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Reframing the Debate about the Socialization of Children: An Environmentalist Paradigm

Barbara Bennett Woodhouse

Who should control children's development? The question evokes a longstanding debate, usually framed in constitutional terms, about laws that intrude on family autonomy in order to socialize children to majoritarian norms. Legal scholars, including myself, have tended to frame the debate as a struggle for control between the private authority of the family and the power of public institutions.¹ I would replace the paradigm in which parents and the state are pitted against each other with a paradigm in which parents and the state act as partners in ensuring an environment conducive to children's healthy development.

In this Article, I will argue that current realities have forced us to reframe the debate in a different way. Mass-media marketing—the advertising and promotion of products for consumption by children—has displaced parental authority as the primary force in socializing our children, with profound impact on the social and cultural environment of childhood. I will argue that these harms call for a legal and policy response, and suggest that environmental law may have important lessons to teach us.

Drawing upon ecological models of child development that have been widely accepted by psychologists, I will sketch an ecological approach that allows us to examine children in context instead of as isolated individuals. I will show how aspects of environmental law and theory, including the interplay of values, ethics and science, might inform our response to the degradation of children's cultural and physical environment. I will propose a new branch of environmental ethics, Ecogenerism, that promotes a child-centered approach to environmental ethics. I will then apply Ecogenerism to two current issues: (1) the effects of advertising on children's health and safety; and (2) the loss of unstructured spaces for children's play, both imaginary and physical. Finally, I will suggest a number of counterarguments against the paradigm shift I propose, and close by inviting more such critiques.

I. REFRAMING THE DEBATE: FROM INDIVIDUAL RIGHTS TO ECOLOGICAL REALITIES

A. The Traditional Paradigm

The traditional paradigm pitting parents against the state is deeply rooted in American family jurisprudence. On one side of the struggle are parents and the private institutions—from soccer clubs to churches to boot camps for defiant teens—that families deputize as their agents in guiding their children's development and instilling in their children the values that they hold dear. On the other side of the struggle are schools, child welfare agencies, family and juvenile courts, and all the other public institutions that utilize the "police power" of the state to qualify and limit parental authority and to instill publicly promoted values.

The theoretical separation between public and private spheres masks their essential interdependence. Each of these two contenders for power—the public state and the private family—claims a stake in regulating and shaping children's development. Sometimes the stake is described in public terms: as a collective interest in socializing "our children" to become citizens in a democratic society.2 Sometimes it is described in private terms: as an individual right to control the education and up-

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2 See, for example, *Tinker v Des Moines Independent Community School District*, 393 US 503, 524 (1969) (Black dissenting) ("School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens.").
This framework for thinking about the socialization of children has obvious caveats, as well as obvious strengths. For example, most scholars acknowledge that the public/private dichotomy is itself built on a myth—the myth of separate spheres. We have come to realize that the public and the private are not separate and discrete, but mutually reinforcing and mutually dependent. This interdependence is evident in the arguments of scholars who defend the primacy of the private family by pointing to its public role and asserting that society has a collective stake in assuring its authority. It is also evident in the work of scholars who point to the many ways in which public institutions and laws operate to create and enforce supposedly private spheres of autonomy and unregulated control. Children cannot leave a home that they find oppressive or disregard an unreasonable parental command without becoming lawbreakers. If they do break these status-based laws, their parents can seize and physically discipline them, and can have them detained by police and either returned to parental custody or declared wards of the state. Clearly, hierarchies of status, from the discarded practice of enforcing patriarchal control of men over women to the current practice of enforcing control of parents over children, are defined by law and enforced by state action.

Thus the public/private dichotomy is not a natural truth, but a tool for examining laws and policies. For all of its flaws, the public/private dichotomy continues to serve an important role in

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3 See, for example, *Troxel v Granville*, 530 US 57, 66 (2000) (recognizing the “fundamental right of parents to make decisions concerning the care, custody, and control of their children”).


5 See, for example, David J. Herring, *Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children*, 26 Loyola Chi L J 183, 209–56 (1995) (describing the political roles of the family unit as one justification for family privacy).

6 See Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 Mich J L Reform 835, 842–44 (1985) (arguing that the notion of state intervention into the family is incoherent because the state defines the family).

7 State laws generally allow reasonable corporal punishment, see Deana Pollard, *Banning Child Corporal Punishment*, 77 Tulane L Rev 575, 582 (2003) (noting that “no state has banned corporal punishment perpetrated by parents or legal guardians that does not rise to the level of ‘child abuse’”); allow for return of runaway minors, see, for example, *Alaska Stat § 47.10.141* (2004); and empower parents to petition to have an ungovernable child declared a person in need of supervision and placed in state custody, see, for example, *Cal Wel & Inst Code § 601* (2004).

8 Id. See also Fineman, 23 Conn L Rev at 966–69 (cited in note 4).
highlighting the tensions that develop in a democratic society between majoritarian values, enacted into public laws, and the values of family autonomy and privacy, protected by constitutional constraints on majority rule.

I have relied on these concepts in teaching classes about the relations between child, parent, and state. For fifteen years, I have begun each unit on “The Constitution and the Family” by drawing a triangular diagram on the board, with the state at the apex, the parent and child linked by a line that forms the base, and a horizontal line across the center of the triangle representing the zone of family privacy into which the state may enter only for the most compelling of reasons. The child and parent remain united, and shielded from state intervention, unless the parent has committed some bad act or gross omission that endangers the child. In rare cases, the presumption that a fit parent has a right to control his child may be overridden by principles of children’s liberty and privacy. Thus, when a mature child and parent are in conflict over a child’s exercise of the right to an abortion or to lifesaving medical care, the state will pierce the zone of family privacy and provide a judicial bypass of parental consent. But these cases are the rare exceptions to the rule of parental autonomy in enforcing personal values and choices regarding children’s development.

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9 See, for example, *Cruzan v Missouri Department of Health*, 497 US 261 (1990) (holding that a state can refuse to supplant a patient’s judgment on lifesaving care with a parent’s); *Bellotti v Baird*, 433 US 622 (1979) (holding that a mature minor has a right to obtain an abortion without parental permission).
Parental powers are not absolute; they may be counterbalanced by weighty state interests. In many decisions, the Supreme Court rejects the notion of an impenetrable barrier between state and family by balancing or weighing the public interests that the state has in children's welfare against the right of the parents to assert fundamental liberties and maintain private spaces. When state authorities interfere with parental choices, the Constitution, as interpreted in cases like *Parham v JR*, *Wisconsin v Yoder*, *Prince v Massachusetts*, and *Troxel v Granville*, mediates between claims of public and private control by empowering individuals who feel oppressed by the state to invoke the Fourteenth and First Amendments. Moreover, the Constitution empowers the courts to test the importance of the state's asserted interests and to measure the fit between these interests and the means of regulation. In procedural due process cases like *Santosky v Kramer*, which held that parental rights may not be terminated without clear and convincing evidence of unfitness, the Court balanced private interests (the right to a relationship with one's child and the child's right to a safe family zone) against public interests (protection of children and reducing administrative costs) and the risks of error in the procedural scheme, to determine the level of due process protection the Fourteenth Amendment requires. The scheme assumes a large measure of parental autonomy and control over children's development and also assumes that parental control is threatened whenever the state acts to intervene.

In my writings, as in my teaching, I accepted this basic triangulation of child/parent/state as the starting point for analysis. My writing argued that our analysis of when the state may

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14 530 US 57, 66 (2000) (noting the "fundamental right of parents to make decisions concerning the care, custody, and control of their children" and citing "extensive precedent").


16 Id.
pierce the zone of privacy needed to be re-balanced to place a
greater emphasis on the rights of the child.¹⁷ While this might
alter the balance of power between the state and the parent
(making thinner the barrier that deflects state intervention), I
argued that it was a necessary component of justice for chil-
dren.¹⁸ Drawing upon feminist theory, I argued that children, like
women, have been marginalized and excluded from power.¹⁹ The
dominion of the parent over the child, like the dominion of the
husband over the wife, might not be as benign or unselfish as we
imagined.²⁰ The veil of privacy drawn over family relations might
obscure other important values and rights, such as liberty, equal-
ity, and protection of dependent family members, that deserve
recognition.²¹ Borrowing from feminist theory, I advocated a
“generist” theory, focusing on meeting the needs of the next gen-
eration.²² I also proposed a “generist method” that would place
children at the center of our analysis.²³ I advocated a child-
centered perspective on parents’ rights and argued for a child-
centered, interdisciplinary, and developmentally-informed per-
spective for evaluating children’s law and policy.²⁴ In balancing
the rights of parents against the interests of the state in the edu-
cational sphere, I proposed that parents’ control should not be
absolute, but rather should be weighed against the strong public
interests in the protection and education of children and the
child’s rights to receive an education and enjoy protection from
harm.

¹⁷ See, for example, Barbara Bennett Woodhouse, Children's Rights: The Destruction
and Promise of Family, 1993 BYU L Rev 497, 513 (arguing that the modern approach to
the family must be a “community ethos that values children enough to accept them as
meaningful members of our society, assign individual responsibility of their nurture and
care, protect their family ties, and give meaningful support to their caregivers”).
¹⁸ See Woodhouse, 33 Wm & Mary L Rev at 1113–17 (cited in note 1) (arguing that
Meyer and Pierce further a notion of the child as property, in favor of parents' rights,
rather than focusing on the interests of the child).
¹⁹ See id at 1037–68 (tracing the historic transformation of society's view of children,
from property to individuals with rights).
²⁰ Id.
²¹ See Woodhouse, 67 Geo Wash L Rev 1247 (cited in note 1).
²² See Barbara Bennett Woodhouse, Hatching the Egg: A Child-Centered Perspective
²³ Id.
²⁴ See Annie G. Steinberg, Barbara Bennett Woodhouse, and Alyssa Burrell Cowan,
Child-Centered, Vertically Structured, and Interdisciplinary: An Integrative Approach to
Children's Policy, Practice, and Research, 40 Fam Ct Rev 116 (2002).
B. A Crisis of Culture and a Call to Action

This was my frame of reference as I began thinking about the question of, “who controls children’s development?” in preparation for The University of Chicago Legal Forum Symposium, “The Public and Private Faces of Family Law.” But this time, when I asked myself the question, I found myself following an entirely different road map. Perhaps my mental map had been changed by a conference hosted at the Center for Children and the Law at the University of Florida in March of 2003.\(^\text{25}\) Our conference, titled “Children, Culture and Violence: Images, Myths and Realities,” gathered experts from a range of disciplines to converse about the effects on children of growing up in a violent environment and to explore the images, myths, and realities of children as victims and as victimizers within a culture of violence.\(^\text{26}\) The data, both qualitative and quantitative, was sobering.\(^\text{27}\) It brought sharply into focus the role of cultural and market influences on children’s development and socialization that do not fit neatly into my child/parent/state triangle.

Or perhaps it was my adult daughter who inspired me to abandon the familiar road for one less traveled. She had just published a novel set in a world of virtual reality and artificial intelligence, where humans and their constructs have left behind a ravaged Earth made uninhabitable by war and environmental degradation.\(^\text{28}\) They have emigrated to new places in the universe where bioengineered babies are produced in industrial crèches, where state and market have taken over the very definition of what is or is not “human,” and the public/private dichotomy seems obsolete.\(^\text{29}\) We often say that “children are our future.” If this nightmare might be our children’s future, I wondered, was I asking the wrong questions about our children’s present?

For whatever reason, something in my mental world had shifted so that the familiar triangle seen through a public/private prism no longer seemed to reflect reality. In its place, I saw a rapidly changing environment of intersecting forces, where new technologies flooded our children with new influences in toxic

\(^{25}\) See <http://www.law.ufl.edu/centers/childlaw/> (visited Apr 4, 2004).
\(^{26}\) See <http://childconference.ichp.edu/> (visited Apr 4, 2004).
\(^{27}\) See Nancy Dowd, Dorothy Singer, Robin Wilson, eds, *Children Culture and Violence* (forthcoming Sage Press 2005) (essays examining the culture of violence in media, in the streets, and in the home).
\(^{28}\) Chris Moriarty, *Spin State* (Bantam 2003).
\(^{29}\) Id.
doses. These influences are neither public nor private within the traditional family/state dichotomy, but their effect on contemporary American children's socialization appears far more pervasive than that of either the American Parent or the American State. By the time she reaches eighteen, the average American child has spent more hours sitting in front of a television than engaging in any activity other than sleeping. Media and marketing dictate the foods she eats, the clothes she wears, and the music she buys. Media and marketing, far more than family or government, create and manipulate child and youth culture and are reshaping the ecology of childhood and youth.

Among psychologists and sociologists, the term "ecology" has long been used when analyzing children's development. Although I have not found other legal writings discussing this exact issue, I am certainly not the first to suggest that twenty-first century advocates for children might wish to emulate twentieth century environmentalists. Advocates for children and families from both the public and private camps have worked to unite and mobilize the legal system to deal with toxic conditions that threaten children and parents alike. Suppose we analogize what is happening within the culture to the crises created by toxic wastes like PCBs, the byproduct of unregulated manufacturing, and toxic substances like DDT that were invented and marketed for a valid purpose but created unintended harms to living creatures. Suppose we examined the nature of the delivery systems and quantities of new inputs into our culture to determine whether they adversely affect renewable (but not infinitely resilient) human resources. I would argue that environmental and

31 See sources cited in notes 215 and 216.
32 Public international institutions and state agencies such as the World Health Organization or national and state departments of health, education, and the environment rely on non-governmental organizations like the National Institute on Media and the Family or the American Academy of Pediatrics to support, inform, and often to goad their work. See, for example, <http://www.mediafamily.org> (visited May 14, 2004); <http://www.aap.org> (visited May 14, 2004); <http://apa.org> (visited May 14, 2004).
33 PCB stands for “polychlorinated biphenyl.”
34 DDT stands for “dichlorodiphenyltrichloroethane.”
35 See, for example, United States v Montrose Chemical Corp, 835 F Supp 534 (C DCAL 1993) (involving a government suit against corporations that released DDT and PCBs into the Los Angeles wastewater system).
land use law provides a blueprint for this transformation of family law and policy.

Shifting the terms of such a controversial debate is not easy, but we have faced this challenge before. In the wake of the Industrial Revolution, natural ecological systems that had remained relatively stable over long periods of time were suddenly thrown out of balance and degraded, creating grave risk to life on the planet. Yet it took a century or two for us to realize that we were destroying an environment that had seemed so vast and natural—an environment that it seemed only God or Nature truly possessed the power to create or destroy. When Rachel Carson published *Silent Spring* in 1962, no one could have imagined a new field of law would follow. But her work awakened the public to the threats posed by man to the ecology of the natural world and the processes of creation and renewal that had been ignored and underestimated. In order to address the crisis, we had to find a new way to conceptualize the public/private dichotomy, rather than characterizing regulation as an intrusion on discrete parcels of private property.

Experts who study the ecology of childhood have been sounding a warning call much like that of the early environmentalists. In 1999, sixty psychologists wrote to the American Psychological Association stating that “the use of psychological insight and methodology to bypass parents and influence the behavior and desires of children constitutes a crisis for the profession of psychology.” The authors went on to state that “today these practices are reaching epidemic levels, and with a complicity on the part of the psychological profession that exceeds that of the past. The result is an enormous advertising and marketing onslaught that comprises, arguably, the largest single psychological project ever undertaken.”

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37 Rachel Carson, *Silent Spring* (Houghton Mifflin 1962) (documenting effects on wildlife of pesticides such as DDT and other human impacts); see also Rachel Carson, *Silent Spring* (Mariner 2004) (40th anniversary edition).


39 Id.
mony, and professional position papers, experts have been telling
us of the measurable adverse effects of advertising and media
violence on children. They have called for regulation of the mar-
keting to children of unhealthy foods and toys, and of violent me-
dia and electronic games. Citing studies on brain development
and the effects of television, the American Academy of Pediatrics
advises that children under age two should watch no television
at all, and that media exposure (including to television, video
and computer games, and movies) for older children be limited to
no more than one to two hours per day of educational nonviolent
fare. Yet current studies show that the average child aged two
to seven is exposed each day to almost five and a half hours of
media outside of school, and that the average child older than
age eight is exposed to over six hours a day—making media con-
sumption more pervasive in children’s lives than any activity
other than sleep.

In February 2004, the American Psychological Association
took the drastic step of calling for a ban on advertising directed
at children younger than nine years old. Perhaps we have
reached the point where we can no longer ignore the rapid and
unregulated development of a mass-media marketing culture
that is changing the ecology of childhood and parenthood. Chil-
dren are courted by purveyors not only of children’s foods and
toys but of adult products and services. Marketers are aggres-
sively vying for the attention and lifetime loyalties of young con-
sumers using every available technology and the potent tools of
psychology and other behavioral sciences. Of particular concern
are current industry trends targeting preschoolers and preteens,
the increase in marketing in schools, and the use of psychology
and other behavioral sciences to scrutinize and manipulate chil-
dren.

I will argue that mass-media marketing is not a benign en-
trepreneurial enterprise—it is a potentially destructive assault

online at <http://www.aap.org/family/tvf1.htm> (visited Apr 4, 2004).
41 Commercial Alert, *Psychologists, Psychiatrists Call for Limits on the Use of Psy-
chology to Influence or Exploit Children for Commercial Purposes* (Commercial Alert
1999), available online at <http://www.commercialalert.org/index.php/category_id/1/
subcategory_id/21/article_id/68> (visited Apr 4, 2004).
43 Aird, *Advertising and Marketing to Children in the United States*, in Pufall and
on children’s environment that we must strive to understand and attempt to regulate. I know this proposal is controversial. Feminists who called for regulation of media images because they threaten the welfare of women (pornography, bondage, and snuff films) have already been stung when they stirred this First Amendment hornet’s nest.44 Closer to home, my colleague Sharon Rush has braved charges of censorship with her argument that assigning children to read racially charged classics like Mark Twain’s Huckleberry Finn subjects them to “emotional segregation.”

Invoking children’s interests is also a politically dangerous game. Observers of the human condition and cultural conflict may say that the most I could expect would be a new rhetorical weapon for fighting old culture wars that are not really about children anyway.46 I can see significant dangers in calling for the regulation of forces that we barely understand. We require preparation of an environmental impact statement for many decisions and actions that significantly alter the human environment. Indeed, the foundation of much environmental regulation is analysis of the environmental impacts of private activity. But can we even begin to understand the impact of private activity on the cultural, as opposed to the physical or biological, environment?

An environmental approach would also impinge on distinctions between speech and conduct that are integral to our thinking about intellectual freedom and the role of the First Amendment. First Amendment jurisprudence distinguishes between conduct, which generally is not protected, and speech, which generally is protected.47 Speech includes not only spoken words

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47 See Gregory v Chicago, 394 US 111, 124 (1969) (Black concurring) (“[O]ur Federal Constitution does not render the States powerless to regulate the conduct of demonstrators and picketers, conduct which is more than 'speech.'”). Criminal conduct is generally
and writings, but also visual and auditory symbols, images, and messages.\textsuperscript{48} The Supreme Court has repeatedly struck down attempts to regulate speech based on its content.\textsuperscript{49} Thus, a physical assault is unprotected conduct, but the enactment of an assault on television, in a film, or in a handheld video game is likely to be viewed as protected speech. Commercial speech receives lesser but still substantial protection.\textsuperscript{50}

There are serious dangers to breaching the First Amendment distinctions that protect expression from content-based regulation. Not least of these is the process of identifying speech that harms. Falsely crying “fire” in a crowded theater is the classic example of harmful speech that overcomes the individual’s ability to process and filter information. But we generally assume that the individual will process and filter the message, and that it is the individual’s choice how to respond to speech, not the speech itself, which produces the harmful effects. A toxic gas can be identified as harmful through scientific testing and can be regulated or prohibited. But toxic media images? Toxic advertising?

A discussion of the First Amendment implications of an environmental approach must take place before the implementation of any regulation. But I will set aside these issues for another day. My project in this Article is to begin a discussion about the ecology of childhood, to explore the effects on children of mass-media culture, and to explore an environmental approach to regulating it. How would an environmental or ecological approach to questions about socializing our children and shaping their development change our analysis of the roles of the parent and the state? What does environmentalism tell us about the public and private spheres of action, and how would it address the influence of the media and the market in shaping children’s ecology? How might we bring the lessons of environmentalism to bear on what many see as a toxic environment that threatens both the private role in guiding children’s socialization and the public stake in the health of the next generation?

unprotected, and non-criminal expressive conduct is generally protected but receives less protection than “pure speech.” \textit{Texas v Johnson}, 491 US 397, 406 (1989).

\textsuperscript{48} See, for example, \textit{Texas v Johnson}, 491 US 397, 397 (finding flag-burning to be protected speech).

\textsuperscript{49} See, for example, \textit{R.A.V. v City of St. Paul}, 505 US 377, 382 (1992) (“Content-based regulations are presumptively invalid.”).

\textsuperscript{50} See, for example, \textit{44 Liquormart, Inc v Rhode Island}, 517 US 484 (1996) (providing First Amendment protection to truthful, non-deceptive commercial advertising).
II. MASS-MARKET CULTURE AND THE ECOLOGY OF CHILDHOOD

In the current political climate, regulation is demonized and deregulation is the ideal.\(^{51}\) Government should have a very good reason to interfere in supposedly private activity and proponents of regulation should bear the burden of proof.\(^{52}\) Likewise, the burden is on me to explain what I find compelling about the current situation before I propose how environmental regulation might operate to mitigate it.

Something new, or at least different in scale and degree, is happening to the socialization of American children—and increasingly to children across the globe. Groping for a term that accurately describes what I have in mind, I call this force “mass-media marketing.”\(^{53}\) I argue that it is having a deleterious effect on the culture of childhood. Moreover, childhood is an especially important site of culture:

Because psychic culture must always be passed from generation to generation through the narrow funnel of childhood, a society's child-rearing practices are not just one item in a list of cultural traits. They are the very condition for the transmission and development of all other cultural elements, and place definite limits on what can be achieved in all other spheres of history.\(^{54}\)

Today, however, meaning is generated in massive quantities in order to gain advantage in the marketplace.\(^{55}\) Beginning in the

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\(^{51}\) When government provides the channel of communication, as it does with radio, for example, the scope of regulatory power is greater. See FCC v Pacifica Foundation, 438 US 726 (1978) (holding that the FCC has the power to limit indecent speech on the radio).

\(^{52}\) See Robert W. Hahn, Achieving Real Regulatory Reform, 1997 U Chi Legal F 143 (arguing that “new law” should generally “shift the burden of proof so that fewer regulations impose major net costs on the average American consumer”).

\(^{53}\) This term cannot capture the complexity of the relation between culture, media, and markets. Entire academic departments and institutes are devoted to the study of these phenomena (for example, New York University's Media Ecology studies department). The phenomenon I wish to highlight is the same one discussed by Karst—a youth culture shaped by media forces. See Karst, 91 Cal L Rev 967 at 1002-11 (cited in note 46).

\(^{54}\) Lloyd deMause, The Evolution of Childhood, in Lloyd deMause, ed, The History of Childhood, 1, 3 (Psychohistory 1974).

\(^{55}\) Scholars of social semiotics and postmodernists speak of “signifying practices,” defined as the “meaning-making behaviors” in which people engage through the production of “texts.” The term “texts” includes the broadest range of expression and media, anything that conveys or is read as having meaning. For a quick orientation to semiotics, visit the University of Colorado at <http://carbon.cudenver.edu/~mryder/itc-data/semiotics.html> (visited May 14, 2004) and its glossary at <http://www.aber.ac.uk/media/Documents/S4B/sem-gloss.html> (visited May 14, 2004). By using such terms, I
closing decades of the nineteenth century, the motif of children’s culture was increasingly used to promote the marketing of products for children. In the early years of the last century, photographic images of children were used to sell Pears soap and Shredded Wheat cereal. But the postmodern reality is quite different:

Television has profoundly changed family life and continues to do so. Television has also had massive social and community effects. . . . Studies of remote regions prior to and after the arrival of television demonstrate dramatic decreases in community involvement and shared activities such as team sports, particularly as the number of channels increases. Thirty-plus years of research have amply documented that exposure to television profoundly changes people’s behavior and patterns of daily life.

The advent of new technologies that exploit virtual reality further blurred the divide between the physical world and the world of mass-market fantasies. As one cultural historian remarked, utilizing the discourse of postmodernism:

The new era of childhood, the postmodern childhood, cannot escape the influence of the postmodern condition with its electronic media saturation. Such a media omnipresence produces a hyperreality that repositions the real as something no longer simply given but artificially produced as real. . . . As media push the infinite proliferation of meaning, boundaries between childhood and adulthood fade as children and adults negotiate the same mediascape and struggle with the same impediments to meaning making. Images created to advertise food, clothing, entertainment, and beauty products create new appetites and define needs we never intend to convey that the culture of childhood, like all culture, is not static or given, but socially constructed.

57 Id at 102–03.
58 Frank W. Putnam, Dissociation in Children and Adolescents: A Developmental Perspective 207 (Guilford 1997) (internal citation omitted).
knew existed. Often, advertisements selling products or touting entertainment, with advertising budgets in the tens of billions of dollars, are aimed directly at children. Children recognize brand logos long before they can read. The average American child between the ages of two and eighteen spends five hours and forty-eight minutes per day with electronic media and forty-four minutes per day with print media. The bombardment of advertising and seductive images is relentless. The lines between programming and advertising blur, with media selling other media and programming selling products. Children have “nowhere to run, nowhere to hide” from a manufactured culture of consumption.

I consider this culture ersatz and manufactured because it has not arisen naturally out of complex social forces working over a long period of time. It has been created for the specific purpose of increasing demand for a particular product. In this sense, it is artificial, not natural. While many aspects of traditional culture mystify us and cause us worry, at least we know that they evolved over time and have deep roots in some settled cultural substrata. Whether I defend them, as I do taboos on incest, or challenge them, as I do taboos on same-sex marriage, I know that I am dealing with something akin to an organic growth process. By contrast, the thrills and chills, the tastes and hungers of mass-market culture are artificial in that they are intentionally manufactured in a dosage calibrated to sell a specific product to a specific set of consumers, whether those consumers need the product or not.

The dominance of mass-market culture stems from marketers’ ability to spread a message with lightning speed, in massive doses, utilizing the powerful new technologies of the information age—television, films, CDs and DVDs, the web, and digital imag-

60 In Marketing and Advertising terminology, these are referred to as “latent needs.”
65 Yes, I know how subjective and indeterminate these labels are, but they convey my concerns better than any others I could employ.
This potent messaging system not only sells things, it also changes how all of us, especially children, see the world and how we see people's roles within it.\textsuperscript{66} Of course, culture is never neutral. A storyline or image may be designed to reinforce dominant values, such as patriotism or love of family. Or it may be intended to tap into listeners' or viewers' defiance of dominant cultural norms, as in acid rock and "goth" fashion. What seems different in the mass-market media context is the sheer quantity and pervasiveness of "culture" that is produced and disseminated. It is disseminated, moreover, not because of any commitment to the cultural message, but because its creators believe the message will effectively sell a product. As my brother, Dr. Charles H. Bennett, a quantum physicist,\textsuperscript{67} helped me to understand, my concern is less with the content of the message (the idea or the image) than with its commercial use, its dosage and its method of delivery. Returning to the analogy to toxic substances, a chemical that might be nontoxic or even beneficial when consumed in naturally occurring amounts can become lethal if main-lined or force-fed in a concentrated overdose, especially to a child.\textsuperscript{68}

Children's natural appetites can become distorted, as can their perceptions of self and other.\textsuperscript{69} Advertisements become confused with the storyline itself, when popular characters are used to sell products or to introduce commercial messages.\textsuperscript{70} This further blurs the line between messages intended to convey values and ideas, and messages intended to sell products by titillating the viewers' appetites for sex, violence, and consumption.\textsuperscript{71}


\textsuperscript{67} For Bennett's biography, see <http://www.research.ibm.com/people/b/bennetc/> (visited Apr 4, 2004).

\textsuperscript{68} Many drugs, including amphetamines, opiates, and alcohol that are harmless or beneficial in appropriate doses are harmful when used in doses designed to alter the state of consciousness of the consumer. See, for example, Matthew Segal, Comment, \textit{Overdue Process: Why Denial of Physician-Prescribed Marijuana to Terminally Ill Patients Violates the United States Constitution}, 22 Seattle U L Rev 235, 239 (1998) (noting that a Indian Hemp Drugs Commission study concluded that "while extensive use of marijuana could be harmful, small doses could be beneficial").


\textsuperscript{71} Karst refers to this triumvirate as "consumerism, transgression and sexuality."
An overload of age-inappropriate information that children have difficulty processing swamps children's natural curiosity. It is difficult for a pre-adolescent child to develop a healthy body image or explore his or her emerging sexuality when steamy sex acts of every description pop unbidden onto the computer screen from sophisticated pornography sites. In the following Parts, I address several contexts in which the mass-media market has changed the ecology of childhood.

A. Children and Advertising

As psychologists have long recognized, exposure to television influences all aspects of children's development. As one expert explains:

[T]elevision-based assumptive belief and value systems are powerful influences on children's thinking about the nature of the world. . . . Children's programming is especially insidious in using a variety of techniques to blur reality-nonreality distinctions. For example, toy advertisements rely on a heavy blending of live actors with animated action. . . . In querying preschoolers and young school-age children, I find that many have a difficult time determining whether or not certain characters well known to this age group exist outside of television. This is, of course, what the advertisers want. A natural outgrowth is that cartoon characters endorse a variety of products—as a stroll down the cereal aisle in any supermarket will make all too clear.

Meanwhile, the growing strength of the research documenting young children's inability to recognize and defend against television advertising has prompted the American Psychological Association ("APA") to issue a new call for regulatory intervention. In 2000, the APA convened a Task Force on Advertising and Children. The Report of the APA Task Force details the current mass-market media situation and its evolution. While acknowledging that advertising has a long history, the APA Task Force

Karst, 91 Cal L Rev at 1003 (cited in note 46).
72 Putnam, Dissociation in Children and Adolescents at 207–12 (cited in note 56).
73 Id at 209–10.
identifies two trends: (1) the growth in advertising channels reaching children as cable and satellite channels have proliferated, and (2) the migration of televisions and computer screens into children's bedrooms, where children view advertisements in isolation from other family members. These trends have resulted in a dramatic increase in advertising directly intended for the eyes and ears of children. As the Report notes, the average child today views more than forty thousand commercials a year and advertisers spend more than twelve billion dollars per year to reach the youth market.  

Children ages fourteen and under make $24 billion in direct market purchases and influence $190 billion in family purchases. The boundaries between advertising and programming are blurred by sponsorships that link popular characters from shows to the marketing of foods and other products by picturing those characters on packaging and in advertisements.

Focusing primarily on television, the most widely studied medium, the Report examines the nature of advertising aimed at children and how children's cognitive development affects their processing of these commercial messages. Four product categories—toys, cereals, candies, and fast food—account for approximately 80 percent of all television advertising aimed at children. The messages link the products with "fun and happiness" and rarely provide any factual product-related information. They may contain disclaimers, such as "part of a balanced breakfast" or "some assembly required," but these warnings are incomprehensible to the target audience.

For adults, recognition that a particular message is an advertisement triggers what the Report calls "a cognitive filter" that takes into account the fact that the source of the message has other interests than the consumer, that the message is intended to persuade, that the message may be biased, and therefore that the message demands a different interpretive strategy.

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75 Id at 2-4.
76 Id at 2.
77 Id. The FTC has limited an even more confusing practice known as "host selling" in which a character from the host show appears within the commercial, touting the product. Kunkel, Report of the APA Task Force on Advertising and Children at 6 (cited in note 70).
78 Id at 4.
79 Id at 5.
80 Id.
than other messages. At least two essential cognitive tasks are involved in any mature person's understanding of advertising: (1) distinguishing between commercial and noncommercial content, and (2) recognizing the persuasive intent motivating advertising, and its biased nature. Numerous studies cited in the Report clearly establish that children younger than ages seven to eight cannot recognize the boundaries between commercial and non-commercial messages and lack the ability to understand the persuasive intent of advertising. The Report concluded that advertising to children is inherently unfair.

The Task Force also addressed the effects of advertising on children, asking (1) does it affect children's product preferences?, and (2) does it result in consumption of products inimical to the health and well-being of children? The Report answers both questions in the affirmative. Studies show that exposure to even a single commercial affects a child's product preferences and, more importantly, that children's product preferences affect parents' purchasing decisions. Among the highly effective tactics advertisers use is the inclusion of premiums with products, with one study showing that half of children's cereal purchases were prompted by premiums, such as a small figure or toy included in the product package. In several studies of children and parents in the supermarket, three fourths of parent-child exchanges about products were child demands for merchandise advertised on television. The increased levels of child-parent conflict created when parents refuse children's demands also raises concern.

The APA Task Force Report also found, based on numerous studies, a link between increases in advertising for unhealthy foods and rates of childhood obesity. Eating habits formed in

82 Id at 5.
83 Id at 6-7.
84 Id at 23.
86 Id at 14-15.
87 Id at 10-11.
88 Id at 10.
90 Id at 11.
91 Id at 12.
childhood persist throughout life, magnifying the social implications of unfair advertising directed towards children. Advertisers of candy and cereals openly target a children's market, but advertisers of alcoholic beverages and cigarettes have also effectively recruited young users. While children may happen to see commercials for beer, wine, and cigarettes that are aimed at adults, studies indicate that many commercials for these adult products specifically target and are designed to appeal to the young.

B. The Diminished Role of Parents and Other Adult Figures

Mass-media marketing culture dominates partly because of the potency of its delivery, but also because it is drowning out or substituting for other voices in children's lives. In the past, adults within the family interpreted culture to children. Messages about culture were conveyed from one generation to the next in daily interactions. Traditionally, parents decided which influences to allow into their children's lives and which influences to ban.

Constitutional decisions have described parental control over children's associations and socialization as a protected "right" of the parent. Taken to its extreme, this formulation suggests that any state regulation of influences on children preempts parental choices, and is therefore constitutionally suspect. The Supreme Court has never gone so far. Instead, it has conceptualized a partnership between government and parents. As Justice Brennan stated in Ginsberg v New York, a "legislature could properly conclude that parents and others, teachers for example, who have . . . primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." In addition, "the state has an independent interest in the well-being of its youth." While this interest does not "justify an unnecessarily broad suppression of speech addressed

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92 Id.
94 See Melvin Konner, Childhood 239–46 (Little, Brown 1991) (describing how children across a wide range of cultures learn by observing parents and other adults).
96 390 US 629 (1968).
97 Id at 639.
98 Id at 640.
to adults," it does support restriction of speech that is reasonably thought to be harmful to minors. Thus, both individual parents and society as a collective possess strong interests in shielding children from harmful speech.

Today, economic realities and structures of work and recreation function to distance or disable parents from their direct role in socializing children. One reason for this shift lies in the degradation of parents' earning power, producing the "two income trap" where both parents must work to meet a family's material needs. Observers point to the deteriorating condition of poor and working class families as policymakers remove income supports and public benefits and embrace the deregulation of labor and the market. The absence of parents does more than simply leave the family undefended, allowing the mass-media barbarians to storm the gates. As parents and other adults spend less time with children, other forces must fill the role of socializing our children. A vacuum is created into which mass-media influences flood.

In our grandparents' day, it was relatively easy to monitor a child's books or playmates. Now, children watch television at school and receive assignments to watch programs as part of their homework. They have access to media, such as computers and video games, in libraries, internet cafes, and arcades, not to mention in the homes of other children. Few parents today have the time or the strength to play gatekeeper to the pervasive influence of mass-market media. The percentages of mothers of young children who work outside the home, as grown exponen-

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100 Ashcroft v American Civil Liberties Union, 124 S Ct 2783 (2004); Sable Communications of California, Inc v FCC, 492 US 115, 126 (1989).
101 For a general discussion, see Elisabeth Warren and Amelia Warren Tyagi, The Two-Income Trap: Why Middle-Class Mothers and Fathers Are Going Broke (Basic Books 2003); Joan Williams, Our Economy of Mothers and Others: Women and Economics Revisited, 5 J Gender, Race & J 411 (2002).
102 See Martin Guggenheim, Somebody's Children: Sustaining the Family's Place in Child Welfare Policy, 113 Harv L Rev 1716, 1746 (2000) (noting that "[s]ince the 1970s, the concept of 'child welfare' has been artificially narrowed to mean little more than protecting children from parental harm"); Robert B. Reich, What Happened to the American Social Compact?, 50 Me L Rev 1, 10 (1998) (describing the "current situation" as "widening equality coupled, paradoxically, with a weakening social compact"). See also Kincheloe, The New Childhood, in Jenkins, ed, The Children's Culture Reader 159-60 (cited in note 56).
tially. In 1960, 18.6 percent of women with a child under six participated in the labor force. By 1994, that rate had tripled to 61.7 percent.\textsuperscript{104} The fact that parents spend more hours working outside the home is only one of many factors, including access to quality day care, stagnating employment and wage rates and lack of affordable health insurance, that affect the lives of children.\textsuperscript{105}

To control the relentless flow of media influences, a parent would have to remove the child from peer influences and from mainstream social institutions. More and more parents appear to be doing just that. Estimates vary, but as many as one million children are currently being home schooled and their numbers are growing.\textsuperscript{106} Most come from two-parent families with a stay at home parent. According to the Census Bureau, the number of home schooled children could grow to over thirty million without exhausting this core constituency.\textsuperscript{107} Many of the parents describe dissatisfaction with the school environment and the moral and religious values it teaches as reasons for their choice of home education.\textsuperscript{108} Arguably, the home schooling movement represents an attempt by parents to separate children from a popular culture that they perceive as subversive of their own family or religious values.

Studies indicate that most parents take one of three approaches to managing their children’s television viewing. They either surrender to mass-media dominance as inevitable, accept its dominance as normal, or actively facilitate its intrusion into family life and its displacement of parents as the primary source of acculturation.\textsuperscript{109} While most parents say that they impose rules on television watching, the statistics, and their own children, suggest otherwise. According to children, over 60 percent of parents have no rules about television watching.\textsuperscript{110} More than half of all children have televisions in their bedrooms, with recent sta-


\textsuperscript{107} Id.

\textsuperscript{108} Id.

\textsuperscript{109} See Gentile and Walsh, 23 J Applied Developmental Psych at 160 (cited in note 63) ("A number of reviews have shown that parents typically do not exert much control over the media that their children consume.").

\textsuperscript{110} Id.
Statistics showing that 26 percent of two to four-year-olds and 39 percent of five to seven-year-olds have their own televisions—a factor that increases the number of hours of television a child watches and reduces the likelihood of parental monitoring of television viewing.\(^{111}\) "Simply put, it is now normative for American children to have a television set in their own room... This decreases parents' ability to serve as a buffer between their children and the commercial appeals that the media deliver to them."\(^{112}\)

Time spent watching media, and especially the presence of a television in the child's bedroom, is negatively correlated with school performance.\(^{113}\) Media consumption is positively correlated with childhood obesity.\(^{114}\) In contrast to diets of educational television, diets of typical television tend to teach children about sexist and aggressive attitudes, fear, and consumer behavior.\(^{115}\) As noted earlier, voluntary codes governing advertising and measures promoting educational programming seem powerless to stem this tide.\(^{116}\)

C. The Disparate Impact on Poor and Minority Children

The negative effects of mass-media are not equally distributed across the population. They are especially concentrated in the most vulnerable families where economic stress, lack of time, and lack of education may diminish the effect of parental interventions. Children growing up in minority families, families of low socio-economic status ("SES"), and single parent and divorced families face a heightened risk:

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\(^{112}\) Id.

\(^{113}\) See Gentile and Walsh, 23 J Applied Developmental Psych at 160 (cited in note 63).


\(^{115}\) Gentile and Walsh, 23 J Applied Developmental Psych at 160 (cited in note 63).

Children in single parent homes watch more television, more movies, and listen to more radio each day than children in two-parent homes. Children in minority families watch more television, watch more movies, and play more video games. Children in low-income families watch more television, watch more movies, play more video games, listen to the radio and CDs more, read less, and use the computer less than children in higher-income families. Similar patterns are found for parental education level, such that lower education levels are correlated with higher electronic media use.\(^\text{117}\)

Moreover, mass-media advertisers apparently target more vulnerable populations. In the United States, "unhealthy images relating to food are already much more common on prime-time [television] shows aimed at [African Americans] than on other such shows."\(^\text{118}\) Like children, minorities that live at the poverty line are never discounted as consumers. They present a valuable market share for certain products that are inexpensive to manufacture and inexpensive to market in bulk.\(^\text{119}\)

Minority youth are not only caught in the crossfire of advertisements and subliminal messages about consumption aimed at their more affluent neighbors, they are also specifically targeted with advertisements for expensive clothing and the latest fashion items.\(^\text{120}\) Messages that equate love with a diamond ring, manhood with a fast new car, and happiness with a high-tech toy have a very bitter edge when the viewer knows such products can never be within his reach. "A student's path to obtaining them may lead to burglary, drug dealing, assault or homicide."\(^\text{121}\)

In the inner cities, the notion that it is up to parents to turn off "the tube" rings especially hollow. It should not surprise us that in neighborhoods where streets are dirty and unsafe, play-

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119 Id.
grounds lack operable equipment, and any open areas that might allow unstructured play are littered with hazardous materials, parents might reasonably prefer to have their children stay home and watch television or play violent, but relatively harmless, videogames. Poor parents who prefer television to outdoor play may be making rational choices in favor of the lesser of two evils. Children’s economic situation shapes their socialization. As Kenneth Karst points out, “[t]he most dismal reality in the socialization of American children is that at least one in six of them live in poverty.”

Poverty, poor schools, poor housing, poor health care, dangerous streets, and a lack of adult supervision in families struggling to survive all play a role in the ecology of inner-city childhood. Mass-media culture plays its own insidious part. It would be simplistic to argue pure cause and effect: the child who sits in front of a television in a poor household, absorbing messages about consumerism and violence, becomes the future juvenile delinquent who is driven to take by force the objects and the power he has been taught to crave. But it would also be simplistic to discount the effects on children of being saturated with messages about material things that they and their families cannot afford. As William Julius Wilson points out, much of what we view as deviant conduct may be “particular cultural adaptations to the systematic blockage of opportunities in the environment of the inner city.” How much more difficult it must be to tolerate one’s marginalization from the “good life” when one has been fed constant images of consumption, violence, and sexuality in advertisements, sitcoms, media, and high tech toys. Teenagers themselves raised this issue in a conversation with Justice Yvonne Mokgoro, the first black judge and the first woman judge on the South African Constitutional Court. A group of teenage girls from West Philadelphia asked her for advice on how to resist the temptation to sell drugs or steal in order to obtain the material things (the latest fads in clothes and shoes, gold jewelry, high tech items, and cars) that they saw advertised all around them as they rode to school on the subway and that some

122 Karst, 91 Cal L Rev at 1011 (cited in note 46).
124 Karst refers to this triumvirate as “consumerism, transgression and sexuality.” Karst, 91 Cal L Rev at 1003 (cited in note 46).
of their peers had obtained through lawbreaking.\textsuperscript{125} She answered, with great gravity and sympathy, that she had no good answer.\textsuperscript{126} It was far easier for her, growing up in a South African township, because no girl she knew had more than two dresses—an everyday dress and a Sunday dress.\textsuperscript{127} She walked to school, and there was no television, no advertising, no consumer culture of adolescence, to tempt and distract her from studying hard and working beside her mother.\textsuperscript{128} She could not tell these Philadelphia teenagers, from personal experience, how to resist, but she urged them to do so.\textsuperscript{129}

Of course, some might argue that awareness of what the wealthy have also instills ambition and a drive to achieve more material success. Even before mass-media, poor people aspired to become wealthy. Can the impatience of modern consumers be explained by mass-media and modern marketing? I believe that creating a state of greedy impatience and empowering the consumer to act upon it by buying now rather than later is precisely the goal of mass-media marketing and its collateral structures, such as easy credit and pay day lending. Never before in American history have images of extraordinary affluence so thoroughly blotted out the concrete reality that most people live on limited incomes and cannot afford luxuries. As the rich have become richer, the average American has gone deeper into debt.\textsuperscript{130} The poorer the consumer the higher the cost of credit—many working class Americans are borrowing from pay day lenders at interest rates as high as 800 percent in order to pay for goods and services they cannot afford.\textsuperscript{131}

We know, as well, that advertising increases children’s materialism—the belief that products and their acquisition serve as the basis for determining one’s own personal worth. Whether


\textsuperscript{126} Woodhouse, 2 U Pa J Const L at 31 n 105 (cited in note 125).

\textsuperscript{127} Id.

\textsuperscript{128} Id.

\textsuperscript{129} Id.

\textsuperscript{130} Household debt as a percentage of disposable income is higher than at any other time in history, standing at 103 percent of personal disposable income, up from about 31 percent in 1949. Christopher L. Peterson, \textit{Taming the Sharks: Towards a Cure for the High-Cost Credit Market} 3 (2004).

\textsuperscript{131} Id.
materialistic values contribute to the child’s or to society’s good or ill is a complicated question, but the connections between advertising and materialism among young children are clear.\textsuperscript{132}

D. Spillover Effects on Children of Changes in Adult Culture

Mass-market culture also changes the culture of adults, affecting their relationships with children. Media dominates the family dinner table, with 58 percent of families with children reporting that they have the television on during dinner.\textsuperscript{133} The National Institute of Mental Health found that “[t]here is less verbal communication, less looking at each other, but more physical touching among family members when the [television] is on.”\textsuperscript{134} While physical intimacy between parents and children is important, it is not a substitute for mutual engagement in verbal and conceptual activity.\textsuperscript{135} Media can affect parents’ relationships with children in more subtle ways as well. Mass-market culture defines the good life and the good parent in ever more material terms, thus devaluing the role of things that cannot be manufactured, sold, and consumed. Many parents have several jobs and work overtime in order to provide their children with televisions, cell phones, designer clothes, processed foods, electronic toys, and other consumer products that are clearly not necessities.

Consumption seems to rise inexorably. As Alan Durning explains in his book, \textit{How Much is Enough?}:

Luxuries become necessities between generations as well. People measure their own material comforts against the benchmark set in their own childhood. So each generation needs more than the previous did to be satisfied. Over a few generations, this process can redefine prosperity as poverty. The ghettos of the United States and Europe have things such as televisions that would have awed the richest neighborhoods of centuries past, but that does not diminish the scorn the consumer class heaps on slum dwellers, nor the bitterness felt by the modernized poor.


\textsuperscript{133} Gentile and Walsh, 23 J Applied Developmental Psych at 158 (cited in note 63).

\textsuperscript{134} Id (citations omitted).

\textsuperscript{135} See Konner, \textit{Childhood} at 87 (cited in note 94) (noting the role of loving stimulation and care in the development of children, but also the central role of language in developing a concept of self and self’s relation to others).
With consumption standards perpetually rising, society is literally insatiable. The definition of a "decent" standard of living—the necessities of life for a member in good standing in the consumer society—endlessly shifts upward. The child whose parents have not purchased the latest video game feels ashamed to invite friends home. Teenagers without an automobile do not feel equal to their peers. In the clipped formulation of economists, "Needs are socially defined, and escalate with the rate of economic progress."  

Given this constantly escalating social standard, it is not surprising that we see more and more families enmeshed in the child welfare system for poverty related reasons that we have redefined as "neglect and abuse."  

Poor parents cannot meet unrealistic standards that equate poverty and the collateral effects of low SES (homelessness, malnutrition, substandard medical care) with parental failure to meet children's essential needs. We know that poor children face a plethora of social and environmental risks, yet we virtually ignore these factors in our legal responses to at-risk children.  

In my class exercises on abuse and neglect, students routinely decide that three children must be removed from their mother and placed in foster care for their own safety because they are living in a trailer home without electricity or running water. At a recent conference, I heard a judge speak of a case in which fourteen children living in a rundown home were nearly placed in foster care simply because the adults in the family earned too little to put a decent roof over their heads.

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137 Nationally, most victims of child maltreatment suffer from neglect, including "medical neglect" (57.2 percent), with a much smaller percentage suffering from physical abuse (18.6 percent) or sexual abuse (9.6 percent). U.S. Department of Health and Human Services, Child Maltreatment 2001 at 4 (GPO 2003), available online at <http://www.acf.dhhs.gov/programs/cb/publications/cm01/oucover.htm> (visited Apr 4, 2004).

138 See Sue Books, Poverty and Environmentally Induced Damage to Children, in Valerie Polakow, ed, The Public Assault on America's Children: Poverty, Violence and Juvenile Injustice 42, 44 (Teachers College 2000) (noting that environmentally induced damages is "not an issue of social values and political priorities" because it is "commonly framed as an issue of misfortune" and because it is "an 'affliction of the poor,' who have less of a voice").

139 Barbara Bennett Woodhouse, Making Poor Mothers Fungible: The Privatization of Foster Care, in Francesca M. Cancian, et al, eds, Child Care and Inequality: Rethinking
E. The Effects on Young Children of Exposure to Adult Themes Such as Sex and Violence

Finally, mass-market culture challenges the boundaries of childhood, by using "adult" themes like sex and violence to stimulate and entice a very young audience—the same audience that previous generations of Americans have striven (however imperfectly) to shelter from premature or intensive exposure to sex and violence. Modern scholars recognize that childhood is a culturally constructed idea, rather than a universal fact. The cultural construct, and thus the boundaries of childhood, may be very different from one place to another and from one time to another. For example, childhood among the Inuit people involves dangerous games that teach the child skills of aggression and instill anxieties about separation that are necessary for survival as a hunter and gatherer in a nomadic society. In Colonial America, children worked side by side with adults on farms and in producing crafts, but the child and his work belonged to adults. Childhood was a time of work, with many children bound to servitude by indenture and slavery. In a society where life was hard and food was scarce, premature sexuality, unmarried pregnancy, and defiant conduct that challenged adult authority were punished harshly.

In the Victorian and Progressive Eras, from the mid-nineteenth to early twentieth century, the construct of childhood as a time of purity and innocence held sway, reaching extremes that have been described as "sacralization" of the child—a mythology that protected some children from harm but deprived all children of agency and voice. This shift reflected the changing

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Carework for Children and Youth 83, 89 (Routledge 2002) (noting that, under new welfare laws, "many children were removed [from their families] because of their parents' poverty and lack of education"). See generally Dorothy E. Roberts, Shattered Bonds: The Color of Child Welfare (Basic Civitas 2002).

140 Lynn Spigel, Seducing the Innocent: Childhood and Television in Postwar America in Jenkins, ed, The Children's Culture Reader 110, 114 (cited in note 56) (tracing and critiquing the impulse to protect children from adult themes); Allison James, Understanding Childhood from an Interdisciplinary Perspective: Problems and Potentials, in Pufall and Unsworth, eds, Rethinking Childhood at 34 (cited in note 38).

141 James, Understanding Childhood from an Interdisciplinary Perspective, in Pufall and Unsworth, eds, Rethinking Childhood at 28–29 (cited in note 38).

142 Id.

143 See Woodhouse, 33 Wm & Mary L Rev at 1037 (cited in note 1).

144 See id at 1037 n 182 (punishment for striking one's father was death in some colonies).

145 See Viviana A. Zelizer, Pricing the Priceless Child: The Changing Social Value of
role of men and women in an increasingly industrialized economy that placed home and market in separate spheres. A sheltered childhood required an economy in which children's labor was not essential for survival, in which one parent could stay home as caretaker of the children and the other could go out into the workplace as wage earner for the entire family. Never a reality for poor and minority children, the notion of childhood as a time of innocence and play nevertheless was presented as a cultural ideal. Child labor was seen as an evil because it stunted the child's opportunities for education that might lead to social advancement in adulthood.

These thumbnail sketches of the various meanings of childhood illustrate how childhood has been culturally constructed to meet the developmental needs of children and the practical constraints on adults in particular social contexts. In Colonial times, it was the parent's duty to train the child to meet the exigencies of a harsh world where they were lucky to survive infancy. In Victorian times, it was the parent's duty to protect the innocence of the child by isolating their children from adult society. In modern times, some critics suggest we have reverted to the older model of unsheltered childhood:

We have had to abandon the idea that children are best served by isolating them from the realities of the surrounding world so that they might remain carefree and innocent as long as possible. Such isolation is no longer possible. More akin to the views of their colonial counterparts, late twentieth century parents see their youngsters surrounded by dangers from which there is no safe haven. In a world of latchkey children, illicit drugs, terrifying new illnesses, and the horrors of child molestation, innocence has become vulnerability. The uninformed child is at risk. The protected child is once again the child who can cope successfully in an adult world.\textsuperscript{146}

For better or for worse, in today's media saturated world, "[b]oundaries between adulthood and childhood blur to the point that a clearly defined, 'traditional,' innocent childhood becomes

\textsuperscript{146} Karin Calvert, \textit{Children in the House}, in Jenkins, ed, \textit{The Children's Culture Reader} at 79 (cited in note 56).
To me, it is far from clear that our contemporary social deconstruction of childhood really matches children's needs. In an increasingly technological society in which deadly weapons and batterings arise as the most common causes of child fatalities, one might argue that the emphasis in childrearing should be on education, nonviolent conflict resolution, and deferral of procreation. Yet images of sex and violence are ubiquitous in children's lives—in music videos, in movies and sitcoms, and on the Internet. This has not happened overnight. Twenty years ago, my husband and I laughed when our then twelve year old son reacted to a movie preview featuring a steamy sex scene on Saturday afternoon television by wailing "Sex, sex, sex all around me and I won't get any until I'm forty!" We laughed, but our son's anxiety at being bombarded with such explicitly sexual material, when simply trying to cope with boredom on a rainy Saturday, expressed a bewilderment and frustration that troubled us.

While parents may worry most about images of sex, experts in child psychology and neurology are more concerned with images of violence or of sex coupled with violence. The APA Task Force found that "[m]eta-analyses confirm that exposure to media violence promotes aggressive behaviors, attitudes more accepting of violence, increased hostility, and other anti-social outcomes.

Voluntary controls are not terribly effective. Makers of video games, films and CDs voluntarily adopted rating codes that indicate whether a lyric, film or game is appropriate for a given age group. But the codes are widely ignored by buyers and by sellers who routinely sell inappropriate products to children too young to be viewing such materials under the rating codes.

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149 A discussion of the effects of illegal images (for example, child pornography) is beyond the scope of this Article, but, I believe, along with many researchers, that exposure to images of inappropriate sexual conduct with minors, not to mention actual sexual abuse of children, is damaging to the young child's development. See Heyman, 78 Chi Kent L Rev at 584–85, 608–11 (cited in note 44) (discussing the ill effects of violent pornography and the exposure of children to pornography).


151 See Federal Trade Commission, Marketing Violent Entertainment to Children: A
ently, in my community any child can enter an R-rated movie as long as an adult purchases the ticket. The adult need not attend the show. Movies, video games, and television substitute for time with parents, and children consume these media in huge quantities, often without parental supervision and without parental mediation of the images of sex, racism, sexism, and violence.

Studies have repeatedly shown that exposure to violence in media affects a child’s brain and behavior. According to the American Academy of Pediatrics: (1) over one thousand studies confirm the link between media violence and aggressive behavior in children; (2) by the age of eighteen, the average American child will have viewed some 200,000 acts of violence on television alone; (3) the level of violence in Saturday morning cartoons is higher than during prime time; (4) media violence is especially damaging to children younger than eight years old because they cannot tell the difference between fantasy and real life; (5) media violence affects children by increasing aggressiveness and antisocial behavior, increasing their fear of becoming victims, making children less sensitive to victims of violence, and increasing their appetite for more violence in media and in real life; and (6) because media fail to show the consequences of violence, children learn that there are few repercussions for violent acts.

Studies of emerging interactive technologies are even more sobering. A child who plays interactive video games featuring violence is more likely to behave violently. Moreover, children’s access to such games is virtually unrestricted, despite voluntary rating codes. Children aged thirteen to sixteen could buy video games rated “M” (intense violence, profanity, mature sexual


152 Author’s conversations with Gainesville, Florida preteenagers and their parents.
154 Id at 159–60.
themes) 85 percent of the time, although the rating limited the games to children aged seventeen and older.\textsuperscript{157} It is no accident that these games end up in children's hands. Federal Trade Commission studies show that game designers actually targeted 70 percent of games rated M to appeal to and sell to children under seventeen years of age.\textsuperscript{158}

At the place where children, culture, and violence intersect, myths manufactured to meet market demand can become destructive realities. Purveyors of popular culture know that physical and sexual conflict and tension stimulate audiences.\textsuperscript{159} A recent study shows that video games are heavily racist and sexist, as well as violent.\textsuperscript{160} In the mass-media, black and brown people, especially black males, are often portrayed as criminals.\textsuperscript{161} Young black males are portrayed as misogynistic and as dangerous predators. Young black females are constructed as "Ho's" and "Bitches." Some argue that minority teens of both sexes buy into this mythology and construct their own misogynist and violent identities.\textsuperscript{162} Whatever the role of rap or hip hop and MTV in this process,\textsuperscript{163} we cannot deny that, as a culture, we are steeped in a mythology of black youth violence and deviance. Not accidentally, we see more and more poor minority children funneled not only into the child welfare system but also into the criminal justice system for acts treated as youthful mistakes when committed by Caucasian children.\textsuperscript{164}

\begin{itemize}
\item\textsuperscript{157} Federal Trade Commission, \textit{Marketing Violent Entertainment to Children} at 52 (cited in note 151).
\item\textsuperscript{158} Id at 45.
\item\textsuperscript{159} See Karst, 91 Cal L Rev at 1004–6 (cited in note 46) (citing studies).
\item\textsuperscript{160} For a general discussion, see Children Now, \textit{Fair Play: Violence, Gender and Race in Video Games} (Children Now 2001).
\item\textsuperscript{161} See Lynnell Hancock, \textit{Framing Children in the News: The Face and Color of Youth Crime in America}, in Valarie Polakow and Jonathan Kozol, eds, \textit{The Public Assault on America's Children: Poverty, Violence, and Juvenile Justice} 78, 96 (Teachers College 2002) (concluding that the press needs to understand its "role in fostering the public's fear of Black and Brown children").
\item\textsuperscript{162} This is a racially and culturally charged topic and I hesitate to enter this debate for fear of appearing to blame the victim or denigrate the validity of Black culture. For a research paper that examines both the positives and the negatives of such music, posted on an African-American women's web site called Sistahspace, see Franklin B. Krohn and Frances L. Suazo, \textit{Contemporary Urban Music: Controversial Messages in Hip-Hop and Rap Lyrics} (Intl Soc for General Semantics 1995), available online at <http://www.sistahspace.com/nommo/mvl3.html> (visited Apr 4, 2004).
\item\textsuperscript{163} See Institute on Media and the Family, \textit{MTV and Children and Music Fact Sheets}, available online at <http://www.mediasfamily.org/facts/> (visited Apr 6, 2004).
\item\textsuperscript{164} See Barbara Bennett Woodhouse, \textit{Youthful Indiscretions: Culture, Class Status, and the Passage to Adulthood}, 51 DePaul L Rev 743 (2002) (discussing socioeconomic
I concede the continuing importance of debates between parents and schools about curriculum, about which books to teach in school, and whether schools should inculcate patriotism or educate children about sexuality. But, as Joe Kincheloe notes, these traditional debates take place in a vastly changed childhood environment:

With the evolution of TV as a medium that attempts to more or less represent reality, children have gained an adult-like (not necessarily an informed) view of the world in only a few years of TV watching. Traditional notions of childhood as a time of sequential learning about the world don’t work in a hyperreality saturated with sophisticated but power driven views of reality. . . .

In the context of childhood education, the postmodern experience of being a kid represents a cultural earthquake. The curriculum of the third grade is determined not only by what vocabulary and concepts are ‘developmentally appropriate’ but by what content is judged to be commensurate with third grade experience in the lived world. Hyperreality explodes traditional notions of curriculum development—third graders can discuss the relationship between women’s self image and the nature of sexual behavior. While parental groups debate the value of sex education in public schools, their children are home watching a TV docudrama depicting the gang rape of a new inmate in the federal penitentiary. When teachers and the culture of school treats such children as if they know nothing of the adult world, the kids come to find school hopelessly archaic, out of touch with the times.165

The real action in the socialization of children is not in parent-child-school interactions but in fact elsewhere—in video games, television, the Internet, and DVDs. It is in children’s bedrooms


165 Kincheloe, The New Childhood, in Jenkins, ed, The Children’s Culture Reader 159 and 172 (cited in note 56). Kincheloe writes of a “media omnipresence [that] produces a hyperreality that repositions the real as something no longer simply given but artificially reproduced as real.” Id at 170.
(where parents do not intrude), in the halls of schools (where teachers are visibly absent), and in shopping malls and streets.\textsuperscript{166} And the action is increasingly ugly. The studies I have described tell a relatively bland story. I have only the mildest of word and diagram images at my disposal in the pages of a printed law journal. Playing the video game Grand Theft Auto, where players gain points for raping and beating up a prostitute or running over an old lady crossing the street, gives one a taste of the full flavor of what our children experience.

III. A PUBLIC ROLE IN THE PROTECTION OF CHILDREN'S CULTURAL ENVIRONMENT

The traditional paradigm that we use to explore who should control the development of children—a dichotomy between the private family and the public state—suggests that parents can bear the ultimate responsibility for protecting children from a toxic mass-media culture. I submit that even educated parents remain relatively powerless against the onslaught of the well-funded and sophisticated forces marketing images and appetites to our children. Most poor, single, minority parents hardly stand a chance. When unnatural products overwhelm natural appetites, and make a sham of the ideal of the informed and autonomous consumer, one can fairly suggest that the market will not self-correct.\textsuperscript{167} At such times, a society must turn to some form of regulation to reduce the overwhelming power of the media in children's lives.

A. Precedents for the Regulation of Mass-market Media Influences

It would be impossible to explore in this Article all the possible avenues for government regulation of mass-media marketing affecting the ecology of childhood. Regulation takes many forms.

\textsuperscript{166} For a general discussion of the violence and harassment children face, particularly from their peers, see James Garbarino and Ellen DeLara, \textit{And Words Can Hurt Forever: How to Protect Adolescents from Bullying, Harassment, and Emotional Violence} (Simon & Schuster 2002).

\textsuperscript{167} See Aird, \textit{Advertising and Marketing to Children} at 151 (cited in note 38). For an opposing view, see Adam Thierer, \textit{How to Improve the Quality of Children's Television}, Exec Memo 450 (Heritage 1996), available online at <http://www.heritage.org/Research/Family/EM450.cfm> (visited May 14, 2004) (arguing that deregulation and robust market competition is the way to improve the quality and quantity of children's programming).
It can be direct or indirect. It can be imposed by municipalities, by states, and by the federal government. Federal initiatives can be premised on federal powers, such as the Commerce Clause, or they can rely on monetary incentives, as in legislation that conditions federal funding on compliance with federal standards. Federal agencies, acting under powers conferred by Congress, have jurisdiction over a range of areas that might be implicated by the phenomenon that I am seeking to control. The Federal Communications Commission ("FCC"), the Federal Trade Commission ("FTC"), and the Food and Drug Administration ("FDA") all conceivably could exercise regulatory control over some aspect of this phenomenon. Local communities have exercised zoning authority as a means of protecting and controlling children's environment. Arguably, there is no need to resort to an environmental paradigm in order to address the evils I have outlined above. However, efforts to date under traditional avenues of regulation give little cause for optimism.

A call for regulation of advertising aimed at children is not new. Concern about television advertising to children dates back more than forty years, and in the 1970s became so widespread that the FCC, charged with regulating the public airwaves, utilized its rule-making powers to restricted advertising during children's television programming. These restrictions remain in place. While they are not uniformly popular, we generally accept that government has a legitimate role in regulating and setting criteria for use of a limited public resource—the airwaves. Currently, advertisements during children's shows on broadcast channels and cable are limited to ten minutes and thirty seconds out of each hour on weekends and twelve minutes out of each hour on weekdays.

Conceivably, the FCC has the authority to ban advertising to children entirely, based on the APA's argument that advertising

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168 US Const Art I, § 8, cl 3.
170 See, for example, Village of Euclid v Ambler Realty Co, 272 US 365, 394 (1926) (noting zoning's positive effects on children).
to children is inherently unfair and harmful. However, the past experience of this and other regulatory agencies suggests that such a proposal would meet strong political opposition. In 1978, the FTC, the agency charged with regulating advertising regardless of the medium, moved to prohibit all television advertising to children. The notion advanced by the FTC, that television advertising to children could be deemed inherently unfair and thus subject to sweeping regulation, set off a firestorm of protest. These arguments, however, were substantially the same as the current arguments advanced by the APA. In the 1970s, an era more friendly to regulation than the present, the FTC was roundly condemned as a "National Nanny." Opposition from the affected industries was so fierce that Congress withdrew jurisdiction from the FTC to regulate "unfair" advertising.

Opponents of regulation argued that the advertising industry should be allowed to regulate itself. To date, industry self-regulation has taken the form of a set of self-regulatory guidelines administered by the Children’s Advertising Review Unit (CARU) of the National Council of Better Business Bureaus. These guidelines address some of the most serious advertising abuses. While advertisers generally seem to comply with the more specific guidelines (for example, that “a product should be demonstrated in a way that can be duplicated by the child for whom the product is intended”), many of the guidelines are unduly vague and general (for example, that “care should be taken not to exploit the child’s imagination”). Disclaimers are required, but studies show that they are rarely couched in child-friendly language (for example, “you have to put it together,” instead of “some assembly required”). In sum, self-regulation has

173 See Association of National Advertisers, Inc v FTC, 627 F2d 1151 (DC Cir 1979) (adjudicating a challenge to the FTC’s rulemaking procedures in connection with the promulgation of rules on advertising to children).
174 Then FTC Chairman Pertschuk came under fire from the advertising industry for taking this unpopular step. Id.
176 See Palmer, Report of the APA Task Force on Advertising and Children at 18 (cited in note 103)
failed to address the serious concerns raised by advertising aimed at children.

Americans, far more than citizens of other countries, have tended to adopt voluntary guidelines and to eschew regulation of a wide variety of potentially toxic or damaging products. Many Americans conceive of the idea of regulation, as "big government" run amok.\textsuperscript{179} Ordinary folks, as well as free market theorists and libertarians, oppose resort to government intervention in private enterprise because of a resentment of paternalism.\textsuperscript{180} Casting regulation of mass-media marketing as a form of "environmental" protection is likely to alarm rather than placate the opposition. Regulations enacted to protect the environment have become the poster child (or whipping boy) for every ill that besets American businesses. While protection of the spotted owl has been seen as imposing unreasonable economic costs, perhaps Americans will place a higher value on protecting children because they represent the future of our own species. Yet, in some sectors, an environmentalist paradigm may elicit more negative than positive responses.\textsuperscript{181}

Even among environmentalists, the notion of an environmentalist approach to abating a toxic mass-media culture may encounter opposition. Because of First Amendment concerns, even those who generally favor regulation of chemical environmental toxins or invasive exotic species might hesitate to extend regulation to potentially toxic media influences. How can we deal with doses of advertising, sex, and violence that are toxic to children, engulf their worlds, and harm the natural environment for their growth, without also infringing adults' rights to access all forms and quantities of speech? Should adults have unlimited access to materials that harm children?

\textsuperscript{179} For an engaging discussion of Americans' resentment of regulatory paternalism, in the context of regulation of food advertising, see Note, 116 Harv L Rev 1161 (cited in note 175).

\textsuperscript{180} For examples of critiques on the notion of government regulating the content of children's television, see Thierer, \textit{How to Improve the Quality of Children's Television} (cited in note 167) (opposing regulation as interfering with free market); Robert Corn-Revere, \textit{Regulation in Newspeak: The FCC Children Television Rules}, Cato Pol Anal 268 (Cato 1997), available online at <http://www.cato.org/pubs/pas/pa-268.html> (visited Apr 6, 2004) (opposing regulation as paternalistic).

Interestingly, while the United States Congress endorsed a hands off approach to commercial speech aimed at children in mass-media other than television, it has taken a more interventionist approach to speech on the Internet. Congress has enacted several bills that attempt to regulate the Internet directly—imposing criminal penalties on providers who allow children to access inappropriate content—but the Supreme Court has struck down these laws as unconstitutionally infringing the rights of adults. In *Reno v ACLU*, the Supreme Court recognized that protecting children from harm is a compelling state interest, but struck down the Communications Decency Act of 1996 ("CDA") on the ground that its terminology was unconstitutionally vague and that its operation would infringe adults' First Amendment rights. The CDA sought to impose penalties on persons who knowingly allowed minors to access obscene, indecent, or patently offensive materials on the Internet. While obscenity is not protected speech, adults have the right to access speech that might be characterized as indecent or offensive. Part VII of the Supreme Court opinion opens with these words:

We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.  

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183 See, for example, *Reno v ACLU*, 521 US 844 (1997) (striking down the Communications Decency Act as unconstitutional).


185 47 USC §§ 223(a)–(e) (Supp 1997).

186 Id.


188 Id at 874.
Justice O'Connor, concurring in part, argued that the CDA had a lawful goal—creating a child safe zone on the Internet.\textsuperscript{189} She compared this concept to zoning regulations that allow communities to confine adult entertainment to designated districts in order to avoid exposing minors to offensive materials:

The creation of "adult zones" is by no means a novel concept. States have long denied minors access to certain establishments frequented by adults. States have also denied minors access to speech deemed to be "harmful to minors." The Court has previously sustained such zoning laws, but only if they respect the First Amendment rights of adults and minors. That is to say, a zoning law is valid if (i) it does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material. Unlike the Court, however, I would invalidate the provisions only in those circumstances [in which it fails these two tests].\textsuperscript{190}

As of 1997, O'Connor suggested, the technology was not available to create a barrier sufficiently precise and workable to separate the children's zone from the adults' zone.\textsuperscript{191} But technology changes rapidly. The notion of declaring a zone of internet speech (or of commercial speech) as off limits to children is very appealing. It suggests a precedent for protecting speech aimed at adults while protecting children from exposure to such speech.

After the Court struck down the CDA in \textit{Reno}, Congress continued to explore new ways to tame the Internet for children. In \textit{Ashcroft v ACLU},\textsuperscript{192} the Court upheld a scheme that conditioned federal Internet funding for a library on the library enforcing measures to prevent children from accessing indecent materials on the Internet.\textsuperscript{193} It remains to be seen whether a new scheme aimed at direct regulation of the Internet, rather than a funding-based regulation, will pass constitutional muster.\textsuperscript{194}

\textsuperscript{189} Id at 886.
\textsuperscript{190} Id at 887–88.
\textsuperscript{191} \textit{Reno}, 521 US at 891.
\textsuperscript{192} 535 US 564 (2002).
\textsuperscript{193} Id.
\textsuperscript{194} In its most recent pronouncement on regulation of the internet, \textit{Ashcroft v ACLU}, the Court was unanimous that protecting minors from harmful speech is a compelling government interest. 124 S. Ct. 2783, 2792 (Kennedy); 124 S Ct 2797, 2801 (Breyer, J). The Court declined to uphold that the Child Online Protection Act ("COPA") on the record before it, but indicated that laws penalizing internet providers for allowing minors to
Although commercial speech enjoys less First Amendment protection than political or artistic speech, the Supreme Court has not favored attempts by states to regulate commercial speech aimed at adults that also reaches children, even when that speech advertises products that cannot legally be sold to children. In *Lorillard Tobacco v Reilly*, the Court acknowledged:

The State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products. In a case involving indecent speech on the internet we explained that "the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults."[196]

Because of concerns about First Amendment free speech values, defenders of the Free Speech Clause find themselves in a strange alliance with purveyors of media sex and violence in fighting attempts to regulate content. Critics express concern that protecting children from materials containing harmful content will have the effect of reducing our culture to flavorless pablum, fit only for children's consumption. Perhaps the true reason for such vigorous opposition to regulation of speech aimed at children is the concern that regulating to protect children would open the door for an imposition of a conservative code of family values. Liberals fear that regulators could justify censorship of any and all speech that offends majority norms or offends the majority's morals by claiming it is harmful to children.[197]
Again and again, however, both critics and advocates of limiting children's exposure to harmful images and messages fall back on the notion that parents have both the right and the duty to monitor what their children see and hear. Parent-activated internet filters, V-chips, and special web zones to which parents may subscribe their children, all fail to protect the child whose parent is either uninterested or unable to enforce (or afford) these child-safe zones. Moreover, individualized parental control may be a wholly ineffective alternative to government regulation. As with contagious diseases and firearms, when one child in a peer group is exposed to risk, the entire group is potentially exposed. Arguably, the only effective regulation is a regulation that clearly identifies certain messages and images as toxic to children and seeks to protect all children, not just the children of the vigilant, from exposure.

The regulatory response to the harms of exposure to lead paint provides precedent for focused legislation to aid children. Lead paint regulations rely not only on the education of parents, but also prohibit the utilization of a toxic substance while providing for its clean up. Such efforts help to minimize the damage to the developing brains of young children. Environmentalists and specialists in child development are also embarking on another ambitious project. Increasing recognition that children may be uniquely vulnerable or susceptible to environmental toxins, spurred by the lead poisoning epidemic, resulted in passage of the Children's Health Act of 2000. This Act required the National Institute of Child Health and Human Development to establish a consortium of representatives from a broad range of federal agencies—including the Environmental Protection Agency—to conduct a National Children's Study of Environmental Effects on Child Health and Development. Its mandate includes planning and implementing large cohort prospective studies from infancy to adulthood on the effects of exposure to

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198 Alice G. McAfee, Creating Kid-Friendly Webspace: A Playground Model for Internet Regulation, 82 Tex L Rev 201 (2003) (proposing a plan to fence kids into a child-safe internet playground rather than fencing them out of adult spaces).
200 42 USC § 201 et seq (2000).
harmful substances. The mandate also includes the investigation of environmental factors, "both risk and protective," which "influence [children's] health and developmental processes." While the Act garnered strong bipartisan support, it has not received the necessary funding. The Study includes a working group on Effects of Media on Children's Health and Development. Should the Study substantiate evidence of ill effects, will government respond to the findings by rejecting regulation and advocating parental and industry self-regulation, or by imposing some form of more systemic regulation?

B. The Role of Law

Many observers, such as my colleague Nancy Dowd, might share my concern for the effects of mass-market culture and yet doubt that the law, acting on its own, has the power to force change in the culture of family. She writes: "Our cultural conception of family can be transformative or subversive of the law, redefining family in relation to existing rules. But law is an ineffective tool, by itself, to accomplish change or redefine family." Yet Dowd also believes that the law can and should be used to support and affirm change, and that, in fact, the law is never neutral. As in environmental interventions, I would argue that our task in regulating the ecology of childhood is walking the tightrope between supporting healthy growth and imposing damaging or reactionary change.

Kenneth Karst, in an article on children and cultural conflict, analyzes the marginalization of the family and its shrinking role in the modern socialization of American children. Like myself, he sees mass-media as playing an enormous role in shaping children's worlds, but he focuses particularly on its role in shaping their identities. He sees both positive and negative effects in the mass-media's messages of consumerism, transgression, and sexuality, but he concludes that the influences of media largely lie beyond the reach of regulatory law. He makes a persuasive case that law generally has been a blunt instrument for adults

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202 Id.
203 Id.
205 Id at 785. See also Nancy E. Dowd, Redefining Fatherhood (NYU 2001).
206 Karst, 91 Cal L Rev at 967 (cited in note 46).
207 Id at 1004.
fighting culture wars and that much of what passes for regulation of youth and youth culture has nothing to do with the well-being of children and everything to do with the political agendas of adults.\textsuperscript{208} As he and others have lamented, state intervention to shape children’s development has often harmed poor children, immigrants, and minority children—in short, our most vulnerable children.\textsuperscript{209} Recently, we have seen lawmakers play on citizens’ fears about out of control children by enacting harsh and punitive juvenile justice schemes that deprive children of opportunities, resources, and freedom.\textsuperscript{210}

If law serves primarily as a tool for adult factions to assert their power in the hopes of winning cultural conflicts over children’s values and identities, keeping children in their place, and forcing a homogenous or nostalgic definition of what family means, then I share the concerns that many have expressed as to the effectiveness and desirability of enacting regulatory laws. But one can perceive of government laws and policies far more modestly—as a tool for adapting to changing circumstances, rather than for forcing change as “progressive” or punishing change as “deviant”.

At least in theory, regulatory interventions intended to protect children from toxic mass-market media would be evidence-based, as opposed to ideological, and would be premised on practices derived from “science”—through the study of nature, child health, and human ecology. Adopting an environmental approach might actually recast “family autonomy” and “free speech” arguments in profound ways.

At the very least, our discourse might change. Perhaps we might conclude that we had failed to frame the question correctly, and conclude that this issue is not about values of parental autonomy or values of free expression, but rather about values of generational justice and human flourishing.\textsuperscript{211} Instead of speaking of individual “rights,” “autonomy,” “morality,” and “personal responsibility” when discussing state interventions in the culture of childhood, we might speak in the organic and collective language of ecological systems, focusing on preserving “renewable resources,” on fostering “sustainable growth” and on pre-

\textsuperscript{208} Id at 1028.
\textsuperscript{209} Roberts, \textit{Shattered Bonds} (cited in note 139).
\textsuperscript{210} Karst, 91 Cal L Rev at 1014 (cited in note 46).
\textsuperscript{211} See discussion in Part VI of why an emphasis on children’s flourishing is not anthropocentric and matters to the environment as a whole.
serving or restoring "ecological balance." Instead of assuming a separation between mind and body, speech and its effects, we might come to terms with the fact that images and messages can have profound effects on developing organisms, diminishing their prospects of realizing their capacity for intellectual freedom and maturity.

IV. AN ECOLOGICAL ANALYSIS OF CHILDREN'S DEVELOPMENT

How does an environmental approach to children's development and to the forces affecting their development differ from a more traditional approach for analyzing problems facing children? It does not approach children, parents, and the government as separate autonomous actors, but rather as linked together, awash in a sea of culture. Social scientists already do this sort of work. Examples abound in the work of the United Nations Children's Fund ("UNICEF"), the World Health Organization ("WHO"), and other international organizations. A Canadian Senate document, "Creativity and Inequity: An Environmental Scan of Trends in the Americas Affecting Children's Rights and Development," aimed at evaluating challenges to children's well-being in the Western Hemisphere, provides an excellent example of an environmental approach to this issue. The document's analysis is rooted in an ecological theory of child development, as expounded by scientists and researchers such as Drs. Urie Bronfenbrenner and James Garbarino—both key authorities from whom I have drawn in my prior law and policy work.215

212 Some might argue that all values, including those of science, are subjective and socially constructed. While this may be true in theory, in practice there are important attributes that distinguish between religious or ideological beliefs and science. See Epperson v Arkansas, 393 US 97, 103 (holding that a law prohibiting the teaching of evolution was unconstitutional because the law "selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine"). As experience tells us, bad science can be used to justify deregulation, and skepticism about good science can be misused to block needed regulation. See Ackerman and Heinzerling, Priceless at 110-114 (cited in note 181) (discussing bad science and ideological conflict).

213 Examples include UNICEF's Innocenti Research Centre, see <http://www.unicef.icdc.org> (visited Apr 29, 2004); WHO's research activities and publications, see <http://www.who.int/research/en> (visited May 14, 2004).


215 See, for example, Garbarino, Raising Children in a Socially Toxic Environment (cited in note 121); James Garbarino, Adolescent Development: an Ecological Perspective (Merrill 1985); Urie Bronfenbrenner, The Ecology of Human Development: Experiments by
This ecological theory of children’s development envisions children at the center of concentric circles of human and natural systems. An ecological approach examines the nature and quality of the relationships and environments in which the child lives.  

Developmental ecology has coined a taxonomy of its own. Children interact with people and with the physical world within “Microsystems” such as family, school, peer group, and neighborhood. These Microsystems may imprison children or may serve as the gateway to a larger world. Relationships between Microsystems constitute the “Mesosystem.” These relationships may be consistent and mutually supportive of children’s development, or they may be in conflict, trapping children in a double bind between family and school, peer group and neighborhood. Accordingly, if a family seeks to avoid such conflicts by removing their children from the larger society, such as through membership in a faith community that isolates children from society or through the home schooling movement, these parental choices would place the Microsystems of home, school, peers, and neighborhood within one single unified Mesosystem.

A further set of environments called “Exosystems”—in which children do not directly participate, such as a parent’s workplace or a local government agency—also affect their lives. All of these systems are embedded in a cultural “Macrosystem.” A cultural Macrosystem is the patterning by history, power, and ideas of the broader society in which the child lives. Prejudices, politics, and ideologies, religions and moral values, indeed even the very conception of childhood itself, comprise a part of the cultural Macrosystem. The cultural Macrosystem of children therefore could be represented by concentric circles centered on the child, intersected by other circles that overlap. An ecological perspective would focus on supporting the dynamic balance that charac-

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216 See, for example, Garbarino, *Adolescent Development* at 72, 73 (cited in note 215) (describing an “ecological map”).

217 Pearson, *Creativity and Inequity* at 3 (cited in note 214).

218 Id.

219 Id at 4.

220 Id.

221 Pearson, *Creativity and Inequity* at 4 (cited in note 214).

222 Id.

223 Id.
terizes such Macrosystems, rather than on forcing changes (whether liberal or conservative) within them.\textsuperscript{224}

One problem with using such an ecological analysis is its cultural contingency. Given the cultural diversity of our society, is there any way to pin down whose Macrosystem we are talking about and to draw generalizable lessons? We have faced this challenge before, in harmonizing a pluralist society with values of democracy and in developing policies that work for states and nations without oppressing cultural communities within them.\textsuperscript{225}

What are the common issues parents and children in the United States share, despite our differences?

\textbf{Ecological Systems of Childhood}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{ecological_systems.png}
\caption{Diagram of Ecological Systems of Childhood.}
\end{figure}

\textsuperscript{224} Many environmentalists have concluded that flux, rather than stability and balance, characterize healthy ecological systems, and now refer to "dynamic" systems. See Symposium, \textit{Beyond the Balance of Nature: Environmental Law Faces the New Ecology}, 7 Duke Envir L & Pol F 1 (1996).

The Canadian report, with its lens focused more broadly on "The Americas," identified two tendencies within the Macrosystems of the Americas—one positive, "diversity," and one negative, "inequity"—that seem at least as true of the United States as they are of the rest of our hemisphere. Given what we have already discussed about the ecology of childhood in the United States, these two categories seem apt anchors for our analysis. Looking at the broad Macrosystem surrounding children, families, and government in the United States, we can see the richness and strength of diversity partnered with the corrosive effects of inequality and injustice. Attention to the ecology of childhood might also help us identify the best level at which to address different developmental challenges. Is the relevant site the Microsystems of family, school, or neighborhood, or is it the Exosystem of workplace and marketplace? At what level of specificity shall we define the relevant Macrosystem? Are there regional or demographic differences that argue for a larger or a smaller cultural lens?

Ecologists study habitats and the systems within them. Thus, ecology provides a very different way of looking at problems than the legal method of approaching them within a paradigm of volition and choice, freedom and lack of freedom—as we do with criminal, tort, contract, and even family law. What are the relevant habitats and systems for children? Having set forth an ecological framework for the analysis of children’s development, the Canadian report identified a range of environments or habitats, including the physical environment, health environment, the human habitat, economic and social environments, political and legal environments, zones of violence, and zones of ideas and knowledge, that affect children’s development. In each of these habitats or environments, the report examines trends and provides data on threats to children’s well-being. Examples include air pollution and urbanization in the physical environment and globalization and income inequality in the

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226 Pearson, Creativity and Inequity at 4-5 (cited in note 214).
227 Environmentalists also have focused attention on the importance of making appropriate decisions at the most appropriate levels, whether local, regional or national. See Robert R.M. Verchick, Why the Global Environment Needs Local Government: Lessons from the Johannesburg Summit, 35 Urban Law 471 (2003).
228 See generally Pearson, Creativity and Inequity (cited in note 214).
229 Id at 6-7 and 12.
economic environment. The report identifies specific developmental challenges in each of these environments. These developmental challenges are intended to “offer clear choices between paths that either favor or hinder children’s rights to survival and development.” For example: “Will air pollution continue affecting children’s environment and health? Or will good air quality provide a healthy environment for children? Will cities be built for families or built for drivers? Will they allow the child’s world to expand with his mobility and autonomy or will fear and poverty confine children to enclosed spaces?”

Some may ask, given the reality of cultural contingency, whether we can truly measure children’s well-being or know whether a developmental challenge is positive or negative. Is urbanization or globalization a good or a bad thing for children? While cultural contingency is very real, I would argue that we cannot let our fear of blundering into dead ends paralyze us from moving forward. For example, the Canadian report measured challenges to children’s development by several yardsticks. Some were relatively objective measures of health and survival, such as infant mortality, immunization, and poverty rates. Few will seriously quarrel with these measures (although I know some in any academic audience may question them). Other measures were clearly more culturally contingent—are education and free speech good or bad? Many cultures have believed—and still do—that values such as access to ideas, freedom of religion, family autonomy, and gender equality are not really necessary, and may be detrimental to a child’s healthy development.

230 Id at 19.
231 Id at 6.
232 Pearson, *Creativity and Inequity* at 7 (cited in note 214).
233 Id at 17.
234 Id at 13 and 26.
235 Id at 26 and 29.
Still, a yardstick or metric is necessary, even if it is not universal. The Canadian report utilized as its yardstick of children's needs the United Nations Convention on the Rights of the Child ("UNCRC"). Despite its rejection by the current administration in Washington, this document has provided the international baseline for talking about children. It represents the closest step towards a universal standard, defining what the international community accepts as children's essential human rights. These include the rights to equality, dignity, and autonomy commensurate with the child's emerging capacities. Social rights such as adequate food, health care, and education are identified as rights of children and as owed to children by adults and governments.

In addition to international law documents created by adults, we have the voices of children, here and in the world community. Children have a lot to say about their own needs. Researchers can look to children's viewpoints and concerns in formulating their inquiries. Documents such as those produced by child delegates to the United Nations Special Session on Children and the Children's Earth Summit provide opportunities for children to influence our policies and our order of priorities in addressing the many challenges to children's development from an ecological perspective.

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238 For a discussion of the current U.S. government stance on this convention, see Human Rights Watch, Question and Answers on the UN Special Session on Children, available online at <http://www.hrw.org/press/2002/05/unchildrenqa0502.htm> (visited Apr 13, 2004).
239 See id (noting that the United States and Somalia are the only two United Nations member countries that have not ratified this treaty).
240 See Preamble to UNCRC (cited in note 225).
241 Id at Art 27(3).
242 Id at Art 24.
243 Id at Art 28(1).
244 Pearson, Creativity and Inequity at 10 (cited in note 214) (noting that children identify natural disasters as one of their primary concerns).
246 See, for example, Children's Earth Summit: The Call and Commitment of Young People for a Better World, available online at <http://www.peoplesearthdecade.org/resources/documents/CES_About.pdf> (visited Apr 13, 2004).
247 For a general discussion of enhancing children's participation in policy formation, see Barbara Bennett Woodhouse, Enhancing Children's Participation In Policy Formation, 45 Ariz L Rev 751 (2003).
Does an ecological approach have anything new to say about the public/private divide? At first glance, many of the zones and environments identified in the Canadian report appear to fall on the public side of the ledger: public health departments deal with sanitation and immunization, public school systems deal with education, city and state police deal with violence, and governmental regulatory agencies deal with the economic environment of trade, jobs, and markets. These are the Macrosystems that define much of what occurs in the Exosystems (such as parents’ workplaces) that indirectly affect a child’s development. But other environments, like “the social environment” and “the environment of ideas and knowledge” do not fall neatly into public or private pigeonholes. While each of these environments could provoke a long discussion, I find the “environment of ideas and knowledge” most intriguing. The trends identified under this heading are the very ones that sparked my concern and motivated me to undertake this thought experiment. The Canadian report identified the following as areas of intense concern in this environment: globalization of the media, connectivity, media and its impact on identity, violent messages, media portrayals of children and adolescents, and the role of the market in turning children into consumers. These areas of concern are integrally related to the phenomenon I earlier described as “mass-market culture.”

I do not wish to suggest that we can solve our problems by defining zones and habitats and identifying topics for action within them. An ecological approach enables us to recognize the interaction of systems and the inevitable impact of radical changes within them. Academic writers—particularly lawyers—are intent on bringing order out of apparent chaos. Complexity theory suggests that there is a natural order we cannot hope to comprehend or predict—let alone capture in statutes—and thus we must learn to respect this natural order. Nevertheless, to deal systematically with different situations, we label them: this is family law, that is criminal law, and the other is property law. But one lesson lawyers should learn from environmentalists is that ecological systems do not respect artificial boundaries or

248 See Pearson, Creativity and Inequity at 1-2 (cited in note 214) (Table of Contents).
249 Id.
250 Id at 32-35.
251 Part II.
labels. These labels may be useful tools to help humans think about and understand what they observe, but they are not reality and cannot be allowed to trump reality.

V. ETHICS, VALUES AND SCIENCE

Thus far, I have written as if there is just one "environmentalism," and that only one approach to studying and preserving a healthy ecology exists. As we shall see, environmentalists studying natural ecosystems have adopted many different approaches and are conscious of the differences between their approaches as well as the commonalities that unite them. Any attempt to structure an environmental approach to children's issues must be grounded in some form of "environmental ethics." I would argue that we need to develop an "environmental ethics for children." The work of my colleague Professor Alyson Flournoy, who directs the environmental law program at University of Florida's Levin College of Law, has influenced my thinking on these issues. In her article, In Search of an Environmental Ethic, Flournoy argues that it is time for environmentalists to pause and try to uncover not only "the objects of [environmentalists'] concern but the bases for our concern." As her narrative shows, this may involve either rethinking and rejecting, or consciously reaffirming, ethical frameworks that already pervade legal theory and remain embedded in common and traditional statutory law.

A. Environmental Ethics

Environmentalists and philosophers of environmentalism have articulated various philosophical axes that provide the moral compass to guide their lawmaking. A form of "anthropocentric utilitarian ethics" provided the starting point for much environmental law. It was labeled "anthropocentric" because it tended to focus primarily on harm to humans, and "utilitarian"

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254 Id at 68.
255 As Flournoy points out, far from being radical or novel, much of the environmental ethics represented in federal legislation reflects the ethical underpinning of the common law of nuisance. Id at 103-08.
256 See, for example, id at 80 (comparing these theories).
257 See Flournoy, 28 Colum J Envir L at 80 (cited in note 253) ("[A]n anthropocentric utilitarian ethic is a familiar justification for many regulatory statutes, including many environmental laws.")).
because its goal was to maximize good and minimize harm—under this approach, rules should maximize the welfare of humans, with benefits to non-humans reflecting "the good" only insofar as they contributed to the welfare of humans.\footnote{Id.}

There are many other ways to envision an ethics of environmentalism that are more or less anthropocentric and more or less individualistic. Animal rights activists, for example, embrace a form of "individualistic biocentric theory" that attributes "rights" to non-humans.\footnote{Id at 81–82 (citing Peter Singer and Tom Regan as examples).} And "ecological utilitarian ethics" places a high value on human flourishing but attempts to incorporate what we know about the interdependency of human and other species and the crucial role of shared ecology.\footnote{See id at 85–86 (discussing the "ecological utilitarian impulse").} Further away from individualism on the spectrum lies what Flournoy calls "holistic biocentric ethics."\footnote{Flournoy, 28 Colum J Envir L at 81 (cited in note 253).} This strand of ethics sees all life forms as worthy of concern and it considers "wholes, such as species or ecosystems, rather than individuals, primary."\footnote{Id.} Flournoy identifies several schools of holistic environmental ethics and suggests that we should think of them as united by an "ecological communitarian ethic" that eschews utilitarian individualism and locates "the good" in the "stability, integrity, and beauty of the community."\footnote{Id at 82.}

Flournoy's discussion of environmental ethics introduced me to pluralism and diversity within the environmental movement, but also to the shared language and concerns that mark both family law and environmental law. Particularly relevant to me, as a long time activist for children, was the notion of "Deep Ecology." The term appears as early as 1973 in the work of Norwegian philosopher and environmentalist, Arne Naess, who contrasted "the shallow" with "the deep" in long range environmental movements.\footnote{Arne Naess, Ecology, Community and Lifestyle 27 (Cambridge 1989) citing Arne Naess, The Shallow and the Deep, Long Range Ecology Movements, 16 Inquiry 95, 100 (1973).} Depth, in Naess's work, refers to an approach to environmental conflicts—diving into the depths rather than swimming on the surface.\footnote{Id at 12.} Writing thirty years ago, Naess identified a competition within the environmental community between two movements. The "shallow" movement focused on

\begin{footnotesize}
\begin{itemize}
\item Id.\footnote{Id.}
\item Id at 81–82 (citing Peter Singer and Tom Regan as examples).\footnote{Id at 81–82 (citing Peter Singer and Tom Regan as examples).}
\item See id at 85–86 (discussing the "ecological utilitarian impulse").\footnote{See id at 85–86 (discussing the "ecological utilitarian impulse").}
\item Flournoy, 28 Colum J Envir L at 81 (cited in note 253).\footnote{Flournoy, 28 Colum J Envir L at 81 (cited in note 253).}
\item Id.\footnote{Id.}
\item Id at 82.\footnote{Id at 82.}
\item Id at 12.\footnote{Id at 12.}
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fighting against pollution and resource depletion and its central objective was the health and affluence of people in the developing countries. The Deep Ecology movement sought to dive deeper.\textsuperscript{266} Deep Ecology challenges the dominant western paradigm, fostered by Newtonian Science, which assumes that nature can be divided into parts, and the parts rearranged according to a set of rules based on logical and mathematical operations.\textsuperscript{267} It has been described by some as a "new metaphysics of humans-in-nature not above it."\textsuperscript{268} Deep Ecology rejects the man-in-environment image for describing life. It adopts instead a relational and total field image that sees all organisms, including but not limited to man, as "knots in the field of intrinsic relations."\textsuperscript{269} Deep Ecology calls for biospherical egalitarianism—an egalitarianism that extends to all life—and respects principles of diversity and of symbiosis.\textsuperscript{270} While Naess acknowledges that any realistic praxis necessitates some killing, oppression and exploitation, Deep Ecology extends the concern we reserve for a narrow range of forms and ways of life such that the "equal right to live and blossom" becomes a deeply seated and intuitive value.\textsuperscript{271}

Looking further, I encountered a variety of schools of environmentalism lumped together under the rubric of "Radical Ecology."\textsuperscript{272} These approaches share many attributes but also many key differences. One author, Carolyn Merchant, breaks these radical approaches down into three modes of thought—in addition to "Deep Ecology," she identifies "Spiritual Ecology" and "Social Ecology."\textsuperscript{273} She identifies three movements: "Green Politics," "Ecofeminism," and "Sustainable Development," that draw

\textsuperscript{266} In \textit{Ecology, Community and Lifestyle}, David Rothenberg, who translated and revised the book with its author, provides concrete examples that may once have seemed radical but have become axiomatic in contemporary environmentalism. For example, "A storm causes a blowdown of trees over a favored hiking trail in the forests surrounding Oslo. An Anthropocentric solution would be to clear away all the trees to make the forest look 'cleaner' and 'neater.' A deeper solution: clear away only what is needed from the trail itself, recognizing that the removal of too many trees might endanger habitats for other species which were improved by the blowdown."

\textsuperscript{267} Merchant, \textit{Radical Ecology} at 55-57 (cited in note 36).

\textsuperscript{268} Id at 86.

\textsuperscript{269} Naess, \textit{Ecology, Community and Lifestyle} at 28 (cited in note 264); see also Merchant, \textit{Radical Ecology} at 87 (cited in note 36).

\textsuperscript{270} Merchant, \textit{Radical Ecology} at 87 (cited in note 36). Deep Ecology also fights against pollution and resource depletion, stresses complexity and not complication, and respects local autonomy and decentralization. Id.

\textsuperscript{271} Naess, \textit{Ecology, Community and Lifestyle} 28 (cited in note 264).

\textsuperscript{272} See, for example, Merchant, \textit{Radical Ecology} (cited in note 36).

\textsuperscript{273} Id at viii–ix.
upon these modes of thought and adopt various definitions of the
good and various strategies for realizing it on this Earth.274

A brief exploration of these ideas may not tell us how to
think about the ecology of childhood, but it can illuminate the
depth and richness of our environmental colleagues’ thinking
and demonstrate our potential to learn from them. In my read-
ing, I came across a concept that seemed to resonate especially
powerfully with the concerns that motivated my thought experi-
ment—the “Human Exemptionalism Paradigm.”275 After Colum-
bus’s arrival in the New World, Europeans enjoyed an unprece-
dented period of abundance, and expanded across the continent
secure in the promise of plenty and in the ideology of progress.276
“Because global resources were so abundant, and people had a
unique capacity to develop and solve problems using technology,
they believed they would always be able to find solutions that
would continue humanity’s forward progress.”277

This story has personal resonance for me. My own father,
Boyd Bennett, was born in 1905 in Saskatchewan Territory,
Canada. He saw the first automobile as it arrived in his town,
read of the Wright brothers’ flight when it happened, and ate the
first bowl, straight from the World’s Fair, of the exotic but mod-
ern breakfast food called Cornflakes. Before he died, he saw peo-
ple walk on the moon, invent the computer, and discover DNA.
He remained convinced until his death, in 1989, that every prob-
lem from overpopulation to famine to nuclear war had a solution
waiting for discovery, at the appropriate time, by Mankind, the
brilliant inventor.

From the environmentalist’s perspective, the “Human Ex-
emptionalism Paradigm” serves as a dangerous corollary to this
optimistic worldview. This paradigm assumes that human socie-
ties are “exempt from the consequences of ecological principles
and environmental constraints”—for example, exempt from the
same threats that affect every other organism.278 The new para-
digm of Deep Ecology seeks to expose the fallacy of human ex-
emptionalism.279 It contends that although humans have unique

274 Id at ix–x.
275 Id at 89.
277 Id at 89 (citing sociologists William Catton and Riley Dunlap). Clearly, this concept
has a special resonance for the United States given its history as a frontier for growth
when the Old World seemed incapable of presenting new opportunities.
278 Id.
279 See id (noting Catton and Dunlap’s view that a “New Ecological Paradigm” will
characteristics as a species, they are still subject to the same ecological laws and restraints as other organisms, because as with every other organism, important linkages and feedbacks exist between humans and the ecosystems in which they are embedded.\footnote{Merchant, \textit{Radical Ecology} at 89 (cited in note 36).}

If linkages and feedbacks exist between humans and their ecosystems, as we have acknowledged with respect to harms to humans caused by assaults on the physical environment, is it not also true with respect to assaults on the mental and cultural environment? We know that when outside or non-organic forces radically transform the context in which salmon or whooping cranes conduct breeding and migration, serious negative consequences ensue.\footnote{Dams and other manmade changes to migratory routes necessary for breeding pose a serious threat to the wild salmon and have resulted in designation of critical habitats for their protection. See Designated Critical Habitat: Critical Habitat for 19 Evolutionarily Significant Units of Salmon and Steelhead in Washington, Oregon, Idaho and California, 50 CFR § 226. Destruction of the wetland habitat in which whooping cranes breed and feed and power lines across the airspace where they migrate have resulted in their near extinction. See David H. Ellis, George F. Gee, & Claire M. Mirande, ed., \textit{Cranes: Their Biology, Husbandry and Conservation} (U.S. Department of the Interior and International Crane Foundation 1996), available online at <http://www.pwrc.usgs.gov/res sched/gee/cranbook/cranebook.htm> (visited May 14, 2004).}
The Human Exemptionalism Paradigm, I fear, has led us to ignore the natural consequences of radical shifts in the ecology of childhood. We accept the "benefits" of these radical shifts in the name of "progress," or perhaps we feel powerless to regulate them because they involve culture and not the economy or the physical environment. Or perhaps we are waiting for definitive proof of cause and effect before acting. Yet these are shifts that we would recognize as seriously endangering for the young of any other species. Borrowing from environmentalists who urge that it is folly to await the "results" of a vast uncontrolled experiment with respect to the effects of CO$_2$ emissions before we can take steps to address the threat of global warming, we might urge that sufficient evidence of long range harm already exists to warrant immediate intervention in the ecology of children.\footnote{See Daniel A. Farber, \textit{Probabilities Behaving Badly: Complexity Theory and Environmental Uncertainty}, 37 UC Davis L Rev 145, 172 (2003) (discussing the precautionary principle and applying an adaptation of it to global warming).}

Another strand of environmentalism that seems singularly relevant to the ethics of children's environmentalism is "Ecofeminism." This movement emerged along with the feminist move-
ment as a reflection on the connections between women and nature. As I will not attempt to describe the origins or the many variations of ecofeminism here, but what unifies them and makes them useful in thinking about children's development is a commitment to the continuation of life on the planet. As Merchant explains:

Although the ultimate goals of liberal, cultural, social, and socialist feminists may differ as to whether capitalism, women's culture, or socialism should be the ultimate objective of political action, shorter-term objectives overlap. Weaving together the many strands of the ecofeminist movement is the concept of reproduction construed in its broadest sense to include the continued biological and social reproduction of human life and the continuance of life on earth.

As ecofeminists appreciate, reproduction is essential to the continuation of life on Earth and women are essential to reproduction. A commitment to continuance of life on Earth makes explicit the linkages between what we do in the present and what happens in our children's future. It also emphasizes the connection between the actions and fates of individuals and the future of the relationships and ecological communities that are necessary for reproduction to occur and for the next generation to survive and thrive.

Sustainable Development is another strand of environmental thought with strong connections to the ecology of childhood and which may provide lessons about how we might defend and restore that ecology. Sustainable Development is oriented to converting ecologically destructive development into environmentally sound production. Its tactics are intriguing because they are small in scale and intimate in design. For example, the home schooling movement has strong parallels to what environmentalists call "sustainable agriculture." Various elements of

283 Merchant, Radical Ecology at 184 (cited in note 36).
284 Id at 209.
285 Id.
286 Id at 198.
287 See Merchant, Radical Ecology at 198 (cited in note 36) (discussing the link between ecofeminism and reproduction).
288 Id at 212.
289 Id 213-14.
this concept bear on my argument. "Biological control"—the use of native or natural organisms to fight invasive bacteria, plants and animals—looks a lot like the work done by "media education" proponents in utilizing media to spread a more healthful and productive message. Adherents of biological control, rather than attempting to eradicate a pest with powerful chemicals, might choose to surround the field with undeveloped woods that harbor its natural enemies. Believing that the natural enemy of media manipulation is media education, educators and parents seek to protect children against harmful media by exposing them to materials and media inputs that educate them to be critical consumers. The discipline called "media ecology" takes this ecological approach to media research, and studies how various media of communication "affect human perception, understanding, feeling, and value; and how our interaction with media facilitates or impedes our chances of survival." These initiatives suggest alternatives to censorship, and emphasize both the importance of understanding how mass-media affects the ecology of learning and the role for individualized grass roots efforts to counter its ill effects.

The literature of environmentalism is rich with examples of ecological thinking that might inform an ecological approach to childhood. Another concept, "restoration ecology," aims to restore the natural balance destroyed by human interventions. "By studying and mimicking natural patterns, the wisdom inherent in evolution can be reestablished." This metaphor describes what the public health community has done in combating the encroachment of commercial infant formula on world patterns of infant feeding.

290 Id at 215.
291 For examples of media education proponents, see the organizations in note 293.
293 For examples of such initiatives, see the Media Education Foundation web page, <http://www.mediaed.org/about> (visited May 14, 2004) (describing the Media Education Foundation as a group that uses videos and other media in public education to counteract the damaging messages of commercial media). The Alliance for a Media Literate America is a grassroots organization dedicated to educating consumers, especially children, how to be literate consumers of media, available online at <http://www.amlinfo.org/> (visited May 14, 2004), and the Action Coalition for Media Education, available online at <http://acmecoalition.org/about.html> (visited May 14, 2004), also works to counter the influence of mass-market media through grassroots education.
295 Merchant, Radical Ecology at 216-17 (cited in note 36).
296 Id at 217.
“Bioregionalism” draws attention to the localized nature of ecological habitats and the importance of understanding their “unique and intrinsic contributive parts.”\(^{297}\) It has much to teach us about the implications of mass-marketing and globalization for the ecology of childhood. As Merchant notes: “Beyond the geographical terrain is a terrain of consciousness—ideas that have developed over time about how to live in a given place. . . . It includes all the interdependent forms as processes of life, along with humans and human consciousness.”\(^{298}\) The concept of sustainable development forces us to look at the consequences of our acts in both the micro sphere—indigenous populations, for example—and the macro, or global, sphere.\(^{299}\) Any present benefit (such as an increase in GNP) must be balanced against the future costs of depleting or damaging precious resources (such as children’s health). Globalization of markets—for example, for work, food and toys—may adversely affect local communities and the children that live in them. Advocates for children might draw upon the “precautionary principle” of various conventions, which suggests that we need not wait for absolute scientific certainty about the precise effects of conduct before regulating it, if the risks of leaving it unregulated may be serious or irreversible.\(^{300}\)

As this brief discussion illustrates, the ethics of environmentalism provides a precedent for the sort of paradigm shift regarding the ecology and ethics of childhood that I have in mind. We are already partly there. Children’s law, like environmental law, has successfully challenged entrenched notions of property. At one time, as I have shown in my writings, children were objectified as the quasi-property of their parents.\(^{301}\) This property-based concept has been replaced by a very different overarching ethical principle. It is captured in the mantra of “best interest of the

\(\_)\(^{297}\) Id at 218 (quoting Peter Berg).
\(\_)\(^{298}\) Id.
\(\_)\(^{300}\) See, for example, the Rio Declaration on Environment and Development: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” United Nations Environmental Programmes, Rio Declaration on Environment and Development Principle 15, available online at <http://www.unep.org/Documents/7DocumentID=78&ArticleID=1163> (visited Apr 29, 2004).
\(\_)\(^{301}\) See generally Woodhouse, 33 Wm & Mary L Rev 995 (cited in note 1).
child." While not without its critics, the "best interest" standard remains the dominant doctrinal paradigm of modern American children's policy.


Environmentalists also have much to teach advocates for children about avoiding paralysis in the face of scientific uncertainty and natural flux. Opponents of environmental regulation have launched sharp critiques at the methods used to calculate costs and benefits, claiming that they overstate the risks and underestimate the costs, and environmentalists have responded with critiques of their own, charging the opposition with manipulating the data and the methods of computations to understate the risks and inflate the costs. I am not qualified to judge the debates over junk science and junk statistics. But regardless of who is right or wrong on specific issues or methods, these debates illustrate a difficulty that lawyers often overlook or exploit—the indeterminacy of science and its vulnerability to ideological distortion.

This critique should resonate with child and family lawyers. The most common critique leveled at the "best interest" standard is that it is too "indeterminate" and thus invites ideologically driven decisions, and critics doubt whether we can separate scientific facts about children's welfare from subjective values. Can social scientists tell us anything useful about children's best interests or is the subject too "value laden" to be quantified? This critique overlooks the fact that children's welfare is neither

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302 For a thorough evaluation of the "best interest" standard, see Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard* 33 Fam L Q 815 (1999).


304 See Farber, 37 UC Davis L Rev at 172 (cited in note 282) (discussing the precautionary principle and applying an adaptation of it to global warming).


306 See Woodhouse, 33 Fam L Q at 820–21 (cited in note 302) (discussing this critique).

307 Id.
static nor capable of exact measurement. In weighing what is "best" for children, we may find that we are motivated by differing assumptions and intuitions both at the micro and macro levels, but there is widespread agreement that the ethical treatment of children requires that their interests be recognized as paramount.\textsuperscript{308}

Earlier I discussed the use of the "cautionary principle" by environmentalists to allocate the burden of proof. This principle allows us to act in the face of uncertainty and flux. I also will draw from environmentalists the related concepts of "ecological dynamics" and "adaptive management." Ecological dynamics recognizes that systems are not static—or even, as commonly assumed "in balance"—but rather in flux, because ecological systems are constantly open to outside influences, and policies that assume existing conditions are the natural order of things 'lead to systems that lack resilience and may break down from disturbances that were previously absorbed.'\textsuperscript{309} As ecologists teach us we must be willing to make mistakes and open to correcting them. Our assumptions and intuitions about what works and what does not work can be tested and adjusted to reflect new realities. With the help of scientists, we can put our assumptions about what is good for children to the evidentiary test and determine whether our values merit continued allegiance. Like witnesses, the findings of science can be cross examined and impeached, and discounted if they lose their persuasive power or are overtaken by new scientific discoveries.

While I defend the best interest standard as the core ethics of children's law, I recognize that the best interest standard has serious limitations in thinking about the ecology of childhood. In traditional family law relating to child custody and adoption, the "best interest of the child" standard reflects what one might call an "individualistic child-centric" ethic. The center of concern is a specific child. The best interest standard only indirectly addresses the needs and interest of children as a group. While politicians may claim a concern for "our children," or for "future generations," such claims are only imperfectly reflected in American law and policy. We are a long way from embracing a "communi-
tarian child-centric” ethic. We must look to international law, such as the UNCRC, for examples of an ethical framework that focuses on our obligations to all of our children, and that recognizes children’s social or welfare rights as well as their individual rights. As Deep Ecology suggests, we must learn to see children not only as individuals but “as knots in the field of intrinsic relations.”

Such a move involves rejecting the common law paradigm that sees relations between law and the family solely in terms of individual rights. We must move away from laws regarding children, parents, and the state solely in terms of hierarchies of status enforced by state-enacted or supposedly “natural” hierarchies of rights, with children as the object in a struggle for power. Instead, I would suggest an approach that studies children within their environments and seeks to understand the complex relations between environment and healthy development. To paraphrase the insight of Deep Ecology, we need to trade our paradigm of hierarchy and control for a relational, total field image that reflects—rather than attempts to dominate—the ecology of childhood. Understanding what is happening in the Mesosystems, Microsystems, and Exosystems on which child development theorists focus is at the core, and not the periphery, of answering the question of who should control children’s development.

VI. A NEW PARADIGM: ECOGENERISM

By simply accepting the importance of an environmentalist approach, one does not address a question, posed by Flournoy, that bears on how we conceptualize the ecology of childhood: how will we define “the good?” Recall the range of possibilities, from an “anthropocentric individualism” that measures the good with reference to whether it is good for humans, to an “ecological communitarianism” that locates the good in the “stability, integrity, and beauty of the community.” Stability, integrity, and beauty are subjective concepts, and their content depends on what we imagine as the primary goal or purpose of the commu-

310 See Preamble to UNCRC (cited in note 224).
311 Naess, Ecology, Community and Lifestyle at 28 (cited in note 263).
312 Flournoy, 28 Colum J Envir L at 68 (cited in note 252).
313 Id at 70–74.
314 Id at 82.
nity. In this Article, I build upon the theory that I called “Generism” in my earlier work, and reframe it as “Ecogenerism”—much as Feminism inspired the approach called Ecofeminism.

A Generist theory, as I wrote in *Hatching the Egg*, places children at the center of society and sees the highest goal of society as fostering the growth of the next generation. In order to accomplish this task, Generists adopt and adapt many of the concepts of feminism. They utilize practical reasoning, they ask “the child question”—how have children’s agency and interest been overlooked?—and they employ oppositional narrative. Ecogenerism, however, would go far deeper than Generism by seeing the good, the best interests of the child, in more natural and ecologically sensitive terms. It would examine the welfare of children with reference to communities rather than individuals, and with reference to Mesosystems, Microsystems, and Exosystems, rather than with reference to the familiar triangle of child/parent/state. Ecofeminists see reproduction, rather than production, as the primary work of human society, and this woman-centered perspective produces a radical shift, moving the work of reproduction, done in large part by women, from the periphery to the center of society. Ecogenerists would identify not only the production of new generations, but also their flourishing and growth, as the most important outcome to be gained from fostering the “stability, integrity, and beauty of the community.” Of crucial importance, Ecogenerism would take a child-centered perspective and would define flourishing through children’s eyes and children’s experiences. Rather than assuming that children serve as the passive objects of others’ actions, Ecogenerism would respect the ecology of childhood and the central role of the children themselves in the process of their own development.

As with any ecological or environmental approach, Ecogenerism would seek to understand the ecology of children and their critical environments through empirical research. As scholars like Kenneth Karst have shown, many of our policies about chil-

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315 Woodhouse, 14 Cardozo L Rev at 1755 (cited in note 22).
316 See id at 1767–72.
317 Id at 1829–41.
318 See Figure 1 in this Article.
320 Flournoy, 28 Colum J Envir L at 82 (cited in note 252).
dren are ideologically driven. But as scholars like Margaret Brinig have shown, there are ways to pierce the ideological haze and to test whether our policies for children actually accomplish the goals we articulate for them.

Imagine if a regulatory scheme to preserve the environment for children's healthy development and flourishing established evidence-based benchmarks similar to those in various environmental laws. Imagine if a judge adjudicating child and family regulations could strike down ideologically driven proposals the way a district court recently struck down as motivated by politics rather than law and science a National Park Service reversal of its earlier conclusion that snowmobiles were harmful to the wildlife in Yellowstone National Park.

VII. APPLYING ECOGENERISM TO CONTEMPORARY PROBLEMS OF CHILDREN'S DEVELOPMENT AND SOCIALIZATION

In this Part, I suggest how an Ecogenerist might approach the analysis of several concrete issues. The first issue is the epidemic of childhood obesity and other health and safety risks for children created by distortions of consumption induced by advertising. The second is the erosion of free play spaces—both in imagination and in the physical world—where children can participate in the process of their own development.

A. Children's Health: Abating Toxic and Dangerous Advertising

In spite of high-tech medical care, some aspects of the public health environment for children in the United States present serious challenges. Harms from these health deficits dwarf the harms from parental abuse and neglect on which our culture seems so fixated. 15 percent of American children do not have health insurance, public or private. 23 percent of children aged

321 Karst, 91 Cal L Rev at 967 (cited in note 46).
323 American Forest and Paper Association, Inc v EPA, 294 F3d 113 (DC Cir 2002) (discussing application of scientific methodologies utilizing evidence-based benchmarks under Clean Air Act).
324 The Fund for Animals v Norton, 294 FSupp2d 92 (D DC 2003).
325 I believe these examples are tough enough, so I will save the most controversial issues (like sex and violence) for a time when I have had more opportunities to let my theory evolve and for discussions that may move it in different directions.
326 ABA Steering Committee on the Unmet Legal Needs of Children, America's Children, Still at Risk 71 (2001).
nineteen to thirty-five months have not received the recommended combined series of immunizations against diseases such as diphtheria, polio, measles and tetanus. The rate of low birth weight babies has increased steadily since 1986, standing at 7.6 per thousand for all births and above 13 percent for babies born to Black and Hispanic mothers. Over 18 percent of children live in areas that do not meet national air quality standards. Over 15 percent of children suffer from exposure to second hand smoke. Almost half of children who live below the poverty line, and a surprising 10 percent of those at or above the poverty line, live in food-insecure household. Half of a million American children are hungry. Yet the rate of childhood obesity has more than doubled in the past twenty years, from 6 percent in 1980 to over 15 percent in 2000. As one study reported:

Nearly 1 of every 3 children is at risk of overweight (defined as body mass index [BMI] between the 85th and 95th percentiles for age and sex), and 1 of every 6 is overweight (defined as BMI at or above the 95th percentile). Complications of the obesity epidemic include high cholesterol, high blood pressure, type 2 diabetes mellitus, coronary plaque formation, and serious psychosocial implications. Annually, obesity-related diseases in adults and children account for more than 300,000 deaths and more than $100 billion per year in treatment costs.

This epidemic of childhood obesity plagues even children who are poor and often hungry, not only in the United States but in other

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328 Id at 30.
329 Id at 12, 86.
330 Id at 13, 87.
331 America's Children at 20 (cited in note 327) (defining a "food insecure household" as one that reports difficulty obtaining enough food, reduced quality diet, anxiety about food supply, increased use of emergency food sources, and sometimes reduced food intake and hunger).
332 Id.
333 Id at 28. As recently as 1994, rates of obesity were equivalent across the races, but in 2000 the percentages of overweight were twice as high for Black children and three times as high for Mexican-American children, when compared to White children. Id.
free market economies. 335 This is a public health matter, but it stems largely from activities we tend to locate within the private sphere. Authorities point to a combination of factors that may have contributed to this problem, including reduced physical activity because of television and cars, changes in eating patterns spurred by increased use of prepared foods, eating out, advertising campaigns designed to create a demand among children for high sugar drinks and other junk foods, and parents’ failure or inability to control what foods children eat. 336 Many also believe that one can trace childhood obesity to poor nutrition during pregnancy and the substitution of formula for breast milk in infant feeding. 337

Domestically, very little litigation has arisen in this area and very little regulation has emerged. Parents’ constitutional rights to control what their children eat are not implicated because these trends can rarely be traced to state action. Parents and physicians concerned about nutrition have challenged school policies allowing in-school advertising or installation of vending machines selling junk food or highly sweetened beverages. 338 Except in this one area, doctrines that focus on a tension between parental autonomy and the state’s interest in protecting the child miss the mark. Except in the school setting, parents either make choices or permit their children to make choices to consume nutritionally empty foods. No one imagines that parents do this out of spite or malice. But many believe that advertising distorts parents’ choices of food for their children as well as their children’s own choices. 339

Americans cherish the freedom to consume whatever food and drink they wish. “Forays into the regulation of dietary customs have encountered fierce antipaternalistic resistance because eating habits are viewed as entirely voluntary and are intimately associated with the individual’s sense of self.” 340 But an-

336 See America’s Children at 28 (cited in note 327).
339 For a fascinating behaviorist analysis of how advertising influences a consumer’s food choices, see Note, 116 Harv L Rev at 1166-72 (cited in note 175).
340 Id at 1174.
tipaternalism lessens when the consumer is a child, and we have been willing to place age restrictions on the consumption and advertising of harmful but legal substances such as tobacco and alcohol. Given our age-based regulation of consumption of these products, age-based regulations of tobacco and alcohol advertising seemed acceptable to voters who would reject tampering with the choices of adults. These advertising regulations provide the closest analogy to the APA’s call to ban all advertising to children under eight, and when it comes to clearly toxic substances, we are generally comfortable using regulation to protect the lungs and brains of vulnerable children.

However, we have relied primarily on parents and on public education to instill good eating habits in our children. We have provided parents with information so that they can make an informed decision. Federal regulations require nutrition labeling on food packaging, but providing raw information to parents clearly has been ineffective in stemming the rise of obesity and poor diet. We might try requiring warnings, as we do with cigarettes and alcohol, such as “Government Warning: This product lacks nutrition, is high in sugar, and may be dangerous to your child’s health.”

An ecological approach would go further, however, and recognize that food consumption occurs not only in Microsystems like the family, but also in Mesosystems. Children’s food consumption is more than a matter of parental choice. Rebalancing our children’s relationship to food will require a wide range of public health measures that effect changes in the culture of what children eat and reshape the average parent’s preferences. The activities of large corporations influence children’s diets, and an Ecogenerist might argue that the subliminal messages used to sell these corporations’ products are like PCBs, in that they are not just ideas, but rather are like concentrated toxins that have the power to inflict major harms.

If environmentalists have shown to us how to analyze such problems from an ecological perspective, they have also pioneered in finding remedies that eschew coercive and violent interventions. As with sustainable development, economic incen-

341 Note that paternalism aimed at children is more acceptable to the public than paternalism aimed at adults. Id at 1175 and n 100 (only 33 percent of American would favor taxing unhealthy snack food generally while 57 percent would favor regulating food ads aimed at children).

342 Id at 1182.
tives and public education programs that change the way people think may be more effective than attempting to eradicate the problem, root and branch, with a heavy dose of authoritarianism.

A first step might be removing some existing perverse incentives. Would it surprise you to know that our tax dollars directly subsidize the pushing of junk food? Businesses get significant tax breaks for money spent on advertising, without any examination of the costs or benefits to society of the particular products being sold in those advertisements. A classic economist would say that advertising is a valid business expenditure as provided by the tax code and would object that analyzing these “business expenses” to determine whether they should be deductible would impose unduly high transaction costs. Yet the tax code contains a host of provisions, from home offices to company cars, which require the taxpayer to meet certain criteria in order to list an expense as deductible. Food should be easy. Moreover, we already require nutritional labeling, thus simplifying the task of identifying food products that lack nutritional value.

In Europe, a number of countries have banned all advertising during children’s television programs.\footnote{See Justin Webb, Swedes toy with advertising ban, BBC News (Dec 20, 1999), available online at <http://news.bbc.co.uk/1/hi/world/europe/572538.stm> (visited Apr 13, 2004) (discussing regulations in Europe).} There are other international examples of governments imposing limits on commercial speech about substances that are neither illegal—like drugs—nor patently toxic—like cigarettes—in order to preserve a healthy environment for children. Infant formula is perhaps the most well known example. Mass-market culture thrives on convincing people to use consumer goods manufactured for sale instead of homemade things. Canned or powdered infant formula replaces a substance manufactured naturally and at no cost within a mother’s body with an expensive substance that often must be mixed with water that may or may not be contaminated. It is delivered through a glass or plastic bottle with a latex nipple—another manufactured consumer product that replaces a natural one. Formula is sometimes necessary in cases where a mother’s milk is not available, but it is a poor second best. Using formula increases the risks of contamination, while compromising nutritional value.\footnote{APA Working Group on Breastfeeding, 100 Pediatrics 1035-39 (Dec 6, 1997).} Formula lacks the antibodies present in mother’s milk that protect small infants from common diseases. Yet many young mothers—including myself, in 1968 when my
daughter was born—have been persuaded by skillful marketing campaigns that formula fed to babies from plastic bottles is superior—more convenient, more scientific, and more modern—to natural breast milk. The American Academy of Pediatrics, noting that almost half of American mothers use infant formula rather than breastfeeding, favors a ban on advertising of infant formula.\footnote{Id.}

Choosing formula over the woman-made product becomes especially dangerous where clean water and currency are in short supply. African countries are directly addressing this issue. A new law in South Africa imposes sweeping limitations on the marketing of infant formula.\footnote{See Cape Argus, "Impractical Regulations" a Threat to Baby Food Market, All Africa News (Dec 5, 2003), available online at <http://allafrica.com/stories/200312050727.html> (visited Apr 13, 2004) (discussing the new law).} The law requires that clear warnings appear in several languages indicating that once a baby begins drinking formula, it is difficult to switch back to breast milk.\footnote{Id.} The regulations go beyond banning misleading statements or requiring that accurate information be provided. They proscribe the use of images to send subliminal messages, and even ban certain private transactions.\footnote{Id.} Advertisements and packaging may not show pictures of a mother feeding her baby from a bottle, and manufacturers may not provide free samples to doctors or to new mothers in hospitals.\footnote{Id.}

The effect of marketing on parental choices about automobiles provides another example of the market distorting parents' choices in ways that affect children by utilizing sophisticated knowledge of behavioral psychology. Parents are rightly concerned about the possibility of harm to children in motor vehicle accidents. In children aged one to fourteen, car accidents cause vastly more injuries than cancer, heart disease, homicide, or birth defects.\footnote{Id.} But how does a parent know that a car is "safe?" A recent article in New Yorker magazine discusses studies that show how automobile manufacturers play to the "reptilian" as opposed to the "cortex" brain's sense of safety in persuading consumers to buy sports utility vehicles ("SUVs").\footnote{Malcolm Gladwell, Big and Bad: How the S.U.V ran over automotive safety, New Yorker 28, 29 (Jan 12, 2004) (discussing Keith Bradsher, High and Mighty: SUVs—The
ies show that consumers seeking to buy a “safer” car feel safer when sitting higher and surrounded by air bags and large expanses of rubber and steel. But SUVs provide only the illusion of safety. In reality, SUVs are more prone to roll over and are less maneuverable in a dangerous driving situation than smaller, lower cars. They are far less safe than seemingly flimsy minivans. In a thirty-five mile per hour crash test, the driver of a giant Cadillac Escalade SUV had a 16 percent chance of a life threatening head injury and a 35 percent chance of a leg injury. In a Ford Windstar minivan, the chances were 2 percent and 1 percent, respectively. SUVs are also more likely to kill people, including children, in other vehicles with which they collide.

An Ecogenerist approach would recognize that parents are not 100 percent autonomous individuals. They do not make choices about their automotive safety in a vacuum. An environmental approach would militate against leaving choices about children’s safety solely to the preferences of private actors who lack sufficient technical information, but would also advocate that such choices be guided by hard data. It would recognize that consumer choices made by today’s parents shape the choices of the parents of tomorrow. It would not only demand that auto-makers provide parents with an objective standard for child safety, but would also provide carrots and sticks to insure that those choices are made in our collective cortexes and not in our individual reptilian brains. One possible incentive structure could include tax breaks for families with dependent children who buy cars that actually are safer, rather than those that feel safer. Or we could tax at a higher rate—or even place constraints on the manufacture and sale of—vehicles that pose an inordinate danger to child passengers in their own and other vehicles.

A regulatory approach, whether it relies on direct or indirect actions, challenges the American tradition that trusts parents to

World's Most Dangerous Vehicles and How They Got That Way (Public Affairs 2002)).
352 Id at 29.
353 Id at 30–31.
354 Gladwell, Big and Bad at 29 (cited in note 351).
355 Id.
356 Id at 31.
357 Near the College of Law where I work, there is a nursery called “Baby Gator” (named after the UF sports mascot) run by the College of Education. A sign facing the parking lot and sidewalk outside says, “Please do not smoke. Baby Gators can see you.”
do what is best for their children. Intrusions into parental decisionmaking, such as mandatory vaccinations and seat belt laws, provide the exception to the American rule of respect for parental autonomy. But modern parents are making poor decisions about what is best, or even safe, for children—choices driven by relentless mass-media marketing that appeals not to the cortex but to the reptilian brain. Instead of treating the parents as unfit or unwise, we could address the systemic effects of government policies towards advertising that distorts parents’ and children’s perceptions.

B. Child’s Play: Preserving Open Spaces for Children’s Culture to Flourish

Turning to another effect of our mass-market culture, it appears that children are losing the open spaces, in both their imaginations and in their environment, necessary for them to play and grow physically and mentally. According to Dr. Michael Brody, Chair of the TV/Media Committee of the American Academy of Child and Adolescent Psychiatry, “The sick child as viewer/consumer has replaced the healthy child of play, sports, and make-believe.” In every culture around the world, storytelling has been the very essence of play. As a former nursery school teacher, I was taught—and personally observed—that simple toys, like trucks, dolls, blocks, and paints, provided the catalyst for storytelling, scientific discovery, and social interaction. According to Brody, however, “today’s toys, with their commercial links, actually act as ‘story blockers.’” Children replay the story scripts that have been given to them rather than inventing stories of their own. This stunting of children’s imagination and blocking of their opportunities for free and unstructured play is a serious collateral effect of the marketing of consumer products such as mass produced toys, manufactured games, and media entertainment to children. These effects are aided and abetted by environmental factors such as suburban sprawl and urban decline.

358 The questions of whether regulation or tax policy are useful approaches to social and economic change, and of whether the market is self-correcting, are beyond the scope of this Article. How you resolve these questions is, of course, crucial to whether you seriously entertain my proposals or reject them as wrong-headed and naive.
360 Id (quoting Michael Brody).
Unstructured play provides an essential part of a child’s development. Children in every culture progress rapidly from infant games—such as peek-a-boo—to middle childhood games—such as hide-and-seek—as they gain a sense of control and develop their understanding of complex concepts like object permanence and peer competition. Some of these games have formal structures imposed by adults or other children, and others are “free play.” By age three, children all over the world can engage in elaborate and creative pretending that fully integrates their language and their symbolic skills. “In two years from the first appearance of language, the child has become capable of elaborate pretense, metaphor, humor, and collaborative imagination.” Children [three to five] throughout the world use dolls and other small objects to represent people and animals, and this gives them the power to make the world theirs. Melvin Konner describes observing young children aged three to five using clumps of earth to represent hyenas attacking a helpless goat represented by a root. They were acting out the dramas peculiarly relevant to their adult lives—competition, killing, hunting, and survival. Play is not about “morality” or about “nonviolence.” But what are the effects on children in our mass-media market culture of play that is scripted for them by producers of goods who want play to be inseparable from the consumption of the goods that they market?

Children’s play, and the spaces in which it occurs, has attracted the attention of environmental researchers. According to researchers at the University of Florida: “Contact with nature is important—as a learning environment, it’s unique. Nature is information rich, complex and dynamic, and it challenges people, even adults.” It is just as important for youth in urban settings to have access to woods, unmanaged fields, and other natural spaces. These natural elements are as crucial for learning and

361 Melvin Konner, Childhood 174–77 (Little Brown 1991) (discussing the value of play as a way for a child to deal with “strong emotions”).
362 Id at 88, 96.
363 Id at 175.
364 Id.
365 Konner, Childhood 175 (cited in note 361).
366 Id at 175–76.
367 Id at 176.
growing as baseball parks and other traditional outdoor recreational opportunities. According to researchers, “exploring untamed spots helps children learn how to find their way around and lessens their fear of the unknown.” Not surprisingly, researchers found that people who had played outside as children are more concerned about the environment and more interested in exploring the outdoors in adulthood. Whether instilling in children a concern for the environment is good or bad depends on one’s ethics and values, and might not warm the heart of a producer of video games. But child developmentalists agree that free play in nature is a valuable aspect of children’s learning in general.

Many American children are deprived of such experiences. Here, once again, we see that the effects of consumerism and a disposable society are especially tough on minority and urban youth. Children in urban areas have little access to safe outdoor play spaces, much less exposure to the beauty of nature. A recent program on National Public Radio’s (“NPR”) Weekend Edition provided a poignant reminder of how many American children and youth live and die without the chance to play and explore in green spaces. The story was prompted by the murder of nineteen year old Diamond Teague, shot to death on his front stoop in Southeast Washington, D.C., in October of 2003. As NPR remarked, Teague’s death merited only forty-three words in the Washington Post. Yet he was a remarkable youth who had earned a college scholarship as a member of the Earth Conservation Corps, a group of inner city youth working to clean up the polluted Anacostia River. NPR interviewed members of the Earth Conservation Corps as they navigated the Anacostia to test for illegal discharge and worked to turn a vacant lot between two abandoned factories into a pocket park in Diamond Teague’s memory. One of them spoke movingly about what it meant to him to leave the dirty, urban streets and travel up the river in a row boat, to discover so close at hand a world of indescribable

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369 Id.
370 Id.
371 Scott Simon and Daniel Zwerdling, Organization that Trains Young Adults from the Poorest Neighborhoods in Washington, DC, National Public Radio (Jan 31, 2004).
372 Id.
373 Id.
374 Id.
375 Simon and Zwerdling, Organization that Trains Young Adults from the Poorest Neighborhoods in Washington, DC (cited in note 371).
beauty that he had not known existed and of which he was now a part.\textsuperscript{376} Life and death are close companions of the Earth Conservation Corps. Every year since its founding in 1991, the Corps has buried one of its members as a victim of street violence.\textsuperscript{377} In the lives of these young people, the ecologies of child development and of nature are graphically intertwined. The environment that is inhospitable to eagles is also inhospitable to children—in Anacostia, both American eagles and American children are endangered species.

VIII. A GROWING GRASSROOTS MOVEMENT: POTENTIAL AND RISKS

A. The Parents Bill of Rights

Empowered by the web, grassroots activists have begun a national campaign to raise public awareness and effect legal change, and they are winning significant victories.\textsuperscript{378} They have proposed a Parents Bill of Rights and drafted legislative proposals to further its provisions.\textsuperscript{379} The document asserts that “an aggressive and commercial culture has invaded the relationship of parent and child,” and it calls upon government to restore that balance.\textsuperscript{380} The Parents’ Bill of Rights also contains nine proposed legislative acts intended to help parents limit the ways marketers can advertise to children: (1) a Children's Food Labeling Act that would require fast-food restaurant chains to label contents of food and provide basic nutritional information about it; (2) a Child Privacy Act that would give parents the right to control any commercial use of personal information concerning their children and the right to know precisely how such information is used; (3) a Leave Children Alone Act that would ban television advertising aimed at children under twelve years of age; (4) a Children’s Advertising Subsidy Revocation Act that would eliminate tax deductibility as a business expense for advertising aimed at children under twelve years of age; (5) an Advertising

\textsuperscript{376} Id.
\textsuperscript{380} Id.
to Children Accountability Act that would require corporations to disclose who created all of their advertisements and who did the market research for each ad directed at children under twelve years of age; (6) a Commercial-Free Schools Act that would prohibit companies from pitching products to children while the youngsters are in school and away from parental influence; (7) a Product Placement Disclosure Act that would require corporations to disclose product placements on television and videos, and in movies, video games, and books; (8) a Child Harm Disclosure Act that would create a legal duty for corporations to publicly disclose all information suggesting that their product(s) could substantially harm the health of children; and (9) a Fairness Doctrine for Parents that would make the broadcasting Fairness Doctrine apply to all advertising to children under twelve years of age, providing parents and community with response time on broadcast TV and radio for advertising to children. While some of these provisions seem far-fetched, others strike me as visionary and strongly reminiscent of the demands of environmentalists in the 1970s and 1980s.

B. Preserving Children’s Autonomy: A Child-Centered Perspective on Play

The traditional triangle of child, parent, and state stresses the dangers to families and children of intrusions on adults’ autonomy. As an advocate for children, and a student of children’s agency, I am keenly aware of the danger to children’s autonomy of regulating children’s culture. The antidote to toxic media messages is not to purge children of all messages and images that lack the adult stamp of moral and social approval. In addressing the distortion of children’s culture we must preserve and restore the mental and physical space in which children are free to manufacture their own culture and engage in their own meaning-making. Nor should we approach technology as an enemy to children’s well-being and growth. As scholars like Laurie Taylor and innovative philanthropists like Peter Samuleson and Steven Spielberg have demonstrated, electronic games and the internet can challenge and empower players of all ages.382

381 Id.
Children are resilient and resourceful, and have shown that they can draw upon consumer culture in structuring their own social interactions and constructing zones free from adult domination. "Consumer culture provides children with a shared repository of images, characters, plots and themes: it provides the basis for small talk and play, and it does so on a national, even global scale. Researchers of children's culture show how children "create their own meaning from the stories and symbols of consumer culture." In play, children create a culture of their own that often finds meaning and control in the rejection of adult norms. Childhood studies, a relatively new discipline, uses child-centered methodologies to explore how children's culture is created and has evolved. Scholars have found that consumer goods aimed at children, especially if children can afford to buy them, play a positive role in this developmental task of individuation from parents and other adults. The fascinating description provided by Allison James, from her field work in northeast England, provides a vivid example. James writes about the culture surrounding a type of junk food locally known as "kets." American children called these "penny candies" when I was growing up, before brand names and inflation made the term obsolete. James studied the rituals constructed by children around the consumption of these sweets. The candies fizz and explode when bitten into; they are bright and unnatural in color (blue, red, green); they involve messy hands-on rituals (as when removing the gob stopper to observe and display its color changes and the color changes of the consumer's tongue); and they often involve symbolic cannibalism (biting off heads and limbs of candies shaped like people) or eating of taboo creatures (consuming candies shaped like worms). These candies are rarely wrapped and they are never served on a plate or eaten with utensils. They also have no nutritional value. James concludes:

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384 Id at 299.
385 Id.
386 Allison James, *Confections, Concoctions, and Conceptions*, in Jenkins, ed, *The Children's Culture Reader* 402 (cited in note 56). Americans are familiar with these candies, and give them names like gob stoppers, fizzy bullets, and gummy worms.
387 Id.
“Kets” involve a rejection of the series of rituals and symbols surrounding the meal and are regarded as rubbish by adults. Because they are despised by the adult world, they are prized by the child’s, and become the metaphoric meals of childhood. . . . The child’s private funds, which are not controlled by adults, are appropriately spent on those sweets symbolic of his world. Kets, deemed by adults to be rubbish, are under the child’s control.388

An Ecogenerist approach would suggest that the nutritional value in “kets” be improved without detracting from their colorful junkiness and the rituals of their consumption.

At what point does mass-marketing to child consumers cross the line from healthy autonomy to something more problematic? Diane Levin of Wheeler College in Boston recently demonstrated some toys marketed to American children that give me pause. These objects called “sound pops” or “hot licks” are ‘interactive candies’ that incorporate a lollipop into a battery-operated handle. The lollipop spins or the toy is activated when ‘your tongue turns it on,’” and Levin is concerned about the “sexualisation” of these products, which are designed for children as young as four years old.389 Health care providers share Levin’s concern about the use of sexuality to entice and recruit child consumers. “Increased exposure to ‘oversexualised and underfed images’ in the media is correlated with increased dieting and body-image problems in girls.”390

I provide these stories to emphasize the delicate balance between conserving or restoring the ecology of childhood and purging the child’s environment of those aspects that displease adults or make them uneasy. I have no clear answer to the question of where one should draw the line between supporting children’s autonomy and exploiting children by marketing products through appeals to sexual innuendo that is developmentally and cognitively inappropriate. As James has shown, mass-media markets can empower children in ways that add to their healthy development. As Levin’s research suggests, shock value can be used in ways that arouse concern not only in parents but in child developmental experts. We should never deny that, in their role as consumers and critics of products purchased for them, chil-

388 Id at 402.
390 Id (quoting Margo Maine, who counsels children with eating disorders).
Children have a valid voice in deciding what they like and do not like and can assert their emerging autonomy. An Ecogenerist approach would be sensitive to the crucial role of children's autonomy and creativity as an integral element in a healthy ecology of childhood. It would have to tread carefully before determining that a product that offended adults was necessarily “bad” for children.

IX. IS ECOCENERISM AN OXYMORON?

Generist theory provoked counterarguments claiming it is impossible to center a movement around children because they lack autonomy and capacity and are limited in their ability to define their own needs. The same charge has been leveled at Animal Rights advocates. Some may question whether a child-centered approach is even possible, given the tendency of adults to use children’s issues as an empty vessel into which they pour their own concerns. Indeed, some observers of children’s culture suspect that the desire to regulate children’s television may be a symptom of a larger sense of powerlessness on the part of adults who are subject to mass-media influences beyond their control. As Spigel suggests:

[T]he only widespread challenge to commercialization of the airwaves has taken place in the name of the child. The child in this configuration becomes an alibi and a conduit for larger issues regarding commercialization of communication and the price tags attached to free speech on our country’s mass-media. The discourse of victimization that surrounds the child viewer might, in this sense, usefully be renamed and reinvestigated as a discourse of power through which adults express their own disenfranchisement from our nation’s dominant mode of communication.

An Ecogenerist discourse might accept this observation in part, and yet rephrase it to focus on children and their interests. An Ecogenerist might agree that the commercialization of culture has a broad impact on adults, but argue that this does not mean that adults’ efforts to protect children are necessarily adult-

391 See Karst, 92 Cal L Rev at 1004 (cited in note 46).
centric. In addressing a complex ecological threat, it makes sense to focus our efforts on the young of the species. Seen from a child-centered perspective that respects children's future as well as their present agency, our children are neither victims nor alibis: they are developing organisms at greater risk of harm. Losses among the young can rarely if ever be recouped. As I earlier observed, quoting an eminent historian of childhood, a healthy culture of childhood is "the very condition for the transmission and development of all other cultural elements," and deficits and harms during that crucial period "place definite limits" on our collective ability to survive and thrive.393

Deep Ecologists might condemn my analysis as hopelessly anthropocentric. Why focus on the young of the human species when our human population is growing so rapidly and becoming so rapacious that it threatens all other forms of life on Earth? Wouldn't the world be better off with fewer children? My answer is yes, but the world also needs more responsible adults. Today's children will make choices that value and protect the natural environment or degrade and destroy it. How well we raise our children, as consumers and as citizens, will determine the future of more than humankind.

Many environmental writers have argued in favor of preserving our natural world for future generations, as a form of generational justice—an ethical argument that is consistent with the long vision that is necessary to success.394 But what about the importance of socializing our children so that future generations, when they reach adulthood, are prepared to act in socially and environmentally responsible ways?

Let me close with a story that illustrates how unstructured space and the opportunity to play in it can shape a child's world and how children's environment can suddenly turn mean and violent. About ten years ago, a teacher at a parochial school in a depressed area of North Philadelphia was walking through the neighborhood when she came to a vacant lot.395 This was one of the few open spaces where local children could play outdoors. Usually, it was a busy scene with older children playing games

394 See note 308 and authorities cited therein.
395 This story is hearsay, but with indicia of reliability. It was related to me on the day that it happened by my daughter, Jessica Bennett Woodhouse, who worked as a teacher at the St. Michael's School during the Fall of 1992.
involving running, throwing and jumping, and younger children sprawled on their bellies in the dust, inventing stories as they played with matchbox cars and action figures or drew in the dust with sticks. But something had just happened to kick up quite a cloud of dust and frighten a bunch of children of various ages who were milling around, breathless and shaking. They told the teacher that a few minutes before, everything had been fine. A group of boys about ten or eleven years old had been playing baseball while the smaller kids played in the grass and dirt on the edge of the field. Whether intentionally or by accident, the ball from the baseball game had flown over the chain link fence and through the window of a passing police car. Enraged, the officers wheeled their car around and drove up the curb and right into the lot. Kids of all ages scrambled for cover as the cop car chased the kids at top speed, light flashing and siren howling, throwing up clouds of dust, until it cornered one unlucky child against the chain link fence. The police grabbed him, threw him in the police car, and took him off, to be booked and counted as a statistic on juvenile crime.

This story illustrates the resilience of children who can make a playground out of a vacant lot but it also illustrates the harm to society when children grow into adults who lack the fundamental values of concern and self control. Environmentalists and advocates for children should unite in promoting an ecology of childhood in which children grow up strong, healthy, and imbued with an appreciation of other creatures and a love of the natural world around them.

**CONCLUSION**

This article only touches the surface of a topic I hope to explore in far greater depth. I began with the insight that a triangular child/parent/state diagram no longer captures the most important controversy over who should socialize our children. In our times, mass-media marketing has displaced parents as the primary force in the socialization of children. It has compromised true parental autonomy by bombarding our children, and their parents, with toxic images designed to sell unhealthy products. Analogizing this cultural crisis to the environmental crisis that captured public attention forty years ago, I have drawn upon the conceptual framework of developmental psychology to explore the ecology of childhood. I have explored how the methods and principles of environmental and natural resources law might
provide us with tools to understand and address the threats to children and society presented by mass-media marketing. And I have proposed a new paradigm, which I have called Ecogenerism, for framing the debate about how are children are socialized and government's role in preserving an ecological environment that supports children's healthy development. I have suggested that government should work in partnership with parents to address the threat to children posed by mass-media marketing. I have highlighted the work of grassroots organizations that, like the early environmentalists, have begun a social movement aimed at changing the law to address these harms to children's environment.

My article asks many more questions than it answers. Classical economists, constitutional scholars, and even children's advocates and environmentalists doubtless will find much to criticize and many gaps in my theories. If my discussion provokes a vigorous debate about Ecogenerism as a concept, about the soundness of my arguments, and about the wisdom and effectiveness of the approach that I have proposed, it will have accomplished its purpose.