

NO PLACE FOR CHILDREN:  
ADDRESSING URBAN BLIGHT AND ITS IMPACT ON CHILDREN  
THROUGH CHILD PROTECTION LAW, DOMESTIC RELATIONS  
LAW, AND “ADULT-ONLY” RESIDENTIAL ZONING

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#### INTRODUCTION

If there were a hell on earth for children, it might look something like this: They live in small, rat and cockroach-infested apartments in crumbling buildings with utilities in disrepair. With few jobs in the neighborhood to provide income for inhabitants, apartments are overcrowded with siblings, half-siblings, cousins, various adult family members, and an often-changing cast of non-family members. Their homes never feel safe because the dysfunctions of the outside world enter on a regular basis. Some of the adults bring in drugs and weapons. Gunshot sounds—and sometimes bullets—come through the windows. Severe stress weighs on everyone's mind and emotions, leading to violent outbursts and sexual exploitation. The children are effectively trapped in this environment because the world outside is menacing. AIDS-infected drug addicts lie in a stupor in building hallways. On the streets, drug dealers stand on corners and try to lure children into the trade, prostitutes stand on other corners, child sex predators look out windows of nearby buildings, and members of rival gangs cruise the streets intimidating residents. The walk to school is harrowing, and it hardly seems worth the risk because the school suffers from dilapidation, burnt-out teachers, and frequent gang-related violence. There are no outdoor spaces safe for play, so children are in “lock down” in their apartments except when they go to school. Simply breathing anywhere in their world poses a threat; the air is clogged with pollutants from nearby factories and highways. High rates of mortality, sickness, delinquency, and depression characterize children's lives.

This depiction resembles many actual residential environments in America and other western nations today, places where children are now

living, and where many are prematurely dying.<sup>1</sup> A large literature on urban blight describes the causes, nature, effects, and attempts at solving the problem.<sup>2</sup> Its seriously adverse impact on children is well-documented.<sup>3</sup> Yet legal scholars have ignored “neighborhood effect” on children in discussing the law of child protection, parentage, adoption, divorce, and land use. This Article aims to correct this oversight. It advances several proposals—some fairly dramatic—aimed at sparing children from living in the worst urban areas and, more generally, at moving children toward better residential locations. And it presents moral and constitutional arguments as to why government must implement these proposals.

For any child, residential location is a large determinant of well-being. At the negative extreme, a neighborhood can pose threats to children’s well-being far exceeding those present within the home in typical cases of child protection removal.<sup>4</sup> The worst neighborhoods pose direct threats to

1. See *infra* Part I.

2. See, e.g., FROM DESPAIR TO HOPE: HOPE VI AND THE NEW PROMISE OF PUBLIC HOUSING IN AMERICA’S CITIES (Henry G. Cisneros & Lora Engdahl eds., 2009) [hereinafter FROM DESPAIR TO HOPE]; DAVID J. ERICKSON, THE HOUSING POLICY REVOLUTION: NETWORKS AND NEIGHBORHOODS (2009); MARGERY AUSTIN TURNER, SUSAN J. POPKIN & LYNETTE RAWLINGS, PUBLIC HOUSING AND THE LEGACY OF SEGREGATION (2009); GASTON ALONSO, NOEL S. ANDERSON, CELINA SU & JEANNE THEOHARIS, OUR SCHOOLS SUCK: STUDENTS TALK BACK TO A SEGREGATED NATION ON THE FAILURES OF URBAN EDUCATION (2009); COLIN GORDON, MAPPING DECLINE: ST. LOUIS AND THE FATE OF THE AMERICAN CITY (2008); SEGREGATION: THE RISING COSTS FOR AMERICA (James H. Carr & Nandinee K. Kutty eds., 2008); BRENDA ANN KENNEALLY, MONEY POWER RESPECT: PICTURES OF MY NEIGHBORHOOD (2005) (Bushwick area of Brooklyn, NY); HOWARD GILLETTE, JR., CAMDEN AFTER THE FALL: DECLINE AND RENEWAL IN A POST-INDUSTRIAL CITY (2005); THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA (Xavier de Souza Briggs ed., 2005); WALTER THABIT, HOW EAST NEW YORK BECAME A GHETTO (2003); JILL JONNES, SOUTH BRONX RISING: THE RISE, FALL, AND RESURRECTION OF AN AMERICAN CITY (2002); NEIGHBORHOOD POVERTY: POLICY IMPLICATIONS IN STUDYING NEIGHBORHOODS, VOLS. I, II, AND III (Jeanne Brooks-Gunn et al. eds., 2000); SEAN ZIELENBACH, THE ART OF REVITALIZATION: IMPROVING CONDITIONS IN DISTRESSED INNER-CITY NEIGHBORHOODS (2000); LEALAN JONES ET AL., OUR AMERICA: LIFE AND DEATH ON THE SOUTH SIDE OF CHICAGO (1997); ALEX KOTLOWITZ, THE OTHER SIDE OF THE RIVER: A STORY OF TWO TOWNS, A DEATH, AND AMERICA’S DILEMMA (1998) (Detroit); ALEX KOTLOWITZ, THERE ARE NO CHILDREN HERE: THE STORY OF TWO BOYS GROWING UP IN THE OTHER AMERICA (1991).

3. See Dolores Acevedo-Garcia & Theresa L. Osypuk, *Impacts of Housing and Neighborhoods on Health: Pathways, Racial/Ethnic Disparities, and Policy Directions*, in SEGREGATION: THE RISING COSTS FOR AMERICA, *supra* note 2, at 208–16; TURNER, POPKIN & RAWLINGS, *supra* note 2, at 79–82; Prudence Brown & Harold A. Richman, *Neighborhood Effects and State and Local Policy*, in 2 NEIGHBORHOOD POVERTY: POLICY IMPLICATIONS IN STUDYING NEIGHBORHOODS, *supra* note 2; Deborah L. Shelton, *Students Take Academic Hit When a Slaying is Close to Their Home*, CHI. TRIB. (June 14, 2010), [http://articles.chicagotribune.com/2010-06-14/news/ct-met-homicide-impacts-children-20100614\\_1\\_homicide-children-violence](http://articles.chicagotribune.com/2010-06-14/news/ct-met-homicide-impacts-children-20100614_1_homicide-children-violence).

4. See *infra* Part I. Social scientists often use “community” or “local community” interchangeably with “neighborhood,” but also at times differentiate the two. See, e.g., Robert J. Sampson, *The Neighborhood Context of Investing in Children: Facilitating Mechanisms and Undermining Risks*, in SECURING THE FUTURE: INVESTING IN CHILDREN FROM BIRTH TO COLLEGE 207 (Sheldon Danziger & Jane Waldfogel eds., 2000); 2 NEIGHBORHOOD POVERTY: POLICY IMPLICATIONS IN STUDYING NEIGHBORHOODS, *supra* note 2, at 16–17, 191–92. In addition, there is substantial literature on how best to delimit a community or neighborhood for purposes of study—for example, based on geographic boundaries or based on residents’ perception of the spatial limits of their social or public lives. See *id.* at xx, 191–92. For this Article, it is not necessary to describe or assess the debates on these issues. I

children's physical and psychological well-being, and they also adversely affect children indirectly by creating stressors that undermine parents' abilities to care for children.<sup>5</sup> Pervasive crime and substance abuse, in particular, substantially elevate risks to children beyond those created just by less capable or less motivated parents. Given that a relatively high percentage of adults who live in the worst neighborhoods are marginal to begin with, in terms of their inherent capacities for giving care and maintaining safe and healthy homes,<sup>6</sup> the additional threats present in the larger residential environment push the experience of most children in such neighborhoods below what most people—including those who live in the neighborhoods—would regard as a minimally acceptable quality of life. Because such neighborhoods are also likely to have inadequate—even dangerous—schools and few legal employment opportunities,<sup>7</sup> living in them severely diminishes the life prospects of children forced to grow up in them.

Government officials at all levels have endeavored to eliminate such toxic environments for at least the past half-century. Without denying the success there has been in reforming some blighted urban areas,<sup>8</sup> this Article begins with the premise that there are still many residential areas in

will use the terms interchangeably, as is common in everyday discourse, meaning by both a place where a substantial number of people live and interact with each other to some degree on a more or less daily basis. My concern is with the world a child inhabits beyond the home that has an impact on the child's life, however that is characterized or defined. Implementing my proposal as to zoning or declaring communities unfit would, of course, require determining the boundaries of the condemned area, but local officials could do so based on census tract boundaries, their familiarity with local neighborhoods, and input from local residents, police, and community leaders, without needing to answer all the questions that puzzle researchers.

5. See, e.g., 2 NEIGHBORHOOD POVERTY: POLICY IMPLICATIONS IN STUDYING NEIGHBORHOODS, *supra* note 2, at xx, 191–92; Acevedo-Garcia & Osypuk, *supra* note 3, at 221; James Garbarino, Catherine P. Bradshaw & Kathleen Kostelny, *Neighborhood and Community Influences on Parenting*, in PARENTING: AN ECOLOGICAL PERSPECTIVE 297–318 (Tom Luster & Lynn Okagaki eds., 1993); Serena Maria Daniels, *For Some Chicago Kids, There's No Escape From Violence*, CHI. TRIB. (Aug. 23, 2010), [http://articles.chicagotribune.com/2010-08-23/news/ct-met-relocated-violence-20100823\\_1\\_fenger-student-agape-community-center-derrion-albert](http://articles.chicagotribune.com/2010-08-23/news/ct-met-relocated-violence-20100823_1_fenger-student-agape-community-center-derrion-albert); Susan Saulny, *Graduation is the Goal, Staying Alive the Prize*, N.Y. TIMES (July 1, 2010), <http://www.nytimes.com/2010/07/02/us/02chicago.html?sq=&st=nyt&adxnml=1&scsp=1&adxnmlx=1312055938-CDC1wXYklcfqi31UocMVVA>; Ray Rivera, *In Newburgh, Gangs and Violence Reign*, N.Y. TIMES, May 11, 2010, <http://www.nytimes.com/2010/05/12/nyregion/12newburgh.html?adxnml=1&adxnmlx=1312056024-U8MKqOBfMgx3MikBqZj8VA>; Peter Aldous, *Neighborhoods That Can Kill; The Strain of Living in Chicago's Crime-Ridden South Side Seems to Send Tumours into Overdrive. It's Just One Example of a Social Environment That Leads Directly to Poorer Health*, NEW SCIENTIST, Jan. 16, 2010; TURNER, POPKIN & RAWLINGS, *supra* note 2, at 85.

6. See James H. Carr & Nandinee K. Kutty, *The New Imperative for Equality*, in SEGREGATION: THE RISING COSTS FOR AMERICA, *supra* note 2, at 19; THABIT, *supra* note 2, at 266–67.

7. See Carr & Kutty, *supra* note 6, at 19–20; Kristen Mack, Stephanie Banchemo & Annie Sweeney, *Fenger High School: Fear, Frustration Come to Campus: Days after an Honor Student was Slain, Kids List the Perils of Walking to School, While Parents Demand a Halt to Violence*, CHI. TRIB. (Sept. 29, 2009), [http://articles.chicagotribune.com/2009-09-29/news/0909280834\\_1\\_campus-students-fear](http://articles.chicagotribune.com/2009-09-29/news/0909280834_1_campus-students-fear).

8. For accounts of perceived successes, see JONNES, *supra* note 2.

the western world today that are simply unsuitable places for children to grow up, regardless of how competent their parents are, places where most parents would not want to bring their child for even an hour, yet in which many children are now forced to live day in and day out. I further assume that current or contemplated public policy measures to reform such places are not going to succeed sufficiently in the foreseeable future to spare all children now being born from being forced to grow up in hellish residential environments. Attempts to improve the quality of life in the worst neighborhoods often have little success,<sup>9</sup> and children are sometimes the last to benefit from such efforts.<sup>10</sup> Even when urban renewal efforts succeed, they generally take many years and succeed only by relocating the problem from one part of a city to another.<sup>11</sup> During periods of economic downturn, such efforts are especially unlikely to succeed; in fact, the pockets of deep, chronic, widespread poverty in western cities are likely to grow during such times with all of the ills that such poverty generates—violent crime, drugs, bad schools, lack of opportunity, and other threats to children’s health, safety, and chances for fulfilling lives.<sup>12</sup> The

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9. See generally Susan J. Popkin & Mary K. Cunningham, *Beyond the Projects: Lessons from Public Housing Transformation in Chicago*, in *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA*, *supra* note 2; Mireya Navarro, *Lead Poisoning, a Stubborn Nemesis*, N.Y. TIMES (Apr. 21, 2010), <http://www.nytimes.com/2010/04/22/nyregion/22lead.html?adxnml=1&adxnmlx=1312056273-uFgl5E WxDzvJE/+XwOh Avg>; see also, Cara Buckley, *Public Housing Repairs Can’t Keep Pace With Need*, N.Y. TIMES (Oct. 24, 2010), [http://www.nytimes.com/2010/10/25/nyregion/25repairs.html?a\\_dnxml=1&adxnmlx=1312056327-mPySa xHEAulr+U etv/oK+Q](http://www.nytimes.com/2010/10/25/nyregion/25repairs.html?a_dnxml=1&adxnmlx=1312056327-mPySa xHEAulr+U etv/oK+Q).

10. Susan J. Popkin & Mary K. Cunningham, *Has HOPE VI Transformed Residents’ Lives?*, in *FROM DESPAIR TO HOPE*, *supra* note 2, at 199 (noting that families with many young children were among those “hard[est]-to-house” in urban revitalization programs).

11. See Tim Heffernan, *Close-Up on Mott Haven*, Bronx, *THE VILL. VOICE*, Sept. 27, 2005, <http://www.villagevoice.com/2005-09-27/nyc-life/close-up-on-mott-haven-bronx/> (describing gentrification of South Bronx—that is, more affluent New York City residents moving into renovated properties and pricing out poor residents, causing the latter to move, with their problems, to other neighborhoods); John Bebow & Antonio Olivo, *CHA Moves Tenants Out—But Not Up; Ex-Residents Still Live in Struggling, Segregated Areas*, CHI. TRIB. (Feb. 27, 2005), [http://articles.chicagotribune.com/2005-02-27/news/0502270543\\_1\\_public-housing-chicago-housing-authority-cha/3](http://articles.chicagotribune.com/2005-02-27/news/0502270543_1_public-housing-chicago-housing-authority-cha/3) (discussing Chicago’s decade-long Plan for Transformation, which critics say just exported the public housing problems to residential blocks that are growing increasingly unstable); ALEXANDER VON HOFFMAN, *HOUSE BY HOUSE, BLOCK BY BLOCK: THE REBIRTH OF AMERICA’S URBAN NEIGHBORHOODS* 251–52 (2003) (noting that in urban areas where inner-city rejuvenation has occurred, this has typically entailed re-creation of blight in satellite neighborhoods to which the poorest city residents are dislocated); JONNES, *supra* note 2, at 434–35 (discussing migration of drug trafficking in step with police entry into neighborhoods); John A. Powell & Marguerite L. Spencer, *Giving Them the Old “One-Two”*: *Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433 (2003). On the slowness of reform efforts, see BROWN & RICHMAN, *supra* note 3, at 164–68; GILLETTE, *supra* note 2, at 245–46; Sampson, *supra* note 4, at 216–18.

12. See Carr & Kutty, *supra* note 6, at 16 (noting an increase in recent years in the number of people living in areas of concentrated poverty in the U.S.); National League of Cities, *CITY FISCAL CONDITIONS 2009*; Sam Dolnick, *Problems Mount at a Bronx Building Bought in a Bubble*, N.Y. TIMES (Jan. 19, 2010), <http://query.nytimes.com/gst/fullpage.html?res=9F01E6D61438F93AA25752C0A9669D8B63> (describing setbacks to urban renewal effort caused by recession); Joseph Goldstein, *Police Force Nearly Halved, Camden Feels Impact*, N.Y. TIMES (Mar. 6, 2011),

only way to ensure that children do not suffer the effects of growing up in deeply dysfunctional communities is to separate them as early as possible from the adults who are creating toxic social environments in impoverished areas. Efforts to remove those adults—for example, by criminal law enforcement—have generally not worked. The logical alternative is to remove the children.

In fact, programs that have assisted parents who wished to relocate with their children from high-poverty, inner-city neighborhoods to low-poverty areas have greatly improved the children's well-being and long-term life prospects.<sup>13</sup> This Article presents a novel argument for expanding such relocation programs, an argument founded upon basic rights of children—not rights against private actors who might harm them, though children certainly possess such rights, but rather rights against the state. I argue that the state violates basic rights of children by making certain decisions about children's lives that effectively consign many of them to living in hellish conditions. To remedy this violation of children's rights, the state should now institute reforms such as giving children first priority in distribution of housing vouchers and in provision of relocation assistance and, most controversially, making relocation out of the most dangerous neighborhoods mandatory rather than voluntary for parents who have and wish to retain custody of children. The state should no more permit parents to house children in apartments where stray bullets come through windows and drug addicts clutter the hallways outside than permit parents to take children into casinos and nightclubs.

This Article argues that the state is legally free, and in fact morally and legally obligated, to adopt new legal rules and policies aimed at ensuring that no children live in the horrible neighborhoods that exist, and likely will always exist, in our society. It also presents a constitutional lever for overcoming political and community resistance to taking the necessary measures. These measures would entail changes to the law in three broad areas—child maltreatment, domestic relations, and zoning. Part II shows that state decision making in these areas is now largely indifferent to “neighborhood effect” on child welfare. Part III recommends specific amendments to the law to correct this deficiency. Parts IV and V then present the normative theory in support of these reforms.

The legal reforms that Part III presents, though novel and potentially radical in their effects, actually entail simply extending concepts and rules already enshrined in the law. First, child protection law now routinely

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[http://www.nytimes.com/2011/03/07/nyregion/07camden.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2011/03/07/nyregion/07camden.html?_r=1&pagewanted=all).

13. See Acevedo-Garcia, James & Osypuk, *supra* note 3, at 220–23; TURNER, POPKIN & RAWLINGS, *supra* note 2, at 2, 6–10, 81–82; Rosenbaum et al., *New Capabilities in New Places: Low-Income Black Families in Suburbia*, in THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA, *supra* note 2, at 150, 158; Popkin & Cunningham, *supra* note 9, at 189.

employs the concept of unfitness for childrearing, applying it both to individual persons and to living spaces. Unfit parents are persons with particular characteristics, such as drug addiction, mental illness, or demonstrated propensity to maltreat children, that render them unsuitable to serve as caretakers for children.<sup>14</sup> Unfit or unsuitable homes for children are living quarters that contain dangers, such as guns or drugs within children's reach, that have extremely unsanitary conditions, or to which violent persons or sexual predators have regular access.<sup>15</sup> Child protection workers routinely react to parental fitness or home unsuitability by relocating children. Part III of the Article recommends extending the concept of unfitness to groupings of people—that is, communities—and to larger living environments—that is, neighborhoods—and reacting in similar ways to identification of unfitness. Just as the state now takes measures to keep children out of the custody of unfit parents and away from individual living environments deemed unsuitable for children, the state would treat some communities and neighborhoods as unfit for child rearing and separate children from them. Similarly, the law should include within the concept of parental unfitness a parent's living in a manifestly dangerous and unhealthy neighborhood, just as it now includes a parent's living on a park bench or under a bridge.<sup>16</sup> In no case is the purpose to punish or blame parents for their circumstances; rather, it is just to recognize that some birth parents are, for whatever reason, unable in their current circumstances to provide an adequate child-rearing environment.

Domestic relations law also assesses the relative fitness of individuals and homes, routinely in divorce and adoption proceedings and less commonly in maternity and paternity proceedings, and it rests decisions about where and with whom children will live on deficiencies in parenting or home environments. Part III recommends simply supplementing existing parentage and child custody rules with direction to courts that they consider neighborhood quality as well as parental and household quality when they decide with whom a child will live. This innovation would have an effect broader than just addressing urban blight; it would result in children more generally moving toward better residential environments.<sup>17</sup>

Zoning law rests on the concept that particular places are suitable for some uses and unsuitable for others, based sometimes on the physical environment but also sometimes based on the social environment. Business regulations similarly restrict what may be done inside particular public

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14. See, e.g., 750 ILL. COMP. STAT. 50/1(1)(D) (1993).

15. See, e.g., *In re Clark*, No. 275346, 2007 WL 2051656 (Mich. Ct. App. July 17, 2007) (upholding trial court termination of parental rights of mother who could not maintain suitable home).

16. See, e.g., 750 ILL. COMP. STAT. 50/1 (2010) (defining "unfit person" to include a parent who repeatedly fails to provide a child with "adequate" shelter, and defining "neglected child" to include a child who fails to receive adequate shelter).

17. See *infra* Part II.B.1.b.2.

places, and these include restrictions aimed at protecting children, typically by precluding them from entering unsuitable environments (e.g., night clubs, casinos, betting parlors, and factories). Part III recommends that state and local governments create subcategories of residential use, one of which would be “adult only” or “no child” zones. Just as the state now designates some spaces as unsuitable for any human habitation and some businesses as unsuitable for children’s entry, it should begin to designate some areas as unsuitable for habitation by children specifically because of the social and physical environment that exists in them, and enforce a categorical prohibition on residence by children in those areas. Whatever the suitability of blighted neighborhoods for habitation by adults and whatever the state’s obligation to adults now living in such places, the state should not tolerate children living in them.<sup>18</sup>

Similarly, public housing policy since the early 1990s has, in addition to renovation of blighted areas, emphasized dispersal of urban residents, on a voluntary basis, from neighborhoods with high-poverty to low-poverty areas within or outside the cities using housing vouchers. Part III recommends giving first priority for relocation subsidies and support services to children and their caregivers and making relocation mandatory for parents who wish to retain custody of their children rather than voluntary. These zoning and housing policy proposals offer the most comprehensive and immediate approach to keeping children out of the worst social environments; they would affect entire residential areas and populations of children all at once, rather than one household or one child at a time as child maltreatment and domestic relations actions do.

Part IV presents the normative foundation for these recommendations. It argues that children have a moral and constitutional right against the state making decisions about their lives that result in their living in unfit communities. It demonstrates that, although children’s residences might appear to be the consequence of solely private action, the state is actually deeply implicated in the fate of children currently living in horrible neighborhoods. This is not just because many of the worst residential environments are in government-constructed and government-operated housing projects, but because of the state’s determinative role in family formation and its bestowing on parents plenary power over children’s lives, including the power to choose any residential area for the children to live. The state must be accountable, morally and constitutionally, for the way it carries out that role and for its decisions as to the extent of control over children’s lives it gives to parents, including control over where children live.

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18. Cf. Acevedo-Garcia & Osypuk, *supra* note 3, at 215–16 (showing that the impact of neighborhood dysfunction is greater on children than on adults).

Part V addresses arguments against deeming communities unfit and against considering the neighborhood quality in state decision making about children's relational lives. It responds to the contention that the state should not "punish" parents for the conduct of others in their community nor blame them for living in an environment that they did not themselves create and that they might not be able to leave. It addresses potential constitutional objections, including those based on a right to choose where one lives or a right to be a parent and have custody of one's children. Though such a constitutional challenge should not succeed in blocking the reforms, it might force the state to provide more financial relocation assistance, including expansion of current housing subsidy programs. Part V also addresses concerns about a disparate impact on the family lives of poor and minority race persons and about further eroding the quality of life in bad neighborhoods. Though the Article's focus is on potential legal reforms to improve the lives of children and on the normative case for and against those reforms, the Conclusion will also offer some thoughts about the practicalities of implementing these reforms.

This Article's substantive focus is on dangers to children arising from dysfunctions correlated with chronic poverty, but there are also community-wide dangers that arise from other sources, and the Article's analysis and conclusions would apply to them as well. One other source is ideology. Though less widespread than poverty, cult behavior is a significant problem for children in the United States. The revelation of under-age sex and under-age "marriage" in a fundamentalist Mormon community in Eldorado, Texas is one example.<sup>19</sup> Another such cult situation, one that had a horrifically tragic ending, was that of the Branch Davidians in Waco, Texas. In the early '90s, the nation watched in horror as dozens of children, after living for years in a cult compound where adults regularly had sex with minors, burned to death at the command of the cult's leader.<sup>20</sup> As these examples illustrate, in some communities in America, ideology drives members to reclusiveness, which inhibits child welfare agencies' abilities to monitor and protect children's well-being, and it gives community leaders a justification internally for practices that are harmful to children and that might develop for non-ideological reasons, such as brute lust. Some estimates put the current number of cults in the United States in the thousands, and though a cult might exist without any abuse of children and without otherwise creating an unhealthy environment for children, re-

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19. See David Von Drehle, *The Texas Polygamist Sect: Uncoupled and Unchartered*, TIME MAGAZINE (Apr. 24, 2008), <http://www.time.com/time/magazine/article/0,9171,1734818,00.html>.

20. See Tim Weiner, *Warnings of a Disaster in Waco Were Ignored, Witness Testifies*, N.Y. TIMES (July 22, 1995), <http://www.nytimes.com/1995/07/22/us/warnings-of-a-disaster-in-waco-were-ignored-witness-testifies.html?src=pm>.

search and autobiographical accounts suggest that child abuse, particularly sexual abuse, is a common feature of such groups.<sup>21</sup>

The state now generally leaves such insular communities unsupervised, and when problems come to light few ask whether the state should have removed all the children long before, with or without their parents, based simply on the nature of the community. This Article incidentally raises that question. Consistent with the conclusion I reach regarding communities whose dysfunction arises from pervasive and chronic poverty, I conclude that the state should also declare some insular ideological communities unfit for children, and that, at a minimum, agencies and courts in parentage, child protection, and custody proceedings should count against any parents or would-be parents that they live in a cult-like community whose way of life is hidden from public view, especially if the community's ideology encourages conduct toward children that the state believes to be harmful. The role of ideology in such communities elevates the child welfare concern insofar as it means that some environmental influences the state deems harmful to children in these communities are deliberate rather than an unintended consequence of conduct undertaken for other reasons. However, it also gives rise to an additional objection to state condemnation of the communities and state efforts to keep children out of them—namely, the First Amendment right of community members to live in accordance with their religious beliefs. Part V addresses that objection as well.

## I. IDENTIFYING UNFIT COMMUNITIES

Among first world nations, the United States has a relatively high rate of child poverty and of substance abuse and an average rate of crime.<sup>22</sup>

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21. See, e.g., CAROLYN JESSOP, *ESCAPE* (2007); FLORA JESSOP & PAUL T. BROWN, *CHURCH OF LIES* (2009); ELISSA WALL, *STOLEN INNOCENCE: MY STORY OF GROWING UP IN A POLYGAMOUS SECT, BECOMING A TEENAGE BRIDE, AND BREAKING FREE OF WARREN JEFFS* (2008); IRENE SPENCER, *SHATTERED DREAMS: MY LIFE AS A POLYGAMIST'S WIFE* (2007); Saul Relative, *I Mind Ministries: I Mind for Murder but Only One Charged with Murder*, ASSOCIATED CONTENT (Aug. 12), [http://www.associatedcontent.com/article/949037/1\\_mind\\_ministries\\_1\\_mind\\_for\\_murder.html](http://www.associatedcontent.com/article/949037/1_mind_ministries_1_mind_for_murder.html); Richard Read, *Small 'Cottage Cults' Drawing More Converts in United States*, THE OREGONIAN (July 16, 2001), [http://www.oregonlive.com/special/guru/index.ssf?/news/oregonian/1c\\_11gs ide15.frame](http://www.oregonlive.com/special/guru/index.ssf?/news/oregonian/1c_11gs ide15.frame).

22. See Louisa Degenhardt et al., *Toward a Global View of Alcohol, Tobacco, Cannabis, and Cocaine Use: Findings from the WHO World Mental Health Surveys*, 5 PLoS MED. 1053, 1059–61 (2008), available at <http://medicine.plosjournals.org/archive/1549-1676/5/7/pdf/10.1371/journal.pmed.0050141-L.pdf> (Among the 17 nations studied, the U.S. had the highest rates of cocaine (16.3%) and cannabis use (54%). France's rates were 1.9% (cocaine) and 44.1% (cannabis), while Spain's rates were 5.3% and 27.7% and Germany's 6.1% and 4.1% respectively.); ORG. FOR ECON CO-OPERATION & DEV., *GROWING UNEQUAL? INCOME DISTRIBUTION AND POVERTY IN OECD COUNTRIES* 138 (2008), available at <http://www.sourceoecd.org/upload/8108051etemp.pdf> (In the mid-2000s, the average rate of poverty for children in OECD countries was 11%. In the United States, this rate was 18% as compared to 9% in the United Kingdom, 7% in France, and 12% in Japan.); JAN VAN DIJK ET AL., *CRIMINAL VICTIMISATION IN INTERNATIONAL PERSPECTIVE: KEY*

Within the United States, these problems can be found in some measure anywhere, but certain localities suffer from especially high rates and, correspondingly, have especially low quality of life.<sup>23</sup> These same areas generally also have the highest rates of reported child maltreatment<sup>24</sup> and of family circumstances that are known risk factors for maltreatment, including non-marital births<sup>25</sup> and children whose biological parents are not living with each other.<sup>26</sup> Thus, a relatively high percentage of children in such neighborhoods are already the subjects of agency and court proceedings—in child protection cases, in paternity suits, and in custody or visitation disputes. Addressing extra-familial environmental hazards in those proceedings would not increase state involvement in those children’s lives; it would simply entail additional fact-finding. In fact, insofar as a more comprehensive look at children’s lives today enhances state decision makers’ abilities to choose the best available situations for children, it should

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FINDINGS FROM THE 2004-2005 ICVS AND EUICS 42, available at [http://rechten.uvt.nl/icvs/pdf/files/ICVS2004\\_05.pdf](http://rechten.uvt.nl/icvs/pdf/files/ICVS2004_05.pdf).

23. See, e.g., U.S. DEPT. OF JUSTICE, CRIME IN THE UNITED STATES 2007, available at [http://www.fbi.gov/ucr/cius2006/data/table\\_02.html](http://www.fbi.gov/ucr/cius2006/data/table_02.html) (showing rate of violent crime in metropolitan areas more than two and a half times as high as in non-metropolitan areas); SAMHSA, STATE ESTIMATES OF SUBSTANCE USE FROM THE 2005-06 NATIONAL SURVEYS ON DRUG USE AND HEALTH 2 (2008), available at <http://www.oas.samhsa.gov/2k6/state/2k6state.pdf>, at 2 (showing highest rate of cocaine use in Washington, D.C., more than three times the rate in North Dakota); SAMHSA, SUBSTATE ESTIMATES FROM THE 2004-06 NATIONAL SURVEYS ON DRUG USE AND HEALTH § C(2008), available at <http://www.oas.samhsa.gov/substate2k8/substate.pdf> (showing significant variation in rates of illicit drug use among regions within states and among wards within the District of Columbia); SUNY DOWNSTATE MEDICAL CENTER, QUALITY OF LIFE IN THE NATION’S 100 LARGEST CITIES AND THEIR SUBURBS: NEW AND CONTINUING CHALLENGES FOR IMPROVING HEALTH AND WELL-BEING (2004) [hereinafter “Quality of Life”]; *id.* at 1 (stating that the rate of concentrated poverty is 20 times greater in urban areas than in suburban areas of the U.S.); *id.* at 13 (showing that Atlanta, Baltimore, and St. Louis had the highest rates of violent crime among U.S. cities in 2000); *id.* at 24 (listing U.S. cities with highest rates of concentrated poverty); *id.* at 32 (listing U.S. cities with highest rates of unemployment); *id.* at 34 (listing U.S. cities with highest rates of violent crime); *id.* at 36 (listing U.S. cities with overall highest rate of “social deprivation”).

24. URBAN PROBLEMS AND COMMUNITY DEVELOPMENT 251-53 (Ronald F. Ferguson & William T. Dickens eds., 1999) (noting that crime, child maltreatment, delinquency, and other social problems are often bundled together in impoverished areas); Claudia J. Coulton et al., *How Neighborhoods Influence Child Maltreatment: A Review of the Literature and Alternative Pathways*, 31 CHILD ABUSE & NEGLECT 1117, 1132-33 (2007) (discussing well-documented link between neighborhoods with high crime, poverty, and alcohol use and child abuse and neglect).

25. Lawrence B. Finer & Stanley K. Henshaw, *Disparities in Rates of Unintended Pregnancy in the United States, 1994 and 2001*, 38 PERSP. ON SEXUAL AND REPROD. HEALTH 90, 93-94 (2006) (Among women reporting unintended births, 58% of these women lived below the poverty line. “In 2001, poor women had unintended births at five times the rate of their counterparts in the highest income category.”).

26. See THE FED. RESERVE SYS. & THE BROOKINGS INST., THE ENDURING CHALLENGE OF CONCENTRATED POVERTY IN AMERICA: CASE STUDIES FROM COMMUNITIES ACROSS THE U.S. 119, 174, 160-61 (David Erickson et al. eds., 2008), available at [http://www.frbsf.org/cpreport/docs/cp\\_fullreport.pdf](http://www.frbsf.org/cpreport/docs/cp_fullreport.pdf) (noting that high proportion of single parent households contributes to concentrated poverty, finding a strong correlation between single parent households and high rates of poverty in East Albany, NY, and observing that 48 percent of the population of Northwest Milwaukee living in poverty and 52.7 percent of the population comprised of single parent households); Sampson, *supra* note 4, at 209, 215.

reduce the need for subsequent legal proceedings involving children, such as neglect proceedings, delinquency petitions, and custody change requests.

In the past decade, many social scientists have conducted comparative assessments of different neighborhoods within particular cities, based on aggregate data, in terms of the impact that neighborhood environment has on children. Their work evidences the feasibility of objective assessments of neighborhood quality, and it confirms what is obvious from the ethnographic accounts—namely, a neighborhood effect independent of parental characteristics. Regardless of how devoted and competent parents are, living in the nation's worst neighborhoods adversely impacts children's physical health, cognitive and emotional development, school performance, socialization, behavior, and opportunities.<sup>27</sup>

Specifically, recent research shows that children in areas of concentrated poverty are much more likely than children in other communities to be killed or injured by gunshot, witness violence and drug addiction, suffer from depression, drop out of school, become gang members, become drug addicts, and end up in prison.<sup>28</sup> Comparison of high-poverty communities with more affluent communities shows a high correlation between concentrated poverty and elevated rates of child mortality and chronic disease, poor nutrition and health care among children, bad public schools, unemployment, and environmental toxins such as lead paint, rats, hazardous waste, air pollution, and noise.<sup>29</sup> When a neighborhood is character-

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27. See DELBERT S. ELLIOTT ET AL., *GOOD KIDS FROM BAD NEIGHBORHOODS: SUCCESSFUL DEVELOPMENT IN SOCIAL CONTEXT* (2006); ANNE R. PEBLEY & MARY E. VAIANA, *IN OUR BACKYARD: HOW 3 L.A. NEIGHBORHOODS AFFECT KIDS' LIVES* (2002); Martha A. Gephart, *Neighborhoods and Communities as Contexts for Development*, in 1 *NEIGHBORHOOD POVERTY: POLICY IMPLICATIONS IN STUDYING NEIGHBORHOODS*, *supra* note 2, at 13, 28, 30; Nancy Darling & Laurence Steinberg, *Community Influences on Adolescent Achievement and Deviance*, in 2 *NEIGHBORHOOD POVERTY: POLICY IMPLICATIONS IN STUDYING NEIGHBORHOODS*, *supra* note 2, at 126–30; Spencer et al., *An Alternative Approach to Assessing Neighborhood Effects on Early Adolescent Achievement and Problem Behavior*, in 2 *NEIGHBORHOOD POVERTY: POLICY IMPLICATIONS IN STUDYING NEIGHBORHOODS*, *supra* note 2, at 145–46, 157–58.

28. See Danielle H. Dallaire et al., *Predicting Children's Depressive Symptoms from Community and Individual Risk Factors*, 37 *J. YOUTH & ADOLESCENCE* 830, 831 (2008); Robert L. Wagmiller, Jr., *Children and the Changing Social Ecology of Economic Disadvantage in Urban America*, in 1 *CHILD POVERTY IN AMERICA TODAY: FAMILIES AND CHILDREN* 163 (Barbara A. Arrighi & Davis J. Maume eds., 2007); Gephart, *supra* note 27, at 13, 27, 35, 39; Jill E. Korbin & Claudia J. Coulton, *Understanding the Neighborhood Context for Children and Families: Combining Epidemiological and Ethnographic Approaches*, in 2 *NEIGHBORHOOD POVERTY: POLICY IMPLICATIONS IN STUDYING NEIGHBORHOODS*, *supra* note 2, at 69–75.

29. See JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991); *QUALITY OF LIFE*, *supra* note 23, at 6 (“Research has found a strong link between concentrated poverty and unemployment, poor educational achievement, high crime rates and other social ills.<sup>3</sup> Higher rates of disease and mortality are also associated with concentrated poverty.<sup>4</sup> Poor residents living in impoverished neighborhoods often have no grocery stores for buying fresh and affordable produce, have much higher air and noise pollution levels and higher rates of poor housing conditions, such as lead-based paint and high levels of rodent feces. In the poorest neighborhoods, preventable hospitalization rates (e.g., asthma admissions) are much higher than in affluent neighborhoods.”); *id.* at 16

rized by a high percentage of unemployed adults and a high percentage of single parents, it is likely to have a large criminal element, unsafe public areas, few positive role models, few employment or job training opportunities for adolescents, and little inter-familial cooperation in monitoring children.<sup>30</sup> These community characteristics have a direct impact on children that is independent of parent characteristics and quality of home environment.<sup>31</sup> At the same time, they undermine the ability of parents to parent successfully because they increase stress, foster despair, present strong competing influences, and remove needed external support.<sup>32</sup>

Not all poor neighborhoods suffer from these dysfunctions and dangers to children. It is important to look beyond the poverty rate in a given location and examine directly important factors such as rates of crime and drug use and presence or absence of positive social networks.<sup>33</sup> But this research makes clear that a community or neighborhood, as much as an abusive or neglectful parent or an individual home, can present a serious threat to the welfare and healthy development of children. Moreover, it is a threat that is more readily apparent to the state, well in advance of its realization in harm to children, than is the threat that parental unfitness poses for children; local governments are well aware of the quality of life and of statistics on crime, drug use, and other problems in the neighborhoods within their jurisdiction.

## II. INDIFFERENCE TO COMMUNITY UNFITNESS IN CURRENT LEGAL RULES

Despite the clear impact that neighborhood quality has on child welfare, current laws governing state decisions that effectively determine where children live are largely indifferent to that impact. This Part critiques current legal rules governing private use of physical space, parentage, custody disputes between parents, child protection removal from parental custody, and termination of parental rights.

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(reporting a strong correlation between quality of life indices and maternal/infant health); *id.* at 3 (stating the health services are generally deficient in poor communities).

30. QUALITY OF LIFE, *supra* note 23, at 26; Frank Furstenbuerg, Jr., & Mary Elizabeth Hughes, *The Influence of Neighborhood on Children's Development: A Theoretical Perspective and Research Agenda*, in 2 NEIGHBORHOOD POVERTY: POLICY IMPLICATIONS IN STUDYING NEIGHBORHOODS, *supra* note 2, at 25–26; ELLIOTT ET AL., *supra* note 27, at 38, 42, 45, 48, 49, 112–18; Sampson, *supra* note 4, at 215; Gager et al., *The Role of Poverty, Race/Ethnicity, and Regional Location in Youth Employment*, in 3 CHILD POVERTY IN AMERICA TODAY: THE PROMISE OF EDUCATION, at 127–28 (Barbara A. Arrighi & David J. Maume eds., 2007).

31. *Id.* at 55, 81; Dallaire et al., *supra* note 28, at 831, 841; Sampson, *supra* note 4, at 216.

32. *Id.* at 281; Robert J. Sampson & Jeffrey D. Morenoff, *Ecological Perspectives of Urban Poverty*, in 2 NEIGHBORHOOD POVERTY: POLICY IMPLICATIONS IN STUDYING NEIGHBORHOODS, *supra* note 2, at 19; Brown & Richman, *supra* note 3, at 171; Margaret G. Smith & Rowena Fong, *THE CHILDREN OF NEGLECT: WHEN NO ONE CARES* 48–53 (2004).

33. *Id.* at 197, 294.

*A. Government Control of How Private Parties Use Physical Space*

The state generally decides the permissible uses of physical space within its jurisdiction.<sup>34</sup> In the United States, this typically occurs at the municipal level; local zoning laws designate different areas for different uses, such as industrial-only, commercial-only, or residential-only.<sup>35</sup> Local ordinances or state laws further proscribe specific types of activities that would otherwise fall within the category of permissible uses—for example, adult-only retail stores or religious services.<sup>36</sup> The state thereby assumes the power to restrict how private parties use property and to authorize particular uses of private property.<sup>37</sup> For example, designating some land as industrial-only amounts to both prohibiting private parties from living on it and empowering private parties to construct and operate factories and warehouses on it. Designating some land as exclusively residential or mixed residential and commercial amounts to both authorizing private parties to live on it and prohibiting private parties from using it for non-designated purposes.<sup>38</sup> In addition, the state invests legal parent status in particular adults, through legal rules and processes described below, and it confers powers on legal parents that include the power to decide where

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34. Edward H. ZIEGLER ET AL., 2 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 1.2 (4th ed. 2010).

35. See, e.g., BAINBRIDGE, GA., ZONING ORDINANCE art. 7, ch. 7.7, § 7.7.1-2 (2005) (designating certain areas Heavy Industrial (HI) districts “with the purpose of reserving certain areas . . . for industrial operations which may be objectionable due to the emission of noise, vibration, smoke, dust, gas, fumes, odors, or radiation and that may create fire or explosion hazards or other objectionable conditions,” stating that “[u]ses involving human activity such as dwellings, care centers, and certain commercial uses are not permitted,” and explaining that such districts “are highly unsuitable adjacent to residential districts and are generally unfit for the sustained activity of humans and animals”); RIVERSIDE, CAL., MUNICIPAL CODE tit. 19, ch. 19.130, § 19.130.025 (2007); *1568 Montgomery Highway, Inc. v. City of Hoover*, 45 So. 3d 319 (Ala. 2010) (upholding state law criminalizing, and municipal code prohibiting, operation of “adult-only enterprise” within 1000 feet of other particular land uses).

36. See, e.g., *Lighthouse Institute for Evangelism v. City of Long Branch*, 510 F.3d 253 (3d Cir. 2007) (addressing city zoning ordinance and redevelopment plan excluding religious services from permitted uses in zone where secular assemblies and institutions were permitted); *Vineyard Christian Fellowship of Evanston v. City of Evanston*, 250 F. Supp. 2d 961 (N.D. Ill. 2003) (invalidating similar ordinance); ZIEGLER ET AL., *supra* note 34, § 29:21; JULES B. GERARD & SCOTT D. BERGTHOLD, LOCAL REGULATION OF ADULT BUSINESS § 1:3 (2010).

37. One might challenge the suggestion that the state “authorizes” private parties to use property in particular ways, contending that private parties have a natural right or presumptive freedom to use their property however they wish and that there is no state action or involvement when the state chooses simply not to prohibit particular uses. But the law, a product of state action, creates and defines the scope of private parties’ legal rights to property, and the state stands ready to enforce those rights against private parties or other governmental units that might seek to interfere with particular uses of property. So, for example, if a municipality possesses zoning power and its zoning board designates certain areas as residential, property owners can rely on that designation to guard against efforts by other private parties, by state or federal governments, or by some other municipal agency to prevent construction or habitation of houses or apartment buildings on the land.

38. For discussion of the impact—positive or negative—that specific-use zoning can have on quality of life in urban areas, see generally Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1 (2004).

their children live. These two sets of rules in combination make the state a but-for causal agent in any child's residential circumstances; only because the state assigns a child to a legal relationship with and custody of particular adults, and then authorizes and empowers those adults to choose the location of the child's residence from among all areas the state has zoned as residential, does a child end up living in a particular place.

Because the state typically does all this without explicit reference to children's residential location, and because the territory left open to parents for residential choice is typically so extensive, we tend to be oblivious to the state's role. It would be more apparent if the state simply added language such as "for children as well as adults" to zoning laws designating land as residential, or if a particular local government shrank the area zoned for residential use to only horrible locations, or if state statutes stated explicitly: "The state hereby authorizes legal parents to choose horrible neighborhoods for their child's residence." Parents' volition obviously plays a role as well, but a given adult's preference as to where a given child should live is effective only if and because the state makes that adult the legal parent and custodian of that child and empowers legal parents to choose where the child will live. That is obvious in the case of adoptive parenting, and it is no less true in the case of parenting by biological parents. Absent that state action, birth parents would be in no better position than any other adult who wished to take possession of a child. Depending on how one interprets certain other legal rules (e.g., prohibitions on kidnapping), in the absence of parentage laws either any adult or no adult could lawfully take possession of a child at any time.

Though zoning laws today do not distinguish between residential use for children and residential use for adults, one of the rationales local governments have given historically for segregating residential and non-residential uses, against objections based on property rights, was concern for the health of children in particular.<sup>39</sup> In making decisions today about, for example, how close to a factory they should permit people to live, regulators are likely to consider the enhanced danger to children of, for example, inhaling toxic particles, because childhood is a crucial time for development of important human organs such as the lungs and the brain. If they do ever consider the possibility of allowing only adults to live in certain places, such as areas with high air pollution levels, regulators might conclude that such a restriction would be too difficult to administer—in particular, because adults who have settled into an area without children might subsequently conceive a child. In contrast, it is much more admini-

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39. See, e.g., *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391 (1926).

strable to exclude children from casual use of particular spaces deemed unsuitable for them, such as casinos, and the state generally does so.<sup>40</sup>

There is no assumption here, therefore, that land use planners and business regulators are oblivious to the impact environment can have on children's well-being. But most likely state actors simply have not given much thought to the possibility of excluding just children from a neighborhood on the basis of its social environment, and so have also not considered whether problems of administrability in that context might be outweighed by other considerations. It might well be that the child welfare gain resulting from a "no-child policy" in particular blighted areas outweighs the costs of administering the policy, and that a no-child policy is preferable to simply excluding all persons from residing there, because the basic aim is to separate children from a certain group of adults and a certain social milieu. I discuss these possibilities in Part III.

### *B. Domestic Relations and Child Protection Laws That Determine Children's Residences*

The legal rules that now govern formation, regulation, and dissolution of parent-child relationships are for the most part indifferent to community environment. Explicit direction to state decision makers to take into account the larger social and physical environment in which a child would live is largely confined to the context of qualifying applicants for adoption, and even with respect to that context one finds such direction only in a minority of states.

#### *1. Parentage*

Parentage rules include maternity and paternity rules that assign initial legal parenthood with respect to newborn children as well as adoption rules that assign legal parenthood to a new parent or set of parents.

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40. See, e.g., LA. REV. STAT. ANN. § 27:260(A)(2) (2009) ("A person under the age of twenty-one shall not . . . [l]oiter, or be permitted to loiter, in or about any room, premises, or designated gaming area wherein any licensed game is operated or conducted."); W. VA. CODE § 29-25-24(a)(2) (2008) (the language of which will be amended per 2009 W. Va. Act No. 106 and read: "An individual may enter a designated gaming area or remain in a designated gaming area only if the individual: . . . Is at least twenty-one years of age."); CAL. PENAL CODE § 273f (2008) ("Any person, . . . and any firm or corporation, who as employer or otherwise, shall send, direct, or cause to be sent or directed to any saloon, gambling house, house of prostitution, or other immoral place, any minor, is guilty of a misdemeanor."); CAL. BUS. & PROF. CODE § 25665 (2008) ("Any licensee under an on-sale license issued for public premises . . . who permits a person under the age of 21 years to enter and remain in the licensed premises without lawful business therein is guilty of a misdemeanor.").

*a. Maternity and Paternity*

Maternity rules throughout the United States assign initial legal motherhood to a child's birth mother.<sup>41</sup> The law requires no consideration of maternal fitness in any case, let alone consideration of the environment in which the birth mother lives.<sup>42</sup> Thus, even a birth mother who is a heroin addict and prostitute living on the streets in a crime-ridden and drug-infested neighborhood automatically becomes the first legal mother of any child to whom she gives birth.<sup>43</sup> That legal status entails a presumptive right to custody of the child, and terminating that legal status is typically quite difficult.<sup>44</sup>

Paternity rules likewise generally predicate initial legal parenthood solely on biological connection.<sup>45</sup> States sometimes apply legal presumptions of biological paternity, such as a man's being married to the birth mother, without requiring genetic testing, but in those cases they generally permit any other man claiming to be the biological father to demand genetic testing and to become the legal father upon demonstrating by such testing that he is the child's biological father, regardless of his fitness to participate in raising a child or his living situation.<sup>46</sup> Presumed fathers might become unable at some point to exit the legal father-child relationship even if they can prove that they are not the biological father of a child,<sup>47</sup> but they will not be excluded from legal parenthood based on unfitness or living in a dangerous environment. Only in a few instances have courts denied paternity to a man on grounds of relative capacity to parent, those rare cases when each of two men has had a presumption of paternity in his favor and state statutes instructed courts to choose between the two based

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41. See James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 859 (2003).

42. *Id.* at 859-60. For an argument that this state practice violates the constitutional rights of newborn babies, see James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. REV. 755 (2009).

43. In such a case, a child protection agency would likely take the child into custody if it became aware of the child (and there is a substantial likelihood that it would not), but the birth mother's legal parent status would cause the child to incur a year or more of foster care and possibly many years of a cycle of removal from and return to the custody of the birth mother. For a description of the state's current, terribly inadequate response to birth parent unfitness, see James G. Dwyer, *The Child Protection Pretense: States' Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407 (2008).

44. See Dwyer, *supra* note 41, at 952-66.

45. See *id.* at 865-81.

46. See *id.* at 868-71.

47. See, e.g., *Weidman v. Weidman*, 808 A.2d 576 (Pa. Super. Ct. 2002), *appeal denied*, 816 A.2d 1103 (Pa. 2003) (holding that former husband was estopped from contesting his paternity as to child he always knew was not his biological offspring because of his extensive involvement in the child's life during marriage); *Parker v. Parker*, 950 So. 2d 388 (Fla. 2007) (holding that former husband was barred by statute of limitations from contesting paternity on grounds of ex-wife having defrauded him).

on “policy” considerations. In those cases, the courts have given no consideration to the community in which the men lived.<sup>48</sup>

*b. Adoption*

A child can enter into a new parent-child relationship through adoption. Adoption typically effectuates a termination of at least one prior parent’s rights as well as investing legal parent status in new parents.<sup>49</sup> Step-parent adoption terminates the legal parent status of just the initial parent other than the one to whom the adopter is married.<sup>50</sup> “New family” or “stranger” adoption typically terminates the rights of both initial legal parents, if the state has not already terminated the initial parents’ rights in a child protection proceeding.<sup>51</sup> Subpart 5 below presents standards for terminating parental rights in adoption and child protection proceedings. This Subpart focuses on rules for qualifying persons to become adoptive parents.

Rules for adoption and treatment of applicants for adoption are in many ways revealing of what the legal regime for parenthood more generally might be if not for entrenched notions of biological-parent entitlement. What the state does in an adoption is functionally equivalent to what it does through paternity and maternity laws—namely, creating a legal parent-child relationship with presumptive custody reposed in the parent, and thereby assigning children to a family.<sup>52</sup> Yet the rules governing adoption, unlike the rules for paternity and maternity, come very close to adhering to a child-centered ideal.<sup>53</sup> They require a detailed examination of persons who wish to become parents, and they require that courts confer legal parent status on an adult only when that is in the best interests of the child, which in theory entails a comparison with available alternative potential parents.<sup>54</sup>

In this realm, where the potential parents are not viewed as having a natural right to raise a child, state scrutiny is relatively rigorous. However, even here, in most states the law reflects no consideration of potential

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48. See Dwyer, *supra* note 41, at 874–75.

49. See, e.g., GA. CODE ANN. § 19-8-18(b) (2010).

50. See Dwyer, *supra* note 41, at 904–06.

51. *Id.* at 884–85.

52. See *id.* at 882–83.

53. For an extensive theoretical analysis of what constitutes a child-centered ideal of state decision making about children’s family relationships, see JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* (2006).

54. Dwyer, *supra* note 41, at 881–906. In step-parent adoption cases, the comparison is between the applicant and the existing legal parent whose parental status would be extinguished by the adoption. In new-family adoptions, the comparison in practice is often just a discrimination between applicants who pass some quality threshold and those who do not, though in many cases adoption agencies try to find the best match for a child, in light of the child’s particular needs and the capacities and circumstances of particular adoption applicants.

parents' community environment. Statutory rules for court approval of an adoption are typically minimalist, stating simply that a court find that the adoption is in the best interests of the child and/or that the applicants are suitable parents, taking into account any assessment of the applicants that has been done.<sup>55</sup> Some states' statutes dictate in some detail what a court must find in order to approve adoption, but the focus is entirely on the applicants' personal qualities and home. For example, Colorado's adoption law requires a court to be "satisfied" as to "[t]he good moral character, the ability to support and educate the child, and the suitability of the home of the person adopting such child," as well as "[t]he criminal records check of the prospective adoptive parent."<sup>56</sup> Similarly, Kansas's adoption statutes authorize court approval of an adoption on the basis of an agency assessment and direct that, in conducting the assessment, the agency "is authorized to observe the child in the petitioner's home, verify financial information of the petitioner, . . . clear the name of the petitioner with the child abuse and neglect registry . . . , [and] determine whether the petitioner has been convicted of a felony."<sup>57</sup> Maine's adoption statute appears affirmatively to limit the court's and adoption agency's focus to parental characteristics by presenting a seemingly exclusive list of relevant considerations:

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55. See, e.g., HAW. REV. STAT. § 578-8(a) (2010) ("[T]he court may enter a decree of adoption if it is satisfied (1) that the individual is adoptable . . . , (2) that the individual is physically, mentally, and otherwise suitable for adoption by the petitioners, (3) that the petitioners are fit and proper persons and financially able to give the individual a proper home and education, if the individual is a child, and (4) that the adoption will be for the best interests of the individual . . . ."); HAW. REV. STAT. § 578-8(b) ("Before entering the decree, the court shall notify the director of human services of the pendency of such petition for adoption and allow a reasonable time for the director to make such investigation as the director may deem proper as to the fitness of the petitioners to adopt the individual, . . . and as to whether the best interest of the individual will be subserved by the adoption . . . ."); see also ALA. CODE § 26-10A-25(b) (2009); ALASKA STAT. ANN. § 25.23.120 (2010); ARIZ. REV. STAT. § 8-116(A) (2007); ARK. CODE ANN. § 9-9-214 (2009); DEL. CODE ANN. tit. 13 § 915(a) (2009); FLA. STAT. ANN. § 63.142(4) (2005); GA. CODE ANN. § 19-8-18(b), (d) (2010); IDAHO CODE ANN. § 16-1507 (2009); IND. CODE ANN. § 31-19-11-1(a), (c) (2008); LA. CHILD. CODE ANN. art. 1217, 1239 (2004); MD. CODE ANN. FAM. LAW § 5-3A-34 (a) (2006); MASS. GEN. LAWS ch. 210, § 6 (2007); MINN. STAT. ANN. § 259.57(a) (2007); NEV. REV. STAT. ANN. § 127.150 (2010); N.Y. DOM. REL. LAW § 114 (2010); N.C. GEN. STAT. ANN. § 48-2-603(a) (2009); OR. REV. STAT. ANN. § 109.350 (2003).

56. COLO. REV. STAT. ANN. § 19-5-210 (2005).

57. See KAN. STAT. ANN. § 59-2132(e) (2005); see also MONT. CODE ANN., § 42-4-201(1) (2004) (directing consideration of "(a) age, as it relates to health, earning capacity, provisions for the support of a child, or other relevant circumstances; (b) marital status, as it relates to the ability to serve as a parent in particularized circumstances; and (c) religion, as it relates to the ability to provide the child with an opportunity for religious or spiritual and ethical development"); MONT. CODE ANN., § 42-5-107(2) (providing that in contested adoption cases, the court should consider the nature of the child's relationship with the various parties and the child's need for continuity); N.M. STAT. ANN. § 32A-5-36 (1991) (likewise directing courts to examine the nature of the relationship the child has formed with adoptive parents after initial placement); 23 PA. CONS. STAT. ANN. § 2535(b) (2010) (directing pre-adoption investigation to include "adopting parents' age, sex, health and racial, ethnic and religious background").

In determining the best interests of the adoptee, the court shall consider and evaluate the following factors to give the adoptee a permanent home at the earliest possible date: 1) The love, affection and other emotional ties existing between the adoptee and the adopting person or persons, the biological parent or biological parents or the putative father; 2) The capacity and disposition of the adopting person or persons, the biological parent or biological parents or the putative father to educate and give the adoptee love, affection and guidance and to meet the needs of the adoptee . . . ; and 3) The capacity and disposition of the adopting person or persons, the biological parent or biological parents or the putative father to provide the adoptee with food, clothing and other material needs, education, permanence and medical care . . . .<sup>58</sup>

At the level of agency regulation, administrative codes are generally much more detailed.<sup>59</sup> In some states, regulations do direct social workers conducting home studies to take into account the quality of an adoption applicant's community. For example, New Jersey's administrative code directs adoption agencies to "obtain information on the applicants" that includes "[l]ocation and description of physical environment of the residence and neighborhood."<sup>60</sup> In most states, though, the focus of administrative code directions to social workers conducting home studies is likewise limited to applicants' personal characteristics and home environments.<sup>61</sup> In those states, local agencies might develop their own checklists

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58. ME. REV. STAT. ANN. tit. 18A § 9-308(B) (1998).

59. See Dwyer, *supra* note 41, at 885-88.

60. N.J. ADMIN. CODE § 10:121A-5.6 (2011); see also FLA. ADMIN. CODE ANN. R. § 65C-16.005 (3)(h) (2011) ("Housing and neighborhoods must provide adequate space and the living conditions necessary to promote the health and safety of the family."); GA. COMP. R. & REGS. 290-9-2-.06 (2009) (prescribing investigation of "home and community," including "[d]escription of the neighborhood" and "[a]ssessment of community resources, including accessibility of schools, religious institutions, recreation, and medical facilities"); LA. ADMIN. CODE tit. 67 § 5101 (2008) (stipulating that an "application for court approval of adoptive placement . . . shall contain" a statement about the applicants as to "the adequacy of the physical environment of their home and neighborhood"); N.M. CODE R. § 8.26.3.18 ("physical and social home environment and neighborhood environment"). In Indiana, court rules require that a pre-placement adoption investigation include a "physical description or neighborhood, house, housekeeping standards, etc." Ind. Vanderburgh Sup. Ct. L.P.R. R. 13.

61. See, e.g., ALA. ADMIN. CODE R. § 660-5-22-.04(f)(1) (2009); CAL. CODE REGS. tit. 22, § 35181 (West 2009); IOWA ADMIN. CODE R. 441-200.4(600) (2009); 922 KY. ADMIN. REGS. 1:030 (2009); ME. CODE R. § 10-148 Ch. 19. Add. § 2 (Lexis Nexis 2011) (listing as a criterion "the adequacy of the physical plant (home and immediate grounds)"); N.Y. COMP. CODES R. & REGS. tit. 18, § 421.16 (2009); OHIO ADMIN. CODE 5101:2-48-12 (2009); OKLA. ADMIN. CODE § 340:75-15-87 (2009); OR. ADMIN. R. § 413-120-0310 (2009); TENN. COMP. R. & REGS. 0250-4-9-.09 (2009); UTAH ADMIN. CODE R. 512-40 (2009); 22 VA. ADMIN. CODE §40-280-20(B)(7) (directing study of "[h]ome and community environment," identifying as components of this study only "[t]he degree to which the home environment allows for privacy among family members; adequate play areas; and freedom from health and safety hazards . . . [and t]he accessibility of community resources that may be needed for the child").

for home studies and those might include consideration of neighborhood quality, but it is unclear to what extent that occurs.<sup>62</sup> And it is uncertain how courts would treat information about a neighborhood in the absence of statutory direction to consider it; applicants might well complain if precluded from adoption solely or principally on the basis of a consideration not set forth in state statutes or regulations. Reported decisions of courts disqualifying applicants from adoption are fairly rare. Among those that exist, none make mention of the applicants' neighborhoods or communities; the courts have focused entirely on the characteristics of the applicants—most often, race or religion (because of race- or religion-matching policies), age, or sexual orientation—and the quality of the home environment.<sup>63</sup>

One might assume that applicants for adoption of a biologically unrelated child are generally relatively affluent because such adoptions are usually quite costly for the applicants and thus their neighborhoods are rarely a concern. If that is true, then legislative and judicial silence about community quality should not be surprising. This is not to suggest that affluent neighborhoods are all trouble free, but, as shown in Part I, seriously adverse neighborhood effects typically occur in residential areas marked by chronic and pervasive poverty. Many applicants for adoption, however, are relatives of the birth parents, and many such applicants are relatively poor.<sup>64</sup> Yet the few reported decisions of courts or agencies denying applications for adoption by such relatives focus only on the characteristics and homes of the applicants, not mentioning neighborhood quali-

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62. The only example I have been able to identify is in Washington State. See WASHINGTON STATE DEPT OF SOC. & HEALTH SERVS., CHILDREN'S ADMIN., FAMILY HOME STUDY, available at [http://www1.dshs.wa.gov/pdf/m\\_s/forms/10\\_043.pdf](http://www1.dshs.wa.gov/pdf/m_s/forms/10_043.pdf). A national clearinghouse for information about adoption suggests that this is typical of home study checklists nationwide but cites no evidence of this. See U.S. DEPT OF HEALTH & HUMAN SERVS. ADMIN. FOR CHILDREN & FAMILIES, THE ADOPTION HOME STUDY PROCESS, available at [http://www.childwelfare.gov/pubs/f\\_homstu.cfm](http://www.childwelfare.gov/pubs/f_homstu.cfm).

63. See *Lofton v. Sec'y of Dept. of Children & Family*, 358 F.3d 804, 809 (11th Cir. 2004) (rejecting challenge to state's refusing to allow homosexuals to adopt); *In re Jones*, Nos. 99-CA-65, 66, 67, 68, 69 1999 Ohio App. LEXIS 5504 (Ohio Ct. App. Nov. 15, 1999); *Drummond v. Fulton Cnty. Dep't of Family & Children's Serv.*, 547 F.2d 835 (5th Cir. 1977); *In re Adoption of Victor Lamont Haven*, No. C-780343 1979 Ohio App. LEXIS 9744 (Ohio Ct. App. Aug. 1, 1979); *In re Adoption of Michelle T.*, 44 Cal. App. 3d 699 (Cal. Ct. App. 1975); *In re Adoption of A Minor*, 228 F.2d 446 (D.C. Cir. 1955); *In re Farrar*, 635 So. 2d 674 (La. Ct. App. 1994); *Dickens v. Ernesto*, 30 N.Y.2d 61 (N.Y. 1972); *In re J.D.W.*, 711 A.2d 826 (D.C. 1998); *In re Petition of Niskanen*, 223 N.W.2d 754 (Minn. 1974); *In re D.L.*, 479 N.W.2d 408 (Minn. 1992); *In re M.F. v. D.A.H.*, 1 S.W.3d 524 (Mo. Ct. App. 1999); *In re Adoption of Riffle*, Nos. DA-93-7, 94-2 1996 Mont. Dist. LEXIS 594 (Mont. Dist. Ct. Jan. 17, 1996); *Avery v. Dep't of Soc. & Health Servs.* (*In re Adoption of B.T.*), 78 P.3d 634 (Wash. 2003); *In re Petition of Schomer*, 411 N.E.2d 554 (Ill. App. Ct. 1980); *In re Woodruff*, No. 1125 1984 Ohio App. LEXIS 12277 (Ohio Ct. App. Dec. 31, 1984); *O'Rourke v. Kirby*, 429 N.E.2d 85 (N.Y. 1981).

64. WILLIAM P. STATSKY, FAMILY LAW: THE ESSENTIALS 290 (2d ed. 2004) (forty-two percent of U.S. adoptions in 1992 were stepparent or relative adoptions).

ty.<sup>65</sup> This might suggest that courts ignore or under-emphasize community environment in many adoption cases.

Ironically, several states' statutes direct child welfare agencies seeking adoptive homes for a child following termination of initial parents' legal right to look for a placement within the same neighborhood.<sup>66</sup> Though this might afford such children some stability in the sense of continuing to live in a familiar environment, the concentration of child maltreatment in dysfunctional communities suggests that, more often than not, the child would be much better off if entirely removed from the initial parents' community after severance of the parent-child relationship.

## 2. Awarding Custody After Parental Separation

Courts adjudicate custody disputes between legal parents following paternity determinations and following marital separations or dissolutions. For both circumstances, the rules are the same.<sup>67</sup> Like adoption rules, rules governing child custody disputes are especially child-focused, among all the legal rules affecting children's lives. In the adoption realm, the explanation is likely that adoption applicants are not viewed as having any natural rights to parent.<sup>68</sup> In the realm of custody disputes between two legal parents, it is likely that the competing parties both are viewed as having natural rights to parent, and thus cancel each other out.<sup>69</sup> The child-focused nature of custody decision making is manifest in the near universality of an over-arching "best interests of the child" standard of decision.<sup>70</sup> Yet in this area as well, a pervasive absence of reference to the parents' surrounding community suggests a reluctance to make a parent's larger environment count for or against them, perhaps because it is seen as a proxy for affluence and lawmakers believe parents should not suffer for

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65. See note 74, *infra*.

66. See, e.g., WASH. REV. CODE ANN. § 13.34.136 (b)(iii) (2004) (governing permanent placement for a child whether adoption, foster care, with relatives or with parent/guardian) ("A child shall be placed as close to the child's home as possible, preferably in the child's own neighborhood, unless the court finds that placement at a greater distance is necessary to promote the child's or parents' well-being"); OR. ADMIN. R. 413-110-0340 (2) (2010) ("In the case of a child for whom the permanency plan is adoption, the worker must document in the permanency plan . . . efforts to identify potential adoptive families from the neighborhood and community in which the child resides.").

67. See Dwyer, *supra* note 41, at 907.

68. See, e.g., Lofton, 358 F.3d at 809; *In re Clausen*, 502 N.W.2d 649, 665-66 (Mich. 1993) (drawing a distinction between natural entitlement of biological father and lack thereof on part of would-be adoptive parents); *Lindley ex rel. Lindley v. Sullivan*, 889 F.2d 124, 130-31 (7th Cir. 1989) ("Because of its statutory basis, adoption differs from natural procreation in a most important and striking way.").

69. FLA. STAT. ANN. § 744.301(1) (West 2010) ("The mother and father jointly are natural guardians of their own children and of their adopted children, during minority."); Dwyer, *supra* note 41, at 910.

70. Dwyer, *supra* note 41, at 907-910.

being less affluent, or perhaps because lawmakers believe parents should not suffer because other persons create a bad environment around them.

Child custody statutes, in addition to announcing a general “best interests” standard, typically provide a list of specific factors that courts should consider in deciding what custody and visitation arrangement is best for a child.<sup>71</sup> Many direct courts to consider a child’s “adjustment to” or ties to the community in which he or she has lived,<sup>72</sup> but none direct courts to compare the relative quality of the neighborhoods that the two parents inhabit. Consideration of this factor could include community characteristics that cause a child to be not well adjusted to living there, but the idea behind this factor appears to be a concern for stability, not wanting to remove children from an environment to which they are accustomed; it is not concern for adverse community conditions, even though in some cases such conditions might as a factual matter outweigh the benefits of stability. Uniformly, these statutes also indicate that courts may consider any other factor they deem relevant—that is, that the specified factors are non-exclusive,<sup>73</sup> and under such a catch-all provision, courts could consider each parent’s neighborhood. But one rarely sees any reference to neighborhood or community in reported custody decisions. At most there is discussion of the relative quality of the schools in the two parents’ locations,<sup>74</sup> which can serve to some degree as a proxy for, or indicator of, neighborhood quality, but certainly not a perfect proxy. In fact, appellate courts generally reject relative affluence as an appropriate direct consideration, reflecting feminist concerns that doing so would systematically disfavor mothers who had sacrificed employment prospects to care for children,<sup>75</sup> and affluence is so closely connected to residential location that trial level courts might understand this to mean they should not count against a parent that he or she lives in a community with problems tied to poverty.

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71. *Id.* at 916–17.

72. *See, e.g.*, ARIZ. REV. STAT. § 25-403(A)(4) (2007); CONN. GEN. STAT. ANN. § 46b-56(c)(9) (2009); D.C. CODE § 16-914(a)(3)(D) (2008); IDAHO CODE ANN. § 32-717(1)(d) (2006); MO. REV. STAT. § 452.375.2(5) (2003).

73. *See, e.g.*, ARIZ. REV. STAT. § 25-403(A)(4) (2007); ALASKA STAT. § 25.24.150(c)(9) (2010); IDAHO CODE ANN. § 32-717(1) (2006) (“The court shall consider all relevant factors”); CONN. GEN. STAT. ANN. § 46b-56(c) (2009); MO. REV. STAT. § 452.375.2 (2003).

74. *See, e.g.*, *D’Ambrosio v. Fowler*, No. 0494-07-4, 2008 WL 423885, at \*2 (Va. Ct. App. Feb. 19, 2008).

75. *See, e.g.*, *Johnson v. Johnson*, 872 So. 2d 92, 95 (Miss. Ct. App. 2004) (“This Court is not aware of any authority for the proposition that the parent earning a greater income is entitled to some preference in a custody dispute based solely on that consideration.”). *But cf.* *Patel v. Patel*, 599 S.E.2d 114, 121–22 (S.C. 2004) (declining to take into account a son’s expressed preference to live with his father, because it appeared to be based on a positive attitude toward living in California rather than South Carolina rather than toward living with father per se).

### 3. *Removing Children from Parental Custody*

Child protection intervention is predominantly reactive to harm that has already occurred to children, and rarely proactive in protecting children at high risk so that they never suffer harm.<sup>76</sup> Certainly child protective services (“CPS”) agencies never assume custody of children simply because a parent is living in a horrible neighborhood. CPS might take custody if parents are homeless and locate themselves and their children in very unsuitable places, such as a city sidewalk or under a bridge, treating that as neglect on the part of the parents, at least if decent shelters for homeless families are available.<sup>77</sup> More likely, they will induce the parents to stay with the child in a public or publicly subsidized facility.<sup>78</sup> And if the parents live in a house or apartment, CPS will not remove a child or intervene in any other way simply because the parent is living in a neighborhood where life outside the house or apartment is extremely hazardous for a child. State statutory and administrative rules for removal generally dictate that removal is proper if and only if the parent, immediate home environment, or both substantially threaten a child’s safety and there is no reasonable alternative intervention that would obviate the threat.<sup>79</sup> Yet children do not live exclusively within their parents’ house or apartment; they inevitably spend much of their time outside the family home and their quality of life depends very much on the larger social environment.

When CPS does receive a report because a child has been abused or neglected, or is endangered by something other than just the neighborhood, such as parental drug use in the home, does it consider in its investigation the quality of the neighborhood in which parent and child live? A typical agency checklist for assessing a child’s safety includes reference to violence and drug use by parents or others in the household where a child lives, but not violence and drug use by persons outside the household.<sup>80</sup> It includes dangers to the child’s health or safety within the home, such as exposed electrical wires or weapons within a child’s reach, but generally not dangers to health and safety just outside the door of the child’s home or apartment.<sup>81</sup> It also includes reference to a parent’s inability or unwillingness to protect a child from harm inflicted by others within the house-

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76. See Dwyer, *supra* note 41, at 952–66.

77. See, e.g., MICH. DEP’T OF HUMAN SERVS, CFP 713–1, CPS INVESTIGATION–GENERAL INSTRUCTIONS AND CHECKLIST (2008) available at <http://www.mfia.state.mi.us/olmweb/ex/PSM/713-1.pdf> at 9 (listing lack of housing or temporary shelter as a factor in agency decision to take a child into custody) [hereinafter “MICHIGAN CPS MANUAL”].

78. See *id.* at 12.

79. See, e.g., ALA. CODE § 12-15-306 (2006); CAL. WELF. & INST CODE § 361 (West 2008); NY FAMILY CT. ACT § 1027 (2009); VA. CODE ANN. § 63.2-1517 (2007); MINN. ADMIN. R. 9560.0221 (2007).

80. See, e.g., MICHIGAN CPS MANUAL, *supra* note 77, at 5–6, 9–10.

81. See, e.g., *id.* at 9.

hold, and to a parent's allowing a young child to wander alone outside the home, but not to a parent's inability to protect a child outside the home because the community is simply extraordinarily dangerous.<sup>82</sup> CPS rules will encourage social workers to look at the surrounding community as a potential source of assistance,<sup>83</sup> but not as a liability or source of danger to the child. And they will authorize agency workers to urge a non-abusive parent to relocate in order to get the child away from an abusive parent, but not in order to get out of a bad neighborhood (though undoubtedly some agency workers sometimes do this).<sup>84</sup> Some agencies use diagnostic tools aimed at gauging the likelihood of future abuse, looking for "stressors" that could cause a parent to act impulsively rather than thoughtfully in disciplining a child, but remarkably these tools generally do not include residence in a dangerous, crime-ridden neighborhood as a stressor.<sup>85</sup>

Of course, in practice, in neglect cases predicated in whole or part on lack of supervision, child protection workers are likely to gauge the danger to a child posed by being unsupervised based in part on the relative safety of the neighborhood. A parent who allows a child to play outside the home unsupervised in a suburban subdivision where there is very little crime and other parents are outside and able to help with monitoring is unlikely to be charged with neglect. In contrast, although child protection workers are not likely to monitor parental supervision in the nation's worst neighborhoods, most likely if asked they would agree that a parent in such a neighborhood would be neglectful ever to leave a young child unsupervised anywhere outside the home, even in the hallway of their apartment building. Yet the law and agency policies in most jurisdictions do not explicitly direct CPS workers to make the surrounding neighborhood a factor in their assessment of danger to a child.

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82. See, e.g., *id.* at 7-8.

83. See, e.g., *id.* at 5 (agency worker assessing child's situation shall "consider the resources available in the family and the community that might help to keep the child safe").

84. See, e.g., *id.* at 12. There are multiple CPS investigation guides and checklists that are similar to the Michigan CPS Manual. See N.C. FAM. SUPPORT & CHILD WELFARE SERVS., N.C. SAFETY ASSESSMENT (2005), available at <http://info.dhhs.state.nc.us/olm/forms/dss/dss-5231.pdf>; R.I. DEP'T OF CHILDREN, YOUTH AND FAMILIES, 500.0010, CRITERIA FOR A CHILD PROTECTIVE SERVS. INVESTIGATION (2006), available at [http://www.dcyf.state.ri.us/docs/cps\\_criteria\\_final.pdf](http://www.dcyf.state.ri.us/docs/cps_criteria_final.pdf); VA. DEP'T OF SOC. SERVS.: CHILD PROTECTIVE SERVS., VOL. VII, SECTION III, CHAPTER A, APPENDIX: ADDITIONAL GUIDELINES OR SUGGESTED PRACTICES, PART IV: FAMILY ASSESSMENT AND INVESTIGATION (2008), available at [http://www.dss.virginia.gov/files/division/dfs/cps/intro\\_page/manuals/07-2008/appendix\\_part\\_4.pdf](http://www.dss.virginia.gov/files/division/dfs/cps/intro_page/manuals/07-2008/appendix_part_4.pdf).

85. See, e.g., OR. STATE OFFICE FOR SERVS. TO CHILDREN AND FAMILIES, CHILD ABUSE AND NEGLECT RISK FACTOR CHECKLIST, available at <http://dhsforms.hr.state.or.us/Forms/Served/CE0955A.pdf>; N.C. DEP'T OF SOC. SERVS., SDM FAMILY RISK ASSESSMENT OF ABUSE/NEGLECT POLICY AND PROCEDURES (2009), available at <http://info.dhhs.state.nc.us/olm/forms/dss/dss-5230-ia.pdf>.

#### 4. *Returning a Child to Parental Custody*

State law rules for returning a child to parental custody following a child protective removal typically call simply for evidence that parents have followed steps outlined by CPS designed to eliminate the conditions in the home that previously were found to endanger the child.<sup>86</sup> Those steps might include keeping certain people out of the home, such as an abusive boyfriend or a drug supplier,<sup>87</sup> but they appear never to include moving out of a given neighborhood. One state, Colorado, does require case workers to take into account the neighborhood environment in assessing whether return to parental custody would be safe for a child.<sup>88</sup> Simply considering the neighborhood in assessing danger to the child does create an incentive for parents to move out of a dysfunctional community. But CPS agencies generally do not make relocation per se a condition for return of a child, even though neighborhood conditions might be a partial cause of the parent's inability to care properly for the child.

#### 5. *Termination of Parental Rights*

Courts terminate legal parent-child relationships in child protective proceedings and in adoption proceedings. The former generally occurs only after a finding that a parent has engaged in serious maltreatment and after a period of at least a year during which the state retains custody of a child and CPS workers attempt to "rehabilitate" the parents.<sup>89</sup> Courts generally terminate parental rights when a parent fails to become rehabili-

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86. See, e.g., CAL.WELF. & INST. CODE § 366.22 (2008); CONN. GEN. STAT. ANN. § 46b-129 (2009); FLA. STAT. ANN. § 39.522 (West 2010); N.H. REV. STAT. ANN. § 169-C:23(III) (2010) ("Upon showing the ability to provide proper parental care, it shall be presumed that a return of custody is in the child's best interests."); UTAH ADMIN. CODE R. 512-301-6 (2011); OR. ADMIN. R. 41-040-0017 (2009); *In re Chicase*, 2008 WL 1849690, at \*10-11 (Ohio Ct. App. 2008) (denying a parent's request for reunification, because of parent's failure to follow CPS plan).

87. See, e.g., HAW. REV. STAT. § 587-53(f)(1) (2010); ME. REV. STAT. tit. 22 § 4036(1)(F-1) (2004); TEX. FAM. CODE ANN. § 262.1015 (West 2008); WASH. REV. CODE § 26.44.063(1) (2005); *In re T.N.*, 180 S.W.3d 376, 383-86 (Tex. App.) (upholding termination of parental rights based in part on mother's continued contact with and exposure of her children to her drug supplier); *In re A.H.*, 751 N.E.2d 690, 700 (Ind. Ct. App. 2001) (upholding order that father who sexually abused child stay away from the home). For an overview of the topic and a persuasive argument for doing this more often, see Robin Fretwell Wilson, *Removing Violent Parents From the Home: A Test Case for the Public Health Approach*, 12 VA. J. SOC. POL'Y & L. 638 (2005).

88. See, e.g., COLO. CODE REGS. § 2509-4, 7.301.1(B)(3) (2007) ("The following information shall be included in the assessment documented in the Family Services Plan: . . . Family environment and overall functioning, including physical environment of the housing/neighborhood, family composition, stability, stresses, parenting skills, discipline methods and relationships.").

89. See Dwyer, *supra* note 41, at 954-63; see, e.g., ALA. CODE § 12-15-319 (2006); ARK. CODE ANN. § 9-27-341(2010); COLO. REV. STAT. ANN. § 19-3-604 (West 2005); CONN. GEN. STAT. ANN. § 45a-717 (2009); DEL. CODE ANN. tit. 13, § 1103 (West 2009); FL. STAT. ANN. § 39.806 (West 2010); GA. CODE ANN., § 15-11-94 (West 2009); IOWA CODE ANN. § 600A.8 (West 2001); KAN. STAT. ANN. 38-2269 (West 2005); KY. REV. STAT. ANN. § 625.090 (West 2010); LA. CHILD. CODE ANN. art 1015 (2004); ME. REV. STAT. ANN. tit. § 4055 (2004).

tated, and they determine that it would not be safe for the child to return home then or within a reasonable period of time.<sup>90</sup> As suggested by the rule for return to parental custody, the legal system rarely or never requires parents to relocate as a condition for return of a child, and it is never an explicit consideration in a termination case that parents live in a neighborhood that presents dangers to the child's welfare. The focus is on parental characteristics and parental efforts to correct behavior and improve a bad home situation.<sup>91</sup> This can include evidence that parents remain unable or unwilling to supervise a child outside the home, but it never includes a parent's failure to move out of a neighborhood that is unsuitable for children.

Courts also effect an involuntary termination of parental rights in adoption proceedings when a legal parent refuses to consent to the adoption.<sup>92</sup> Grounds for terminating parental rights in this context also focus on parental conduct, principally whether the parent objecting to the adoption has maintained contact with and given support to the child.<sup>93</sup> A few states authorize adoption over the objection of a birth parent when the parent's refusal to consent to the adoption is "unreasonable" or contrary to the best interests of the child.<sup>94</sup> In theory, a court in such a state could take into account where a parent lives in deciding that the parent is withholding consent unreasonably. But only in rare cases have courts applied a best-interest basis for waiving parental consent to adoption, and in doing so they have focused exclusively on attributes of the parents, not at all on the parents' community.<sup>95</sup>

### 6. Summary

On the whole, legal rules governing children's relational lives are indifferent to the quality of life in communities where parents or potential parents live. There is some indication of its consideration in the context of adoption and, to a lesser extent, custody disputes between legal parents. But these types of decisions are less likely to involve adults who live in horrible neighborhoods than are the many types of state decisions that do involve such adults—in particular, non-marital parentage cases and child protection cases.<sup>96</sup> Therefore, where state consideration of community

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90. See Dwyer, *supra* note 41, at 961.

91. *Id.* at 956.

92. *Id.* at 963.

93. *Id.*

94. *Id.* at 963 n.362.

95. *Id.*

96. See *supra* note 40; Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871, 910–22 (2009); *Harvard Law School Faculty Scholarship Series*, Paper 26, available at [http://lsr.nellco.org/harvard\\_faculty/26](http://lsr.nellco.org/harvard_faculty/26) (arguing that charges of racial bias based on racial disproportionality have not been substantiated).

fitness is most needed, the law nevertheless makes it irrelevant. It is obviously relevant to children's welfare where potential legal parents would take them to live after they are born and whether the world that abusive or neglectful parents inhabit is likely to exacerbate their inherent shortcoming rather than help them overcome their deficiencies. Yet the law now ignores that important fact.

### III. INJECTING COMMUNITY QUALITY INTO STATE DECISION MAKING ABOUT CHILDREN'S LIVES

A child welfare legal response to the reality of neighborhood effect would be fairly straightforward. More complicated would be overcoming political resistance, moral objections, and constitutional challenges. This Part describes what appropriate changes to zoning, domestic relations, and child protection laws might look like.

#### *A. Zoning for Child Protection*

Relying on criteria discussed in Part I, including rates of violent crime, gang activity, substance abuse, condemned properties, single-parent households, and unemployment, government at the state or local level could identify the worst residential areas for children within its jurisdiction. A computer program with an algorithm for incorporating various types of data as to community conditions relevant to child welfare could generate a neighborhood quality index by census tract,<sup>97</sup> and government officials could readily identify those at the extreme negative end of the scale. A legislative body could specify some objective standard or "tipping point" at which the neighborhood quality is so low (e.g., less than ten on a 100 point scale) as to render an area categorically unsuitable for children. It might also establish another standard (e.g., below twenty points) for identifying areas as to which an administrative body should undertake a more comprehensive and subjective assessment, with community input, to determine whether the environment is so bad and timely improvement so improbable as to justify the disruption that would result from declaring the community unfit. Based on such judgments, the state could publicly declare particular communities unfit for child rearing and alter local zoning laws to designate those areas adult-only residential areas.

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97. Data collection and quantitative demographic research is predominantly based on census tracts, which are "the closest approximation to neighborhoods available in official statistics, with populations typically ranging between 2,500 and 8,000 inhabitants and boundaries initially drawn to construct geographic units with relatively homogeneous population characteristics, economic status, and living conditions." Wagmiller, *supra* note 28, at 166. Multi-criteria ratings of neighborhood quality are already common. *See, e.g.*, TURNER, POPKIN & RAWLINGS, *supra* note 2, at 86.

Following such a finding and declaration, the state could take any number of steps toward making such areas childless. Most starkly, it could simply order that by a certain date no household in the area may contain children, and no children may enter the area, with civil and/or criminal penalties for any adults who do not comply. More modestly, it could set a target date for making an unfit community childless and offer whatever relocation assistance it reasonably can to parents currently living in the area, while strictly enforcing a prohibition on entry of new families containing children into the area. Currently, a great number of people living in blighted neighborhoods want to relocate to better places, and in fact in some places litigation has been brought to require changes to or expansion of government programs of relocation assistance, which currently fall far short of meeting the demand.<sup>98</sup> Thus, many parents might welcome the rezoning if it were coupled with expansion of relocation programs or with a change in the rules governing those programs to give parents with minor children priority over other applicants. As discussed in Part IV, courts might order state and local governments that impose no-child zoning to provide adequate relocation assistance to all affected parents, were advocates for such parents to mount a constitutional challenge to the rezoning. But there would also be some parents who would prefer not to move.

Though the idea of making entire neighborhoods childless for child welfare reasons is novel, it is analogous to many things governments already do without much controversy. Governments already routinely make judgments about the suitability of particular spaces for habitation by any humans, when they zone areas for industrial use only, when they condemn individual buildings, and when they declare some neighborhoods “blighted” for urban renewal grant purposes.<sup>99</sup> Many states’ definitions of

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98. See, e.g., TURNER, POPKIN & RAWLINGS, *supra* note 2, at 87 (noting that some applicants for housing vouchers must wait years); Philip D. Tegeler, *The Persistence of Segregation in Government Housing Programs*, in THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA, *supra* note 2, at 210-11 (noting that demand for relocation assistance currently far exceeds supply); Bob Shaw, *The War Over Affordable Housing*, ST. PAUL PIONEER PRESS, June 28, 2008 (discussing relocation in the Chicago area); Eric Siegel, *U.S. Judge is Asked to Order Housing for Poor in Suburbs*, THE BALTIMORE SUN, Mar. 21, 2006 (discussing litigation over housing subsidy programs in Baltimore).

99. See, e.g., VA. CODE ANN. § 15.2-931 (2009) (“It has been and is continuing to be the policy of the Commonwealth to authorize each locality . . . to prevent blight and other environmental degradation . . . .”); VA. CODE ANN. § 36-49 (2009) (providing provisions for the adoption of redevelopment plans to address blighted areas); 35 PA. CONS. STAT. §§ 1701-1719.2 (2008) (Pennsylvania’s Urban Redevelopment Law, the purpose of which is the clearance, reconstruction, and rehabilitation of blighted areas); N.J. STAT. ANN. § 40A:12A-5 (West 2009) (authorizing evacuation of persons from areas deemed in need of redevelopment, identified on the basis of considerations such as: “The generality of buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living or working conditions,” “[t]he discontinuance of the use of buildings previously used for commercial, manufacturing, or industrial purposes; the abandonment of such buildings; or the same being allowed to fall into so great a state of disrepair as to be untenable,” [and a]reas with buildings or

“blight” include an unhealthy social environment—in particular, chronic criminal activity.<sup>100</sup> The state also routinely makes judgments about the suitability of particular spaces for habitation by children specifically when they declare households unfit for children and make them childless through child protection proceedings. This analogue is significant from a conceptual and moral standpoint because when a court orders removal of all children from a household but imposes no restrictions on which adults live there, it might be viewed as implicitly finding that some places are adequate for adult habitation but not for children to live in. Yet the practice of removing just children from a home is well established and widely accepted. The practice of excluding just children from public space in particular areas is also common; many jurisdictions today have juvenile curfews, prohibiting minors from being out of doors at night.<sup>101</sup> Such discriminations are readily understood as reflecting differences between children and adults in vulnerability to, and capacity to avoid, dangers in the environment.

Further, the state now exerts substantial coercion on adults with respect to their residential choices, in some ways for the sake of protecting children. As noted in Part II, sometimes parents can avoid losing custody of their children in child protection proceedings, or can regain custody, only by changing their residence, even if relocation is not an explicit condition for having custody. And numerous laws severely restrict the residential choices of convicted sex offenders.<sup>102</sup> In addition, for the benefit of the general public, many localities prohibit people who own no property interests (i.e., homeless people) from sleeping or otherwise establishing residences on publicly-owned properties;<sup>103</sup> occasionally governments quarantine people to prevent the spread of disease;<sup>104</sup> and governments at every level force some convicted criminals to live in one particular place—namely, a jail—for extended periods of time.

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improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.”). *Cf.* *Kelo v. City of New London*, 545 U.S. 469, 473 (2005) (addressing takings of property following state’s declaration that New London was a “distressed municipality”).

100. *See e.g.*, N.C. GEN. STAT. ANN. § 160A-503(a) (2010) (defining “blighted parcel” to include properties whose existence contributes to juvenile delinquency and crime or is “detrimental to the public health, safety, morals, or welfare”); GA. CODE ANN. § 22-1-1(1) (defining blight by reference to conditions that include repeated illegal activity and being “conducive to ill health, transmission of disease, infant mortality, or crime”); ALA. CODE § 24-2-1 (2006).

101. *See Note, Juvenile Curfews and the Major Confusion Over Minor Rights*, 118 HARV. L. REV. 2400 (2005).

102. *See* Timothy Zick, *Constitutional Displacement*, 86 WASH. U. L. REV. 515, 520–21, 569–72 (2009); Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 6–12 (2006) (describing recent state and local sex offender exclusion measures).

103. *See* Zick, *supra* note 102, at 521, 577–79.

104. *Id.* at 521–22, 583–86.

Moreover, governments also already endeavor to disperse people from areas of concentrated poverty; the federal and some state governments have long had various types of programs aimed at relocating people from high-poverty, urban neighborhoods to low-poverty urban or suburban areas, using relocation vouchers, housing subsidies, and employment assistance.<sup>105</sup> By some accounts, these programs have had significant success, greatly improving the lives of participants, the great majority of whom remain long-term in the lower-poverty, residential areas to which they move.<sup>106</sup> In some places, political resistance from receiving jurisdictions have created obstacles, but in other places families moving out of high-poverty, inner-city neighborhoods have generally found acceptance and assistance even in suburban neighborhoods.<sup>107</sup> Making evacuation of children the highest priority would put parents at the top of the list for relocation assistance programs, which would mean whatever resources governments do commit go toward that aim before others are addressed. Already federal law sets aside some housing subsidy funds for use just in facilitating reunification of children in foster care with parents whose homes CPS had found unsuitable.<sup>108</sup> The government might also shift some funding currently devoted to urban renewal to child relocation because it might justifiably have less concern about conditions in places inhabited only by autonomous adults, who are presumed voluntarily to have chosen to live there (a presumption I evaluate below) and to be better able than children to guard their own welfare. It would also mean that most of the adults moving to lower-poverty areas are single mothers with their children, whom existing residents in the receiving community might perceive as less threatening than adult males moving from the inner city. Moreover, after the initial evacuation period, any further relocations under a “childless neighborhood” program should involve only one newborn baby and the parent or parents living with the baby, who are most likely to be welcomed into a new neighborhood and who are less costly to move than parents with several older children.

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105. See FROM DESPAIR TO HOPE, *supra* note 2; Rosenbaum et al., *supra* note 13, at 150–75; Gephart, *supra* note 27, at 13–14. Federal law authorizing housing subsidy programs is found at 42 U.S.C. Sec. 1437f (West 2009). Cf. Federal Uniform Relocation Assistance Act, 42 U.S.C. § 4601-4655 (2006) (requiring relocation assistance to property owners and tenants when federal agencies or state and local governments using federal money condemn properties).

106. See Popkin & Cunningham, *supra* note 10, at 192–95; Rosenbaum et al., *supra* note 13, at 150–75.

107. John Goering, *Expanding Housing Choice and Integrating Neighborhoods: The MTO Experiment*, in THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA, *supra* note 2, 127–49; Rosenbaum et al., *supra* note 13, at 150–75; Gregory Korte, *Subsidized Housing Redefining Suburbia*, CINCINNATI ENQUIRER, Sept. 14, 2008, at A1 (noting resistance to entry of housing voucher holders in large numbers into middle-class neighborhoods).

108. See 42 U.S.C. § 1437f(x).

There is also nothing novel about the concept of a childless community or of an environment where parents may not bring children. Usually exclusion of children from residential areas is the result of private covenants rather than of government zoning, and for the supposed benefit of those who reside in them rather than to protect the children. There are retirement communities that by mutual covenant do not allow minor inhabitants and housing complexes where only senior citizens can own or rent units.<sup>109</sup> Exclusion of just children from certain non-residential areas, though, is also common and is typically done to protect the children from an environment the state believes would be hazardous to their welfare. As noted above, states prohibit parents from bringing children into nightclubs, casinos, and betting parlors.

The novelty of my proposal would be in its peculiar combination of features. It would entail the government (rather than private parties by mutual agreement) imposing the concept of an adult-only (rather than non-residential for anyone) place on entire communities (rather than just an individual home) for the purpose of child protection (rather than for the benefit of people who wish not to live with children). What is novel about the idea makes it in some ways more difficult to defend against objections and in other ways easier to defend, as explained in Part V below.

### *B. Amending Domestic Relations and Child Protection Laws*

In addition to, or instead of, such blanket condemnations of communities, the legal system could respond to the fact of adverse neighborhood effect by injecting routine considerations of it into individual court decisions about particular children. Courts and agencies called upon for other reasons, such as a post-divorce custody dispute or reported child abuse, to decide individual cases concerning the family lives and residences of children, could as a matter of course invite evidence about the larger environments in which particular parents live and what effects any dysfunction in the neighborhoods has had or is likely to have on children in those loca-

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109. Although the federal Fair Housing Act prohibits discrimination against families with children, exceptions are made for senior citizen communities. Age-qualified communities are permitted if either "at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older" or 100 percent of the residents are at least 62 years old. 42 U.S.C. § 3607. For examples of communities that exclude children, see Christopher Caldwell, *Childproof*, N.Y. TIMES MAGAZINE, Aug. 13, 2006, at 13; Kelly Greene & Jennifer Levitz, *Retiree Havens Turn Younger to Combat the Housing Bust*, WALL ST. J., Dec. 1, 2008, at A1; Phillip McGowan, *New Housing Caters To 55-And-Older Set*, THE BALT. SUN, May 27, 2007, at A1; Bethany Sanders, *Retirement Community Tries to Evict Six-Year-Old Girl*, BABBLE (Oct. 22, 2009, 10:00 A.M.), <http://blogs.babble.com/strollerderby/2009/10/22/retirement-community-tries-to-evict-six-year-old-girl/>; *About Brookshire*, RETIRE AT BROOKSHIRE.COM, [http://www.Retireatbrookshire.com/about\\_brookshire.html](http://www.Retireatbrookshire.com/about_brookshire.html) (last visited Jan. 28, 2010); *Active Adult Living 55+ Active Lifestyle and Retirement Communities*, ACTIVE ADULT LIVING.COM, [http://www.Activeadulthoodliving.com/new\\_communities.htm](http://www.Activeadulthoodliving.com/new_communities.htm) (last visited Jan. 28, 2010).

tions. A quality-of-life rating by census tract of the sort suggested above might simplify such assessments. Courts might even apply a very strong presumption or absolute bar against awarding or returning custody to a parent living in a community with a rating below a certain level, even if the community has not yet been declared categorically unfit for children and zoned adult-only. But even when no parent or potential parent before an agency or court lives in a neighborhood below a specified level of minimal adequacy, the relative quality of parents' or potential parents' neighborhoods should factor into decisions about legal parenthood and custody. As a factual matter, it is relevant to the empirical question of what custodial arrangement is best for a child. Some neighborhoods might not be so bad as to warrant strong presumptions against or categorical prohibitions on residence by children, yet still be much less desirable places for children than other neighborhoods that are available options for them. Consideration of this fact comes into play to some degree now in domestic relations and child protection proceedings with older children, when parents or agency workers express concern about a youth being or becoming involved in illicit neighborhood activities. Legislators should instruct courts to consider it directly and routinely and with infants as well as older children and adolescents. State decision makers should anticipate what problems a neighborhood environment could present for a child in the future, just as they try to anticipate what problems parents' personal shortcomings could present in the future.

Taking account of the plain reality that a child's fate can rest very much on the nature of the community in which he or she grows up would require, as a first step, adding "quality of neighborhood" to the list of factors in any legal rule directing courts to determine on a case-by-case basis what is best for a child. In most of the legal contexts discussed in Part II, this would be a very simple and modest adjustment. As noted in Part II, in some jurisdictions, agencies and courts already take account of community fitness in approving applicants for adoption. Making this a universal statutory or regulatory requirement should not be difficult for legislatures or agencies as a drafting matter or as a political matter. In all states, adoption or child welfare agencies already undertake a detailed assessment of applicants for adoption or foster care, and in states where the law does not already instruct them to consider the quality of applicants' neighborhoods, legislatures could easily add that to the list of criteria for qualifying someone. States might spell out in some detail what specifically "home studies" should look for in assessing whether adoption or foster care by particular applicants would be in a child's best interests, in light of other applicants, in terms of community characteristics.

Likewise, in allocating custody and visitation after parental separation, in divorce or paternity proceedings, courts already, under current laws, engage in detailed examinations of parents and their home environments in

order to determine what results would be in children's best interests, and it would be a simple matter to add neighborhood quality or community fitness to the relevant considerations that state statutes list. This amendment to custody laws might be more controversial than the amendment to adoption laws because it could have a disparate impact on mothers relative to fathers, just as consideration of relative income would do, and I address this concern in Part V.

In deciding whether to remove a child from parental custody, and later whether to return such a child to parental custody, child protection agencies and courts could similarly take explicitly into account that a parent who has been reported for child maltreatment is living in a neighborhood that exacerbates or adds to deficiencies in parenting and home environment. Thus, a parent living in a highly dysfunctional community would be more likely to lose custody of a child, and less likely to regain custody, than a parent living in a healthy community who had engaged in the same abusive or neglectful behavior. The rationale would be partly that the overall quality of life for a child of the former parent is substantially lower than that of a child of the latter parent, and so the former child stands in greater need of assistance and would benefit more from removal to another residential situation. And it would be partly that parents in a dysfunctional community with many stressors are less likely to correct their behavior than are parents in a community with greater social supports and fewer stressors.

Especially after an agency and court have found parents to be abusive or neglectful and informed them that their neighborhood environment is an obstacle to proper care for their children, parents remaining in that neighborhood should count strongly against return of the child, at least if moving out is a realistic option for the parents. (I address in Part V the concern that it is not so for some.) At a minimum, such parents would have to show a major transformation in their parenting capacity or home environment in order to make it in the child's best interests, or even acceptably safe, to return to live with them. In effect, if not explicitly, this could amount to CPS making parental relocation a condition of return. This would not be so different from a practice sometimes seen now, in which CPS workers tell parents they need to get away from their drug source or other corrupting influences if they are ever going to rehabilitate themselves personally. There are undoubtedly cases in which a parent in isolation is minimally adequate to care for a child, but who in a dysfunctional environment cannot give the child a satisfactory quality of life, either because of the effect that the environment has on the parent or because the parent is unable to shield the child from the dangers that the community presents.

Lastly, in deciding whether to terminate a parent's legal rights with respect to a child, in a child protective proceeding or in an adoption pro-

ceeding, courts should take into account not only what efforts parents have made to rehabilitate themselves, or what effort a birth parent objecting to an adoption has made to assume parental responsibilities, but also whether the parent now lives in a safe neighborhood or has put in place strong protections against any dangerous elements in the community. Parents who have had to work hard to overcome addictions and other mental problems are likely to continue to be marginal parents even if they do successfully complete a rehabilitation program, and living in a community where violence, despair, and substance abuse are pervasive greatly increases the likelihood of relapse by the parent and of harm to the child.<sup>110</sup>

The decision context in which it would be most difficult to inject consideration of community fitness is parentage law, because individualized best-interests decision making is virtually non-existent in this context currently. As explained in Part II, maternity and paternity laws now do not call for a best-interests determination or for an assessment of birth parents' capacity to parent. For the state to address the unfitness of the communities in which some birth parents live would therefore require a larger revision of these laws. I have argued elsewhere for substantial revision of parentage laws, on the grounds that they violate constitutional rights of some newborn children, insofar as they force babies to be in legal relationships with and the custody of unfit birth parents.<sup>111</sup> I urge as a remedy for this constitutional violation that states revise their parentage laws to withhold legal parent status in the first instance from birth parents that are manifestly unfit, as evidenced by serious child maltreatment histories, substance abuse, or incarceration. Those parents would be required to demonstrate to a court that they have or soon could overcome the conditions that triggered state scrutiny. In deciding whether to confer legal parent status on such birth parents, courts would take account of any parental characteristics that create a risk of harm to the child, just as courts today do in deciding whether to return to a parent a child whom CPS has previously taken into custody. And in making such a decision, courts could also take into account the neighborhood and social circle in which these presumptively unfit parents live.

Thus, with respect to initial assignment of legal parenthood, the larger step would be altering the rules to make anything other than biological connection relevant to the state's decision. Until that happens, there will be no way for the state to address through parentage laws the concern that some birth parents will take newborn babies home to live in terribly dysfunctional, dangerous communities. If a parental unfitness exception were engrafted onto parentage laws, birth parents' residential location could be

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110. See Dwyer, *supra* note 43, at 424–27.

111. See generally Dwyer, *supra* note 43.

a factor in assessing their fitness, along with their personal characteristics and home environment. Community environment could count in favor of conferring legal parent status, if the community is healthy and offers supportive services and connections for parents. Or it could count against parentage, if the community is dysfunctional and poses dangers to children's welfare.

As noted above, in addition to simply making neighborhood quality a factor in decision making, the state might use categorical negative assessments about particular neighborhoods, short of declaring that they must become and remain childless, in the various domestic relations and child protection decision contexts. The state might shortcut decision making in some contexts by establishing a presumption, perhaps an irrefutable one, against granting legal parent status or custody of a child to persons who live in certain communities. For example, in the parentage context, if any individualized best-interest decision making were to be done, a prior public determination that a birth parent's community is a "high risk" or "unsafe" area for children could constitute an "unfitness trigger" that forces the birth parent to demonstrate in court that conferring legal parenthood on him or her would, all things considered, be better for the child than the available alternatives, such as adoption. Or it could constitute strong evidence against a birth parent brought into court by some other unfitness trigger, such as a maltreatment history. In other words, state statutes could say that a court must determine the parentage of every child born to an adult who lives in residential area X, with a presumption against conferring legal parenthood on that adult. Or they could say that a court must determine the parentage of every child born to an adult with a specified maltreatment history, substance abuse problem, mental illness, or term of incarceration and that, in doing so, it should also count heavily against conferring legal parenthood on that adult that lives in a community declared to be unfit for children.

In the adoption context, state laws could impose a strong presumption against, or an absolute bar to, adoption by persons who live in certain neighborhoods, so that agencies need not even bother conducting a home study for such applicants, as would occur today if an agency uncovered an applicant's prior conviction for a violent felony against a child. Similarly, in choosing foster homes for children whom they remove from parental custody, child protection agencies should exclude from eligibility homes in horrible neighborhoods. In some cases, this will rule out kin placement, as all or most of a parent's extended family might live in the same or comparable neighborhoods. When two fit parents are competing for custody after divorce or a paternity proceeding, the fact that one lives in an officially "blighted" neighborhood could be fatal to their claim. Divorce law has long been looking for presumptions that would allow courts to short cut decision making and that would discourage some parents from litigating at

all,<sup>112</sup> and this is one presumption that might be unassailable and likely to produce some efficiency gains (though, again, the poorest members of society are not much represented in divorce cases). Even visitation with a non-custodial parent could be affected; courts might justifiably condition any visitation on its not taking place within particular neighborhoods.

In the child maltreatment context, legislatures might amend their statutory definitions of neglect to make a parent's remaining in or moving into a neighborhood after it has been declared unsuitable for children per se neglect. This would be a form of "failure to protect," a concept now applied to parental decisions to remain in or move into a household with some person the parent knows to present a danger to the child, such as a convicted child molester.<sup>113</sup> Significantly, it is a concept applied ostensibly without regard to the voluntariness of the parent's choice to be in such a household; it is no defense to a "failure to protect" charge to say that one could not afford or was afraid to live elsewhere.<sup>114</sup> In deciding whether to return a child to parent custody or instead to terminate parental rights, the law might contain a strong presumption that if a parent continues to reside in an unfit community, return is inappropriate and the parent has not been rehabilitated.

In any of these contexts, the adults involved could avoid unfavorable treatment by moving. Agencies and courts could inform the individuals of that, but at some point the individuals would simply become aware that neighborhood quality matters and therefore realize that they could improve their chances for a favorable outcome by relocating. Not all will choose to do so, and for some that will be because of a perceived inability to relocate. In Part V below, I consider objections to the state's imposing on those who choose not to relocate the cost of being denied legal parenthood or custody of a child. But probably many will choose to do so who would not have done so otherwise, so the aggregate effect of both types of reforms should be an improvement in the average quality of neighborhood in which children grow up. To the extent that relocations require higher expenditures on housing and transportation, this shift would necessitate a reallocation of resources by parents and/or by public treasuries, but as discussed further below, costs of living are not necessarily lower in blighted inner-city neighborhoods than in some safer and healthier areas outside of cities.

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112. See Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1534-51 (1994) (discussing the use of presumptions in custody disputes).

113. See Kate Brittle, *Child Abuse by Another Name: Why the Child Welfare System is the Best Mechanism in Place to Address the Problem of Juvenile Prostitution*, 36 HOFSTRA L. REV. 1339, 1355 (2008).

114. See Justine A. Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOY. L. REV. 565 (2004).

## IV. A CHILD'S RIGHT TO A SAFE NEIGHBORHOOD

Part III suggested several ways in which the state might improve child welfare by endeavoring systematically to shift children from worse to better residential areas. This Part explains why doing so is not merely optional for the state, but in fact morally and legally obligatory. Children have a right, against the state, that it make decisions about where and with whom they live in a more careful way, one that is responsive to the seriously adverse impact that poor neighborhood quality can have on children's well-being.

Begin with the premise, articulated in Part II above, that the state now plays an essential role in the series of events by which children come to live in particular places. It is not solely the result of private choices that the world for some children is filled with danger, disease, and dysfunction. Rather, it is also a result of the state deciding, when a child is born, who the child's legal parents will be and what the scope of acceptable residential choices for parents is. We can imagine an advocate for a newborn child objecting to application of a state's maternity law, for example, on the grounds that the birth mother lives in a hellish place and is unwilling to relocate even if she receives state assistance in doing so. Imagine that the advocate presents compelling evidence that the state's making that woman the baby's legal mother would result in a much worse life for the child than would making some other willing adult the child's legal mother. Or that it would be in the child's best interest for the state to make the birth mother the baby's legal mother if and only if the state compels her to move to a very different neighborhood. On the basis of that evidence, the advocate would argue that the child has a moral and a Fourteenth Amendment due process right against the state's forcing the child to be in a legal family relationship with, and in the custody of, the birth mother. This would not be a positive rights claim—that is, a plea for state assistance, or for gratuitous state protection against private harm.<sup>115</sup> It would be a negative rights claim—that is, a demand that the state not do something harmful to the child.<sup>116</sup> This is a perfectly intelligible claim, one consistent with prevailing constitutional doctrine.<sup>117</sup> And it would be a claim with great moral force, in essence objecting to abuse of state power: “How dare you, the state legislature and courts, force this child to live with that woman in that place, when you know that you are consigning the child to a life lived in a hell on earth?”

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115. See *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195–96 (1989) (discussing the constitutional distinction between a limitation on interference with rights and an obligation to provide assistance).

116. See *id.*

117. See generally Dwyer, *supra* note 41.

It is easier to recognize the state's active role in creating a child's living situation if one first considers certain analogous cases where the state action is well recognized. One such case is appointment of guardians for incompetent adults.<sup>118</sup> Imagine an adult becoming mentally incompetent suddenly, perhaps as a result of an illness, while remaining physically fit, and the state's needing to make a decision about the person's care, including who will serve as guardian. Suppose two persons, both blood relatives, wish to assume control of the person's life and that both petition to become the guardian. Suppose further that one of them lives in a safe and well-functioning suburban community whereas the other lives in a crime- and drug-infested inner-city housing project where residents are afraid to leave their homes and stray bullets come through apartment windows. The state can easily elicit information about where the petitioners live and where they intend for the incompetent adult to live.

If the state chose to place the ward in the care and custody of the petitioner who lives in a horrible environment and who intends to stay there, we would readily recognize that state action is involved in creating the ward's overall living situation, including his or her location in a dangerous and dysfunctional community, and we would expect the state to justify its seemingly inappropriate decision—for example, by explaining that the other petitioner was wholly unsuited to the guardian role, that there was no reasonable alternative placement, and that it has strongly encouraged this petitioner to move to another location. Absent adequate justification, we would think the state has abused its power to appoint a caregiver for an incompetent person and has violated a moral and constitutional right of the incompetent adult. And it would not be sufficient justification if the state explained that it simply chooses not to inquire about the residential circumstances of any petitioners for guardianship. We would say that if the state is going to involve itself in the incompetent person's life to the extent of conferring on some other person legal power over the incompetent person's life, it must do so with care and in a manner designed, at a minimum, to avoid putting the incompetent person in danger.

There have not been constitutional challenges to state appointment of guardians for incompetent adults, because state statutes require that this be done in accordance with the ward's best interests anyway,<sup>119</sup> in stark contrast to parentage laws, which generally make no reference to the child's welfare. However, there have been judicial findings of constitutional violations in the somewhat similar context of the state's committing incompetent adults to the custody of psychiatric or intensive care facilities where

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118. See Dwyer, *supra* note 43, at 785–86.

119. Because of the best interests standard, any objection to appointment of a particular guardian could rely simply on such a statute. See Dwyer, *supra* note 42, at 785–86.

internal conditions are unhealthy or unsafe.<sup>120</sup> Even convicted criminals have recognized constitutional rights against the state's consigning them to terrible living conditions.<sup>121</sup> Those cases involve commitment to a residential facility operated by state actors, which might appear to make them distinguishable; but a constitutional claim should lie as well if the state consigned adults to private long-term care facilities that the state knew to be unsafe and unhealthy, or if the state placed convicted criminals in privately run prisons it knew to have terrible conditions.<sup>122</sup>

Also analogous are selections of foster parents and adoptive parents; sometimes the state must choose such caretakers for a child, and when it does so, there clearly is state action and we expect the state to do so with some care.<sup>123</sup> If, for example, the state gave preference in adoption or selection of foster parents to convicted sex offenders, to compensate them for the fact that they might have difficulty finding a partner with whom to procreate, we would clearly see state action and believe that it violates a constitutional right of children. Even if the state chose such persons accidentally, because it simply did not do any sort of background check on the applicants it had for adoption or foster care, we would fault the state for acting irresponsibly and want to hold it accountable for any abuse children incur as a result. Likewise if the state approved "new family" adoptions (i.e., adoptions of children with whom the adopters have no connection by biology or marriage) by people living in horrible inner-city neighborhoods, as a matter of sympathy-induced preferences or because the state simply chose not to care anymore what sort of life adopters could give children, we would perceive state action that should be subject to constitutional challenges.

Similarly, there is state action, requiring justification, whenever the legislature or a court makes a decision about whom a child's legal parents and custodians will be. That includes a decision at the legislative level to make biological parents the legal parents of a child without regard to the parents' residence (or personal fitness or home environment). As in the case of guardianship for adults and adoption of parentless children, it is no justification for the state to explain that it simply chooses not to inquire about such information. The state should not assume control over the lives

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120. *See id.* at 785.

121. *See id.* at 784.

122. *See* *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003) (agreeing with the Sixth Circuit and with district courts "that have found that private prison-management corporations and their employees may be sued under § 1983 by a prisoner who has suffered a constitutional injury").

123. *See* *Nicini v. Morra*, 212 F.3d 798, 809-12 (3d Cir. 2000) (adopting a "deliberate indifference" standard to selection of foster parents and citing decisions of other courts applying similar standard); *Kenny A. v. Perdue*, No. 1:02-CV-1686-MHS, 2004 WL 5503780, at \*3-4 (N.D. Ga. Dec. 13, 2004) (holding that children have a substantive due process right to the state's selecting foster parents on the basis of a "professional judgment").

of children in this way unless it does so with care; otherwise, some children might be better off if no legal relationships with adults are established, and they simply remain in a birthing facility or if a nurse or doctor who is present at the birth takes them home and assumes de facto custody. And in fact, the state typically does have information about birth parent's residential location, just as they have information about birth parents who have abused other children, have committed serious felonies, or have used illegal drugs during pregnancy.<sup>124</sup> Birthing facilities must report all births to a state department of health or vital records, and in their reports they would typically include home addresses for the persons expected to be the legal parents.<sup>125</sup> A simple computer program at the receiving state agency could flag births to biological parents who live in unfit communities.

There is also clearly state action when the state designates particular spaces as appropriate for residence by all persons, knowing that some adults who are parents will choose to live there with children, and legally empowers parents to choose to live there, even though it is aware that some such spaces are truly unfit for residence by children. Because parents have that legal authority over children's residence, they can call upon the state to enforce their choices as to where children live, as against other private parties (e.g., an extended family member, a teacher) or government actors who might wish to cause particular children to live in different places. It is because the state has made the adults with whom children in horrible inner-city neighborhoods live the legal parents of those children and has reposed in them the legal authority to choose where the children will live that a person concerned about the children's welfare cannot drive through the neighborhood with a bus, collecting the children and bringing them to live in a safe and attractive group home in the suburbs or out in the country. If someone did that, the parents could call the police, and the police would track down and return the children and would throw the do-gooder in jail.

Thus, the state's position with respect to children living in hellish neighborhoods is not one of a passive, inactive onlooker; rather, it is one of an active participant, consigning children to the custody of adults who live in such neighborhoods, empowering the persons it selects as legal parents to decide where children will live, and designating places as suitable for residence.<sup>126</sup> Even if one is inclined to defend this entrenched state

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124. See Dwyer, *supra* note 43, at 441–45. States have this information because they maintain child abuse registries and records of criminal convictions, and because birthing facilities that discover illegal drugs present in a newborn's bloodstream must report this to the local child protection agency. *Id.*

125. See *id.* at 408.

126. The Supreme Court was simply oblivious to the state's role in family formation when it rendered its decision in *Deshaney v. Winnebago County Department of Social Services*. 489 U.S. 189 (1989) (holding that mother of abused child could not maintain constitutional tort action against child protection agency that repeatedly returned the child to the custody of his abusive father).

practice, on grounds such as those I consider in Part V below, one should acknowledge that state actions and state decisions are playing a crucial role in where children live and that the state should be prepared to defend its actions and decisions. Viewing the state as an active participant makes it easier to see the plausibility of a claim that any child residing in a very dangerous neighborhood reflects a violation of the child's moral and constitutional rights by the state. The suggested moral claim against the state on behalf of a newborn child whose birth parents live in a horrible neighborhood is not "please save me from private dangers you played no part in creating," but rather "you must not put me into a legal relationship with or in the custody of people living in that place and you should not be telling the citizenry that that place is suitable for children to live."

Even more clearly, a constitutional claim against the state in the United States must allege affirmative conduct on the part of the state,<sup>127</sup> and this can quite plausibly be done. The state infringes the substantive due process rights of children under the Fourteenth Amendment of the Constitution of the United States when it chooses for them legal parents who live in unfit communities, empowers legal parents to choose where children will live from among all areas zoned residential, and encourages parents to live in unfit communities by designating them as suitable for residence by all private individuals, including children, despite their unfitness. A representative for a newborn child should be permitted to assert such a claim and to seek injunctive relief against the state, requiring the state, if it is going to continue to take control of children's lives in this fundamental way, either to assign the child to legal parents who would not choose to live in an unfit community or to prohibit parents from locating children in an unfit community. A guardian for a newborn whose parents live in such a place could seek a negative injunction against the state's applying its parentage laws to that child, against the state's issuing a birth certificate with the birth parents' name on it, and against any state effort to force nurses and doctors in the birthing facility to relinquish possession of the child in favor of the birth parents.

Thus, in this context, as in selection of guardians or private care facilities for incompetent adults, selection of private prisons for convicted criminals, and selection of foster and adoptive parents for children, we should view the state as constrained by the Fourteenth Amendment to operate in a certain fashion in making momentous decisions about private individual's lives—at a minimum, not acting with deliberate indifference to the fate likely to result for those individuals from the state's decisions. Decisions about whom a person's family members will be are decisions the state in a

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127. See Michael J. Gerhardt, *The Ripple Effects of Slaughter-house: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409 (1990).

modern liberal society presumptively should not be making for anyone, and when the state must do so, its authority to do so should extend no further than the justification for its doing so. If children require the state to choose a legal family for them, solely because of their incompetence, the state should aim solely to provide competent decision making that substitutes for the children's own decision making—that is, that chooses on behalf of the child the alternative, among all those available, that we might expect the child to do if able, which presumably means the alternative most likely to serve the child's best interests, all things considered. As argued further in Part V, there is no justification for the state's doing otherwise.

In other words, state decision making about children's lives is best conceptualized as proxy decision making on their behalf, pursuant to the state's traditional *parens patriae* role as ultimate protector of non-autonomous persons, just as is state decision making about the lives of incompetent adults.<sup>128</sup> As such, it should aim solely to achieve what is best for the children, and it should do so as competently and thoroughly as is reasonably possible, which would entail taking into account all factors relevant to their welfare.<sup>129</sup> Such factors clearly include the suitability of particular communities for child rearing, as measured by the sorts of circumstances that governments and private organizations consider in identifying "blighted" neighborhoods or in ranking communities based on "quality of life"—namely, poverty rate, crime rate, prevalence of substance abuse, and availability and quality of public and private services such as schools and medical care. For the state to make decisions as to who will be a child's legal parent and custodian, as to what power legal parents will have over children's residential locations, and as to what areas it will designate as suitable for children to live, without regard for the harm these decisions are likely to cause the child, is to abuse its power and violate the constitutional rights of the child. Thus, children arguably have a substantive due process right that the state at least make reasonable efforts to ensure that they do not, as a result of these state decisions and actions, end up living in horribly unhealthy and unsafe neighborhoods.

## V. OBJECTIONS

As explained in Part III, my proposals resemble many other common and widely accepted government practices. This might provide some reason to think that they are permissible, feasible, and not unjust. Governments routinely declare neighborhoods "blighted" for certain purposes, including the purpose of forcing people to move out, through a condemna-

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128. See Dwyer, *supra* note 42, at 766.

129. For an extended philosophical account of why this is the case, see DWYER, *supra* note 53.

tion or abatement proceeding. They condemn buildings or blocks of buildings, declaring them unfit for human habitation, which results in forced relocation of many residents. Zoning laws identify areas of a community as unfit for residential purposes, because of proximity to unsafe conditions or to other incompatible uses, and initial creation of such a law could result in residential displacement. Thus, governments are fairly comfortable with the concept and practice of categorically assessing physical spaces in relation to habitation and of coercing people's residential choices, sometimes even baldly ordering them to relocate without offering them any assistance to do so. My zoning proposal is unusual simply because it targets the residential circumstances of large groups of children and coerces large groups of adults as to their choices of residence just for the sake of children. The proposal to consider community quality in all decision making about parentage and child custody is also novel, but Part II showed that it is not unprecedented for the state to consider it in some decisions.

Despite the resemblance of my proposals to some existing government practices, they are likely to be jarring to many people. The idea of a territory in which children may not live or even visit could be the premise of a science fiction movie. To recommend denying or diminishing a parent-child relationship because of the neighborhood in which an adult lives might sound like urging that parents be punished for being poor. Because these specific ideas are novel, there have not been published judicial or scholarly objections to them, but one might anticipate a number of objections. In particular, from an assumption that no individual can be held responsible for the quality of life in any given neighborhood, various unfairness objections might seem to follow. In addition, coercing people to move, although governments do it fairly routinely, does implicate constitutional rights, and threatening to deny or terminate parental status to people because of where they choose to live implicates constitutional rights under current doctrine—that of parents to raise their offspring—that generally does not come up in other land use situations and that might be stronger than property rights or the right to choose where to live.<sup>130</sup> There are also humanitarian and pragmatic concerns that arise from disrupting people's ties to a community and their daily interactions with extended family, some of which entail provision of needed care to family members, such as elderly parents.

It is worth noting at the outset, though, that my proposals do not entail certain adverse consequences for affected individuals that some other restrictions on residence and mobility do. My proposals should not trigger

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130. See, e.g., *Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925) (recognizing right of parents to choose child's education); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (vacating a law that forbade the teaching of a foreign language prior to the eighth grade based on a parent's right to instruct children).

feelings in residents that the government is messing with their lives out of self-interest because private developers are lining politicians' pockets, the way they do with many eminent domain and condemnation actions.<sup>131</sup> In addition, most types of exclusionary zoning practices with which we have experience involve trying to keep people out of objectively desirable places, and those often have stigmatizing effects, generating feelings in the excluded of unworthiness and of being disdained, especially if they are motivated by immoral and irrational prejudices, such as racism.<sup>132</sup> My proposals, in contrast, entail requiring or encouraging people to move out of undesirable places and to relocate to better residential areas, and the reason for doing so is not based on an assumption that they occupy an inferior social status relative to those who are permitted to remain, but rather an assumption that the persons targeted occupy an important social role that cannot properly be carried out in the undesirable places. Even denying some persons child custody on the basis of neighborhood quality does not in and of itself amount to a judgment about their inherent qualities as parents, except perhaps sending signals that they have made poor decisions relating to child rearing—namely, where their children live. Nevertheless, there is likely to be a perception that the state is judging parents and communities negatively, for creating a bad environment for children and perhaps indirectly for being poor. There might also be a perception that the government is being callous in breaking up communities, social networks, and families. This final Part addresses numerous potential objections to the idea of making some residential areas “no-child zones” for child protection purposes and to the idea of disfavoring parents and potential parents in individualized judicial and agency decisions on the basis of their residential locations.

#### *A. Punishing Parents for Things Other Than Their Own Conduct*

Some might object that state action imposing costs on people because of the poor quality of their neighborhoods amounts to unfair punishment. Denying people legal parent status or custody of a child is a quite substantial cost to impose on them, and effectively forcing them to relocate also imposes a large cost.<sup>133</sup> The state would appear to be imposing one cost or the other because of conduct by people other than those who are incurring the cost—that is, because other people commit crimes, sell drugs, fail to care for their property, do not supervise their children, and so forth. It is a

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131. See generally Steve Chambers, *Angry Citizens Get Their Say on Eminent Domain*, STAR-LEDGER, Mar. 14, 2006, at 13 (noting the perception of impropriety by some critics of eminent domain actions).

132. See Zick, *supra* note 102, at 591–92, 604, 606.

133. John A. Powell, *Opportunity-Based Housing*, 12 J. AFFORDABLE HOUSING & CMTY. DEV. L. 188, 189 (2003).

basic moral principle that people should not suffer for the wrongs of others.<sup>134</sup> In contrast, a parent's or potential parent's home environment is typically something over which he or she does have control, and so we feel more comfortable holding that individual responsible for problems in the home environment.

This objection is unpersuasive for many reasons. First, the assumption that the cost would be imposed solely because of other people's conduct is likely false in many cases, perhaps most. The adults on whom the cost would be imposed presumptively have chosen to live in the community and/or to have a child, and they can be held responsible for that choice. Underlying the objection, though, might be an additional assumption that many people who live in communities unsuitable for children are incapable of living elsewhere, because they cannot afford to live elsewhere or because they need the support of others in those communities. That assumption has some plausibility, because there is a shortage of low-income housing nationwide, finding employment in new locations can be difficult, and many people do rely on neighbors and family members for child care, elder care, and other needs.<sup>135</sup> Moreover, some parents might feel forced to move into bad neighborhoods after they already have children.

But surely it is not true of every parent living in an unfit community that they cannot move to better neighborhoods; many might have the means, but choose to remain in familiar surroundings and near family and friends because they get some gratification from living there. Many of those who can move might be faulted for not putting their child's welfare first.

In fact, there are many places in the United States that are not crime- and drug-ridden and where people live with very little income, even just welfare benefits.<sup>136</sup> It might not be especially difficult financially for parents to move themselves and their children to a small town or rural area; most likely, many inner-city residents simply do not consider moving to such a place, and those who do might reject the idea for non-financial reasons, such as wanting to stay near family or anticipating boredom and loneliness. Further, there are public and private employment agencies in many communities to help people find employment.<sup>137</sup> And there is federal

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134. See generally Max Stier, Note, *Corruption of Blood and Equal Protection: Why the Sins of Parents Should Not Matter*, 44 STAN. L. REV. 727, 731 (1992).

135. See Deborah J. Jones et al., *Mothers' Perceptions of Neighborhood Violence and Mother-Reported Monitoring of African American Children: An Examination of the Moderating Role of Perceived Support*, 36 BEHAV. THERAPY 25, 27 (2005); Powell, *supra* note 133, at 192, 195-97.

136. See generally James A. Kurre, *Is the Cost of Living Less in Rural Areas?*, 26 INT'L REGIONAL SCI. REV. 86, 109 (2003); Jennifer Sherman, *Coping with Rural Poverty: Economic Survival and Moral Capital in Rural America*, 85 SOC. FORCES 891 (2006).

137. Tian Luo et al., *The Expanding Role of Temporary Help Services from 1990 to 2008*, 133 MONTHLY LAB. REV. Aug. 2010 at 3, 10 (explaining the enormous growth of temporary employment in counties which were at the lowest levels of temporary employment).

funding to subsidize housing for some low-income individuals through programs in which parents currently in unfit communities could be given priority.<sup>138</sup> Local governments, if acting rationally, should be willing to contribute relocation assistance, as well, to poor people wishing to move out of certain jurisdictions with their children, in light of the substantial costs those people are likely to impose on governments if they stay, by needing various social services.<sup>139</sup> So the state could obviate concerns about moving costs by offering relocation vouchers to all parents, to finance the cost of moving, and by expanding low-cost housing subsidy programs. This would expand the range of options for the many people who want to move to better places.<sup>140</sup> In addition, currently people living in poverty are forced to move often anyway, as rents change and buildings are condemned or renovated, so they do not have much stability in their lives as it is.<sup>141</sup> Relocation to entirely different environments, to better functioning communities, might allow them greater stability.

In short, a blanket assumption that every parent living in a horrible neighborhood is incapable of moving elsewhere is unwarranted; probably most who would be affected by the reforms I propose are living in unfit communities by choice. Their choices might be understandable, insofar as they are motivated by desires to remain near family, friends, and familiar places, but they are nonetheless choices. And those who are not living in such places by choice might welcome relocation assistance, even if they are told they must accept it or risk denial or removal of child custody. Moreover, probably most children who live in terrible neighborhoods were conceived and born when their parents already lived in those neighborhoods, so the parents presumptively have made at least that voluntary decision—that is to have a child, or to risk creating a child by having sex, despite knowing the child would live in the terrible place—that can be a basis for justifying imposing costs on them, just as such a decision is a basis for imposing the costs of a child support obligation.

Second, even if we assume that some people cannot afford to relocate, at least not without substantial government assistance that is not presently available, and therefore that some people are not responsible for the fact that they live in one community rather than another, it does not follow that imposing costs on them, in terms of their parental interests, is unfair pu-

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138. See Powell, *supra* note 133, at 205 (urging expansion of low-cost housing in suburban areas); see also *id.* at 192–93 (critiquing the Section 8 program).

139. Chicago instituted a relocation program in the early 1990s, with apparent success. *Id.* at 197. On the other hand, some cities have at times relocated people to even worse places. See, e.g., JONNES, *supra* note 2, at 14–18 (discussing relocation of people from shelters in Manhattan to tenements in the South Bronx).

140. See Powell, *supra* note 133, at 189–90; Tegeler, *supra* note 98, at 211 (noting that demand for relocation assistance currently “far exceeds . . . supply”).

141. Powell, *supra* note 133, at 198.

nishment. Not every cost people incur at the hands of the state or private parties is a punishment. Typically, we are more likely to view as punishment taking away from someone a good that they currently possess, as opposed to declining to give someone a good that he does not possess but wants to have.<sup>142</sup> Some of the state decisions discussed above are of the latter sort. Birth parents who fill out an application for a birth certificate and adults who apply for adoption are asking the state to give them something they do not yet have—namely, legal parent status as to a new entrant to the human community and all the legal rights that go with it.<sup>143</sup> Parents who seek a transfer of custody to them from another parent or from the state (i.e., when a child is in foster care) are also asking for something they do not currently have. Refusing these requests looks less like the state imposing a cost on people than does taking away legal parent status in a termination of parental rights proceeding or taking custody away from a parent in a domestic relations or child protection proceeding.

Even with respect to state decisions taking away an existing legal status or disrupting a parent's relationship with a child, however, it is inconsistent with our views of analogous decisions in other contexts to characterize the decisions as punishment. For instance, in adults' decisions about the relationships they will form or dissolve with other adults, we generally do not characterize as punishment one person's deciding that he does not want the relationship. If one adult declined an invitation by another adult to marry, in part because the other adult lived in a neighborhood with a very low quality of life and was unwilling to move, we would not ordinarily characterize that decision as a punishment. This is because the notion of punishment entails an intention to cause suffering,<sup>144</sup> and in such a case any suffering is incidental and unintended. The same would be true if two individuals were already in a relationship such as an intimate partnership and at some point a disagreement about where they should live became severe enough that one chose to exit the relationship. We would not say the one who chose to exit was punishing the other, unless her intent was just to inflict pain on the other as a consequence for his insistence on living in a bad place; we would instead say that she is simply doing what she thinks is best for herself. The state, in deciding parentage and custody, is

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142. BLACK'S LAW DICTIONARY 1353 (9th ed. 2009) (stating that punishment is a "sanction—such as a fine, penalty, confinement, or loss of property, right, or privilege—assessed against a person who has violated the law").

143. Some might respond to this point by asserting that biological parents have a moral right to raise their children and that the state would be violating or taking away that right by denying them legal parent status. I have explained at length elsewhere why no adults have a moral entitlement to raise their biological offspring. See DWYER, *supra* note 53, at 170–204.

144. See *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985) ("The infliction of punishment is a deliberate act intended to chastise or deter."); MERRIAM-WEBSTER DICTIONARY, available at <http://www.merriam-webster.com/dictionary/punishment> (last visited Aug. 23, 2011) (defining punishment as "suffering, pain, or loss that serves as retribution").

effectively acting as an agent for the child, pursuant to its *parens patriae* responsibility, making the same sort of decision about relationship formation on behalf of an individual child. The state, in terminating parental rights or taking custody away from a parent, is not aiming to inflict suffering on the parent; it is aiming, rather, just to do what is best for the child. Other analogies can be drawn to adverse actions the state takes toward persons that are not punishment—for example, quarantining those who carry contagious diseases.<sup>145</sup> And the law requires persons to do many other things as conditions for becoming or remaining parents and custodians, such as having a home somewhere, securing medical care, getting a child to school, and providing clothing and food to children, and those conditions are not deemed punitive.<sup>146</sup>

Third, though action need not be a punishment to be unfair, the analogy to adult decision making about relationships with other adults suggests that state decisions to deprive adults of parentage or custody based in part on the neighborhoods they inhabit are not unfair regardless of whether they can be characterized as punishment. Indeed, there are other things outside the control of parents and would-be parents on the basis of which the state denies them custody or parental status. Mental illness and mental or physical disability are clear examples. People who suffer from such unchosen conditions will have that counted against them in applications for adoption, in a post-divorce custody disputes, in decisions whether to remove abused or neglected children from their custody or to return them to parental custody after removal, and in termination of parental rights proceedings.<sup>147</sup> In addition, people routinely have counted against them in such contexts their associations with other people whose behaviors could be harmful to children, even when it might be quite difficult for them to avoid associations with such persons. For example, if a divorced mother remarries to a man with a history of criminal sexual abuse of children, or if she has a father with a history of child sexual abuse, a court could certainly count against her in a custody dispute her continued association with such a person if the children would be involved in that association.<sup>148</sup> A

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145. See, e.g., THE CNTR. FOR L. & THE PUBLIC'S HEALTH, *The Turning Point Model State Public Health Act: State Legislative Update Table* (2007), [http://www. publichealthlaw. net/Resources/ ResourcesPDFs /MSPHA% 20LegisTrack .pdf](http://www.publichealthlaw.net/Resources/ResourcesPDFs/MSPHA%20LegisTrack.pdf).

146. See, e.g., ALA. CODE § 16-28-12(a) (1975); ALA. CODE § 26-16-2(6) (1975).

147. See, e.g., GA. COMP. R. & REGS. 290-9-2.06(3)(d)(6) (2007) (consideration of mental and physical health in home study of adoption applicants); VA. CODE ANN. § 20-124.3 (2008) ("In determining best interests of a child for purposes of determining custody or visitation . . . the court shall consider . . . [t]he age and physical and mental condition of each parent"); MASS. GEN. LAWS ANN. ch. 210, § 3(c)(xii) (West 2010) (listing "mental deficiency" and mental illness among the bases for finding a parent unfit in termination of parental rights proceedings).

148. See, e.g., *In re Tidwell*, 35 S.W.3d 115 (Tex. Ct. App. 2000) (accepting termination of mother's parental rights where evidence revealed that mother allowed her children to live with and near several sexually abusive relatives).

more controversial example is the practice of removing children from the custody of parents who are chronic victims of partner abuse.<sup>149</sup> Adults who live in horrible neighborhoods are associating with a larger group of co-residents in a setting (a neighborhood) that is less intimate and intense than a home, but who nevertheless pose a very real threat to children's well being on a daily basis.

Of course, there are objections to the state counting some of these other things against parents or potential parents as well. In particular, advocates for parents with disabilities have objected to some state decisions denying custody based on the disability,<sup>150</sup> and there is a large amount of scholarly literature opposing the practice of removing children from the custody of domestic violence victims.<sup>151</sup> Advocates for persons with disabilities, though, have generally not argued that the state must ignore any disabilities. Rather, they have argued that the state has a moral and constitutional responsibility first to provide assistance that would compensate for the disability—for example, by providing intensive parenting training to a person with a mental disability.<sup>152</sup> Likewise, scholars who object to removal of children from domestic violence victims do not argue that witnessing domestic violence against a parent is not bad for children, nor that the state should be oblivious to it. Rather, they argue, like those advocating for disabled persons, that the state should do more to assist the unfortunate parent, which in the case of domestic violence victims would mean helping them avoid being abused.<sup>153</sup> Some do maintain that it is always wrong to impose the cost of separation from children on women just because of conduct by someone else,<sup>154</sup> but they provide no response to the reasoning above—in particular, the point that state decisions about child custody cannot permissibly be based on anything other than the child's best interests, and the point that the state routinely and without objection imposes costs on parents for several other things beyond parents' control.

Consistent with the arguments of advocates for persons who are disabled and for domestic violence victims, one might maintain that my pro-

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149. See, e.g., *Nicholson v. Scoppetta*, 820 N.E.2d 840 (N.Y. 2004) (addressing constitutional challenge to policy of removing children from custodial parents solely on the basis of the parents' failure to protect children from witnessing domestic violence against the parents).

150. See, e.g., Susan Kerr, *The Application of the Americans with Disabilities Act to the Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 J. CONTEMP. HEALTH L. & POL'Y 387 (2000); Dave Shade, *Empowerment for the Pursuit of Happiness: Parents with Disabilities and the Americans with Disabilities Act*, 16 LAW & INEQ. 153 (1998).

151. See Zandra D'Ambrosio, *Advocating for Comprehensive Assessments in Domestic Violence Cases*, 46 FAM. CT. REV. 654, 655 (2008) (citing PETER G. JAFFE ET AL., MAKING APPROPRIATE PARENTING ARRANGEMENTS IN FAMILY VIOLENCE CASES: APPLYING THE LITERATURE TO IDENTIFY PROMISING PRACTICES 56 (2005); Nany Ver Steegh & Clare Dalton, *Report from the Wingspread Conference on Domestic Violence and Family Courts*, 46 FAM. CT. REV. 454, 456 (2008)).

152. See, e.g., Kerr, *supra* note 150, at 413–25.

153. See, e.g., D'Ambrosio, *supra* note 151, at 659–63 (and other sources cited therein).

154. See, e.g., *Nicholson v. Williams*, 203 F. Supp. 2d 153, 252 (E.D.N.Y. 2002).

posals are fair to parents only if coupled with substantial programs of relocation assistance, more substantial than those that currently exist. I have suggested that it would be rational of local governments to devote resources to evacuating children and parents from inner-city neighborhoods, and I believe a strong argument could be made for the state having a moral duty to children to assist parents financially in moving, an argument that rests on an assumption of the state's partial responsibility for the children's predicaments. But the fact that governments generally do not provide relocation assistance following eminent domain or condemnation actions suggests that popular morality does not ascribe a right to people to government relocation assistance whenever the government requires them to move.

Finally, it bears mention that the major normative premise of the unfairness objection, that people should not suffer because of the choices of others, applies even more clearly to the current plight of children in unfit communities and so bolsters the argument that children have a right not to live in such places. Children should not have to bear the enormous cost of growing up in conditions akin to a war zone that arises from choices parents make using their state-conferred power over children's lives. Forcing children to live in hellish places would seem more clearly unfair than forcing parents to move out of hellish places, with or without state assistance.

*B. Disparate Impact on Persons Who Are Poor or of Minority Race*

Related to the first objection is a group-focused unfairness complaint—namely, that the reforms I propose would fall most heavily on poor and minority race people.<sup>155</sup> As explained in Part I, chronic poverty is an indicator of community unfitness, because of the dysfunctions correlated to it, so the reforms would obviously fall most heavily on the poor. Those living in the most impoverished neighborhoods are disproportionately of minority race.<sup>156</sup> Indeed, the concentration of racial minorities in blighted areas is in significant part a result of racist government policies and racist practices of private businesses and individuals.<sup>157</sup> Thus, although my proposals target dysfunctions rather than poverty or race per se, there would be a disparate impact on historically subordinated groups. A similar argument is often made against state child protection interventions more generally.<sup>158</sup>

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155. Cf. Sheila Crowley, *HOPE VI: What Went Wrong?*, in *FROM DESPAIR TO HOPE*, *supra* note 2, at 229 (complaining that demolition of public housing projects and the forced relocation that is involved has been traumatic for poor families).

156. See *NEIGHBORHOOD POVERTY: POLICY IMPLICATIONS IN STUDYING NEIGHBORHOODS*, *supra* note 2, at 1–3; WAGMILLER, *supra* note 28, at 165, 175.

157. See GORDON, *supra* note 2, at 69–111; TURNER, POPKIN & RAWLINGS, *supra* note 2, at 3–5.

158. See Dwyer, *supra* note 43, at 470–72.

Such a disparate impact no longer supports a constitutional challenge to state action,<sup>159</sup> but it might nevertheless support a moral challenge. The challenge would fail, however. It would fail, first of all, because it ignores the fact that the reforms are aimed at helping children who are living or would begin living in poverty absent the reforms, and these children are disproportionately of minority race. Thus, while one might perceive an adverse disparate impact on certain groups of adults, to the extent that the reforms do result in coercing some people to disrupt their lives or denying some people parent status or custody,<sup>160</sup> there would be a positive disparate impact on similar groups of children, assuming that the reforms advance their welfare.

The challenge would fail also because there is little to commend a moral premise that people are entitled not to have the state impose policies whose cost falls most heavily on a group to which they belong, when the policies do not reflect an aim of causing that group suffering and instead reflect entirely legitimate government aims. There are innumerable examples of other government policies that have a disparate impact and that do not lead to this sort of group-based unfairness complaint. Tax laws aim to encourage activities the government values and to discourage activities the government disvalues,<sup>161</sup> and as such they have a negative disparate impact on groups engaged in activities the government does not value. Even when similar disparate impact complaints do arise in other contexts—for example, in connection with bans on activities most likely to be engaged in by persons who are poor, such as prostitution<sup>162</sup> and shoplifting,<sup>163</sup>—they do not carry the day.

Further, we generally accept that private individuals' choices in the aggregate can have a disparate impact on historically subordinated groups, but that those choices must nevertheless be accepted. As argued above, state best-interests decision making about children's relationships should be viewed as substituting for the self-determining relationship choices private individuals ordinarily make for themselves, warranted only by children's need for a surrogate decision maker. Adults' relationship choices provide an apt analogy. In the aggregate, these choices have a disparate impact on the poor, because all else being equal, adults generally prefer to form intimate partnerships with people who are not poor. No one would

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159. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977).

160. I say one might perceive a disparate impact, rather than there will be a disparate impact, because one might believe parents are benefited when their children's welfare is advanced, even if the parents do not see the benefit and even if the parents suffer in the process.

161. JOSEPH M. BESSETTE & JOHN J. PITNEY JR., *AMERICAN GOVERNMENT AND POLITICS: DELIBERATION, DEMOCRACY, AND CITIZENSHIP* 571 (2011).

162. See generally TEELA SANDERS, MAGGIE O'NEIL, & JANE PITCHER, *PROSTITUTION: SEX WORK, POLICY AND POLITICS* 33 (2009).

163. See generally KERRY SEGRAVE, *SHOPLIFTING: A SOCIAL HISTORY* 36 (2001).

suggest that the state should take steps to ameliorate this impact by forcing some adults to be in relationships with or to live with poor people. The alternative in the present context would be to treat children instrumentally by allowing sympathy for unfortunate adults to justify sacrificing the children's welfare, or in other words to give the unfortunate adults parental status or custody as a kind of compensation for their misfortunes, ignoring the welfare costs for the children. It is a basic premise of our shared morality that persons should not be treated as instruments to gratify others.

*C. The Reforms Would Harm the Very Persons They Aim To Benefit*

Both advocates for persons with disabilities and scholars opposed to removals of children from domestic violence victims also argue that removal from parental custody does more harm to children than good, even if there are problems with parental custody.<sup>164</sup> At least in most cases, they argue, the best outcome for the child will be to maintain parental custody despite the costs for a child that a disability or witnessing abuse of their parent might have on the child. One might argue, similarly, that even if state decision making about children's legal relationships and residences is a proxy decision for the children in which nothing matters except what is best for the children, that assessment must be a comprehensive one, weighing the costs and benefits as to each of several imperfect alternatives. One might argue further that although bad neighborhoods are a problem for children, separating children from parents just for that reason will typically not serve children's overall well being. Encouraging parents to move out and offering them assistance to do so is one thing, but removing children from their custody if they decline is quite another, and could be, on the whole, bad for the children.

The major premise of this line of reasoning—namely, that state decisions about children's relational lives should be based on comprehensive assessments of children's best interests, rather than focused on just one aspect of life—is unassailable. However, it does not support an indictment of my proposals, for several reasons.

First, it is inapposite to my proposal for revising domestic relations and child protection laws. That proposal does not entail state decision making about the relational lives of individual children based solely on neighborhood quality. Rather, it would simply make neighborhood quality one of many factors in an overall best-interests assessment, to be balanced against other child welfare considerations. As such, it should never result in decisions that are, on the whole, bad for children. Moreover, assess-

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164. See, e.g., D'Ambrosio, *supra* note 151, at 659–60.

ment of a neighborhood would take into account existing positive aspects, such as the existence of a supportive social network, as well as negative aspects.

The zoning proposal, on the other hand, could entail denial or disruption of parent-child relationships, when adults refuse to move out of unfit communities. However, an objection to the zoning proposal based on the costs of separating children from parents has substantial purchase only in contexts where certain adults have an established and healthy social parent-child relationships with their children. It has very little purchase in the context of state decision making as to who will be a newborn baby's legal parents, because then there is not the concern about severing an existing attachment, and there is ample supply of adoptive parents for newborns.<sup>165</sup> To be sure, the biological connection is a relevant consideration in assessing the overall welfare of a child in connection with parentage decision making, but it is only one consideration among many and is less significant than a child's interests in basic health and safety. An argument based on costs of separating children from parents also has little purchase in situations where custodial parents' relationship with a child is attenuated for other reasons, and parental refusal to move with the child might evidence such attenuation, as might also parental maltreatment of a child, which occurs at a very high rate in unfit communities.<sup>166</sup>

The greatest concern would relate to removal of older children from parents to whom they are attached and who have not maltreated them, yet who refuse to move out of a neighborhood deemed unfit for children. One way to address this concern might be to take the stronger step of simply ordering the parents to move by issuing an order to vacate. Many local governments have substantial experience with such orders addressed to entire households.<sup>167</sup> Alternatively, the state might infer that parents who place more importance on staying in a current home and maintaining connections to local residents than on maintaining custody of their children are indifferent or marginal parents, even though they would not otherwise be deemed to have maltreated the children. It might treat the decision to stay behind as itself a form of neglect, just as child protection agencies do when parents choose to continue living with another adult who has abused their child. In "failure to protect" cases, a refusal to change one's living situation for the sake of the child signals an unwillingness to provide ade-

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165. See NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADOPTION EXPERIENCES OF WOMEN AND MEN AND DEMAND FOR CHILDREN TO ADOPT BY WOMEN 18-44 YEARS OF AGE IN THE UNITED STATES (2002), available at [http://www.cdc.gov/nchs/data/series/sr\\_23/sr23\\_027.pdf](http://www.cdc.gov/nchs/data/series/sr_23/sr23_027.pdf).

166. See CHRISTOPHER JAMES HOBBS, HELGA G.I. HANKS, & JANE M. WYNNE, CHILD ABUSE AND NEGLECT: A CLINICIAN'S HANDBOOK 5 (2d ed. 1999).

167. See David Schultz, *What's Yours Can Be Mine: Are There Any Private Takings After Kelo v. City of New London*, 24 UCLA J. ENVTL. L. & POL'Y 195, 212 (2005).

quately for the child, and failure to protect alone can be a sufficient basis for removing a child from parental custody and ultimately terminating parental rights. The situation would be no different conceptually from one in which a parent left a home shared with a child in a good neighborhood, moved by herself to a blighted neighborhood, and refused to return to be with the child because she had grown accustomed to the new surroundings and formed new social connections.

Even with respect to the great majority of parents who would be willing—even delighted—to accept subsidies and services that facilitate relocation with their children, some might object to making relocation mandatory on the grounds that parents will be forcibly divorced from supportive social networks, including extended family members. As noted above, any assessment of a neighborhood should take into account such networks, so a community should be declared unsuitable for children only if its harmful aspects substantially outweigh its helpful aspects. In addition, there is evidence that social networks in blighted urban neighborhoods are in fact quite weak relative to the networks that exist in better neighborhoods, into which relocated families have been able to enter when participating in housing voucher programs.<sup>168</sup> Suburban residents are often initially resistant to entry of voucher users and suspicious of voucher users when they first arrive, but soon after they welcome relocated families into their community and social support network.<sup>169</sup>

Some might further argue, though, that the proper state response is to eliminate chronic poverty and community dysfunction with infusion of massive government resources. Rather than taking children en masse from communities and parents, the state should invest heavily in making every community fit. This approach would minimize disruption to family's lives. There can be reasonable disagreement about whether such a state transfer of wealth from wealthier citizens to poor communities is morally permissible, morally required, or good public policy. Let us suppose that there is a good case to be made for its being morally required. Nevertheless, it is exceedingly unlikely to happen, because of political realities, and if it does it will take many years to improve a neighborhood sufficiently for it to be a safe and healthy place for children. Neither litigation nor lobbying is likely to induce legislatures to do it. Past government initiatives to create strong social structures in disorganized, dysfunctional neighborhoods have usually been ineffective.<sup>170</sup> Neighborhoods do change, but the change is

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168. David P. Varady & Carole C. Walker, *Housing Vouchers and Residential Mobility*, 18 J. OF PLANNING LITERATURE 17, 26 (2003) (noting however, that a fundamental aim of the Section 8 voucher program is promoting free choice of residency).

169. See Popkin & Cunningham, *supra* note 9, at 189; Rosenbaum et al., *supra* note 13, at 158.

170. See ELLIOTT ET AL., *supra* note 27, at 294, 297; David Gonzalez, *In the South Bronx, Blight Returns to a Rehabilitated Block*, N.Y. TIMES (Jan. 6, 2011), <http://www.nytimes.com/2011/01/07/nyregion/07block.html?page=1>.

usually very gradual, and it usually results in the dysfunctional community simply being transplanted to a new location.

Thus, the problem of unfit communities is going to persist, and unless and until it is eliminated, it should be a component of state decision making about children's lives. Children are entitled to avoid living in horrible places, absent countervailing considerations that make it in their best interests to live in them. They are entitled to have decisions about their lives based on facts about the real world as it now is, not as some imagined utopia. Adults are not required to make choices about their relationships based on what life would be like in a perfect world, and the state should not force upon children decisions about their relationships based on such counter-factual speculation.

#### *D. Effect on Community*

Another set of objections charging that the reforms would do more harm than good focuses on the effects on the larger group or environment. On the one hand, it is plausible to think that the reforms I propose would lead to the further deterioration of bad neighborhoods. On the other hand, some might speculate that making people leave one bad place will just result in transplantation of the blight to another place.

Emptying the worst neighborhoods of children would likely result in withdrawal of government-provided services and programs, including schools, that create jobs and infuse wealth; reduce already depressed property values; and rob the communities of any vibrancy and civic pride that might now exist. To declare a neighborhood unfit for children is like condemning and evacuating a building, leaving it to crumble, one might maintain. However, to conclude from this concern that the state should continue to ignore the impact of community dysfunction on children's welfare when making decisions about the children's lives, one would need to add a major, normative premise along the lines of "the state should not sacrifice the interests of adults who might remain in a community after the children are removed, in order to protect the interests of children." That major premise is not at all plausible, for at least two reasons.

First, even if a balancing of adults' and children's interests were appropriate, the state should choose in this context to serve children's interests, because they are clearly weightier. The marginal effect of my proposal on the lives of adults who would remain in condemned neighborhoods would be relatively small. When schools and other government services and programs for children close, some will lose jobs, but they can look for work elsewhere, with competition for the jobs reduced by the exit of many parents. Losses in property values are more likely to be felt by absentee landlords than by residents; in fact, rents might drop for tenants of housing projects. And loss of any existing vitality and pride would in-

flict just a modest psychological cost. In contrast, children's fundamental developmental interests, and indeed survival, are at stake.

Second, such a balancing is not appropriate. Again, when the state presumes to make such profound decisions about the intimate lives of private individuals, which it can justifiably do only because some private individuals are incapable of making the decisions themselves, it must aim to match as closely as possible the decision making the individuals themselves would do if able. There is no justification for injecting others' interests into the decision calculus. Surely adults are entitled to, and generally do, decide where they will live without compromising their self-regarding interests in order to bolster struggling communities. Children should have an equivalent legal right, one protecting their interests rather than their choices, effectuated by the state as surrogate, to exit and stay out of communities that are unfit for children, or simply to be in a better neighborhood if that is, on the whole, in their best interests, taking into account their existing ties to people and places. They should not be held hostage in horrible neighborhoods to guard against the danger of further deterioration.

Lastly, further community disintegration would not necessarily be the ultimate consequence of facilitating children's exit from currently dysfunctional communities. A public declaration that a community is unfit for children and that the state will pursue a policy of making the community childless might trigger sufficient sympathy for the adults living in that community to generate more public support for rejuvenation projects than has ever before existed. It might also motivate some adults living in such a community to organize internal rejuvenation efforts. All the proposals could generate increased awareness of a situation that is certainly unjust to the children and arguably unjust to the adults, as well.

As for the fatalistic prediction that the state cannot eliminate problems by moving people, because the problems will move with them, that is much more plausible with respect to state decisions to order all residents of an area to evacuate.<sup>171</sup> My "no-child zone" proposal is superior to an all-out condemnation of a neighborhood from a child welfare and public health perspective because it would divide custodial parents and their children from other residents in unfit communities. It would cause children to grow up in different places with very different influences from what they now experience, leaving as far behind as possible the bulk of those who perpetuate the dysfunction by operating the drug trade and engaging in violence. Of course, some custodial parents are involved in illegal activ-

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171. See Alexandra M. Curley, *Dispersing the Poor: New Directions in Public Housing Policy*, in *CHILD POVERTY IN AMERICA TODAY*, VOL. 4: CHILDREN AND THE STATE 71, 85 (Barbara J. Arrighi & David J. Maume eds. 2007) (discussing this problem with respect to the component of the federal Hope VI program that involves rebuilding housing projects).

ities, but relocating them might end that involvement. Some existing federal housing subsidies have dispersed aid recipients thinly throughout areas outside the city center, to avoid creating a concentration of poor households in any one area, and that approach has been successful.<sup>172</sup> Of course, some people who relocate retain ties to the inner city, at least for a while, and that might be more likely with people who are coerced into moving than has been the case with people who voluntarily choose to move. This is a fear of receiving communities. But experience with existing programs reveals an eventual shift in focus by parents and children, as they become accepted into, accustomed to, and appreciative of their safer and healthier new environments.<sup>173</sup>

### *E. Infringement of Adults' Constitutional Rights*

In addition to the policy questions raised above, the reforms I propose, because they might interfere with individuals' freedom to choose where they live or result in depriving people of legal parent status or custody of children, could well be constitutionally problematic. This Subpart first articulates the contours of the constitutional rights potentially infringed to determine whether adults would have colorable claims to constitutional protection, and then discusses states' defenses of the reforms against any constitutional challenges.

#### *1. Freedom in Choice of Residential Location*

The freedom to choose where one lives is, as an empirical matter, an important liberty that we ordinarily take for granted. It would therefore seem straightforwardly within the protections of the Fourteenth Amendment. It is not clear, though, which strand of Fourteenth Amendment doctrine, if any, would support a complaint against the reforms I propose on the grounds that they coerce residential choices.<sup>174</sup> There are several possibilities.

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172. See *id.* at 73 (asserting that the federal Moving to Opportunity demonstration program, which disperses residents of high-poverty inner-city neighborhoods to lower-poverty areas using housing vouchers, "was successful in dramatically improving housing and neighborhood conditions for families," who generally integrated into a new social network rather than recreating the old one in a new place); G. Thomas Kingsley, *Taking Advantage of What We Have Learned*, in FROM DESPAIR TO HOPE, *supra* note 2, at 266–67; Rosenbaum et al., *supra* note 13, at 156–58; Simpson, *supra* note 4, at 221–22.

173. Rosenbaum et al., *supra* note 13, at 161–70; Kingsley, *supra* note 172, at 266.

174. See Zick, *supra* note 102, at 538–39 (suggesting ambivalence on the part of the drafters of the Constitution as to a right to migrate among the states).

*a. Right To Travel*

First, there are right to travel cases. The Supreme Court has characterized the right very broadly, requiring “that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”<sup>175</sup> Though these cases typically involve deterrents to people who want to relocate, presumably the right includes protection of freedom not to move as well as freedom to move. In many of its decisions applying the right, the Court has treated the right as principally a right against discrimination in conferral of government benefits based on how long one has lived in a particular location, grounding the right in both the Equal Protection Clause and the Privileges and Immunities Clause.<sup>176</sup> That sort of anti-discrimination protection is not pertinent to the present context; there would be no discrimination based on term of residency. There is some discrimination, based on parental status or parental aspiration, because the reforms target parents and would-be parents. However, those persons are obviously not similarly situated to people who are not parents or seeking parental status, in terms of the basic aim of the reforms, so an equal protection claim would not go very far.

In a few cases, the Court has addressed direct restrictions on movements into a state, but it analyzed them in terms of state violation of the Interstate Commerce Clause or the Privileges and Immunities Clause,<sup>177</sup> and such an analysis also would not be pertinent to the reforms I propose. Lower courts have addressed prohibitions on leaving a state, analyzing such prohibitions under the Due Process Clause, but only in the criminal context, generally upholding such restrictions as conditions of parole.<sup>178</sup> The principle underlying the direct restriction cases might be aptly extended to the present context if a state were to try to induce people to relocate across state lines, but only if there were that interstate dimension. Supreme Court decisions have applied this right, insofar as it is embodied in the federal Constitution, only to restrictions on interstate travel, not to restrictions on freedom of movement within a state.<sup>179</sup> In any state, the

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175. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969), *overruled in part by* *Edelman v. Jordan*, 415 U.S. 651 (1974).

176. *See Saenz v. Roe*, 526 U.S. 489 (1999). *Cf. Zick*, *supra* note 102, at 539 (noting that the Supreme Court has never settled on a definite textual home for the right to travel).

177. *See Edwards v. California*, 314 U.S. 160, 168 (1941) (holding that a state law prohibiting transportation of indigent people into the state of California violates the Commerce Clause); *United States v. Wheeler*, 254 U.S. 281, 298–99 (1920) (holding that deportation of non-citizens from a state potentially violated the Privileges and Immunities Clause, insofar as it denied to non-citizens a freedom to live peaceably in the state that citizens of the state enjoyed); *see also United States v. Guest*, 383 U.S. 745, 759–60 (1966) (affirming that a constitutional right to travel exists, and so a violation of it by state actors could be the subject of a civil rights suit, but without identifying a textual basis for the right).

178. *See, e.g., Pelland v. Rhode Island*, 317 F. Supp. 2d 86 (D.R.I. 2004).

179. *See Saenz*, 526 U.S. at 500 (characterizing the “right to travel” as protecting “[1] the right

residential locations that could be considered categorically unfit for children make up only a tiny fraction of all the locations where people in the state can live, so inducing parents or would-be parents to exit or not to move into such locations could not plausibly be viewed as coercing exit from or deterring entry into the state. Thus, this line of Supreme Court doctrine would not support an objection.

Some lower courts have found in the Federal Constitution a fundamental right to freedom of intrastate travel.<sup>180</sup> Most have addressed either residency requirements at the municipal level or direct restrictions on movement, such as laws against “cruising” or loitering.<sup>181</sup> One federal appellate court decision, though, addressed as an infringement of a right to intrastate travel a city’s excluding persons convicted of drug crimes from residing in, or even entering, certain “drug zones.”<sup>182</sup> The Sixth Circuit Court of Appeals acknowledged that “the City’s interest in enacting the Ordinance—to enhance the quality of life in drug-plagued neighborhoods and to protect the health, safety, and welfare of citizens in those areas—represents a compelling government interest,” but found that the ordinance was not sufficiently narrowly tailored to address the problem of drug crime recidivism, and so the court invalidated the ordinance.<sup>183</sup> Objections to considering neighborhood quality in various parenting contexts could invoke that decision in aid of a demand that laws directing such consideration be subjected to strict scrutiny. Many other circuit courts, though, have declined to recognize constitutional protection of free intrastate travel.<sup>184</sup> The Eighth Circuit, addressing a challenge to a law prohibiting sex offenders from living near schools, found it unnecessary to decide whether there is such a constitutional right, because it determined that the law did not limit anyone’s freedom to travel throughout the state, implicitly treating a prohibition on living in a particular place as not restricting one’s freedom to travel to that place.<sup>185</sup> Thus, there is some support at the feder-

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of a citizen of one State to enter and to leave another State, [(2)] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, [(3)] for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State”); *Green v. Minn. Dep’t Human Servs.*, 755 N.W.2d 713, 725–26 (Minn. 2008) (holding that federal right to travel was not implicated by state law rule that members of Native American tribes who qualified for TANF benefits from a tribe had to accept benefits from the tribe and could not demand referral to program of neighboring county); *Pelland*, 317 F. Supp. 2d at 90. *See also* Zick, *supra* note 102, at 586–88 (explaining that courts have not clearly recognized a right to intrastate travel under the federal constitution). There might be state constitutional analogues that address infringement of a right to travel within a state’s borders, but we need not go there to find constitutional rights implicated by my proposals, as discussed below.

180. *See Doe v. Miller*, 405 F.3d 700, 712–13 (8th Cir. 2005).

181. *Id.*

182. *Johnson v. City of Cincinnati*, 310 F.3d 484, 493 (6th Cir. 2002).

183. *Id.* at 502.

184. *See Miller*, 405 F.3d at 713 (citing cases).

185. *Id.* That determination would appear inconsistent with the Supreme Court’s treatment of laws and policies that deter people from establishing a new residence in a state as infringing the right to

al appellate level for attributing a fundamental constitutional right to freedom of intrastate travel and for finding that laws excluding people from particular places infringe that right, but that support is slim at this point.

A final, and perhaps most relevant, group of lower court decisions under the right to travel umbrella addresses constitutional objections by custodial parents who wish to relocate and who are told they will lose custody to the other parent if they do. That sort of order is analogous to both the zoning proposal and the proposal to consider the relative quality of parents' neighborhoods in post-divorce custody decisions, insofar as they involve a threat by the state to deny custody of a child to a parent based on the parent's choice as to residence. One state supreme court has held that such an order violated a custodial parent's constitutional right to travel, but most state appellate courts have held that the best interests of the child is sufficient justification for burdening the custodial parent's exercise of the right to travel.<sup>186</sup> The prevailing view thus suggests that the reforms I propose could trigger a right to travel challenge, but that the challenge should fail if the state can show that the reforms improve the health and safety of children.

### *b. Takings*

Second, there are cases in which governments need private property for public purposes, such as construction of a highway, and they exert eminent domain power over the property, effectively forcing anyone living on the property to move. Significantly, the public purpose in some cases the Supreme Court has addressed was to renovate a blighted area.<sup>187</sup> Curiously, such cases get addressed solely under the Takings Clause of the Fifth Amendment, which applies to states by means of the Fourteenth Amendment, even though they involve not only a taking of property but also compelling people to leave their homes.<sup>188</sup> Courts generally uphold such state actions, requiring simply that they serve a genuine public purpose, rather than merely providing a benefit to other private parties, such as developers.<sup>189</sup> Eliminating blight is an accepted public purpose.<sup>190</sup> This

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interstate travel; the Court has not rejected right to travel claims in such cases on the grounds that denying benefits to new residents would not preclude them from traveling to the state. For discussion of other federal and state court decisions relating to restrictions on sex offenders, see *Zick*, *supra* note 102, at 572–76.

186. See, e.g., *Baxendale v. Raich*, 878 N.E.2d 1252, 1259 (Ind. 2008) (holding that order changing custody to father if mother moves to another state did not violate mother's right to travel because the burden on her relationship with her children was modest and was justified by the children's best interests) (citing similar decisions in other states).

187. See *Kelo v. City of New London*, 545 U.S. 469, 477–78 (2005); *Berman v. Parker*, 348 U.S. 26, 33–34 (1954). Many lower court decisions address such situations as well. See, e.g., *Fulmore v. Charlotte County*, 928 So.2d 1281 (Fla. Dist. Ct. App. 2006).

188. See, e.g., *Kelo*, 545 U.S. at 475.

189. See *id.* at 477–78. The Supreme Court has stated, though, that an incidental benefit to a pri-

might seem inconsistent with the popular belief that property rights are fundamental, but the Constitution specifically addresses taking of property and appears to bestow blanket permission for it, simply conditioning the permission on a requirement of paying the property owners appropriate compensation.<sup>191</sup> In any case, the reforms I propose do not entail the state taking title to property.

In the related area of “regulatory takings,” local governments sometimes deem some buildings uninhabitable and command their evacuation, without intending to take title to the property themselves. Courts have assimilated such cases to the Takings doctrine, treating forced termination of a lease as a taking of a property interest, and they have generally upheld these decisions so long as they “bear a substantial relation to public health, safety, morals, or the general welfare . . . .”<sup>192</sup> These cases present a closer analogy to the proposed zoning reform than do the eminent domain cases; in inducing parents and potential parents to relocate from certain neighborhoods, the state would effectively be partially condemning a neighborhood (rather than just single buildings) and diminishing the market value of properties. My proposal would differ insofar as the evacuation at which they aim is limited to children and their parents, rather than to all persons living in a building. That difference would sufficiently reduce the economic impact on property owners so that no compensation should be owed property owners,<sup>193</sup> and it makes it easier to show a substantial relation to the health and welfare of persons.

### *c. Substantive Due Process*

The closest doctrinal fit for a Fourteenth Amendment challenge to the reforms at issue here, though, would appear to be the substantive due process analysis of land use regulations that limit who can live together in particular localities. The Supreme Court has not established a fundamental right to live where one wishes, but it has on at least one occasion struck

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vate party is permissible. *Id.* at 485–86.

190. See George Lefcoe, *After Kelo, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 TUL. L. REV. 45, 51–66 (2008).

191. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”). Cf. *Goldstein v. Pataki*, 516 F.3d 50, 57 (2d Cir. 2008) (“[T]he power of eminent domain is ‘a fundamental and necessary attribute of sovereignty, superior to all private property rights.’” (quoting *Rosenthal & Rosenthal, Inc. v. N.Y. State Urban Dev. Corp.*, 771 F.2d 44, 45 (2d Cir. 1985) (per curiam))).

192. See, e.g., *Devines v. Maier*, 665 F.2d 138, 145 (7th Cir. 1981); see also Zick, *supra* note 102, at 575–76 (discussing judicial treatment of sex offender exclusion laws that result in some sex offenders having to leave their existing homes as regulatory takings).

193. See Carol Necole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims After Property Transfers*, 36 CONN. L. REV. 7, 18–19, 21–23 (2003) (discussing “noncategorical regulatory taking[s]”).

down a regulation that constrained the types of family relationships that people are permitted to have in a particular residential area.<sup>194</sup> The leading Supreme Court authority in this doctrinal area is the 1977 plurality decision in *Moore v. City of East Cleveland*.<sup>195</sup> In *Moore*, the Court invalidated a local ordinance prohibiting occupancy of a dwelling by persons who did not form a traditional unitary family, when a woman caring for two grandchildren was charged with violating the ordinance because she also had an uncle and cousin of the children living in her house.<sup>196</sup> The plurality noted that whereas due process challenges to land use regulation generally trigger only rational basis review—requiring the state to show simply that the regulation is a rational means of serving a legitimate state interest—when a land use regulation has the affect of interfering with family life, it should apply heightened scrutiny.<sup>197</sup> The plurality then found that the ordinance was not closely related to a compelling state interest, having as its principal aim the relatively unimportant one of avoiding excessive car traffic in a neighborhood.<sup>198</sup>

Lower courts have analyzed under this substantive due process rubric restrictions on where former sex offenders can live, which typically preclude their living near schools and other places where children congregate. These restrictions serve the same broader purpose as my proposals, separating children from unrelated adults that would endanger them by living in the same neighborhoods. Convicted sex offenders have challenged these restrictions, arguing in part that the restrictions affected their family lives, either forcing other family members also to abide by the restrictions or forcing a family to split up into different residences.<sup>199</sup> Courts have generally upheld the restrictions, finding that such restrictions do not infringe a fundamental right and that they serve sufficiently well the legitimate state interest of protecting children from abuse.<sup>200</sup> Lower federal courts have also generally rejected the notion of a constitutional right to be in public

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194. Cf. *Doe v. Miller*, 405 F.3d 700, 714 (8th Cir. 2005) (reaffirming Eighth Circuit's rejection of such a right).

195. 431 U.S. 494 (1977). An infamous Supreme Court decision upholding the forced relocation of Japanese-American citizens during World War II, *Korematsu v. United States*, 323 U.S. 214, 216 (1944), appeared to analyze the relocation as an equal protection matter, rather than substantive due process. The *Korematsu* decision is widely assumed to be repudiated by, and in fact an embarrassment to, the Court. See David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 343 (1994). This is so not because of any conclusion that forced relocation is always unconstitutional, however, but rather because the policy targeted a specific racial group and rested on racist assumptions that the Court failed to recognize.

196. 431 U.S. at 496–97.

197. *Id.* at 498–99.

198. *Id.* at 500.

199. See, e.g., *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005).

200. See *id.* at 710–14.

places,<sup>201</sup> and the constitutionality of quarantine measures is long-established.<sup>202</sup>

An outright ban on children living in unfit communities arguably resembles the zoning ordinance at issue in *Moore* more than the restrictions on individuals in the sex offender, public spaces, and quarantine cases. It would directly aim at, rather than having the incidental effect of, precluding certain family configurations in certain places. A court might therefore apply heightened scrutiny to such a ban. My proposals for reforming domestic relations and child protection law also directly target family life, but they do not amount to an outright ban on any collection of individuals residing together; they simply make an adult's residential location one factor in a decision as to whether she can share her home with a child. A threshold question would therefore be whether simply making a person's location a relevant consideration burdens the right to live with family where one wishes so much as to constitute an infringement of fundamental liberty rights. Courts might well answer that question negatively, but I will assume for the sake of argument that an infringement would be found, thereby forcing the state to show that considering location in decisions about children's family life is necessary to serve a compelling state interest.

In sum, courts have not been especially protective of individuals' desires to live in particular places, so there is no clear basis or especially strong support for an objection based on a supposed constitutional right to live wherever one wants and to do so without the state imposing costs based on the place one chooses.<sup>203</sup> The best doctrinal category for a constitutional challenge to laws imposing a cost on parents or would-be parents because of where they live would be substantive due process, charging that such laws effectively limit the types of families that can live in certain locations. Because the laws impact family life, courts might well apply heightened scrutiny. I consider below, after discussing other plausible rights claims, whether my proposals could survive such scrutiny.

## 2. Parental Rights

An alternative constitutional challenge to both sets of proposals would rest not on a protected right to choose where one lives, but rather on a protected right to be a legal parent or to have custody of a child. The Supreme Court has issued a significant number of decisions relating to both the right of biological parents to be legal parents and the right of legal parents to raise their children as they see fit without government interfe-

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201. See Zick, *supra* note 102, at 604.

202. See *id.* at 586–87.

203. See generally *id.*

rence. Unfortunately, the Court's last word on both of these parenting-related rights was ambiguous, because the most recent decisions in each realm were plurality decisions, without a majority of the Court agreeing on what the controlling constitutional test or principle is. These decisions leave somewhat uncertain exactly when the right is burdened and what test the state must pass for laws burdening the right to be upheld.

*a. Right to Legal Parenthood*

In a series of four decisions addressing claims to legal parenthood by biological fathers who were not married to the mothers of the children at issue, the Supreme Court established as a general rule that such men are to receive constitutional protection of their interest in being legal parents of their offspring if and only if they are fit to parent and have established a relationship with the child or demonstrated a commitment to parenting.<sup>204</sup> There is no reason to suppose the Court would dispense with the fitness condition for constitutional protection with respect to would-be parents other than unwed biological fathers; the Court is unlikely to proclaim that unwed fathers may be excluded from legal parenthood because of unfitness but wed fathers and mothers may not. Thus, under existing doctrine, a state may deny legal parenthood to any biological parent on the grounds that the biological parent is unfit, and the Court has never presumed to dictate how states should define parental fitness. A state might deem living in a horrible place per se unfit to raise a child, and under existing doctrine, this would not even infringe biological parents' constitutional rights with respect to legal parentage. Certainly, simply making residential location a relevant factor in an individualized parentage decision would not infringe those rights.

In a later decision concerning the constitutional rights of unwed fathers, and the Court's most recent decision, *Michael H. v. Gerard D.*,<sup>205</sup> the four Justices supporting the plurality opinion announced that it is not in fact sufficient for receiving constitutional protection of an interest in parenthood that one show biological parenthood and a relationship or commitment. Rather, the plurality said, the Constitution protects the "unitary family," which the plurality suggested would mean a child, the child's mother, and a man who is the mother's husband or who is living with the mother.<sup>206</sup> Under this rule, a biological father would receive no constitutional protection of his interest in being a child's legal father unless he is married to, or at least cohabiting with, the child's mother. Moreover, though rejecting the biology-plus-commitment/relationship test that the

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204. See Dwyer, *supra* note 43, at 813–16.

205. 491 U.S. 110 (1989) (plurality opinion).

206. *Id.* at 123–24.

earlier cases seemed to establish, the plurality gave no indication that it would dispense with the fitness requirement for constitutional protection. As noted above, a finding of unfitness could rest in whole or in part on a person's living in a place that is unsuitable for children.

In sum, only limited categories of adults enjoy any constitutional protection of their desires to be legal parents even if they are fit, none who are unfit enjoy constitutional protection, and a state could treat a wholly unsuitable community environment as a basis for finding unfitness just as it now treats an unsuitable home environment as a basis for finding unfitness. Thus, both when it establishes legal parent-child relationships and when it suspends or terminates existing legal parent-child relationships, the state might be free to deny legal parent status to adults based in part on where the adults live, without being constitutionally compelled to justify its doing so. If, on the other hand, courts were to reject the idea that living in a horrible place makes one an unfit parent, then they would subject denials of legal parent status to constitutional scrutiny in some cases.

#### *b. Control Rights of Legal Parents*

With respect to constitutional rights of people after they become legal parents, and when their remaining legal parents is not at issue, the Court has consistently held that legal parents receive some constitutional protection of their freedom and parenting choices under the Due Process Clause.<sup>207</sup> The Court's decisions, which have principally concerned parental control over children's education, have not made clear how strong parents' child rearing rights are or what constitutional test applies. In cases involving only a substantive due process claim, the Court has appeared to apply rational basis review.<sup>208</sup> In its most parent-protective decision ever, *Wisconsin v. Yoder*,<sup>209</sup> holding that Amish parents must be exempted to some degree from compulsory schooling laws, the parents' claim to control of their children's education rested on a free exercise of religion right as well as a substantive due process right, and the Court intimated that the religious dimension of the parents' desires elevated the level of judicial scrutiny.<sup>210</sup> There would be a religious dimension in the cult compound cases alluded to in the Introduction of this Article, but generally not in the context of communities that are unfit by virtue of violent crimes, drugs,

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207. See *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion) (holding that state court addressing non-parent petition for visitation with a child must accord some deference to the parent's views of the child's interests, and citing earlier Supreme Court decisions on child rearing rights of legal parents).

208. See David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 141-42 (Supp. 2006).

209. 406 U.S. 205 (1972).

210. *Id.* at 215, 233.

and other dysfunctions associated with chronic and pervasive poverty. Whether *Yoder* is still good law and, if so, to what extent it applies to groups other than the Amish are open questions,<sup>211</sup> but I will assume religious enclaves would have a relatively strong constitutional claim against evacuation of children from their communities, potentially triggering some form of heightened judicial review.<sup>212</sup>

In its most recent decision regarding parental control rights, *Troxel v. Granville*,<sup>213</sup> the Court seemed to treat a parental substantive due process right *simpliciter* as a fairly weak right, requiring only that the state accord some presumption or deference to legal parents' views of the child's best interests when a third party demands visitation with a child.<sup>214</sup> The Court did not reject the best-interests test as a basis for overriding parental wishes. In sum, then, Supreme Court doctrine on parental freedom to make child-rearing decisions, which would include deciding where to live with one's child, suggests that parents would receive some constitutional protection for their residential choices, but not especially strong protection.

### 3. State Defense of the Reforms

The review of doctrinal categories above reveals that parents affected by my proposals could mount a constitutional challenge to them, most likely grounded in substantive due process, with the specific rights to live with family members and to have authority over the lives of their legal children having the most promise. They might allege a violation of their children's constitutional rights as well, insofar as children also have important interests in connection with where and with whom they live. All such rights, however, would allow for infringement if the state has sufficient justification for doing so.<sup>215</sup> Some of the rights might trigger only rational basis review, requiring the state to show merely that counting community unfitness against a person could serve a legitimate state interest, and the state could easily meet that burden. The proposals would have the aim and effect of causing some children to live in decent communities rather than neighborhoods that endanger their welfare, and avoiding dangers to children's welfare is clearly a legitimate state interest.

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211. See *Douglas Cnty. v. Anaya*, 694 N.W.2d 601, 605–08 (Neb. 2005) (rejecting the argument that a hybrid constitutional claim asserting both free exercise and parental rights triggers strict scrutiny of state action).

212. Courts are currently divided as to whether parental free exercise cases present a “hybrid rights” situation, within the meaning of dictum in *Employment Division v. Smith*, 494 U.S. 872 (1990), triggering a higher level of scrutiny than applies when individuals assert only a free exercise right. See James G. Dwyer, *The Good, the Bad, and the Ugly of Employment Division v. Smith for Family Law*, 32 *CARDOZO L. REV.* 1781, 1787–88 (2011).

213. 530 U.S. 57 (2000) (plurality opinion).

214. See Meyer, *supra* note 208, at 141–42.

215. See *Saenz v. Roe*, 526 U.S. 489, 499 (1999).

At least one of the many possible rights claims, though, might trigger heightened scrutiny of some sort, perhaps even strict scrutiny, and therefore might require states to make the much stronger showing that its policies are necessary to serve a compelling state interest. Interestingly, the claim most likely to trigger strict scrutiny, given existing doctrine, is not a claim to constitutional protection of one's interest in becoming a parent nor to constitutional protection of one's freedom in making child rearing decisions, but rather a substantive due process claim against the states dictating what kinds of families can live in certain places. Most likely, though, were the courts to address constitutional objections by birth mothers to being deprived of a legal relationship with babies because of where they live, kinds of cases that have simply not before arisen, they would uniformly find somehow that a fundamental constitutional right is at stake and triggers strict scrutiny. Assuming the proposals advanced here would be subjected to strict scrutiny, at least when challenged by some categories of adults—for example, existing parents who are not otherwise unfit and whose rights might be terminated if they do not move and birth mothers who are denied legal parent status because of where they live, we must ask whether they would serve a compelling state interest sufficiently well to satisfy this demanding test, which presumes the law to be constitutionally impermissible.

The compelling interest requirement is easily met. The Supreme Court has consistently treated protection of children's health and safety as a compelling state interest, even in cases where the only interest of children at stake was an interest in education.<sup>216</sup> In the case of unfit communities, not only children's educational interest, but their very survival is at stake.<sup>217</sup>

Courts' resolutions of constitutional challenges to the reform proposals would therefore turn on the fit between the proposals and the aim of safeguarding children's welfare. Specifically, courts would inquire whether the state could effectively pursue some other means of protecting the children without infringing the constitutional rights. With respect to the

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216. See Dwyer, *supra* note 43, at 819 n.258. A number of lower courts have held, in the context of custodial parent relocation, that protecting the welfare of the child, in terms of the child's continuing a relationship with the non-custodial parent, is a compelling state interest sufficient to justify infringing the custodial parent's right to travel. See Linda D. Elrod, *States Differ on Relocation: A Panorama of Expanding Case Law*, FAM. ADVOC., at 8 (Spring 2006). Some state courts have authorized a parent to relocate with a child despite the other parent's objection but not on the basis of a holding that protecting the child's welfare is not a compelling state interest. *Id.*

217. Protecting children would also satisfy the public purpose requirement for takings, if the proposals were viewed as burdening adults' property rights in their existing residence. *Cf.* *Kelo v. City of New London*, 545 U.S. 469, 484–85 (2005) (noting that the Court had treated as public purposes facilitating agriculture and mining, “transforming a blighted area into a ‘well-balanced’ community through redevelopment,” and “breaking up a land oligopoly,” eliminating a “‘significant barrier to entry in the pesticide market’” (citations omitted)).

proposal for declaring communities unfit and prohibiting residence by children in them, the only apparent alternative would be to eliminate unfit communities. Complaining parties might assert that states should be required to eliminate the community dysfunctions that pervade children's lives in the nation's worst neighborhoods, rather than aiming to evacuate children from those places. I considered above such an argument couched just in moral terms, agreed with the argument, and then noted that as a matter of real world politics, the desired outcome is unlikely to happen. Now, though, the question is whether a constitutional lever might be used to force states to achieve this outcome of eliminating the ills associated with chronic and pervasive poverty and to do so fairly expeditiously.

Of course, fear of that constitutional lever might deter states and localities from adopting any of my proposals. However, as noted above, a countervailing constitutional claim, on behalf of children, might be used to force the state's hand. Here I would note that a court might well conclude that it is simply unreasonable to expect a state to pursue this other means of protecting children. Community dysfunction in the worst urban areas arguably runs so deep, and arises to a large extent from private conduct the state cannot completely control, that no amount of money is going to make it functional and suitable for children. Even if it could, that likely could occur only over a long period of time, during which time children would remain in danger, and only by displacing the criminal element to a different location, where the same problem would arise. Eliminating all dysfunctional communities and not creating new ones would probably require taking over the lives of the many dysfunctional people who now live in horrible neighborhoods, to an extent that would infringe their constitutional rights. Thinking realistically about the challenges that such people and places pose, therefore, a court should conclude that the Constitution does not require states to eliminate community unfitness rather than trying to keep children out of communities that are now unfit for them.

Significantly, states are not required to find ways of eliminating blight without moving people out when they condemn areas and declare them unsuitable for any human habitation. And in the analogous context of declaring homes unfit, states now routinely dictate that certain homes must be child-free, because of the adults who live there and the conditions those adults create, and that practice is not deemed constitutionally problematic. This is so even though it would be much more feasible for the state itself to improve the conditions within individual homes so that children may safely live there—for example, by ordering certain adults to stay away and posting a guard to enforce the order, than it would be for the state to transform horrible neighborhoods. If states can remove children from parental custody and even terminate parental rights because parents do not take the necessary steps to ensure that their homes are safe and healthy places, without violating parents' constitutional rights, then they should

also be constitutionally permitted to remove children from parental custody and terminate parental rights if parents refuse to take steps necessary to ensure that they live in a neighborhood that is safe and healthy for their children (i.e., moving). In addition, as noted in Part II, courts in child protection proceedings are increasingly ordering an abusive parent out of the house so that the child can remain, thereby denying that parent both the freedom to live wherever he wishes and custody of his child, for the sake of protecting the child's welfare.

What a court might require the state to do, when it orders evacuation of children from unfit communities or when it threatens to deny legal parent status or custody to someone, is to provide adequate relocation assistance. As to any parents who would be willing to relocate if they had the resources, but who are truly unable to afford to do so, providing relocation assistance is clearly a preferable and perhaps constitutionally mandatory alternative to severing the parents' connection with children. Thus, a potential strategy for forcing states to provide greater funding for relocation programs than they currently do might be to first advance a constitutional claim on behalf of children, challenging state laws that cause them to live in horrible neighborhoods, and then, when the state commands that children may not live in such places, to advance a constitutional claim by parents against the state's effectively forcing them to relocate without providing the necessary assistance for them to do so.

#### *F. Summary*

Adults adversely affected as a result of the legal system considering the quality of the community they live in when determining parentage or custody of a child cannot plausibly object that they are being unfairly punished, that doing so would have an unjustifiable impact on an historically subordinate group or on a community, that doing so would not in fact help children, or that their constitutional rights are being violated. This is true also of zoning the worst residential areas adult-only, because evacuating children from those places does appear the only realistic way of serving the state's compelling aim—and moral and constitutional obligation—to spare children from living in terribly unsafe and unhealthy environments. Adversely affected persons might have a valid complaint against a society and an economic system that tolerates great disparities in wealth and horrible living conditions for some, and that does too little to help people overcome addictions and other personal deficiencies, but that complaint does not warrant forcing the next generation to be subjected to the same horrible living conditions and damaged in the same way that preceding generations were. At most, those adults might have a constitutional right to state assistance in relocating.

## CONCLUSION

Growing up in a dangerous and unhealthy neighborhood is neither inevitable nor excusable for any child, even though the existence of such places might be inevitable in a society like ours. For many, it is difficult to see that the presence of children today in such places is a contingent fact, representing a policy choice on the part of the state. But it is a choice and that choice requires defense, given that children have a presumptive moral and constitutional right against the state placing them into relationships with and the custody of adults who live in such places. The state could do otherwise, and I have proposed reforms by which the state could ensure that children do not grow up in such places. The weakness of the objections to those proposals suggests that the current state of affairs is in fact indefensible.

Implementing the proposed changes to domestic relations and child protection law would not pose significant practical difficulties. When children are already in the child protective system or already the subject of other court proceedings because of a dispute between legal parents, it is a simple matter to add neighborhood quality to the list of factors that inform decision making. It would likely result in more children being placed into families with adults who are not biological parents, and at some point the supply of adoption applicants might be exhausted, but legal decision making for any child always takes into account the available alternatives. In disputes between two parents or between two applicants for adoption, a choice between them taking into account neighborhood quality imposes no additional cost on the state other than some additional evidence taking.

The more difficult component of the reforms is mandating relocations as a condition for parental status and custody. This is in part because of problems inherent in any welfare programs targeting children, such as the moral hazard of creating an incentive to have more children, but the state now has many decades of experience dealing with such problems, and the problems have not led many to conclude that we should simply not give any parents child rearing subsidies. It is also in part because relocating can be arduous for adults and children, especially if their new communities are not entirely welcoming, which is sometimes the case. Policing the exclusion of children could be difficult, because a parent could keep a child hidden away in an apartment to avoid detection, but as a neighborhood becomes near-childless, few parents will want to remain in them anyway and a child's presence will be less likely to go unnoticed by neighbors, who might report violations. Some transplanted teens might seek to return, maintain gang and drug-trade involvement, or bring their behavioral problems to the new location. But policing against return would be little different from the enforcement of curfews that police now do, and any concerns regarding older children will arise only when a neighborhood is first de-

clared unfit, because any relocations later in time should only be of newborns.

Further complexity arises from neighborhood dynamism; governing regulations would need to account for change in community conditions over time, positive or negative, and would need to guard against repeated changes in a neighborhood's status, in order to create some stability. That should be a fairly simple matter. Additionally, there is the concern about disrupting relationships of inter-dependency; some special attention would need to be paid to non-parent adults left behind who have been dependent for care on those who leave and who might now need the state to provide transportation or alternative caregivers. And the power to declare neighborhoods unfit is one susceptible to abuse for reasons of political strategy, personal gain by politicians, and race- or class-based prejudice. Residents would need to have recourse to costless administrative or judicial proceedings to participate in or challenge zoning decisions, but that is generally already true today.

Against these various difficulties and costs, some of which are inherent in relocation and renewal programs that the state already operates, must be weighed the grave dangers that children face in our nation's most dysfunctional communities and the enormous social costs that result from the damage neighborhood dysfunction causes children. To spare children from those dangers and society from those long-term costs, the state and parents should be willing to endure some transitional hardships and the costs of administration and enforcement.

As noted in the Introduction, the ideas and analysis presented here could be extended to communities that are dysfunctional, from the state's perspective, for reasons other than poverty. In the case of religious cults, there would be an additional First Amendment objection to the state's attempts to remove children from the community. Even if a free exercise claim elevated the burden of justification borne by the state, however, its compelling interest in protecting children from an abusive and intellectually oppressive environment would satisfy that burden in places like the Branch Davidian Compound and the Yearning for Zion Ranch.

The ideas and analysis might even be extended to the international context; there might be entire nations or regions within other nations that are unfit for children, because of famine or war, and it might be appropriate to consider whether modern western nations or international governing bodies have some obligation and license to enact policies designed to remove as many children as possible from those places, with or without the support of private citizens or governments in those places. The basic idea is the same: The world over, children reside in certain places because of laws that determine at the time of their birth and thereafter which adults will be their parents and which adults will have custody of them, and the

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governments that enact those laws should be held accountable for the consequences those laws have for children.