 353-64 (1995) [hereinafter Karst, *Myths*]; Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 *UCLA L. REV.* 499, 502-10, 545-63 (1991) [hereinafter Karst, *Pursuit of Manhood*].

48. I do not say that women are incapable of feeling anxiety or antigay antagonism, but, for a long time, general social hostility toward gay men has exceeded hostility toward lesbians, and "straight" men have been more hostile toward homosexual orientation than have "straight" women. See Fajer, *supra* note 29, at 624-31.

49. A similar projection of this fear feeds efforts to subordinate Black men as well, but that is another complicated story. The identification of one stimulus that these varied impulses toward subordination have in common should not lead us to assume that the resulting forms of subordination are equivalent. See Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 *UCLA L. REV.* 1467 (2000).

Perhaps not every group status conflict is imbued with moral content, but the current "attack" vogue in political tactics has made the stirring of anger into an art form. For the invocation of constituents' ire, nothing else sells quite so well as an image that embodies some moral transgression by those who can be cast as the political Enemy.⁵⁰ Yet, we should not let our aggravation at this genre deceive us into dismissing the genuineness of the moral impulse that makes such an ad effective. J.M. Balkin makes two important points about group status and moral conflict:

Debates about morality are not smokescreens for debates about status; rather, struggles over status are struggles over what forms of life should be honored and receive general moral approval. Debates about morality and moral approval are the medium through which status competition is carried out, but the moral debates are no less authentic for that reason.

[On the other hand,] . . . Just as moral disapproval is not simply a cover for status competition, a status group's attempt to maintain a preferred status or a status hierarchy is no less real simply because hatred or animus is absent.⁵¹

Balkin's main thesis, which I find wholly persuasive, is that the avoidance of unjust group status hierarchy ought to be a central goal of American constitutional law. His second point in the quoted passage reminds us that majoritarian moral disapproval written into law is not enough, by itself, to establish the constitutionality of the proposed legal presumption against "homosexual parenting."

It is easy to see how the group status conflict is also a contest over authority in both its political and cultural dimensions. Authority in the sense of delegated power is invoked on both sides of the status conflict, for the issue is framed as a proposal for a legislature or a court to create a legal presumption. Authority in the sense of prescription of meanings is also central to the conflict, with preservation of a culture of repression⁵² ranged against the claim of gay men and lesbians to equal citizenship. As Balkin remarks in the context of gay-rights conflicts, "An ongoing status regime relies on the continual reproduction of a set of social meanings about what is normal and abnormal, moral and immoral, prestigious and base, that provide a baseline of expectations about what is happening in society and what things mean."⁵³ In the dispute over a legally recognized status for gay or lesbian parents, advocates on the two sides seek to establish contrasting authoritative meanings (both descriptive and normative) attached to

50. See *infra* text accompanying notes 246-57.

51. Balkin, *supra* note 44, at 2332 (bracketed words are my interpolation). See generally ABEL, *supra* note 45, at ch. 4.

52. I use this term in both of its chief modern senses: (1) the suppression of one's own assumedly "evil" psychological impulses, and (2) the subordination of a group.

53. Balkin, *supra* note 44, at 2336.

homosexual orientation, to gay or lesbian would-be parents, and to the predicted experiences of children who may or may not be placed in those parents' households. The resolution of this contest, embodied in the law of adoption, will both reflect and reinforce one or another prescription of those meanings. Fears about the socialization of children serve as an ideal receptacle for group status anxieties. This clash over the status of gay and lesbian parents, like the larger cultural conflict about the status of gay and lesbian Americans, is not merely related to conflicts about morality and authority, but is congruent with those conflicts.

B. *Transracial Adoption*

The modern debate over transracial adoption also centers on the socialization of children, and prominently features the same themes of morality, authority, and group status. The story of race relations in America obviously is not wholly a Black/White story.⁵⁴ But transracial adoption as a current political issue is focused on the adoption of African American children by White parents.⁵⁵

Transracial adoption⁵⁶ was rare in the United States until the 1960s. The practice increased roughly threefold from 1968 to 1971 (from 733 adoptions to 2,574), but in 1972 the National Association of Black Social Workers issued a position paper roundly condemning the practice.⁵⁷ Partly as a result, by 1975 (the last year for which national statistics are available) the number had dropped to 831.⁵⁸ A 1987 survey concluded that White

54. I use the terms "Black" and "White" as they are customarily used, in spite of their obvious inadequacies in describing a categorical division of people. A growing body of literature attests to the complexity of our social divisions along indistinct lines that do not so much mark racial and ethnic boundaries as suggest them. See, e.g., Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 10 *LA RAZA L.J.* 127 (1998), 85 *CALIF. L. REV.* 1143 (1997); Colloquy, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 *IOWA L. REV.* 1467 (1996). I have self-identification in mind when I refer to a parent who is Black or White. For elaboration, see Karst, *Myths*, *supra* note 47.

55. I say this even though Congress, in the Indian Child Welfare Act of 1978 ("ICWA"), prescribed a system of adoption of Native American children that strongly preferred Native American adoptive parents and gave primary jurisdiction over such cases to tribal courts. See Pub. L. No. 95-608, 25 U.S.C. §§ 1901-1963 (2000). Despite some criticism, neither the ICWA nor its underlying objective face any serious political challenge. For a good summary of the ICWA's operation, see RACHEL F. MORAN, *INTERRACIAL INTIMACY* 134-38 (2001).

56. I use this term as it is most frequently used today, to refer to White parents' adoption of Black children.

57. The position paper is reprinted in RITA JAMES SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTION* 50 (1977).

58. All these data are taken from Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race-Matching in Adoption*, 139 U. PA. L. REV. 1163, 1178-80 (1991) [hereinafter Bartholet, *Black Children*].

families' adoptions of Black children accounted for one percent of all adoptions, which would place the estimate at around 1,000 per year.⁵⁹

Today, the annual rate of agency-arranged transracial adoptions may be considerably lower, for two reasons. First, Black mothers who have never married are making only about one percent of their total newborns available for adoption. Second, many birth mothers and couples directly arrange the adoption of newborns without an agency as a go-between; such "open" adoptions comprise the majority of transracial adoptions.⁶⁰ Thus, regulations concerning transracial adoption would likely affect only a relatively small number of individuals each year. Furthermore, in 1996, Congress prohibited federally-funded adoption agencies (public or private) from considering race in the adoption process.⁶¹ Present law, in other words, has coalesced around a principle of permission for would-be parents to adopt across racial lines. Prospects for new legal regulations to restrict or discourage transracial adoption are extremely dim. Even so, the debate continues on the relevance of parents' race to the socialization of adopted Black children. It might seem remarkable that debate over such phantom regulations has become intense, but, as we shall see, the explanation is clear. This debate, like the debate about "homosexual parenting," is part of a large and painful cultural conflict.

The dispute over transracial adoption has produced striking parallels to the dispute over adoption by gay or lesbian parents. Here, too, the socialization of children (in this case, African American children) is the focal point for public contention, centering on assertions about the "best interests" of children. Skeptics of transracial adoption charge that those who advocate the end of race-matching are doing so not with the welfare of Black children in mind, but more selfishly, for the benefit of White adults who are looking for children to adopt.⁶² This charge may be fueled by a

59. Kathy S. Stolley, *Statistics on Adoption in the United States*, 3 FUTURE OF CHILD. 26, 34 (1993). The total number of adoptions in the U.S. in 1986 was estimated at about 100,000. *Id.* at 28. Roughly half of all adoptions are by relatives; thus, the proportion of "stranger" adoptions of Black children by White parents would be about 2%, leaving the gross number at about 1,000. *Id.*

60. For both of these estimates, I am grateful to Ruth-Arlene W. Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE J. GENDER L. & POL'Y 131, 142-43, 145 (1995).

61. This provision, which has no application to "open" adoptions, was added to the Small Business Protection Act of 1996, Pub. L. No. 104-188, §1808, 110 Stat. 1755 (1996).

Most social workers believe that they may still treat the cultural competence of applicants as an important consideration in a proposed transracial adoption. Furthermore, one of the chief architects of the 1996 law concludes that it permits consideration of race or ethnicity when it is demonstrably necessary to meet the documented needs of a particular child. See Joan Heifetz Hollinger, *Overview of MEPA* (unpublished manuscript, on file with author). In 1997, Congress enacted the Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115, codified in dispersed parts of Title 42. This Act is also an object of heated controversy. See *infra* notes 83-84.

62. See Howe, *supra* note 60, at 135, 138-40; Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 46-48 (1994). The charge of selfishness resonates with the common belief that adoption is an anomaly in a world where "true" identity and authentic kinship are seen as growing out of biogenetic reproduction.

mistrust of the racial or cultural sensitivity of Whites who are perceived to be accepting Black adoptive children as "a second, third, or last choice" after other options for adoption have failed.⁶³ These are serious moral charges, and they resonate against a widely shared moral sense that it is immoral for parents to use their children for selfish purposes.

Supporters of a legally recognized presumption that Black children should be raised by Black parents emphasize the children's need to be taught "survival skills" in a society still infected by racism,⁶⁴ and a related need to form a positive (Black) racial identity.⁶⁵ The latter point may simply represent a statement about an individual child's need, but for some it also carries a broader claim about the preservation of a culture. The strongest opponents of transracial adoption also offer the group-centered argument that Black children raised to have "white minds"⁶⁶ will be lost as resources in the political struggles of the Black community to overcome racial subordination in its multiple forms. For example, a 1972 position paper of the National Association of Black Social Workers ("NABSW") explicitly identified not only "the need of our young ones to begin at birth to identify with all Black people in a Black community," but also "the philosophy that we need our own to build a strong nation."⁶⁷ In 1988, the former president of the NABSW emphasized this connection between a child's socialized identity and membership in a racial community: "Having white families raise our children to be white is at best the ultimate gesture of disrespect for our heritage as African people. . . . Our children are our future."⁶⁸

Here, as in other recent controversies, the label "racial discrimination" is deployed on both sides of the argument. Opponents of race-matching, citing the group interest urged by the NABSW and others, see this claim as political, neglecting the welfare of individual children in favor of a group

Where second-parent adoption generally takes place in a family where the "first" parent's relationship to the child is by "blood," transracial adoption highlights the biogenetic distinctions between parent and child. See generally Joan Heifitz Hollinger, *Authenticity and Identity in Contemporary Adoptive Families*, 3 J. GENDER-SPECIFIC MED. 23 (2000).

63. See Perry, *supra* note 62, at 57-59. Although Professor Perry would not ban transracial adoption, she supports the placement of Black children with Black adoptive parents when that is feasible. For a skilled professional's advice on maintaining a transracial adoptee's awareness and appreciation of the culture(s) of his or her birth, see JOSEPH CRUMBLEY, *TRANSRACIAL ADOPTION AND FOSTER CARE* 3-11, 21, 63-80 *passim* (1999).

64. See Howe, *supra* note 60, at 131-38.

65. See Asher D. Isaacs, *Interracial Adoption: Permanent Placement and Racial Identity—An Adoptee's Perspective*, 14 NAT'L BLACK L.J. 126, 131-32, 141-46 *passim* (1995) (supporting a preference for Black adoptive parents but not a bar to transracial adoption).

66. ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 105 (1993) [hereinafter BARTHOLET, *FAMILY BONDS*].

67. Quoted in Perry, *supra* note 62, at 46-48. In this claim, typically "our own" is intended to include biracial children. See, e.g., Howe, *supra* note 60, at 148-49 (1995).

68. Quoted in BARTHOLET, *FAMILY BONDS*, *supra* note 66, at 105.

political interest, which one writer calls "a black separatist or nationalist perspective."⁶⁹ These advocates make their own appeals to child welfare. First, they argue that race-matching holds many Black children in foster care for long periods of time, delaying or even preventing them from forming permanent family attachments. Second, they point to social science studies that are generally optimistic about White parents' introduction of Black children to Black culture and about the long-term adjustment of the children to White adoptive parents and siblings.⁷⁰ But here, as in the dispute over the effects of gay or lesbian parents on children, both sides agree that the social science evidence is less than conclusive.

Elizabeth Bartholet, a prominent advocate against race-matching, agrees with the opponents of transracial adoption that Black children adopted by White parents are likely to develop "a sense of the meaning of race that is very different from that of Black children living in a state of relative isolation or exclusion from the white world."⁷¹ Surely, however, she would recognize that individuals among this collection of adoptees are likely to vary considerably in their senses of the meaning of race. A recent and remarkably sensitive ethnographic study by Sandra Patton makes clear that, for transracial adoptees, the search for a coherent sense of racial identity typically is characterized by complication and by struggle.⁷² In this context, the chief disagreement between Professor Bartholet and her critics goes to the issue of whether children's socialization to identities and meanings in tune with integrationist ideals is or is not A Good Thing. Where one observer looks forward to a progressively interracial society, another sees a Black child who has been "raised white" and thus stolen from the Black community, or worse, hears an echo of the era in which Black children were sold away from their families by White slaveholders.

Now we reach the emotional core of the larger issue reflected in this dispute: the role of the adult observer's sense of identity. Twila Perry, who does not flatly oppose transracial adoption but who is skeptical of it, seeks to explain why, even though only small numbers of Black children are

69. Bartholet, *Black Children*, *supra* note 58, at 1219.

70. See, e.g., WILLIAM E. CROSS, JR., *SHADES OF BLACK: DIVERSITY IN AFRICAN-AMERICAN IDENTITY* 108-14 (1991); SIMON & ALTSTEIN, *supra* note 57; Arnold R. Silverman, *Outcomes of Transracial Adoption*, 3 *FUTURE OF CHILD* 104, 117 (1993). In 1997, Simon and Altstein returned to the subject, and concluded: "After more than two decades in which numerous studies were conducted on the impact of transracial adoption on minority children, the data show unequivocally that transracial adoptions serve the children's best interests. No empirical work has been reported that contradicts that generalization." Rita J. Simon & Howard Altstein, *The Relevance of Race in Adoption Law and Social Practice*, 11 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 171, 194 (1997).

71. Bartholet, *Black Children*, *supra* note 58, at 1219.

72. SANDRA PATTON, *BIRTHMARKS: TRANSRACIAL ADOPTION IN CONTEMPORARY AMERICA* 170 *passim* (2000). Patton does not take sides in the political debate over transracial adoption; rather, she seeks to illuminate the many and varied factors shaping individual identities, giving considerable emphasis to public policy and social structures, with the latter prominently including racism and socioeconomic class.

adopted by White parents, those who would ban the practice (or limit it severely) feel strongly enough to talk about child-stealing and "cultural genocide."⁷³ When such heated language is used, two different issues of identity may be in play. The first concerns the influence an adoptive parent has on a child's racial identity. The second concerns the influence on the speaker's own identity. The latter is illustrated by Professor Perry. She invites her readers to picture a transracial adoption as a transfer of a child from the Black (and typically poor) birth mother to the White (and typically more advantaged) adoptive mother. This picture, she suggests, arouses a strongly negative reaction in many African American women: "For Black women, part of the symbolic cultural meaning of mothering is tied to race."⁷⁴ From this perspective, the transfer of the child can imply a devaluation of the accomplishments of Black mothers who raise children under the most trying circumstances and an overvaluation of White women's relative competence as mothers. To such an observer, transracial adoption may seem to be one more example of the saying "the rich get richer," but with that class difference aggravated by both the material harms and the indignities of racial subordination. With the meanings of their own lives thus in the foreground, it is no wonder that these women's feelings demonstrate the close connection between their individual racial identities and their sense of racial solidarity.

A similar connection appears on the other side of this controversy, where the identity of the observer and the observer's views about race relations can also be closely related to his or her perceptions of the child welfare issues raised by transracial adoption. Some of the most effective advocacy against race-matching in adoption comes from Whites who have been frustrated by an adoption system that has put them on "hold" because they are White.⁷⁵ Some of these parents turn to independent adoptions, and others to adoption of children born in Eastern Europe, Asia, or Latin America.⁷⁶ They, too, see their opponents in this debate as concerned less with the welfare of children, many of whom have remained in foster care while agencies pursued race-matching, than with the goal of racial solidarity. These White parents point out that their views are shared by a number of African American writers,⁷⁷ and they do not see the small number of transracial adoptions as threatening the interests of the national Black

73. Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 101 YALE J. L. & FEMINISM 101 (1998).

74. *Id.* at 117.

75. See, e.g., Bartholet, *Black Children*, *supra* note 58, at 1164-71.

76. For example, Professor Elizabeth Bartholet adopted two infant sons in Peru who have grown up with her biological son. See *id.*

77. See, e.g., Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925 (1994); Randall Kennedy, *Orphans of Separatism: The Painful Politics of Transracial Adoption*, AM. PROSPECT, Spring 1994, at 38.

community, with its population over thirty million. Nor do they see themselves as racially insensitive or lacking in concern for their children's development of healthy attitudes toward their own identities or toward the meanings of race in America. Rather than seeing their own parenting as "cultural genocide," they see it as centered on the well-being of the individual children.

The issue of transracial adoption thus brings to the fore at least two competing moralities, along with opposing cultural meanings of child raising and race that compete for authority. But, as in the dispute over the presumptive disqualification of gay and lesbian parents, a perceived conflict about group status hierarchy looms over the issue in all of its manifestations. And here the adoption issue becomes linked, in a particularly poignant way, to more general assumptions about the capacity of African American parents. One prominent theme of cultural politics in the 1990s—that "welfare causes riots"—was, among other meanings, an assertion about the inferior socialization of poor Black children.⁷⁸ The intended audience of White voters had no trouble identifying the main culprits: young Black mothers who, in violation of traditional sexual morality, were bearing children out of wedlock.⁷⁹ In cultural politics, the "morals" issue was inextricable from the issue of a poor, Black, single mother's fitness to raise a family.⁸⁰ If Black women, and not merely those living near the edge of poverty, are ready to find a similar lack of appreciation of their own work as mothers when issues of race and family are discussed, their reaction is understandable.⁸¹

The cultural conflicts are even more heated where the birth mother involuntarily relinquishes custody. The most common transracial adoption involves a birth mother who, at least in form, voluntarily releases her child. But in other cases the state removes children from their homes on the ground of parental abuse or neglect and places the children in foster care for an indefinite period. In these cases, typically there is nothing voluntary about the relinquishment of custody. When state officials decide that the risk of abuse or neglect is such that the child cannot safely be returned home, the state may go further, seeking a court order terminating the parental status of the biological parent who is declared unfit (very often a Black single mother), in order to make the child available for adoption (very

78. Former Vice President J. Danforth Quayle sounded the loudest trumpet. See *infra* note 233.

79. See, e.g., MARTIN GILENS, WHY AMERICANS HATE WELFARE 102-32 (1999); JILL S. QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (1994).

80. On the racialized politics of welfare, see E.J. DIONNE, JR., WHY AMERICANS HATE POLITICS 90-97, 113-14, 136, 366-67 (1991); GILENS, *supra* note 79; QUADAGNO, *supra* note 79, *passim*.

81. Twila Perry's work, *supra* notes 62 and 73, has been particularly valuable in helping me to understand the emotional charge carried by the subject of transracial adoption among Black women, despite the small numbers of children involved.

often by White parents).⁸² Unsurprisingly, the recently increased federal inducements to speed adoption in circumstances where children have been taken from their mothers are highly controversial.⁸³

This debate parallels the more general debate on transracial adoption, sometimes involving the same advocates with similar passion on both sides.⁸⁴ Two areas of agreement can be found. First, all agree that young children need stability in their family living arrangements. But, where one side of the debate emphasizes efforts to preserve and stabilize the child's original family, the other side argues that these efforts are usually doomed, and that the needed stability is more likely to be found in an adoptive family. Second, advocates on both sides agree that serious physical abuse is a proper ground for termination of parental status. But more terminations result not from physical abuse, but from a failure to provide, which is a condition that is highly correlated with poverty.⁸⁵ Thus, any policy that aims at preserving families rather than breaking them apart will have to confront poverty head on. Regrettably, such a confrontation is not on the legislative agenda anywhere in the nation. It would be extraordinary, given the volume of scorn that status politics has recently heaped on young single mothers, if stereotyped views about race did not seep into official decisions about parental unfitness.⁸⁶

82. See Dorothy E. Roberts, *Is There Justice in Children's Rights? The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112 (1999).

83. This policy is embodied in the Adoption and Safe Families Act of 1997 ("ASFA"), *supra* note 61, which uses the conditional distribution of federal funds as an inducement for state agencies to shorten the time children stay in foster care and get them adopted speedily.

84. For a position supporting the relatively speedy termination of parental status for abuse or neglect, and relatively speedy movement of such children from foster care into adoption, see generally ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999); Richard J. Gelles & Ira Schwartz, *Children and the Child Welfare System*, 2 U. PA. J. CONST. L. 95 (1999). For skepticism about the goals of the ASFA, and support for family preservation efforts, see, e.g., Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716 (2000) (reviewing BARTHOLET, *supra*). For Professor Bartholet's reply to the Guggenheim review, see Elizabeth Bartholet, *Reply: Whose Children? A Response to Professor Guggenheim*, 113 HARV. L. REV. 1999 (2000).

85. No one argues that a lack of resources is the only cause of the "neglect" that might justify moving the child on to adoption. But the primary purpose of the ASFA, to put it mildly, is not to channel resources to families in trouble. Instead, it offers payments to states that continue to exceed previous years' numbers of children moved out of foster care and into new adoptive homes. Adoption and Safe Families Act, *supra* note 61, § 201(d), codified in 42 U.S.C.A. § 673(a) (2003). In any case, "Abuse and neglect are not the same." Andrea Charlow, *Race, Poverty, and Neglect*, 28 WM. MITCHELL L. REV. 763, 788 (2001).

86. Writing of the back-and-forth shifts in late twentieth-century policies toward child welfare and child protection, Barbara Bennett Woodhouse comments, "Through these swings of the policy pendulum, only one factor remains constant—the social devaluation of mothering, especially when done by working-class women and women of color." Barbara Bennett Woodhouse, *Making Poor Mothers Fungible: The Privatization of Foster Care*, in *CHILD CARE AND INEQUALITY: RETHINKING CAREWORK FOR CHILDREN AND YOUTH* 85, 95-96 (2002). See also Roberts, *supra* note 82. On the historic and continuing systematic devaluation of Black motherhood, attitudes toward the sexuality of Black women, and assumptions about poor Black women and welfare benefits, see DOROTHY E.

The foregoing discussions of gay and transracial adoption illustrate the themes of cultural conflict (morality, authority, and group status) resounding in fields of law that purport to be governed by the "best interests of the child." The same discussions also illustrate modern sociology's recognition that social conflict normally implies some kinds of agreement, at least on the importance of the interests at stake.⁸⁷ On all sides of these issues, advocates agree that a young child's immediate family ordinarily plays a primary role in acculturating the child to his or her sense of self. Among the elements of identity so taught are the child's race and ethnicity, gender, and religion. Along with those identities, the family imparts attitudes toward morality and authority.⁸⁸ Correspondingly, if stability in family relationships is vital to young children, part of the reason is that socialization takes time—time for identities to take hold, and time for the child to absorb lessons about "the way the world is" and the rules of proper behavior. But, as the following discussion reminds us, parents do not have a monopoly over the socialization process; even very young children are also exposed to acculturating influences outside the family. The most prominent influences are those imparted by school, friends, and television. And, when children reach adolescence, these outside influences only magnify.

II

ADOLESCENTS IN THE IDENTITY BAZAAR

A. *Identities of Choice*

It would be surprising if parents of American children did not have some fears for their children's safety. One teenager driving a car is an inexperienced driver; add some teenage passengers, and the risks of accident increase dramatically.⁸⁹ But, the practitioners of cultural politics mobilize support by evoking a different sort of parental fear: the fear that the child will reject the authority of beliefs that the parent considers fundamental; the fear that the child will behave in ways that the parent's culture defines as immoral; and, perhaps most troubling of all, the fear that the child may come to self-identify with a group that the parent sees as culturally Other.⁹⁰

ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 8-12, 117-22, 202-45 *passim* (1997) [hereinafter ROBERTS, *BLACK BODY*].

We shall return to this subject when we consider the socializing effects of poverty on the formation of identities. See *infra* text accompanying notes 200-45.

87. See LEWIS A. COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* 123 (1956).

88. Indeed, one aspect of "separation trauma" is a child's demoralization upon being deprived of the security of parental authority as a guide to daily life. See JEROME S. BRUNER, *ON KNOWING: ESSAYS FOR THE LEFT HAND* 140 (2d ed. 1979).

89. See Julie Marquis, *California and the West: Passengers Raise Risks of Teenage Car Fatalities*, L.A. TIMES, Mar. 22, 2000, at A3.

90. Some of the adoption disputes discussed earlier fit this pattern of fear perfectly, and the rest of them involve fears that are analogous. Most adoptions, however, take place well before the children

These fears are compounded by the fact that an adolescent may self-identify in ways once thought to be impossible. Even forms of self-identification once called "primordial"⁹¹ (such as race, ethnicity, or religion) are today, in considerable measure, identities of choice.

A commonplace of modern life, for children and adults alike, is "the pluralization of social life-worlds,"⁹² the segmentation of people's lives into different subcultures, or diverse sectors of experience and meaning. Any serious effort at self-description will produce a list of features.⁹³ Every feature an individual names will identify her with a group, with a community of shared meanings (both conceptual and emotional), with a subculture—in short, with an identity. But, in the modern world, all communities and all identities are limited. At points where her identities overlap, an individual can feel tension.⁹⁴

The individual self now lives in an increasingly pluralized life-world. The causes lie in the major social trends of the modern era: the division of labor; capitalism's individualizing influence; urbanization; changes in the family's structure and authority, partly owing to women's entry en masse into work outside the home; the "moralized anonymity" of bureaucratic institutions;⁹⁵ increasing mobility; the growth of mass communications; the lengthening of schooling, and its opening to previously ignored groups. In combination, these developments have pluralized not only the public life-world, but also the life-world of the family. When the Bergers and Kellner say, "[c]hildren habitually and disturbingly emigrate from the world of

reach adolescence. Increasingly, in American family courts, the preferences of adolescent children are given weight in both custody and adoption disputes. See, e.g., Elizabeth S. Scott et al., *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035, 1035-50 (1988). "Nearly ninety percent of the judges surveyed reported that the preference of children aged fourteen and older was either dispositive (absent unusual circumstances) or extremely important." *Id.* at 1050. On the importance of giving a child a voice in such a proceeding, see MARY ANN MASON, *THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE, AND WHAT WE CAN DO ABOUT IT* 65-92 (1999).

91. See HAROLD R. ISAACS, *IDOLS OF THE TRIBE: GROUP IDENTITY AND POLITICAL CHANGE* 35 (Harper Colophon ed. 1977).

92. PETER L. BERGER ET AL., *THE HOMELESS MIND: MODERNIZATION AND CONSCIOUSNESS* 63-82 (1974).

93. For example, ask the fictional Ellen Larsen to describe herself, and she may say something like this: "I am a Norwegian American; a Lutheran; the wife of a Greek American man who was raised in the Greek Orthodox church; the mother of two teenagers; a product of the Minneapolis public schools and a graduate of the University of Minnesota; a systems engineer at Honeywell; a Republican; a supporter of strong gun control laws; an amateur astronomer; a Minnesota Vikings fan; a regular viewer of General Hospital on videotape; a hack golfer"—the list could go on and on.

94. For example, Ellen may get a phone call at work, reporting that her daughter is sick and has been sent home from school, reminding her of the tension between her identity as a mother and her identity as a committed employee. Or, at a social gathering to watch the Vikings on television, she may find that some Vikings fans not only own guns but resent her suggestions about restricting their use. Now, the tension would be between her identity as a Vikings fan and her identity as a supporter of strong gun control laws.

95. BERGER, *supra* note 92, at 61.

their parents,"⁹⁶ the emigration they have in mind is not just a matter of geography. More importantly, they are referring to cultural emigration: from the parents' morality, from the authority of meanings the parents have assigned to behavior, even from the parents' religion and their other group identities. Older children do not merely feel the effects of social change; increasingly they are seen, and they see themselves, as the agents of change. (For illustration, consider the activism of the "flower children" of the 1960s.) The threat to a parent in these circumstances goes not to some abstract "cultural preservation," but to the parent's own identity, as invested in the child.

The idea of "teenage rebellion" became a cliché because it expresses a widespread pattern of beliefs and behavior. But surely many teenagers see their rejection of restrictions on their freedom (by parents, schools, or the state) as a principled resistance to authority that they see as illegitimate. A few centuries ago—before the invention of adolescence, before child labor laws, before compulsory education laws—fourteen-year-old girls were often marrying, and fourteen-year-old boys were in the workforce or the army.⁹⁷ Today these same young people are placed behind a set of institutional fences, keeping them out of adult activities for which they think they have as much capacity as do many of the adults they see around them. They know the fences are not of their own making. We adults are successful in limiting teenagers' work activity and in forbidding them to marry. As I shall recount, we are less successful in limiting the movies they see or the sexual behavior they initiate.

Today's American children begin to learn about the multiplicity of life-worlds long before they reach adolescence. "By the time a child is six, he has spent more time watching television than he will spend in his entire life talking with his father."⁹⁸ In adolescence, just when some sort of resistance to authority may seem attractive as a way to reach out for adulthood, these children are bombarded from all sides with streams of messages telling them what to believe, how to behave, and indeed, proposing identities they should want for themselves.⁹⁹

96. *Id.* at 66.

97. On the late appearance of the idea of adolescence, see John Demos & Virginia Demos, *Adolescence in Historical Perspective*, 31 J. MARRIAGE & FAM. 632 (1969). On the origins of the idea of childhood in Renaissance concerns about education for adulthood, see PHILIPPE ARIÈS, *CENTURIES OF CHILDHOOD* 411-13 (1962).

98. Robert L. Hampel, *A Generation in Crisis?*, 127 DAEDALUS 67, 74 (1998).

99. One effect of the pluralization of life-worlds is that a child can imagine a multiplicity of possible futures. See BERGER, *supra* note 92, at 69-77. Identity itself includes aspirations, for "the Self as protagonist is always, as it were, looking to the future." JEROME S. BRUNER, *ACTS OF MEANING* 121 (1990). In other words, who we are depends in large measure upon who we aspire to be. Even a young child's identity may be brought into focus by the question, "What do you plan to do (or be) when you grow up?" The two wordings are functionally interchangeable, and that in itself is telling. Imagining a future occupation means imagining a future identity, see BERGER, *supra* note 92, at 74-77, and may even affect the sense of present identity. A four-year-old can self-identify as a firefighter-in-the-

The discussion that follows considers several arenas outside the home where American children receive potentially identity-shaping messages: (1) schools; (2) youth culture and the mass media; and (3) urban poverty. Although we shall look at these sources of acculturation separately, their messages continually interact with each other and with the messages children receive at home. Not surprisingly, cultural conflict is found in all three contexts, with the contending parties seeking, often in vain, to use the power of regulatory law to control young people's acculturation.

B. Schools and Socialization

American public schools have occupied a central place in cultural conflict since their earliest days, when Protestants and Catholics warred, sometimes literally, over the religious content of the schools' instruction. The "common school," as the American public school was called, has been expected from the beginning to inculcate common values.¹⁰⁰ For one social group after another, that expectation has translated into a desire, and often a legislative program, to make the public schools express the group's moral values as the true national values. When Our group wins a battle in the schools, we see ourselves as capturing part of a huge expressive apparatus that we can point toward a dual purpose. First, we expect the schools to acculturate children to Our authoritative meanings. Such an optimistic view of the schools' socializing power, I shall suggest, is exaggerated.

making. Given the relative openness of modern society, most such plans, even of older children or adults, remain indefinitely subject to revision.

By the time she is in high school a child may see herself as following a plan toward a particular career or field of study. This plan, once formulated even in general terms, can become a generative part of her identity. Such a plan, taken seriously, not only helps to motivate and organize her actions (notably schooling or other modes of career preparation), but also channels much of her raw experience into categories of meaning shaped around the plan. She may ask, "Does this experience (or transaction or event) advance me toward the next goal, or does it set me back?" More broadly, a life plan offers a teenager a sense of order, and increases her understanding that her choices and actions have consequences. (On the importance of ambitions aligned with life plans, see BARBARA L. SCHNEIDER & DAVID STEVENSON, *THE AMBITIOUS GENERATION: AMERICA'S TEENAGERS, MOTIVATED BUT DIRECTIONLESS* 6-9, 84-87, 106-10 (1999).) Most high school students say that they aspire to one or another occupation, which is often a high-prestige career, but a majority do not match their aspirations with a life plan. These students (called drifters and dreamers in one study) may know that they need higher education, but they either overestimate or underestimate how much education the careers require. *See id.* at 8-9 *passim*. This is one area in which some parents do play significant roles in guiding children, but guidance is abundantly available outside family boundaries.

100. *See, e.g.*, RAY ALLEN BILLINGTON, *THE PROTESTANT CRUSADE, 1840-1860* (2d ed. 1952); WALTER FEINBERG, *COMMON SCHOOLS / UNCOMMON IDENTITIES: NATIONAL UNITY AND CULTURAL DIFFERENCE* 2 (1998); CHARLES LESLIE GLENN, JR., *THE MYTH OF THE COMMON SCHOOL* (1988); DIANE RAVITCH, *THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973* (1974); ROSEMARY C. SALOMONE, *VISIONS OF SCHOOLING: CONSCIENCE, COMMUNITY, AND COMMON EDUCATION* 10-41 (2000).

In the present discussion I am concerned with adolescents. The Supreme Court has endorsed, in general terms, the mission of value inculcation, even in middle schools and high schools. *See, e.g.*, *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982).

Second, we hope to capture the schools in order to reassure ourselves of Our group's status dominance as the true Americans.

The practitioners of cultural politics have discovered one after another vote-getting issue in the curricula of the nation's public schools. At the heart of the politicians' pitch is a promise to deploy law in a perceived struggle for control over Our children's beliefs and identities. In school board elections and controversies involving board members and other local officials, the themes of morality and authority recur, interwoven with group status conflicts. All the major categories of the Social Issues Agenda that originated in the 1980s¹⁰¹ are still with us and represented in this branch of cultural politics: religion; gender, family, and sexuality; race and ethnicity. We consider these issues in turn. In none of these areas has regulatory law significantly influenced the socialization of adolescents.

1. Religion

Today, constitutional conflict over the relationship of religion to schooling extends over a broad range, from public school curricula to public aid for private religious schools. The modern beginnings were the Supreme Court's 1960s decisions holding that official prayers or other religious observances in public school classrooms violated the Establishment Clause.¹⁰² Those decisions gave a constitutional dimension to the sociologists' view that in modern society, religious truth is a matter of individual choice.¹⁰³ Partly because "ritual is prior to dogma,"¹⁰⁴ the regulatory law rejected by the Court (daily repetition of prayer) probably would have an acculturating influence, one stronger for small children than for adolescents.¹⁰⁵ Yet, the constitutional ban on official school prayer has moved on

101. For a discussion of the origins of this agenda as a response to rapid social changes associated with "the Sixties," see KARST, *LAW'S PROMISE*, *supra* note 27, at 1-15.

102. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (Bible reading); *Engel v. Vitale*, 370 U.S. 421 (1962) (prayer).

103. See BERGER, *supra* note 92, at 81. The decisions drew criticism from some academic quarters, but their initial effect in politics was to recruit reinforcements for the southern assault on the Court following *Brown v. Board of Education*. 347 U.S. 483 (1954), 349 U.S. 294 (1955). On hostility to the classroom religion cases, including widespread southern defiance, see LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 186-90, 358-63 (2000).

104. ERNST CASSIRER, *AN ESSAY ON MAN* 79 (1944) (referring to ritual's priority "both in a historical and in a psychological sense").

105. A panel of the Ninth Circuit recently held that teacher-led recitation in a public school class of the current version of the Pledge of Allegiance, containing the phrase "one nation under God," is an official endorsement of religion and thus a violation of the Establishment Clause. *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002) (2-1 decision), *reh'g denied* 321 F.3d 772 (9th Cir. 2003). If and when this decision reaches the Supreme Court, undoubtedly it will be reversed. Even Justice Brennan was on record as approving official use of the Pledge in this form, on the theory that it represents "ceremonial deism," unlikely to give much aid to religion. *Sch. Dist. of Abington Township*, 374 U.S. at 303-04 (Brennan, J., concurring).

My prediction is not based on constitutional principle. For a persuasive argument that principle is all on the side of the complaining parent, see Steven G. Gey, "Under God," *the Pledge of Allegiance*,

from the classroom to such adolescent activities as football games and graduation ceremonies.¹⁰⁶ In these opinions, the main concern has not been acculturation, but exclusion.

In the meanwhile, religious groups have succeeded famously in obtaining both federal legislation and judicial interpretations of the First Amendment that require school fora like newspapers and after-school classrooms to give religious speech the same access as other speech.¹⁰⁷ These opportunities weaken the charge that the public schools are the home of a "secular establishment."¹⁰⁸ So, the old line that "God has been kicked out" of the schools has largely lost its force—except for advocates who seek not just an opportunity for individual students' religious expression, but official school endorsement of religion for the whole student body. These advocates hope the authority of the school will assist in acculturating children to the predominantly Christian religious beliefs and meanings embodied in practices such as classroom prayer.¹⁰⁹ At the secondary level as well as the primary level, using the school's cultural authority in this manner seems unlikely to win the support of a majority of the Supreme Court.¹¹⁰ But, as we shall see, that very prospect may help to keep a political constituency mobilized. This is group status politics pure and simple,¹¹¹ and it is often deployed by political operatives whose fees are paid by interests associated more closely with Mammon than with God.¹¹²

and Other Constitutional Trivia, N.C. L. REV. (forthcoming 2003). In this case, however, I expect the courts to rise above principle, responding to the outraged public sentiment that was reflected in a congressional resolution that passed (99-0) in the Senate and (401-5) in the House of Representatives. S. Res. 2690, 107th Cong. (2002) (enacted).

Douglas Peterson, an elementary school teacher in San José, California, tells me that in his district many students of Asian descent, raised in Buddhist families, feel left out by the official assertion that ours is a nation under God. It will be interesting to see how the Supreme Court deals with such a datum, given the emphasis on the "outsider's" point of view in the Court's opinion in *Lee v. Weisman*, 505 U.S. 577 (1992).

106. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (prayer at football game); *Lee v. Weisman*, 505 U.S. 577 (1992) (prayer at graduation exercise).

107. *E.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (after-school access to classroom, including worship services); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (funding for religious newspaper); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (after-school access to classroom); Equal Access Act of 1984, 20 U.S.C.A. § 4071 (2000), upheld in *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (secondary school public fora).

108. This view prevailed in one federal district court, but the court of appeals promptly reversed that decision. *Smith v. Bd. of Sch. Comm'rs*, 827 F.2d 684 (11th Cir. 1987), *rev'g* 655 F. Supp. 939 (S.D. Ala. 1987).

109. For an example, see the "Family Issues Voting Index," a report card on legislators, quoted in ERLING JORSTAD, *THE POLITICS OF MORALISM: THE NEW CHRISTIAN RIGHT IN AMERICAN LIFE* 83 (1981).

110. As mentioned earlier, such use of school authority has been held to violate the Establishment Clause. *See supra* text accompanying note 102.

111. *See infra* text following note 247.

112. Mammon refers to "material wealth or possessions." WEBSTER'S NEW COLLEGIATE DICTIONARY 697 (1973). According to St. Matthew, Jesus said, "ye cannot serve God and mammon." *Matthew* 6:24 (King James). I leave it to the politicians to explain their way out of this injunction.

School curricula provide a similar focus for cultural politics. Up until now, however, the courts have held invalid legislative attempts to ban the teaching of evolution or to prescribe "balanced treatment" for the version of the Book of Genesis, now rebaptized as Creation Science.¹¹³ Nor have the courts recognized a parent's constitutional right to have children "opt out" of an assigned reading on the ground that it is contrary to the parent's (and the child's) religion.¹¹⁴ School officials generally have broad discretion in defining programs of instruction, and if parents want to opt out of a curriculum that they perceive to be hostile to their religion, their chief option is to remove their children from public school, and either give them home instruction or place them in private school.¹¹⁵ The choice to remove children from public school, made today by significant numbers of fundamentalist or evangelical Protestants, echoes the experience of Roman Catholics long ago. The largest waves of growth of Catholic schools were motivated by the public schools' program of Protestant indoctrination, including the distribution to children of the King James Bible. This indoctrination was no accident; it was designed to "unify" the national culture by subordinating the traditions of Irish and German Catholic immigrants to the authority of "American" (that is, Anglo-Protestant) cultural forms.¹¹⁶ In short, one primary mission of the common school was cultural hegemony, and the religious side of that regulatory mission would violate today's constitutional norms.

Today, parents who wish to withdraw their children from public school face a formidable obstacle: the high cost of tuition. Until recently, the Supreme Court held that the Establishment Clause forbade even indirect transfers of public funds to religious institutions.¹¹⁷ In the last two decades, however, the Court has upheld a number of legislative schemes for supporting private schools, including religious schools.¹¹⁸ In the current season, the liveliest issue of religious politics is the use of vouchers. In such a system the state pays, up to a certain amount, for a child's education

113. *Edwards v. Aguillard*, 482 U.S. 578 (1987) ("balanced treatment" for Creation Science); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (prohibition on teaching evolution à la Darwin).

114. See *infra* sources cited in notes 122-23.

115. The parent's constitutional right to send the child to a private school, rather than the public school demanded by state law, was recognized in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *Wisconsin v. Yoder*, 406 U.S. 205 (1972), can be seen as a constitutional recognition of one type of home-schooling option.

116. See *supra* sources cited in note 100. For a broad constitutional critique of the use of public schools to inculcate values and beliefs, see Tyll van Geer, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197 (1983). As van Geer points out, *id.* at 262-89, and as I argue in this article, there is room for considerable doubt as to whether the schools succeed in their efforts to inculcate.

117. See, e.g., *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973). *Nyquist* was the last major decision to strike down indirect government aid to religious schools.

118. Through the year 2000, the culminating decisions were *Agostini v. Felton*, 521 U.S. 203 (1997), and *Mitchell v. Helms*, 530 U.S. 793 (2000).

at a school chosen by the child's parents. The plans vary. Some limit the use of vouchers to public schools and some extend their use to private schools. Some offer vouchers only to economically disadvantaged parents, and some are open to all families. The voters of California defeated one voucher measure in 2000,¹¹⁹ but the proponents of vouchers have begun to win some of these political battles.¹²⁰ If and when the schemes are adopted, the Supreme Court has already begun a process that will uphold at least some of them.¹²¹ This development may represent a triumph for those who want their children to receive religious instruction on a daily basis, but the whole voucher movement bespeaks the failure of regulatory law to control the socialization of public school children.

2. Gender Roles, Family, and Sexuality

For some parents, one objectionable feature of a secularized public school curriculum is its treatment of subjects involving marriage and family, gender roles, and sexuality. In connection with a leading modern case,¹²² a father wrote to a newspaper that he did not want his first grade daughter exposed to a textbook that showed boys cooking and girls reading. He objected because the book might suggest "that there is no God-given roles for the different sexes."¹²³ The specific issue of working women

119. See Martha Groves, *Decision 2000 Propositions: Vouchers Lose*, L.A. TIMES, Nov. 8, 2000, at A3.

120. On the variety and recent history of voucher proposals, see SALOMONE, *supra* note 100, at 247-50. On the policy debate, see *id.* at 250-56.

121. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). This path for the Court was foreseen by a number of writers. See, e.g., Jarod Bona, *Recent Legislation: School Vouchers*, 37 HARV. J. LEGIS. 607 (2000); Allison M. Olczak, *Scaling the Wall Between Church and State: An Analysis of the Constitutionality of School Vouchers*, 89 KY. L.J. 507 (2000).

For a nuanced view supporting the constitutionality of some, but not all, school choice programs, see Steven H. Shiffrin, *The First Amendment and the Socialization of Children: Compulsory Public Education and Vouchers*, 11 CORNELL J.L. & PUB. POL'Y 503 (2002). Shiffrin argues for a constitutional presumption against vouchers for high school education—and, indeed, for the state's right to compel public schooling of high school children. Along the way, he thoughtfully explores the purposes of democratic public education, *id.* at 513-25, and the different educational needs of adolescent and pre-adolescent children. *Id.* at 507-10, 523-25, 529-31.

122. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987). The case is discussed in Nomi Stolzenberg, "He Drew a Circle That Shut Me Out": *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993); see also SALOMONE, *supra* note 100, at 21-26, 208-15.

Sex education is, in the view of a great many public officials, a special case. Some states, by statute, give parents an unspecified right to "direct" their children's education, and a large number of states or school districts explicitly allow parents to have their children opt out of sex education classes. A statutory alternative is to require notice to parents about sex education materials. See SALOMONE, *supra* note 100, at 71-73, 120-21.

123. Letter of Robert Mozert (1983), quoted in STEPHEN BATES, *BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE OF OUR CLASSROOMS* 81 (1993). See also Nadine Strossen, "Secular Humanism" and "Scientific Creationism": *Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom*, 47 OHIO ST. L.J. 333 (1986).

is bound to fade away. With some three-quarters of married women in the paid work force,¹²⁴ most school children will know before they get to the first grade that girls need not expect to live entirely domestic lives. As the daughter grows up, role models of women who are distinctly non-domestic will surround her, in her own acquaintances and in the communications media. She can scarcely avoid the realization that she, too, has a range of choice about her life and her future multiple identities.

If the schools' assumed imprint on family-related meanings is a minor source of cultural conflict, their assumed imprint on sexual morality has touched nerves all across the land. Sex education can begin in elementary schools, but sex education for adolescents involves pupils who are in a position to put what they learn into practice. The subject of authority is central to this discussion of moral education. A religious tradition as old as St. Augustine of Hippo regards sex as subversive, a wildness that must be broken to harness, if not by the individual's own self-control, then by external authority.¹²⁵ In today's post-Augustinian era, public secondary education often involves such elements as tolerance of homosexual orientation,¹²⁶ or "comprehensive" sex education.¹²⁷ Many parents worry that these offerings are an unwise promotion of teenage sex or even a detailed instruction in the techniques of sin.¹²⁸ However, teenage pregnancy, which was a focus for national politics in the 1970s and 1980s,¹²⁹ declined markedly in the 1990s.¹³⁰ The implications of this datum for schooling differ for different

On the teaching of sex equality as an element of education for citizenship, see Linda C. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 *FORDHAM L. REV.* 1617 (2001). Specifically on children from fundamentalist families, see *id.* at 1642-53.

124. See ROBERT MAX JACKSON, *DESTINED FOR EQUALITY: THE INEVITABLE RISE OF WOMEN'S STATUS* 209 (1998). 74% of mothers with children age six to thirteen are working outside the home, and 55% of working women provide half or more of their families' earnings. News Release, Children's Defense Fund, (Mar. 24, 1999) (on file with author).

125. See ELAINE PAGELS, *ADAM, EVE, AND THE SERPENT* 98-150 (1988).

126. On the flap in New York City over the book, *Heather Has Two Mommies*, see Josh Barbanell, *Under 'Rainbow' a War: When Politics, Morals and Learning Mix*, *N.Y. TIMES*, Dec. 27, 1992, at 34. Efforts to oust gay men and lesbians from public school teaching have sought to play on fears of predation on children, but have also raised the question of teachers as sexual role models. The latter claim parallels some claims about the effects of "homosexual parenting," discussed *supra* in the text accompanying notes 7-42. On the 1970s Florida campaign to fire homosexual teachers, sponsored by Anita Bryant's group, Save Our Children, Inc., and on the "Briggs Amendment," a failed 1978 California ballot measure that would have done the same, see JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 346-47 (1988); ESKRIDGE, *supra* note 8, at 130-32, 226.

127. This term is applied to sex education in a context of human values, including family life, sexual restraint, the risks of pregnancy, and refusal skills. See DAVID G. MYERS, *THE AMERICAN PARADOX: SPIRITUAL HUNGER IN AN AGE OF PLENTY* 249-56 (2000).

128. *Id.*

129. See KRISTIN LUKER, *DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY* (1996).

130. See Alan Guttmacher Institute, *Why Is Teenage Pregnancy Declining? The Roles of Abstinence, Sexual Activity and Contraceptive Use* (1999), available at http://www.guttmacher.org/pubs/or_teen_preg_decline.html (last visited Mar. 19, 2003).

observers, and the division tracks a more general cultural divide on the subject of sexuality.¹³¹

School board elections can become heated, with sex education at the emotional center.¹³² Should the school boards abandon sex education in favor of inculcating abstinence, or should they require schools to redouble their efforts to instruct teenagers on how to avoid pregnancy if they are sexually active? This is one conflict that seems to cry out for a middle way.¹³³ After all, few observers today view a pregnant fifteen-year-old as a success story. There is no logical inconsistency if a school's sex education class teaches abstinence as a strongly preferred path for at least younger teenagers, while recognizing that some students will not choose that path, and therefore provides information about birth control and safe sex, as well.¹³⁴ But, as we shall see, compromise on a middle way is exactly what political operatives do not want.¹³⁵

131. See, e.g., MYERS, *supra* note 127, at 250.

132. An example is the experience in Vista, California, where the Christian Voters League succeeded in electing three members of a five-member school board. After the new majority's efforts to bring creationism into the biology curriculum, and an abstinence-only program of sex education, opponents organized a recall movement, which ousted two of the religious conservatives. The story is summarized in Michael Granberry, *Recall Targets Vista Board's Creationists*, L.A. TIMES, Feb. 14, 1994, at A3; Seth Mydans, *A City Pulls Its School Board Back to the Center*, N.Y. TIMES, Nov. 28, 1994, at A12; Tony Perry, *Christian Bloc Ousted from Board*, L.A. TIMES, Nov. 11, 1994, at A3.

The Vista episode was one phase of a larger movement of Christian fundamentalists in San Diego County, a movement that in 1991 elected twenty-four members to sixteen different local school boards. Jonathan Gaw, *Christian Fundamentalists Make Influence Felt on School Boards; Politics*, L.A. TIMES, Mar. 23, 1992, at B1.

133. See MYERS, *supra* note 127, at 249-56.

134. For a thoughtful discussion of "the need for multi-pronged approaches to solve this extremely complicated, multifaceted, and sometimes socially ingrained problem," including both encouragement to defer sexual activity and access to contraception, all in the context of broad-based social services, see Claire Brindis, *Antecedents and Consequences: The Need for Diverse Strategies in Adolescent Pregnancy Prevention*, in THE POLITICS OF PREGNANCY: ADOLESCENT SEXUALITY AND PUBLIC POLICY 257, 267-79 (Annette Lawson & Deborah L. Rhode eds., 1993) [hereinafter THE POLITICS OF PREGNANCY].

Obviously, preventing pregnancy is not the only reason for urging younger teens to be abstinent. The spread of sexually transmitted diseases among teens is increasing, and it is well known that some viral diseases can be transmitted even when condoms are used. For a capsule version of the figures, see MYERS, *supra* note 127, at 249-56 and accompanying notes. Myers, a social psychologist, is a persuasive advocate of the "middle way."

135. On the recent contest in Congress over the use of conditional federal funding as a way to encourage abstinence-only teaching that forbids instruction in birth control, see Megan Garvey & Jonathan Peterson, *Frustration Voiced Over "Just Say No" Sex Education Plan*, L.A. TIMES, Mar. 3, 2002, at A24. No discussion of public issues concerning teenage pregnancy in America can ignore racial issues endemic to such discussion. For some comfortable White moralists, the term "teenage pregnancy" is apt to evoke images of unwed Black girls living on welfare. See generally QUADAGNO, *supra* note 79. Because poverty is a critical contributing factor in the pregnancy of Black teenage girls, I reserve this subject until we get to a fuller discussion of poverty as an influence on the socialization of children. See *infra* text following note 201.

3. *Meanings of Race and Ethnicity*

In recent times, the common school's goal of assimilating children to a universal national set of cultural meanings has come under renewed challenge, not only for neglecting the cultures of some religious groups but also for ignoring or suppressing cultural forms of African Americans and of children with primary languages other than English. These challenges bespeak concerns about the socialization of all children in public schools, but especially minority children. One widespread response has been the adoption of "multicultural" education.¹³⁶ In its most typical form, such a program aims to do no more than acquaint all students with the diverse sources that contribute to American culture. It is hard to see how anyone can reasonably object to this goal, and, when it is explained clearly by school authorities, few objections are heard.

A more far-reaching response is to promote schools whose curricula focus on the needs of African American children in order to validate their own senses of cultural identity. Attendance at such a school has, from the beginning, been entirely at the option of an individual student's parents. With no more than a glance back at the segregation of the Jim Crow era, some early proposals advocated that certain schools be entirely comprised of African American males.¹³⁷ Court decisions¹³⁸ and education agency rulings¹³⁹ have opened up these schools to female students, and (at least in form) to White students as well. The curricula in some schools are Afrocentric in root and branch; in others, they are less concentrated. But, in either case, surely there is no constitutional objection based on the curriculum, provided that the school population is not officially segregated and attendance remains voluntary. Although the schools have been sufficiently popular with parents for some of them to be oversubscribed, the schools' total student population remains small. In the Black community, there is no unanimity supporting this experiment.¹⁴⁰ What is clear is a strong and

136. For a thorough and thought-provoking examination of "multicultural" education in its various incarnations, see FEINBERG, *supra* note 100, at 233.

137. See Kevin Brown, *Do African-Americans Need Immersion Schools? The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813 (1993). Four decades ago I counted myself among those who supported the desegregation of public schools and hoped that mixing children of different races and ethnicities in our schools would lead to cross-cultural friendships, and would help to acculturate all children to the virtues and values of social groups from opposite sides of cultural borders. Seen in this perspective, the goal of the integrated school was intercultural appreciation, not the cultural conformity that the common school of an earlier era attempted to achieve.

138. See, e.g., *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991) (enjoining an Afrocentric academy from excluding female students).

139. See Michael John Weber, Note, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099, 1121 n.144 (1993).

140. For example, the National Association for the Advancement of Colored People, long a leading proponent of school desegregation, has not been won over to single race schools. See, e.g., Mark Walsh, *Under Court Order, Girls Admitted to Schools for Black Boys in Detroit*, EDUC. WK.,

widely shared dissatisfaction with Black children's education in public schools, one result of which has been a substantial move by parents to place children in religious schools (and strong support among non-Whites for a school voucher program).¹⁴¹ To date, there is no regulatory law in place mandating either an all-Black student body or an Afrocentric curriculum.

Another issue commonly debated is whether public schools may institute bilingual education programs to accommodate the needs of non-English speaking students. Bilingual education (for example, teaching Latina/o children in Spanish in the early grades) can be supported as a way to assure that children receive effective instruction in mathematics and basic reading skills while they are making the transition to courses taught in English. It is also a way to accommodate parents who request help in raising their children to be fully bicultural.¹⁴² Although the educational results are mixed, these purposes are entirely legitimate so long as parents consent. What is not legitimate, however, and what dissenting parents should be entitled to resist on constitutional grounds, is mandatory and prolonged "immersion" instruction in the parents' native language for the purpose of holding the children within a cultural group.¹⁴³ In any case, overwhelming majorities of immigrant parents want their children to learn the skills that Marcelo Suárez-Orozco calls "instrumental"; these include "communication [especially in English], higher-order symbolic and technical skills as well as habits of work, and interpersonal talents that are common in any cosmopolitan setting."¹⁴⁴ The parents may not know about the social science data supporting the assumption that mastery of English is

Sept. 4, 1991, at 24. Another opponent is Dr. Kenneth B. Clark, the social psychologist whose studies were before the Supreme Court in the first school desegregation cases. See Mireya Navarro, *Civil Liberties Union Likens Minority-School Plan to Segregation*, N.Y. TIMES, Jan. 13, 1991, at A20. Charles Willie, a Harvard professor of education (and, like Dr. Clark, African American), rejects the proposal absolutely: "[n]o school that is not integrated can provide a quality education." Quoted in Marjorie Coeyman, *Black Pride Drives This Public School*, CHRISTIAN SCI. MONITOR, Oct. 6, 1998, at B6. See generally Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 HARV. L. REV. 1741 (1992).

141. See SALOMONE, *supra* note 100, at 32, 250. James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2092-2102 (2002), suggest that a turn to vouchers probably will produce an increase in school integration, but that the increase is likely to be marginal. See also Brown, *supra* note 137.

142. See Rachel F. Moran, *The Transnational School*, 9 U.C. DAVIS J. INT'L L. & POL'Y (forthcoming 2003).

143. Some relevant analogies are *Loving v. Virginia*, 388 U.S. 1 (1967) and *Palmore v. Sidoti*, 466 U.S. 429 (1984). But all the decisions comprising the modern constitutional rejection of Jim Crow could be added to the list, beginning with *Brown v. Board of Education*, 349 U.S. 294 (1955).

Parental consent is the constitutional key. For example, "immersion" schools in Hawaii, taught in the Hawaiian language, are not mandatory; they serve children whose parents have requested this form of education. In general terms the state constitution requires the state to "promote the study of Hawaiian culture, history and language." HAW. CONST. art. X, § 4.

144. Marcelo M. Suárez-Orozco, *Everything You Ever Wanted to Know About Assimilation But Were Afraid to Ask*, 129 DAEDALUS 20 (Fall 2000).

essential to their children's futures in the work force,¹⁴⁵ but they can see what is happening in their communities. Indeed, one strikingly successful elementary school in the Los Angeles area obtained the enthusiastic support of working-class Latina/o parents for a reading program conducted entirely in English. The principal summarized the attitude of the parents in these terms: "You teach them English; we'll teach them Spanish."¹⁴⁶ In the political arena, concerns about group status have played a central role, with a politics of respect and recognition ranged against a politics of cultural conformity.¹⁴⁷ When a 1998 California initiative measure (Proposition 227) proposed a sweeping ban on bilingual education in public schools, initial proponents of the measure included many Latina/o parents who were disenchanted with the bilingual education their children were receiving. Before the election, opinion polls showed more than 60% support among Latina/o voters, a number of whom expressed views like those discussed above.¹⁴⁸ Most Latina/o political leaders and prominent figures in the Spanish language media were strong opponents. In the support of non-Latinas/os for the proposition, these Latina/o leaders found feelings of resentment that They (that is, Latina/o immigrants and their progeny) were "taking over." The speculation that group status played a role on the "Yes" side was given a boost when Governor Pete Wilson, the most prominent supporter of an anti-immigrant initiative proposition that had been adopted by the voters a few years earlier, weighed in with his support for banning bilingual education.¹⁴⁹

145. When an immigrant group retains its native language into succeeding generations, that datum alone is a good predictor of lower average incomes and group wealth. "Differences in earnings among immigrant groups are probably less a product of place of origin than of educational level." Kevin F. McCarthy & Georges Vernez, RAND Corp., *Immigration in a Changing Economy: California's Experience—Questions and Answers* 14, available at <http://www.rand.org/publications/MR/MR854.1/MR854.1.chap4.pdf> (last visited Mar. 19, 2003).

146. This is the Bennett-Kew Elementary School in Inglewood, California, whose pupils are about half Latina/o and half African American, with one percent "other." The school has been performing in the 80th percentile of California elementary schools in reading. See Duke Helfand, *Inglewood Writes the Book on Success*, L.A. TIMES, Apr. 30, 2000, at A1. I heard the principal speak these words at a colloquium at UCLA School of Law.

147. This is not a new development. See Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CALIF. L. REV. 321 (1987).

148. Bettina Boxall, *California Elections: Proposition 227 Popularity Extends Past Racial Lines*, L.A. TIMES, May 29, 1998, at A3; Maria L. La Ganga, *Bilingual Ed Initiative Wins Easily*, L.A. TIMES, June 3, 1998, at A1. In the election itself, approximately a 2-1 majority of Latina/o voters in Orange County opposed the measure, after a major anti-227 telephone campaign that reached nearly every registered Latina/o voter. Nancy Cleeland, *O.C.'s Latino Precincts Voted Strongly Against Proposition 227*, L.A. TIMES, June 5, 1998, at B1. The proposition, passed by a 61%-39% vote, required all public school instruction to be in English, but allowed a waiver if parents could show that a child would learn English faster in an alternative program.

149. See Carl Ingram, *Wilson Backs Ballot Measure to Ban Bilingual Education*, L.A. TIMES, May 19, 1998, at A1. The earlier initiative was Proposition 187 (1995), which would have excluded immigrants from public education, public health services, and other benefits. The proposition was held invalid by a federal district court in 1998, and Wilson's successor, Governor Gray Davis, decided not to

It is fair to speculate that at least some supporters of the 1998 proposition sought an end to bilingual education in the interest of a forcible assimilation of Latina/o children to a national culture, in the heavy-handed manner of the Americanization movement of the 1920s.¹⁵⁰ Whether the subject be African American schools or bilingual education, it is hard to see any legitimate objection to a regime that emphasizes parental choice. But only the dreamiest optimist could believe that either of these programs can counteract the devastating effects of poverty on the socialization of poor minority children. Further discussion of race and schooling needs to be deferred until we explicitly address the effects of poverty on the lives of our children.¹⁵¹

4. *Afterword on the Schools*

If the socialization that goes on in our schools often fails to live up to the expectations of those who would use law to produce cultural orthodoxy by regulating curricula, counseling, or use of school facilities, one reason for this failure is that law-as-command confronts the fragmentation of the power to command. For any school, the lawgivers are numerous and diverse: legislators; judges; the state board of education; the local school board; the school's administrators; teachers. With the possible exception of judges, all these policymakers will likely find it necessary to consult the views of parents, and even students, about some of the issues they must decide. Beyond the usual gap between the law's formal demands and its application by the designated authorities (here, school administrators) lies a deeper chasm separating official school policies from the beliefs and behavior of children. We consider some aspects of that chasm in the next section.

C. *Youth Culture and the Mass Media*

In adolescence, children can be expected to have a heightened awareness of the need to make choices about self-definition and about the presentation of the self to others.¹⁵² Teenagers typically experience

appeal that decision. *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995), *reaffirmed*, 997 F. Supp. 1244 (C.D. Cal. 1997).

150. For a short description of the Americanization movement, with accompanying citations, see Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 311-15 (1986). Most of the governmental elements of that movement would violate today's constitutional norms. *Id.*

151. See *infra* text following note 201.

152. The classic source for the following discussion is ERIK H. ERIKSON, *IDENTITY, YOUTH, AND CRISIS* (1968). On adolescence as a crucial time in the formation of morality and other values, see LAURENCE D. STEINBERG, *ADOLESCENCE* 305-14 (6th ed. 2002). I am grateful to Elizabeth Scott, whom I have cited *supra* note 90 and *infra* note 210, and whose writings have directed me to the Sternberg book and to the source in the following note. Her most recent paper, with Laurence D.

self-doubt in the literal sense of uncertainty about their identities. Which identities should they want, and what should they do to achieve them? The question "Who am I?" readily converts into the question "Who would They like me to be?" in which They are often neither parents nor school authorities, but a "generalized other"¹⁵³ composed of other adolescents.¹⁵⁴ This reference group includes not only schoolmates and neighbors but, at least as important, a nationwide youth culture. The socialization process for today's youth prominently includes the messages of television, movies, videos, popular music, Internet chatter, and video games.¹⁵⁵ These media teach at least some children to expect and desire repeated bursts of stimulation by imagery that constantly shifts its focus; for some viewers, then, they can induce a state of mind that remains unreflective.¹⁵⁶ A short-term casualty may be academic achievement.¹⁵⁷ In the longer term, a habit of gravitation toward the superficial may hinder the reflection needed for forming a realistic life plan.¹⁵⁸ The good news here is that, because the communications media are global in scope, youth culture is unlikely to be narrow-minded. The not-so-good news is that, in contributing to a common youth culture, the media are performing much of the homogenizing, standardizing function once claimed for the common school.

In the discussions that follow, I emphasize three prominent styles of messages that the media are sending to children: consumerism, transgression, and sexuality. But I do not mean to suggest that the children are passive victims of media seduction. Teenagers are a market because they have resources of their own, and younger children can participate in the market through convincing their parents to expend resources. If a media message catches on, the reason is that the children are choosing to receive it. The children's choices, of course, are importantly limited by the materials presented in the media—materials that have been market-tested to discern children's presumed preferences. As we shall see, the mass media heighten children's awareness that they have some choices among identities. It is identity formation, after all, that lies at the heart of media influence over

Sternberg, is called *Blaming Youth* (unpublished, 2002), available at http://ssrn.com/abstract_id=332080 (last visited Mar. 20, 2003).

153. GEORGE HERBERT MEAD, *MIND, SELF AND SOCIETY FROM THE STANDPOINT OF A SOCIAL BEHAVIORALIST* 152-64, 253-60 (1934).

154. See Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEV. PSYCHOL. 608 (1979); Philip R. Costanzo & Marvin E. Shaw, *Conformity as a Function of Age Level*, 37 CHILD DEV. 967 (1966).

155. "Teen viewing [of television] averages at least two hours on school nights, and twice that on weekends. . . . [E]arly adolescents watch more than older adolescents, whose consumption of music, movies, and videos increases faster than their television viewing decreases." Hampel, *supra* note 98, at 74.

156. *Id.* at 78-79; John Condry, *Thief of Time, Unfaithful Servant: Television and the American Child*, 122 DAEDALUS 266 (1993).

157. Hampel, *supra* note 98, at 78-79.

158. See SCHNEIDER & STEVENSON, *supra* note 99, *passim*.

children's development. The messages of consumerism, of transgression, and of sex and sexuality all speak to identity. This is socialization, and it is powerful. And, as we shall see, these influences largely lie beyond the reach of regulatory law.

1. *Consumerism and Identity*

The mass media may be answerable for a great many ills, but their most pervasive social product, for viewers of all ages, is consumerism. Indeed, one writer suggests that the very term "youth culture" may be a euphemism for adult marketers who are seeking to "exploit youthful energy and rebellion" for commercial purposes.¹⁵⁹ In a great many homes the TV set is on almost all day. In my own experience, babes in arms learn to recognize advertising logos and start to pronounce brand names soon after they say their first words. Children's television programs are designed from the ground up as ways to market toys, clothes, and everything else a child can be conditioned to "need." Adolescents have money of their own to spend, and they are ready to spend it on adornments of the self: this year's music, this year's shoes. It is only the rare teenager who will commit violence to relieve another of his trendy shoes,¹⁶⁰ but the advertising agencies have sold Americans, and especially the children, the Master Bill of Goods: In consumer products lies self-presentation, a performance that passes for self-realization. Preteens and adolescents are the ideal audience for that message, for when they watch and listen, they bring their identity uncertainties with them.¹⁶¹ Adolescents do have a wide range of choice as to their identities. In the modern era, parents and school officials who would influence those choices must compete with the powerful voices of the communications media and a nationwide youth culture.

2. *Transgression and Identity*

The mass media seek to profit from the insecurity of adolescents by bombarding them with symbols of power through transgression against authority, order, and civility.¹⁶² Violence is one such symbol, and it is

159. STEPHANIE COONTZ, *THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA'S CHANGING FAMILIES* 15 (1997).

160. See, e.g., Shaul Kierstedt, *A Boy in Search of Respect Discovers How to Kill*, N.Y. TIMES, May 15, 1994, at A1 (discussing adolescent who committed robbery for money to buy Nikes).

161. Adolescence creates

uncertainty about the self. . . . Teens actively search . . . for the 'right' way to look and behave. Advertising geared to teens is typically action-oriented and depicts a group of 'in' teens using the product. Teens use products to express their identities, to explore the world and their new-found freedoms in it, and also to rebel against the authority of their parents and other socializing agents. Marketers often do their best to assist in this process.

MICHAEL R. SOLOMON, *CONSUMER BEHAVIOR: BUYING, HAVING, AND BEING* 472-73 (4th ed. 1999).

162. "In the mildly successful Alan Alda film *Sweet Liberty*, one character playfully lists three requisites for a motion picture directed at a youthful audience: the action must show (1) disrespect for

ubiquitous in the media: movies, television, recorded rap. In video games, "an adolescent boy's great escape,"¹⁶³ violent destruction is typically the object of the game. For all child viewers, media violence conveys images of a world that is dangerous, even hostile. For some children, the violence in the media may even contribute to aggressive behavior,¹⁶⁴ and, once again, identity anxiety appears to play a significant role. For example, in one study, when conflicts among ninth-graders turned to violence, typically the triggering cause was the perception of a need to maintain a social identity, to perform according to the perceived demands of a social role.¹⁶⁵

Teenage boys are big spenders, and one film critic notes that the industry's pandering to this market for transgression affects even movies for adults or, as the critic puts it, "what should be an adult medium" is "almost stridently one-dimensional, its gotcha sensibility focused obsessively on the kind of scatological, sexual and bodily function material that have fascinated kids and pained adults for what seems like most of recorded time."¹⁶⁶ For the boy consumers, the transgression in these films is entirely vicarious. Watching the film, they can feel they are asserting themselves and yet remain safe from retributions that might greet similar behavior in the world outside the theater. And paining adults, or, more accurately, impressing one's peers by seeming to pain adults, is the point. Expletives, once successfully banned from the airwaves,¹⁶⁷ are now marketed to teenagers on radio and in recordings with great success,¹⁶⁸ precisely because they seem to transgress against the civilities the children associate with adult authority.¹⁶⁹ This is a sales strategy for a product whose principal consumer is an insecure teenage male who wants his peers to see that he is

authority, (2) destruction of property, and (3) someone in the nude." MONROE E. PRICE, *SHATTERED MIRRORS: OUR SEARCH FOR IDENTITY AND COMMUNITY IN THE AIDS ERA* 49 (1989).

163. PATRICIA HERSCH, *A TRIBE APART: A JOURNEY INTO THE HEART OF AMERICAN ADOLESCENCE* 243 (1998).

164. There is considerable social-scientific basis for concluding that media violence can translate into aggressive, not necessarily violent, behavior. See George Comstock & Victor C. Strasburger, *Media Violence: Q and A*, 4 *ADOLESCENT MED.*: STATE OF THE ART REVIEWS 495 (1993).

165. See Calvin Morrill et al., *Telling Tales in School: Youth Culture and Conflict Narratives*, 34 *LAW & SOC'Y REV.* 521, 552 *passim* (2000).

166. Kenneth Turan, *A Very Scary Scenario*, L.A. TIMES, Aug. 27, 2000, at Cal. 7.

167. See *Fed. Communications Comm'n v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding ban on seven expletives on daytime radio).

168. On daytime radio, indecency is still banned in form, but "shock jocks" are disciplined only sporadically. In 2001, The Federal Communications Commission received almost five hundred complaints about broadcast indecency; only a tiny number produced action. *FCC Commissioner Calls for Review of Indecency Standard for Broadcasters*, 71 U.S. L. WK. 2345 (2002). Rap recordings featuring expletives have produced at least one millionaire, who goes by the name Eminem.

169. See John Blake, *Expletives (No Longer) Deleted*, ATLANTA J. & CONST., Aug. 22, 1998, at 1C. Blake cites James Twitchell, writer of a book on trash talk, to the effect that "the rise in profanity can be linked to money," specifically "the youth market, teens and young adults," who are interested in behavior "that would shock their parents."

"man enough" to enjoy it.¹⁷⁰ For them, the goal is a traditional sex role identity: the will-o-the-wisp of the ideal of masculinity.¹⁷¹

3. *Sexuality and Identity*

In the mass media, consumerism and transgression come together in the time-honored slogan: Sex sells. In the 1980s, prime-time television comedy was said to be deliberately bland, so that "large and passive audiences [would be] sitting ducks for the much shorter, much more sexually charged hard-sell commercials."¹⁷² Today, as the reader will have noticed, the prime-time programming has caught up with the advertising. The audience for television charged with sex also prominently includes children. Anyone who has seen those ads for designer jeans, showing eight-year-olds in sexy stances, will understand what the advertisers are selling, and why they think the ads will be effective. Music videos, too, are strongly oriented toward sex and designed to appeal to a teenage market.¹⁷³ It is fair to say that the mass media targeted to teenage children are saturated with sex.¹⁷⁴

Sex is particularly useful in selling to adolescents because they are just beginning to contend with its mysteries and to shape their responses to it. Not only are they acutely conscious of its capacity to bewilder; they may also be afraid they will not measure up. Advertisements for all manner of personal products, such as remedies for teenage skin blemishes, aim to capitalize on this fear. Similarly, a hip-hop lyric that demeans women may offer an insecure boy temporary relief from the same anxieties. Singing along, he may imagine a momentary control over some essence of the feminine, although he apprehends that, in the real world, power is just what he lacks.¹⁷⁵

170. I do not discount the appeal of the transgressive to teenage girls, plenty of whom seem to think it is cute, or sexy, or both. See Lorenza Muñoz & Lynn Smith, *Growing Up in a World Rated R*, L.A. TIMES, Oct. 4, 2000, at A1. Since the days of Madonna's early popularity, female symbolic transgression has gained in popularity: body piercing, tattoos, gothic makeup. Some of this transgression may be seen as liberating from sex role stereotyping, and thus centered on choices of identity. But the crucial market for hip-hop laden with expletives and glorification of violence consists of the White teenage boys who are the main buyers of the product. On the ways in which "black rage is in as a cultural style for white middle-class kids" (mainly boys, but some girls, too), see HERSCH, *supra* note 163, at 82-85. On teenagers as a market for trash talk, see Twitchell, quoted in Blake, *supra* note 169: "This audience is the great piston of American culture. . . . They don't just have money, but they also have the most time."

171. Karst, *Pursuit of Manhood*, *supra* note 47, at 503-08.

172. PRICE, *supra* note 162, at 23.

173. During the time when MTV featured such videos, an MTV executive said, "we don't shoot for the 14-year olds, we own them." Quoted in MYERS, *supra* note 127, at 218.

174. See Jane D. Brown et al., *Mass Media, Sex and Sexuality*, 4 ADOLESCENT MED.: STATE OF THE ART REVIEWS 511 (1993).

175. On the centrality of power to the quest for masculinity, see Karst, *Pursuit of Manhood*, *supra* note 47, at 503-08.

The mass media are important in cultural politics because they are seen to compete so powerfully with parents' and schools' voices on sex and sexuality. Typically, a local political movement to win control of the school board will be premised on the assumption that the school, in turn, will have a major influence on children's attitudes toward these subjects. But sexuality is perhaps the one area of teenage life that is least responsive to the school's assertion of cultural authority. The messages of the media, combined with the messages of children to each other, are sure to overwhelm the schools' messages on this subject.

Furthermore, the media's messages on sexual themes are, practically speaking, beyond the control of regulatory law. True enough, the Supreme Court regularly says that protection of children against "indecent" messages is a weighty governmental interest.¹⁷⁶ The First Amendment allows government to prevent broadcasters from carrying such messages, at least during the day and early evening,¹⁷⁷ and government can also authorize cable television operators to prohibit indecent programs.¹⁷⁸ Telephone indecency ("dial-a-porn") and indecent incoming mail can be placed under parental control,¹⁷⁹ and with the aid of devices such as the V-chip, so can television reception and (to a lesser degree) access to Internet indecency.¹⁸⁰ But not all parents will impose these limits. If one child in a social set lives in a household where the parents have not taken such preventive measures, a whole world of indecent communications opens before that child and all the others in that set.¹⁸¹ And any demand will find a willing media provider. I am, emphatically, not calling for bigger and better censorship efforts, but for recognition that the politician who promises regulatory law as a "solution" to media sexuality cannot deliver on the promise.

Blaming the mass media for modern teenagers' absorption with the theme of sexuality would be a gross exaggeration, as the children are quite

176. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266-67 (1988) (high school newspaper); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (student's speech to high school assembly); *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (public school libraries); *Ginsberg v. New York*, 390 U.S. 629 (1968) (watered down definition of "obscenity" for juveniles); and cases cited in notes 177-80 *infra*.

177. *Fed. Communications Comm'n v. Pacifica Found.*, 438 U.S. 726 (1978).

178. *Denver Area Educ. Telecomm. Consortium v. Fed. Communications Comm'n*, 518 U.S. 727 (1996).

179. *Sable Communications of Cal., Inc. v. Fed. Communications Comm'n*, 492 U.S. 115 (1989) (telephone indecency); *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728 (1970) (householder's control over incoming mail). But see *Denver Area*, 518 U.S. 727 (invalidating certain blocking requirements aimed at giving parents control over reception of cable TV).

180. The latter control depends on parental deployment of software designed to block indecent content, which is a losing game, given the ingenuity of indecency's purveyors and the even greater ingenuity of would-be teenage consumers. Government regulation of Internet indecency, thus far, has foundered on the difficulty of shielding children from access without preventing adults from gaining access. See *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997).

181. This point is made by Eugene Volokh in his critique of the *Reno* opinion, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 150-51 (1997).

capable of teaching each other. In 1977, the Supreme Court divided over the constitutionality of a New York law that prohibited the sale or distribution of contraceptives to minors under the age of sixteen.¹⁸² Most of the Justices thought the law would not be effective in discouraging sexual behavior, but today this question seems quaint. One major change in our society in the late twentieth century was a lowering of the age in which children engage in sexual activity. This change is documented in survey research data,¹⁸³ but its multifold meanings in the lives of children are brought to life in *A Tribe Apart*, Patricia Hersch's 1998 account of adolescent life in a largely White suburban community.¹⁸⁴ The book is based on Hersch's interviews with some sixty teenagers over a three-year period (1992-95), including regular and intensive interviewing of eight young people who became the book's protagonists. The theme of sex appears to be a constant presence in the minds of these teenagers. The confusion starts early, with thirteen-year-olds trying to imagine the experience of sex. Later, the veterans of sexual initiation, some of these only fourteen years old, compare notes.¹⁸⁵

Hersch recounts how, when an eighth grade girl proposes to repeat in a school assembly her civics class speech on the sexual harassment of middle school girls, her teacher tells her it is an inappropriate subject. It is evident from the context, including the outrage of girls in the class at the teacher's response, that the unfitness of the subject does not lie in any lack of relevance to the girls' daily lives.¹⁸⁶ After all, this is a school in which seventh and eighth grade girls routinely encounter pressure from their boy-friends to be sexually active and just as routinely discuss their sexual experiences and feelings with each other. Rather, the proposed speech is rejected because the school administration would be aghast if it were

182. The Court held the law invalid in *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (7-2 vote).

183. See, e.g., LUKER, *supra* note 129, at 62, 75, 183-84; ROSALIND P. PETCHESKY, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM 210-32 (rev. ed. 1990).

184. See *supra* note 163. For corroboration in a report from a racially integrated high school, see MEREDITH MARAN, CLASS DISMISSED: A YEAR IN THE LIFE OF AN AMERICAN HIGH SCHOOL, A GLIMPSE INTO THE HEART OF A NATION (2000) (Berkeley High School).

185. "Most very young teens have not had intercourse: 8 in 10 girls and 7 in 10 boys are sexually inexperienced at age 15." Yet, "more than half of 17-year-olds have had intercourse." These data are in a 1999 report of the Alan Guttmacher Institute, *Teen Sex and Pregnancy*, available at http://www.agi-usa.org/pubs/fb_teen_sex.html (last visited Mar. 20, 2003). Simple math tells us that by age fifteen, some 20% of girls and 30% of boys are sexually experienced. Although such numbers may be surprising to some readers, it becomes more understandable when one contemplates how the passage of the centuries has converted the age of fourteen from a bridal age into the beginning of a long adolescence during which any sexual urges are supposed to be suppressed. See generally MARY PIPHER, REVIVING OPHELIA (1994). Kristen Luker has likened the decade between the age of puberty and the average age of marriage to a mine field for young women. Kristen Luker, *Dubious Conceptions: The Controversy Over Teen Pregnancy*, AM. PROSPECT, Spring 1991, at 79.

186. The whole episode is related in HERSCH, *supra* note 163, at 63-66.

presented. Obviously, some parents have let the administrators know that they regard sex-related topics as out of bounds.¹⁸⁷

Herein lies an irony. It is plain, throughout Hersch's detailed accounts, that with few exceptions the parents are unaware of their children's attitudes about sex, let alone their children's sex lives.¹⁸⁸ Not surprisingly, these middle-class children, who spend a large proportion of their lives segregated from adults, live in their own culture. When it comes to sexuality (and it often does), they also live outside their parents' knowledge, let alone their effective authority.¹⁸⁹

Two decades ago, Neil Postman wrote that television, "the total disclosure medium," had destroyed the basis for the institution of childhood, which was the concealment of "adult" secrets until young people were educated (notably through print media) to a stage of relatively mature capacity to deal with them.¹⁹⁰ Sexuality was one such set of secrets "not suitable for children." Now, said Postman, all was revealed. Indeed, it was "now common enough to see twelve- and thirteen-year-old girls displayed on television commercials as erotic objects."¹⁹¹ Innocence was gone, and with its departure, childhood had disappeared. Postman seemed to be describing changes in a world of middle class children. By the 1980s much of the innocence of childhood had already left the inner city, along with most of the African American middle class. Postman was writing before the Internet had become a disclosure medium beyond most American imaginations, and before the standard suburban family featured latchkey children with access to liquor cabinets and to each other's bedrooms. Today it is middle class adults who are innocent of the secrets of adolescence. The old question about innocence has turned back on itself: Shall we tell the parents?

Despite these changes, a considerable volume of legislation seeks to protect children from exposure to indecent speech, absent their parents' approval. The Supreme Court continues to state that this goal is a

187. The assistant principal, refusing the girl's request, said, "Jessica, your speech brought tears to my eyes but I can't let you read it because it would stir up so much controversy." *Id.* at 65-66.

188. See generally *id.* Although Hersch has not written a book centered on teenage sexuality, and the book is rich in detail on a wide range of aspects of her adolescents' lives, sexuality is a big subject for these children. On the more general subject of what parents do not know, see MARAN, *supra* note 184, at 191-94.

189. Current constitutional law on the abortion rights of minor women forbids a state to require pre-abortion notice to both parents. *Hodgson v. Minnesota*, 497 U.S. 417 (1990). A state can, however, require notice to one parent, absent a "judicial bypass" (a court finding that the young woman is mature enough to make the decision on her own, or that the procedure is in her best interests). *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 512 (1990). For a persuasive argument that the Supreme Court's decisions in this field represent not a gain for children's rights but an effort to shift power from parents to judges in a way that will allow only some minors to obtain abortions, see Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589 (2002).

190. NEIL POSTMAN, *THE DISAPPEARANCE OF CHILDHOOD* ch. 6 (Vintage Books 1994) (1982).

191. *Id.* at 91.

governmental interest of great importance when laws are measured against the First Amendment,¹⁹² although the Court has expressed some recent doubt about the effectiveness of particular laws in affording the desired protection.¹⁹³ True, the technology of the Internet is continuing to change rapidly, but it is unlikely that either parents or governments will discover an effective and politically acceptable means of blocking children's access to indecent material.¹⁹⁴ If childhood innocence has not quite come to an end, the end appears to be in sight.

Youth culture, we have seen, has a powerful local dimension. No regulatory law now in sight can control what children teach each other. When we consider youth culture in a wider perspective, a broader lesson becomes clear. It is extremely difficult to devise controls that will limit the children without imposing similar controls on adults.¹⁹⁵ How could we protect children against infection by consumerism without restricting adult markets, including media advertising, to a degree that would be intolerable and even unconstitutional?¹⁹⁶ Denying teenagers access to indecency may not be impossible, but any control that achieves that result will restrict adults' access to the same material in ways that are unacceptable.¹⁹⁷ My earlier discussion makes clear that these limitations on adult freedom also violate the First Amendment; more broadly, though, the limitations appear to be unacceptable across a wide spectrum of adult decision makers. Similarly, it is hard to see how late-twentieth-century changes in sexual practices and mores, broadcast over prime-time television and even protected by the Constitution,¹⁹⁸ could have failed to influence teenage

192. See decisions cited *supra* in notes 176-80. For well-founded skepticism about the Supreme Court's asserted devotion to shielding children, see Volokh, *supra* note 181, at 149-67.

193. See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997). The Court seems to have ignored an important technological change that became visible between the trial court's findings in *Reno* and the Supreme Court's decision—a change suggesting that part of the Government's case (on an available technique for age verification of message receivers) might have been considerably stronger than the Court thought. See Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 273, 290-96 (1999). For the criticism that the Court's opinion risks underprotecting speech in future cases, see Volokh, *supra* note 181, at 156-59.

194. My authority on this subject is Eugene Volokh, who not only does constitutional law scholarship but also writes computer code. He concludes that in order to create an effective screening mechanism, the U.S. government would have to require American service providers to monitor sources and block indecent material from going to anyone. That, he persuasively suggests, involves such a restriction on adult access as to be politically nonviable, even in the unlikely event that such a scheme would pass muster under the First Amendment. See his article, *supra* note 181, for a relation of these views to the constitutional doctrine of the day.

195. I am indebted to Robert Goldstein for helping me to see this point in its broad scope.

196. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

197. This conclusion is made clear in the *Sable Communications, Denver Area*, and *Reno* cases, *supra* notes 178-80.

198. See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 506 U.S. 833 (1992); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

attitudes and behavior in the same realm. Thomas Jefferson once wrote, "[t]he disease of liberty is catching."¹⁹⁹

D. *Urban Poverty as Socialization*

The most dismal reality in the socialization of American children is that at least one out of six of them live in poverty.²⁰⁰ The figure for African American and Latina/o children is about one out of four, with even greater proportions, about one-third of Latina/o families and nearly 40% of Black families, living in areas of concentrated poverty.²⁰¹ Poverty not only affects such socializing institutions as the family and the school; poverty itself is a socializing institution, and its results are devastating, undermining the freedom of identity choice that is taken for granted in communities that are more comfortable. In the discussion that follows, I seek to set out some features of this process, but the narrative can be summarized in a few sentences. In urban minority communities where poverty is concentrated, the poverty itself exerts a strong influence on children's identities. Poverty stifles initiative or deflects it toward antisocial conduct, to which regulatory law (the criminal law) is applied with a vengeance, seriously restricting the future economic and social opportunities of those caught in the law's net. The result is irreparable harm to communities and the reinforcement of racial subordination. Some aspects of this vicious cycle, such as beliefs, attitudes, and habits, undoubtedly are cultural, for they assign meanings to behavior. These mental states and their transmission from one generation to the next are not inherent in minority racial or ethnic populations,²⁰² but instead are "particular cultural adaptations to the systematic blockage of opportunities in the environment of the inner city. . . ."²⁰³

As we have seen, the anxiety of adolescence is focused on the achievement of an individual identity that is visibly valued in the child's surroundings. The adolescent's identity anxiety, by definition, looks to the future: How can I achieve a satisfactory adult identity? Yet not every adolescent engages in the detailed life planning that is so crucial to the

199. 1820 letter to Lafayette, in THOMAS JEFFERSON: HIS WORDS AND VISION 17 (Nick Bcilenon ed., 1998).

200. Children's Defense Fund, *Child Poverty*, at http://www.childrensdefense.org/fs_chpov.php (last visited Mar. 20, 2003) (11.6 million children under 18 living below poverty line in 2000; 16.2% of child population).

201. INST. ON RACE AND POVERTY, U. MINN., FINAL REPORT: EXAMINING THE RELATIONSHIP BETWEEN HOUSING, EDUCATION, AND PERSISTENT SEGREGATION 7 (1997).

202. I do not share the earlier view that certain values (or anti-values) in minority cultures led to poverty, see, e.g., Oscar Lewis, *The Culture of Poverty*, in ON UNDERSTANDING POVERTY 187-200 (Daniel Patrick Moynihan ed., 1968), nor the more recent view suggesting a genetic weakness in minority populations, see, e.g., RICHARD J. HERRNSTEIN & CHARLES A. MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 403 *passim* (1994).

203. WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 72 (1996) [hereinafter WILSON, *WHEN WORK DISAPPEARS*].

attainment of identified goals. A minority adolescent who lives in poverty is likely to attend a public high school that is poor in resources and almost entirely populated by other students who also live in an area of highly concentrated poverty.²⁰⁴ The child often lives with a single parent who has little formal education, and even less in the way of connections to job networks. This parent is at a disadvantage in helping the child with day-to-day schoolwork and faces even greater disadvantages in helping the child plan realistically for some identifiable occupation. With the exception of churches, the local environment is likely to lack the usual indicia of youth-oriented civic life, from the Little League to the PTA. A search for after-school work is likely to be fruitless, for want of employers nearby. Indeed, the high unemployment level in an area of concentrated poverty means that a great many of the adults in the child's life will themselves be unemployed. The child will almost certainly lack role models who exemplify the benefits of higher education or, indeed, the benefits of life planning. In other words, the paths to adult identities, founded on rewarding employment and fulfillment of the economic responsibilities of parenthood, are not highly visible. Where should impoverished adolescents turn?

1. *Poverty, Socialization, and Crime*

Surely it is a rare teenager who does not want to "be somebody." Historically, one of the most important avenues to full membership in the American community has been productive work.²⁰⁵ In this perspective, poverty is inconsistent with equal citizenship. Furthermore, in a traditional view that is on its way out but still influential, the ability to earn a good living identifies not just citizenship but manhood.²⁰⁶ In the following discussion, we focus on the socialization of teenage boys in poor minority neighborhoods.

Suburban children have no trouble in seeing education as the path to economic reward. But it should be no surprise if a poor minority youth in the inner city, lacking role models who are educated, finds it difficult to see education's payoff. In these conditions, why study? Reflecting this skepticism, some Black adolescents describe rebellion against school in the vocabulary of cultural assertion. Hence the implicit invocation of cultural authority in the taunt sometimes addressed to the serious student: Don't

204. For documentation on the multifold ways in which life in a neighborhood of concentrated poverty destroys opportunities for young people, see *id.* at 51-86; NAT'L RESEARCH COUNCIL, *LOSING GENERATIONS: ADOLESCENTS IN HIGH-RISK SETTINGS* 63-80, 102-50 (1993); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 55-62 (1987).

205. See JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 63-101 (1991); Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523 (1997).

206. See E. ANTHONY ROTUNDO, *AMERICAN MANHOOD: TRANSFORMATIONS IN MASCULINITY FROM THE REVOLUTION TO THE MODERN ERA* 167-93 (1993).

act White.²⁰⁷ When the prospects seem dim for a boy to achieve manhood through productive work, other avenues may promise to validate his masculinity. A succession of sexual conquests can seem to be one such avenue.²⁰⁸ Gang participation may be another.²⁰⁹ Consumerism, of course, reaches into all neighborhoods, including the poorest, and goods cost money; the drug trade may entice with the prospect of ready cash.²¹⁰ That trade also offers instruction in collateral forms of crime, including violence, and the mass media provide their reinforcement, continually representing violence as an index of manhood.

It bears emphasis that many of the minority poor in America are part of the working poor. For these Americans, the problem is not so much lack of employment but lack of remunerative employment that will support their families. A recent study of Latino men bears out this conclusion; "labor force attachment" turns out to be an inadequate explanation for their poverty.²¹¹ The authors conclude, unsurprisingly, that investment in human capital—education, in plain talk—is crucial to any antipoverty strategy.²¹²

Unfortunately, regulatory law plays a role in perpetuating the negative socialization effects of poverty. The availability of role models for boys is limited by this distressing datum: about one-third of all Black males between the ages of twenty and twenty-nine are incarcerated or on probation or parole²¹³—a figure from which we can infer somewhat higher percentages in areas of poverty concentration. More broadly, the criminal law has played a central role in decimating the positive social contributions of a whole generation of poor young African American males.²¹⁴ This is the

207. On the presence among Black adolescents of attitudes that undermine academic achievement, see A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 371-72 (Gerald David Jaynes & Robin M. Williams eds., 1989).

208. See, e.g., Elijah Anderson, *Sex Codes and Family Life Among Poor Inner-City Youths*, 501 ANNALS AM. ACAD. POL. & SOC. SCI. 59 (Jan. 1989).

209. On the multiple social and economic functions that a gang may serve in the lives of poor young members and "peripheral" hangers-on, see Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2273-76 (1998).

210. On the relation of crime to common traits of adolescents, particularly the tendency of juvenile crime to be related to peer approval and to take place in groups, see Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 591-92 (2000).

211. Susan M. Hauan et al., *Poverty and Work Effort Among Urban Latino Men*, 27 WORK & OCCUPATIONS 188 (2000). See also Deidre Martínez & Sonia M. Percz, *Toward a Latino Anti-Poverty Agenda*, 1 GEO. J. ON FIGHTING POVERTY 55 (1993).

212. Hauan, *supra* note 211, at 218.

213. MARC MAUER & TRACY HULING, *THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 3 (1995).

214. Homicide rates are comparable in Latino communities, especially in areas of concentrated poverty. For a thoughtful analysis of the relevance of poverty and/or economic inequality, see Ramiro Martinez, Jr., *Latinos and Lethal Violence: The Impact of Poverty and Inequality*, 43 SOC. PROBS. 131 (1996).

combined effect of the "war on drugs,"²¹⁵ mandatory sentences, "three strikes" laws, and policies to prosecute juveniles as adult offenders.²¹⁶ A young Black man's felony conviction (a class that includes many drug convictions) can be an "economic life sentence,"²¹⁷ severely limiting (and often ending) his prospects for decent employment and thus drastically reducing the likelihood that he will ever live in a stable family relationship.²¹⁸ In turn, a high level of family disruption in a city is a strong predictor of high levels of violence.²¹⁹ In the inner city, a convict's estrangement from civic participation is nearly total, and it can persist long after the sentence has been served.²²⁰

The consequences of these applications of regulatory law for poor African American communities are calamitous. The tragic irony is that, in the last generation, the nation's principal response to crime has been punishment of ever increasing numbers of young Black men, with ever

215. One recent weapon in the war on drugs is a "zero tolerance" policy that suspends or expels drug violators from school, even for trivial violations. Related policies suspend or terminate forever a drug offender's eligibility for college loans, and even deny prison education. These disastrous policies are cited and ably criticized in Eric Blumrosen & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER, RACE & JUST. 61 (2002).

In 2000, the voters of California adopted Proposition 36, an initiative measure that generally mandates probation for persons sentenced for nonviolent drug possession. Exceptions are provided in cases involving multiple offenders, or involving various aggravating factors. This proposition is codified in CAL. PENAL CODE §§ 1210, 1210.1, and 3063.1 (2003).

216. The race- and class-differentiated figures on prosecution of juveniles as adult offenders are just one part of a larger story, in which the system of criminal justice and the White, middle class public tolerate "youthful indiscretions" on a selective basis, giving White, middle class youths the benefit of second and third chances and sending poor minority youths to prison. See Barbara Bennett Woodhouse's excellent essay, *Youthful Indiscretions: Culture, Class Status, and the Passage to Adulthood*, 51 DEPAUL L. REV. 743 (2002).

A California study in 1999 concluded that minority child offenders were more than twice as likely as White children to be tried as adults. MIKE MALES & DAN MACALLAIR, JUSTICE POLICY INST., *THE COLOR OF JUSTICE: AN ANALYSIS OF JUVENILE ADULT COURT TRANSFERS IN CALIFORNIA* (2000), available at <http://www.cjej.org/pdf/coj.pdf> (last visited Mar. 20, 2003). See also Jonathan Simon, *Inevitable Dependencies: A Comment on Martha A. Fineman*, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*, 5 COLUM. J. GENDER & L. 152, 157-61 (1995).

217. Randolph N. Stone, *Juvenile Justice: A Dream Deferred*, 8 CRIM. JUST. 50 (Winter 1994).

218. For an enlightening analysis of the multiple negative effects of the criminal justice system on families in Black communities, see Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005 (2001).

219. See Robert J. Sampson, *Unemployment and Imbalanced Sex Ratios: Race-Specific Consequences for Family Structure and Crime*, in *THE DECLINE IN MARRIAGE AMONG AFRICAN AMERICANS: CAUSES, CONSEQUENCES, AND POLICY IMPLICATIONS* 229-30 (M. Belinda Tucker & Claudia Mitchell-Kernan eds., 1995) [hereinafter *DECLINE*]. During the 1990s upturn, the Black unemployment rate fell to a new low, and, departing from an earlier pattern, many Black men with prison records found work. William Julius Wilson, *The New Economy and Racial Inequality*, 54 BULL. AM. ACAD. ARTS & SCI. 41, 45-46 (2001). In a declining economy, those gains will almost certainly be erased. *Id.* at 46-48.

220. See Stone, *supra* note 217.

increasing severity.²²¹ This response turns out not to deter crime but to promote further lawbreaking and further community disorganization.²²² The mechanisms of socialization that produce these results are indeed cultural, but they do not reflect a deficiency innate to minority cultures. Rather they are a series of reactions to an environment that is short on opportunities for productive work and long on the impulse to punish. The pernicious effects of this environment extend to women as well as men.

2. *Poverty, Socialization, and Teen Pregnancy*

One of the most important sources of difficulty in attaining a satisfactory adulthood for young Black women is teen pregnancy. Like their male counterparts, young Black women living in poverty are apt to attend a poor school, to be unprepared for college, and to see little opportunity for productive work. In these circumstances, school itself may be seen as irrelevant to the young woman's future.²²³ One of her dreams, in her romantic moods, may picture a life shared with a man who will join her in raising a family. She may even choose to be pregnant, partly in the hope of cementing her relationship with the father.²²⁴ But frequently the romance will not last.²²⁵ Yet, even as the young woman's motivation to marry is fading,²²⁶ or

221. See JEFFREY FAGAN & TRACEY L. MEARES, PUNISHMENT, DETERRENCE AND SOCIAL CONTROL: THE PARADOX OF PUNISHMENT IN MINORITY COMMUNITIES (Columbia Law School Pub. Policy & Legal Theory Working Paper Group, paper no. 10, 2000).

222. See *id.* On the appalling numbers of young Black men who become victims of homicide (usually at the hands of other young Black men), see William A. Darity, Jr. & Samuel L. Myers, Jr., *Family Structure and the Marginalization of Black Men: Policy Implications*, in DECLINE, *supra* note 219, at 271-72.

223. See Brindis, *supra* note 134, at 258-61.

224. On the varying influences that produce teenage pregnancy and childbirth, see LUKER, *supra* note 129, at 109-74; Alan Guttmacher Institute, *Teenagers' Pregnancy Intentions and Decisions* (1999), available at http://www.agi-usa.org/pubs/or_teen_preg_survey.html (last visited Mar. 20, 2003) (see especially the sources cited in the endnotes). See also Nancy E. Adler & Jeanne M. Tschann, *Conscious and Preconscious Motivation for Pregnancy Among Female Adolescents*, in THE POLITICS OF PREGNANCY, *supra* note 134, at 144-58. These analyses do only minimal sorting by race and ethnicity, but their consistent conclusion is that teenage childbirth is strongly correlated with poverty and related forms of social disadvantage.

225. On the variety of reasons contributing to low marriage rates among poor African Americans, see KRISTEN A. MOORE ET AL., CHOICE AND CIRCUMSTANCE: RACIAL DIFFERENCES IN ADOLESCENT SEXUALITY AND FERTILITY 109-15 (1986); M. Belinda Tucker & Claudia Mitchell-Kernan, *Marital Behavior and Expectations: Ethnic Comparisons of Attitudinal and Structural Correlates*, in DECLINE, *supra* note 219, at 145.

Roughly half of poor Latina/o families are headed by single mothers. U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, MARCH 2000, SER. P-20, NO. 455, HISPANIC POPULATION OF THE UNITED STATES 8, 1991 tbl.15.1. Stephanie Coontz reminds us that in the general population, the rate of unwed childbearing began to turn up shortly after real wages for young men began to drop in the 1970s. COONTZ, *supra* note 159, at 86. "Teens from low-income or poor families (who are 38 percent of all teens but account for 83 percent of teen births) are nine times more likely than teens from higher-income families to have a child." Jane Mauldon, *Families Started by Teenagers*, in ALL OUR FAMILIES, *supra* note 5, at 39, 49 (citing Alan Guttmacher Institute research).

marriage to an unemployed (perhaps unemployable) male seems a recipe for instability, pregnancy may have its own value as a badge of adulthood, an avenue to dignity.²²⁷ Her role models are apt to be women who have opted for motherhood on much the same terms. By the time the limelight glow of early pregnancy gives way to the responsibilities of motherhood, this young woman may feel trapped in a "single mother" identity that feels more like the result of drift than an identity of choice. She may feel this way even though she may also resent middle-class White moralizing about unwed motherhood as an example of imposed cultural authority. It should be noted that the moralizing goes on, despite radical changes in both morality and authority over the last half century. As more and more young women of all races defer marriage or avoid it, the earlier "normative imperative" to marry and to raise children only within marriage continues to weaken.²²⁸ Today, a majority of African American children and about one-third of Latina/o children live with single parents, usually mothers.²²⁹

Motherhood will not make a poor young woman more employable. Efforts to make ends meet may be little short of heroic,²³⁰ and still they may fail. At worst, she may lose her child to a state agency that looks at the living conditions of severe poverty and labels them as child neglect.²³¹ Meanwhile, more comfortable observers will keep saying to each other that such a woman is a picture of immorality, and that she should get a job, a man, or both.²³² As for the politicians who say that teenage motherhood is a

226. For some telling quotations from mothers (White, Black, and Latina) who choose not to marry, see LUKER, *supra* note 129, at 158-60.

227. To get a vivid sense of the ways in which some poor young African American women have approached decisions about pregnancy, see the interviews reported from Washington, D.C. by LEON DASH, *WHEN CHILDREN WANT CHILDREN: THE URBAN CRISIS OF TEENAGE CHILDBEARING* (1989) (based on his stories in *THE WASHINGTON POST*) and reported from Evanston, Illinois, by DANIEL B. FRANK, *DEEP BLUE FUNK AND OTHER STORIES: PORTRAITS OF TEENAGE PARENTS* (1983).

228. LUKER, *supra* note 129, at 95-100; Arland Thornton, *Changing Attitudes Toward Family Issues in the United States*, 51 J. MARRIAGE & FAM. 873 (1989).

229. M. Belinda Tucker & Claudia Mitchell-Kernan, *Trends in African American Family Formation: A Theoretical and Statistical Overview*, in *DECLINE*, *supra* note 219, at 3, 14.

230. For some compelling examples, see CAROL B. STACK, *ALL OUR KIN* (1974).

231. See *supra* text accompanying notes 83-86.

232. See, e.g., Gertrude Himmelfarb, *Welfare as a Moral Problem*, 19 HARV. J. L. & PUB. POL'Y 685 (1996).

major cause of poverty,²³³ there is much support for the argument that this statement gets the historical causal relationship exactly backwards.²³⁴

Young Black women tell survey researchers that their ideal is to live in a traditional family—not necessarily one in which the father is the sole breadwinner, but a family in which the children live with both of their parents.²³⁵ As it stands now, this hope often cannot be realized because of the shortage of marriageable Black men in poor urban communities, a shortage that is euphemistically called “the sex ratio.”²³⁶ As I have pointed out, a major contributor to this shortage is the criminal law, which has inflicted disproportionate casualties on young Black men, distancing huge numbers of them from the marriage market. No doubt it oversimplifies to say, without more, that the revitalizing of poor minority communities will depend on increasing stable employment for young men, thus making them more likely candidates for marriage. Such suggestions have been criticized as implying a program of “restoring the patriarchal family structure” among African Americans,²³⁷ and the criticism must be taken seriously. Yet, no one contests the positive correlation between Black male employment and marriage rates.²³⁸ One need not be persuaded by recent palaver about fathers as disciplinarians²³⁹ to agree that it helps a child to have two loving

233. The modern classic example is former Vice President J. Danforth Quayle. In 1992, at the elite Commonwealth Club in San Francisco, he lectured on the sexual immorality of single mothers and called for “social sanctions” to enforce the morality of marriage, saying that intergenerational poverty was predominantly “a poverty of values,” featuring “casual sex” and “children having children.” The very next day, fresh from a fundraiser at the Desert Horizons Country Club in Palm Springs, the former Vice President stood in south-central Los Angeles and said “I wish [the media executives] were here on the streets with me today. . . . They ought to come with me out to where the real America is.” KARST, *LAW’S PROMISE*, *supra* note 27, at 138-39 and accompanying notes (quoting Dan Quayle).

234. See, e.g., LUKER, *supra* note 129, at 109-74; ROBERTS, *BLACK BODY*, *supra* note 86, at 117-22; *supra* notes 208-19 and accompanying text.

235. Annette Lawson, *Multiple Fractures: The Cultural Construction of Teenage Sexuality and Pregnancy*, in *THE POLITICS OF PREGNANCY*, *supra* note 134, at 101, 110-11.

236. For a theoretical sketch, see K. Jill Kiecolt & Mark A. Fossett, *Mate Availability and Marriage Among African Americans: Aggregate- and Individual-Level Analyses*, in *DECLINE*, *supra* note 219, 121, 121-24. See also A. Wade Smith, *Commentary*, in *id.* at 136 (criticizing Keieolt and Fossett’s methodology, but not their conclusions).

237. Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER SOC. POL’Y & L. 1, 27 (1993) (citing Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 568; Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 165-66 (1989)).

238. Mark Testa & Marilyn Krogh, *The Effect of Employment on Marriage Among Black Males in Inner-City Chicago*, in *DECLINE*, *supra* note 219, at 59, 93 *passim*. Other factors undoubtedly contribute to the rise in rates of nonmarital births among poor urban women. The factors include not only the decline in the normative force behind marriage but also the increased independence of working women. See WILSON, *WHEN WORK DISAPPEARS*, *supra* note 203, at 87-110 (1996) (quotes from interviewees at 98-104); Sheldon Danziger, *Commentary* [on Testa & Krogh], in *DECLINE*, *supra* note 219, at 96.

239. Two examples of such assertions among many come from David Blankenhorn and Dan Quayle, quoted in KARST, *LAW’S PROMISE*, *supra* note 27, at 144.

parents in the home. And two incomes would surely be better than one. In any case, these young women ought to have an effective choice in the matter. But poverty's socializing effects, on them and on their potential male partners, deny them both the opportunity for careers and the opportunity for stable family lives.

3. *Poverty, Socialization, and the Structure of Opportunity*

If poor adolescents (girls as well as boys) are to qualify for today's labor market they will have to be persuaded that employers will hire them once they are qualified. For a teenager to engage in productive life planning, he or she needs a sense that a plan, and action to carry it out, may lead to a rewarding life. That sense comes hard for minority adolescents who live in areas of concentrated poverty, because their daily experience gives them little reason to believe that such a course holds real promise. In other words, they are socialized to a sense of futility. The old causal assumptions about "the culture of poverty"²⁴⁰ were inadequate, not because culture was irrelevant to the conditions of the poor, but because the assumption failed to give enough weight to the ways in which poverty itself acculturates. Part of the racial disparity in public education, of course, results from the transmission from one generation to the next of both wealth and educational advantage, and both poverty and educational disadvantage.²⁴¹ A child whose parents were educated in poor schools and have low incomes is likely to be attending a poor school and to have low prospects for future income.²⁴² Racial subordination and the poverty of the inner cities are symbiotic.

Unlike so many of the subjects featured in the politics of culture, the large proportion of children living in poverty is, indeed, a condition that has huge effects on real people's lives. But, for a decade, it has not been a subject highlighted by the practitioners of identity politics, except to heap scorn on the poor. In fact, this form of politics has produced coalitions for a policy of inaction that turns a blind eye to poverty's dismal consequences for American children.²⁴³ So, we return to the themes of morality, authority, and group status. The moralizers who preach at poor minority youths disparage these youths for what they call sexual immorality, specifically, unwed parenthood. They hurl this charge without any reference to the economic conditions that would be needed to make marriage a feasible life choice and make it possible for two-parent families to make a comeback as

240. See Lewis, *supra* note 202.

241. See generally JAMES S. FISHKIN, JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY (1983).

242. See L. SCOTT MILLER, AN AMERICAN IMPERATIVE: ACCELERATING MINORITY EDUCATIONAL ACHIEVEMENT 141 *passim* (1995). As college tuitions have continued to go up, college attendance has become even more difficult for children in poor families. See Stuart Silverstein, *College Further from Poor's Grasp, Study Shows*, L.A. TIMES, May 2, 2002, at A18.

243. See *infra* text accompanying notes 246-57.

the statistical norm in poor neighborhoods. This illogic is just one example of a larger failing on the moralists' part. Speaking from the advantaged status position that encourages them to assert their own cultural authority, they would impose so-called middle class values on young people whose day-to-day experience provides little or no sense of opportunity, little or no reason to believe in the utility of schooling, or of life-planning, or, indeed, of anything that involves deferred gratification. In short, these young people live in circumstances that lack the necessary foundations for inculcating the so-called middle class behavior that the moralists prize.

The sources of poverty are many and diverse, ranging over all manner of individual and structural factors. Here, the subject is politics and its relation to regulatory law, and I am not suggesting that there is any simple legislative answer to the devastations caused by poverty. The goal, however, seems plain enough. What the children of poverty need, above all, is a sense of opportunity for young people in their communities—specifically, opportunities for decent and secure jobs that are realistically available, opportunities that would help young parents to maintain stable family arrangements and would give adolescents new incentives for taking school seriously. One thing is clear: regulatory law cannot provide jobs for those who need them, or otherwise reduce poverty significantly. Indeed, regulatory law (the criminal law) has been a major contributor to family poverty and to community decay. To the extent that such forms of law aim to instruct young people, they are failed exercises in acculturation by punishment.

Yet, law is not limited to prohibitions and punishment. Law in the form of inducement can have liberating effects on individual children's quests for identity, and on healthy community growth.²⁴⁴ Here there is no lack of legislative power. What is lacking is the will, among more privileged Americans, to shoulder the burdens of giving reality to the Constitution's promise of equal citizenship. Half a century after *Brown v. Board of Education*,²⁴⁵ the vicious cycle of child poverty and racial subordination is a national disgrace.

Up to this point in our tour of the uses of regulatory law in cultural conflicts, we have repeatedly explored some issue that generates high emotion, only to discover that the quantum of actual acculturation turning on the issue is small. One who succeeds in getting a rule of law adopted may find that the rule affects only a small number of real children's lives, as in the adoption controversies with which we began. Or, a group that wrests control of a school may find that the school's capacity to conform children's beliefs and behavior to some cultural orthodoxy is weaker than they

244. Concededly, law-as-command would play a necessary role in levying taxes and institutionalizing employment programs, along with their necessary backup services.

245. 347 U.S. 483 (1954).

imagined. Prohibiting public schools from offering sex education, for example, will not produce a generation of innocents; it will turn the instruction program over to other children and the mass media. And the criminal law, far from acculturating poor young men and women to productive attitudes and behavior, has mutilated the communities where these young people live. In the discussions that follow, we shall see that, despite the persistent futility of regulatory law, politicians in search of voters continue to raise anxieties about the acculturation of children, and they will go on invoking images of law as a means of control.

III

ELECTORAL POLITICS AND SYMBOLS OF CHILDREN

Every one of the subject areas we have explored has served as an arena for cultural politics, in which political operatives can make voters fearful about the socialization of children and promise to use law to regulate the socialization process. Here, as in our earlier discussions, concerns about morality and about authoritative meanings are intertwined with concerns about the status of social groups. In the earlier parts of this Article, I have cast doubt on various assumptions about the power of law to regulate the socialization of children. Here, I focus on the political professionals who seek to put those widely shared assumptions to work in enlisting voters.

I begin with actions, seeking to identify some of the working principles that seem to govern political behavior in this field and to illuminate some of the dilemmas faced by the practitioners of identity politics. Then I turn to motives. Why do these seasoned veteran operatives train the public's focus on the acculturation of children? Why do they promise regulation by law, even when they know the law's meager capacity to fulfill the advertised promise?

A. The Operative's Rules of Thumb for Cultural Politics

Political scientists tell us that the greatest influence on voting is the voters' perceived economic interests.²⁴⁶ Yet many politicians and political consultants continue to pitch their appeals to constituencies defined by cultural indicia. "All politics is local,"²⁴⁷ and in many a particular district, playing to fears of the cultural Other may be enough to swing the balance in an election. Indeed, a skilled practitioner knows how to bring cultural politics to bear on fears about jobs and wages. In this Section, we focus on

246. See, e.g., Donald R. Kinder & Roderick Keiweit, *Sociotropic Politics: The American Case*, 11 BRIT. J. POL. SCI. 124, 129 (1981).

247. This phrase, long associated with Tip O'Neill, former Speaker of the U.S. House of Representatives, became the title of his memoirs, *ALL POLITICS IS LOCAL: AND OTHER RULES OF THE GAME* (1994).

the cultural ingredient in electoral politics as it touches on concerns about the socialization of children.

The political operative's rules of thumb for cultural politics are all related to the theme of protection against danger. First, the operative identifies a threat to all We stand for, a threat posed by Them. Second, the operative asserts that We can defend against the threat if We will stand together and stand fast by electing a candidate who is one of Us and who can be trusted to use the power of government to maintain Our morality and Our set of authoritative meanings. In this line of argumentation, questions of group status dominance are always present and almost never explicitly mentioned.²⁴⁸

1. *Polarization Pays*

The heart of any serious campaign featuring cultural politics is emotional: the cementing of loyalty to Our side. An important part of a candidate's self-portrayal is the designation of Enemies who are portrayed as a menace to the authority of Our values and cherished symbols, and, it is insinuated, a threat to the status position of Our group. These portrayals are theater, consisting mainly of posturing and gesturing. Proposing a law may be just such a gesture, implying not only the solution of some "problem," but also the group's status dominance. If the designation of an Enemy serves to unite Our group, part of the reason is that the Enemy allows us to portray the contest not as a matter of interests and tactics, but as a matter of ideals, a struggle over morality itself. The Enemy must be described not merely as a co-citizen who is mistaken, but as a representative of the forces of evil—as Alabama's Chief Justice described those who are homosexual,²⁴⁹ and other judges have described the "moral deficiency" of lesbian mothers.²⁵⁰ For the practitioner of cultural politics, then, the theme of morality (specifically, the claimed immorality of the Enemy) is not simply a rhetorical flourish to be added to a campaign statement. It provides much of the agitation needed to mobilize the constituency and to hold it together.

2. *Never Compromise*

One who would mobilize supporters must retain their support. So, it is a tactical mistake to accept any compromise that might allow an issue of symbolic value to recede from the limelight. No wonder, then, that the most vocal opponents of sex education in the schools have no interest in reaching a middle ground that would combine recommendations of

248. This entire Part draws heavily on SIDNEY BLUMENTHAL, *THE PERMANENT CAMPAIGN: INSIDE THE WORLD OF ELITE POLITICAL OPERATIVES* (1980); MURRAY EDELMAN, *CONSTRUCTING THE POLITICAL SPECTACLE* (1988); KARST, *supra* note 27.

249. See *supra* note 17.

250. See *supra* note 19.

abstinence for teenagers with instruction that will reduce unwanted pregnancies among those who do not choose to be abstinent.²⁵¹ In fact, this strategy is designed to keep the issue alive, but it tends to be explained in the language of morality. One does not compromise with servants of the Devil.

3. *Futility Can Be an Advantage*

The prospect that it may be futile to try to control the socialization of children by changing the law will not bother a political manager who specializes in cultural politics. Here, as elsewhere in politics, "the names of goals remain tactics for courting support rather than conditions to be sought."²⁵² The ideal issue should not only polarize the polity into Us and Them, but should remain unresolved, to serve from one year to another as a highlight of direct-mail solicitation. In this perspective, school prayer in classrooms, at graduation ceremonies, and at football games can help to keep a constituency mobilized for years and years. The Supreme Court's decisions holding such public school prayers unconstitutional²⁵³ can be a help to the operative, by providing material for a fund-raising mailer.

Many legislators have interests in keeping cultural conflicts simmering; for them, the sponsorship of a law offers important political advantages even when all the insiders know the law is unlikely to make much difference in the behavior of children, or even in the behavior of school officials. Ever the candidate in a "permanent campaign," the astute legislator needs, above all, to assure his constituents that he is a vigorous partisan on their side.²⁵⁴ A legislator-candidate who seeks to write a cultural value into law enacts (pun intended) his²⁵⁵ role as defender of the cultural faith, despite the law's likely failure to achieve its announced regulatory goals should it be passed. And whether or not the bill may become law, the legislator's sponsorship stakes a claim to be one of Us.

4. *Emotion Can Trump Reasoning*

Today's political operatives have learned that, for many a voter-consumer, this very identification of a candidate as one of Us may be at least as important as any analyses the candidate may offer for current questions of public policy.²⁵⁶ This identification of candidate with consumer is most effective when it is founded on emotion. So, political drama,

251. See *supra* text accompanying notes 134-35.

252. EDELMAN, *supra* note 248, at 59.

253. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

254. BLUMENTHAL, *supra* note 248.

255. I do mean "his;" this sort of politico tends to be male.

256. See BLUMENTHAL, *supra* note 248, at 3 *passim*.

embodied in the simple, morality-laden, and polarizing symbols of identity politics, can readily displace the inevitable complexities of "reasoned" policy debate. Given that strong political affiliation needs high emotional content, the most effective candidate pronouncements in cultural politics will transmit a mood of shared values, but lie beyond proof or disproof, as in the assertion—so useful in attacks on poor mothers—that "welfare destroys character."²⁵⁷ One result is the popularity among political consultants of election-season advertising on television at the intellectual level of a cartoon. In cultural politics, a cartoon is worth a thousand words.

B. *Dilemmas and Complications for Political Managers*

In operating within these general principles, political managers, whether cultural traditionalists or cultural insurgents, will face obstacles. I now outline these challenges before suggesting the attraction of children's socialization as an issue that may help overcome these obstacles. Although cultural politics may lead to temporary political advantage, operatives who would mobilize traditionalists are fighting a losing game against some of the most powerful forces in modern American social life. On the one hand, both massive immigration and the affluence that has generated increasing numbers of cross-cultural marriages²⁵⁸ are fueling pluralism and multiculturalism. As more multiracial babies appear, the grandparents will lose much of their former intolerance. A concomitant development is increased tolerance or acceptance across cultural lines.²⁵⁹ The new tolerance is heavily promoted in public schools across the land, but it also arises from the educative power of egalitarian rights movements (race and ethnicity, gender, sexual orientation), and from portrayals in the mass media that take the values of tolerance for granted. On the other hand, traditional religion must confront the power of "modernism" to transform the morality of family relations and sexual morality, a power that surely has not run its course. Given the generational changes already underway in attitudes and behavior, the proportions of citizens available to protect the status positions of traditional constituencies seem likely to decline.

257. See EDELMAN, *supra* note 248, at 30.

258. See, e.g., Michael A. Fletcher, *Interracial Marriages Eroding Barriers*, WASH. POST, Dec. 28, 1998, at A1 (noting that America now has 1.6 million interracial couples (roughly 4% of all marriages), although the numbers also show that African Americans have comparatively low rates of interracial marriage).

259. I do not wish to play Pollyanna here. The same cultural changes generate hostilities, precisely because they threaten established status positions. The classic example in recent American history is the hostility that greeted the successes of the civil rights movement. Today's opposition to affirmative action may not be founded on racism, but surely the anticipation of status loss has played some motivating role. Even so, those of us who have witnessed these developments understand that, viewed as a whole, American society has come a long way in its tolerance of racial difference. Not just job markets but social markets are much more open than they used to be. Intolerance is still around, in plentiful quantities, but it is no longer respectable.

While traditionalist leaders often fight a losing battle with modernity, leaders of cultural insurgents are frequent victims of their own success. Prominent in the history of ethnic groups in America is the pattern of ethnic political leaders' working themselves out of their jobs. An insurgent group is, by definition, one that has experienced some significant form of subordination. In political perspective, ethnic groups have been "the creation of their leaders."²⁶⁰ Such a group's initial mobilization emphasizes the need for group solidarity as a means of liberation from oppression. One major source of cultural pluralism in America has been this "defensive" identification with an ethnic group (or a group identified by religion, race, or sexual orientation). The aspirations of a group's leaders, notably including their own career goals, may encourage them to infuse their advocacy with a nationalist or separatist strain, even while the group explicitly seeks a place within the institutions of the larger society. Success in this undertaking usually means new economic power, which means new access to markets both economic and social, which in turn leads to increased cultural assimilation in the next generation. As ethnic bloc voting increases, ethnic identification decreases.²⁶¹ Political participation itself accelerates cultural assimilation, with a concomitant decline in the intensity of group identity.²⁶²

Attempting to avoid irrelevance, an insurgent group may call for legal protection of "the cultural group's coercive power over its members,"²⁶³ a move complicated by the increasingly complex notion of identity. For example, as mentioned earlier, the leading organization of Black social workers has opposed transracial adoption in the name of cultural preservation.²⁶⁴ But the proliferation of children of mixed-race ancestry who grow up to identify themselves as multiracial²⁶⁵ promises an increase in complication of such efforts to maintain group solidarity.²⁶⁶ A further complication of politics will result if and when insurgent groups are forced to confront various forms of "intersectionality"—that is, the intersection in the life of

260. John Higham, *Preface to ETHNIC LEADERSHIP IN AMERICA* ix (John Higham ed., 1979).

261. *Id.* at 11-12.

262. For elaboration of the argument in this paragraph, see Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 325-36 (1986). See generally Richard D. Alba, *Assimilation's Quiet Tide*, PUB. INT. 3 (Spring 1995) (discussing data from 1990 Census).

263. Dorothy E. Roberts, *Why Culture Matters to Law: The Difference Politics Makes*, in CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW, at 85, 93 (Austin Sarat & Thomas R. Kearns eds., 1999).

264. See *supra* text accompanying note 68.

265. For examples, see PATTON, *supra* note 72, *passim*.

266. A particularly poignant example is the division of African Americans along lines of economic class. See ROY L. BROOKS, *RETHINKING THE AMERICAN RACE PROBLEM* 34-128 (1990); Roy L. Brooks, *Race as an Under-Inclusive and Over-Inclusive Concept*, 1 AFR.-AM. L. & POL'Y REP. 9, 20-27 (1994).

an individual of two or more axes of group subordination.²⁶⁷ Should African American women as a group seek legal recognition of their particularized experience of discrimination, distinct from discrimination founded on race or founded on sex? What about Black lesbians or physically disabled Black women? In raising these questions, I do not mean to deny the validity of an intersectional perspective, but merely to highlight the tension between translating such a perspective into law and maintaining the political solidarity of larger groups.

Similar political risks attend efforts to find meaning in, and even legal recognition of, "umbrella" labels for clusters of cultural groups. Labels like "Latina/o" or "Hispanic," in great measure the result of racial and ethnic subordination, purport to lump together a variety of highly differentiated cultures. Political organization around these labels is apt to be as thin as the labels are broad, and, indeed, may prove to be counterproductive in their tendency to essentialize diverse identities by reference to the Spanish language or ancestral connections with Spain.²⁶⁸ And if inter-ethnic coalitions such as "people of color" can be unstable,²⁶⁹ surely one principal explanation is that groups' differential experiences of subordination can lead them to different political priorities, both local and national.

All these forms of complication impede the effort to stick to a political message that is simple. For the operative who would mobilize a constituency and keep it mobilized, then, the chance to focus on children will come as political manna from heaven.

C. *The Charm of Children – The Example of Elian*

The saga of Elian González²⁷⁰ illustrates the uses of a Poster Child in responding to the dilemmas of cultural politics. For a few months in 1999-2000, nearly everyone living in the United States or Cuba was familiar with Elian's picture. The U.S. Coast Guard found six-year-old Elian floating in an inner tube in the Caribbean, after his mother had been lost at sea. His father, who had been divorced from the mother, remained in Cuba and wanted Elian to live with him. With the Cuban economy tottering, surely Fidel Castro saw Elian's value as an instrument for political mobilization. In any case, he demanded Elian's return, orchestrating chanting crowds in

267. The modern classic discussion is Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1993).

268. See Gerald P. López, *Learning About Latinos*, 19 CHICANO-LATINO L. REV. 363 (1998); Francisco Valdés, *Race, Ethnicity, and Hispanismo in a Triangular Perspective: The "Essential Latina/o" and LatCrit Theory*, 48 UCLA L. REV. 305 (2000).

269. See, e.g., Charles R. Lawrence, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 839-46 (1995).

270. The story was told with great sensitivity in *Saving Elian: Frontline* (PBS television broadcast, Feb. 6, 2001). See also David Gonzalez, with Lizette Alvarez, *Justices Allow Cuban Boy to Fly Home*, N.Y. TIMES, June 29, 2000, at A1. The following sketch is drawn from these sources.

his inimitable way. This demand, and all the hoopla in Havana, produced an explosion of emotion in Miami, where Elian was staying in the community of exiled Cubans. His Miami relatives, and most exiles who were vocal, insisted in dramatic tones that Elian stay in the United States, free from the oppression of Castro's brand of socialism. On both sides, high emotion was the order of the day. For a time, law, which is generally assumed to be a mode of settling disputes, was exacerbating this one by dragging it out during a period of jurisdictional squabbling. Then, at the highest level, the U.S. Department of Justice (DOJ) followed what would be the normal practice in a case not charged with politics and decided that Elian should be reunited with his father. The father flew to Washington in the hope of seeing Elian. When a federal court sustained the DOJ's decision²⁷¹ and the Miami relatives remained intransigent, DOJ agents seized Elian at gunpoint for delivery to his father. In Cuba, thousands cheered and wept for joy; Castro basked in new glory. In Miami, thousands wept tears of sadness and outrage.

The Elian story illustrates how a focus on children can serve to mobilize a constituency even when most of the constituents have no children directly affected by the issue in question. One of the most interesting features of this whole chapter was that, for overwhelming majorities among those who came to hold passionate views about where Elian should live, he was above all an abstract image of a little boy. Not many people in either Cuba or Miami actually knew him, and that absence of contextual knowledge, far from diminishing the public passions, probably heightened them by intensifying Elian's role as a symbol. In this role, Elian served as a vessel of emotions, notably those engendered by fear.

Elian symbolized, and for political purposes was, innocence, dependence on adult support and guidance, and vulnerability to adult manipulation. He symbolized, and for political purposes was, the future. He symbolized not just his own future, or the future of the two contending families, but the future of his people. Yet, who were his people? Both the exiles in Miami and the supporters of Castro in Cuba saw him as one of Us, and each side understood that the other side was making the same (that is, the opposite and mirror image) claim. So, the contest over Elian's fate enacted a metaphor for the four-decade struggle in which propagandists on each side reclaimed the authority of The True Cuba, and painted the other side as renegades. Just as Castro's supporters said it would be immoral to separate Child from Father, exiles in Miami said it would be immoral for officials in the Free World to turn a child over to Godless Communism. The fear of "losing Elian" touched the core of personal identity, and the most agitated younger exiles were those whose parents had brought them

271. *Gonzalez v. Reno*, 86 F. Supp. 2d 1167 (S.D. Fla. 2000) (containing extensive factual review).

from Cuba to Miami as children. Many of the most agitated older exiles were those very parents; surely they would see the decision to return Elian to his father as an insult to their own identities, formed in no small measure by their decisions, around 1960, to get their children out of Cuba. For the chanting crowds in Havana, however, surely anything less than a return of Elian to Cuba would seem a betrayal of the Revolution that gave meaning to their sense of citizenship. On each side, Elian symbolized authority, morality, and the status of an identity group. In short, the Elian affair was an exercise in identity politics, in the modern classical mode.

Children (at least Our children) always symbolize, and for political purposes are, innocence, dependence, and vulnerability in a world full of risks. It is easy to imagine a child's being corrupted into wrong thinking and immoral behavior. So, we should expect a politics of fear to identify opponents as threats to our children. In this branch of cultural politics, the menace-in-chief is the socialization of the young to the wrong values. Furthermore, children are easily made into symbols representing group identity and group status. Their acculturation to our meanings is vital if we are to project our cultural authority beyond our own lifetime. When the former president of the Black social workers said, "Our children are our future,"²⁷² he was identifying himself with the preservation of the culture of African Americans as a group. For a "traditional" cultural politician who sees the group's base eroding under the multifold pressures of modernism, or for an "insurgent" cultural politician who sees the group's base dividing into multiple fragments, a poster child can offer instant (if temporary) relief. The image of the child allows the politician to put aside all such complications and speak in the tried-and-true vocabulary of Us and Them.

Yet, the well-being of real children, important as it is, will not be the center of attention for the political managers. Their job is to provide electoral victories; when they call into play the rhetoric of children's acculturation, they are speaking not to children but to adult voters. Indeed, the children whose images are deployed will ordinarily be reduced to abstractions that represent cultural groups. Each of those images is a screen on which the operatives can project a moral order, a set of authoritative meanings, a cultural group's aspirations and anxieties about group status.

Considerations like these go some distance toward explaining why political operatives continue to raise fears about the socialization of children. The remaining question, "Why focus on law?" has been a subtext of much of this article. The Epilogue that follows is a reprise of some answers that have been left implicit up to now.

272. For the context of this statement, see *supra* text accompanying note 68.

EPILOGUE: THE LURE OF LAW

When the subject is the socialization of children, we have seen, the imagery of identity politics is designed to evoke fear. What the operatives offer, after they have scared the voters, is another image: the image of power, of law as command. We have also seen that the power thus imagined is often an illusion. Yet the political operatives go on offering the promise of law to achieve their constituents' preferred cultural orthodoxies.²⁷³ We can speculate that one reason for this strategy may be historical. The cultural changes that have been most disturbing to these constituents, and have provoked their strongest reaction, found early expression in law—notably in the Supreme Court's decisions on school prayer, race, and abortion. On the other hand, law, as the classic popular symbol of authority and power, is easily portrayed as a threat of punishment that will force the unorthodox to abide by conventional understandings of authority and morality. Resort to regulatory law also commends itself to those who sense that their cultural group has lost status in the last generation's upheavals. Law as command may seem to express power itself; in this context, law's command can express the dominance of Our group over Them. One who is uneasy about status will want to believe in the power of regulatory law, not only to control unruly behavior, but to defend against cultural corruption and moral decay and, not incidentally, to regain lost ground.

Elections of candidates usually involve offices that carry some law-making power. It would be surprising if a candidate for the state legislature did not focus his or her campaign on lawmaking, for the main electoral task is to persuade voters that the election matters enough for them to go to the polls. It is natural enough for the candidate to point to the present state of the law, either with alarm at its supposed grievous effects or with alarm at the prospect of repeal. Today even candidates for President are asked to take positions on such issues as school prayer or sex education, even when the law in question is mainly state (not federal) law. What we are talking about here is theater: posturing and gesturing as one of Us, who will bring the law's commands to bear on Them. In all these presentations, whether or not law really is power, it sounds like power. For the practitioners of cultural politics, that seems to be enough.

273. I defy the reader to find a party platform for any presidential election after 1960 that does not contain a promise to change the law, addressed to an identifiable cultural group.