RECONCEPTUALIZING FATHERHOOD: THE STAKES INVOLVED IN *NEWDOW*

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I. INTRODUCTION

Last term, in *Elk Grove Unified School District v. Newdow*,[1] the Supreme Court held that a noncustodial father lacked prudential standing[2] to challenge the constitutionality of a policy at his daughter's school requiring the daily recitation of the Pledge of Allegiance, which includes the words "under God."[3] The Supreme Court has described standing doctrine as the result of "more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."[4] The ambiguity of this doctrine has given judges a readily available and manipulable tool for avoiding merit-based decisions, especially in cases that involve prudential standing, as it resembles an "intuition" more so than does constitutional standing.[5]

In this Note, I provide a short summary of the portions of the *Newdow* opinions that address the standing issue. I then argue that decisions such as *Newdow* have "important symbolic significance and both reflect[ ] and contribute[ ] to our cultural understandings of the traditional family roles

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[1] 124 S. Ct. 2301 (2004).

[2] The "standing jurisprudence contains two strands: Article III [or constitutional] standing, which enforces the Constitution's case and controversy requirement and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction." *Id.* at 2308 (internal quotations and citations omitted). Article III standing, but not prudential standing, requires a showing of injury, causation, and redressibility. *Id.* Both Article III and prudential standing are required for a claimant to have his or her claim heard before a federal court. Harvey v. Veneman, 396 F.3d 28, 34 (1st Cir. 2005).

[3] 124 S. Ct. at 2312. Students can choose not to recite the Pledge at all if they have religious objections to doing so, but the school district requires that "[e]ach elementary school class recite the pledge of allegiance to the flag once each day." *Id.* at 2306 (internal quotations omitted).

[4] *Id.* at 2308 (citing Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.C. Cir. 1982) (Bork, J., concurring))) (internal quotations omitted).

[5] *See generally id.* A three-pronged doctrinal framework, however manipulable, does exist for Article III standing. *See supra* note 2. No such structure exists for prudential standing.

of wife-mother, husband-father, and child."[6] Such decisions have significant normative effects as the very act of determining who has access to the legal system expresses a great deal about whose interests and relationships are officially recognized, embraced, and idealized. By denying Newdow prudential standing, the Supreme Court chose not to recognize or value the interests of noncustodial and nonresident fathers in childrearing and thus undermined the parenting role that those fathers play in their children's lives.[7] I explore how the decision reflects a failure to acknowledge that fathers may indeed have important emotional connections with their children and reinforces the general sense that nonresident fathers are "important for their money but for little else."[8] The *Newdow* majority was able to capitalize on this schema, a harmful action in and of itself, to avoid the difficult question of the constitutionality of the words "under God" in the Pledge of Allegiance. Furthermore, I critique the language of rights used to frame this case and suggest alternative theories that may be useful in the project of redefining the family.

II. THE *NEWDOW* DECISIONS

A. Summary of the Facts and Procedural History

In 1954, Congress passed legislation ("the 1954 Act") that officially added the words "under God" to the Pledge of Allegiance ("the Pledge").[9] In implementing the mandate of a California statute requiring patriotic exercises in public schools, the Elk Grove Unified School District ("the School District") chose to require daily recitation of the Pledge for every elemen-

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[6] MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 76 (1995) (making this argument in the context of family law generally).

[7] This is not to say that Newdow himself acted primarily out of love for his daughter; in fact, it seems that Newdow used his daughter to advance his own atheist agenda without considering the emotional impact the lawsuit would have on her. After the dismissal of this case, Newdow brought a second lawsuit in federal court, this time with eight co-plaintiffs who are either custodial parents or children themselves. Associated Press, *Atheist Files Second Suit on "Under God" in Pledge*, N.Y. TIMES, Jan. 6, 2005, at A19. Newdow also has a history of filing lawsuits challenging governmental religious practices, which suggests that his desire for the removal of the words "under God" from the Pledge is part of a larger atheist agenda. *See, e.g.*, Newdow v. Bush, Civil Action No. 04-2208, 2005 U.S. Dist. LEXIS 524 (D.C. Cir. 2005) (suing President George W. Bush among others for an injunction enjoining the President from including prayers in his presidential inauguration in 2005); Newdow v. Bush, 89 Fed. Appx. 624 (9th Cir. 2004) (describing a similar lawsuit involving the 2001 presidential inauguration); Newdow v. Eagen, 309 F. Supp. 2d 29 (D.C. Cir. 2004) (suing the United States, the United States Congress, its chaplains, and several of its administrative officers to challenge the practice of legislative prayer).

[8] Paul R. Amato & Joan G. Gilbreth, *Nonresident Fathers and Children's Well-Being: A Meta-Analysis*, 61 J. MARRIAGE & FAM. 557, 568 (1999).

[9] Act of June 14, 1954, Pub. L. No. 83-396, 68 Stat. 249 (1954) (codified at 36 U.S.C. 172 (1994)).

tary school class.[10] Michael Newdow, an atheist whose daughter was enrolled in the School District, filed a lawsuit under the First Amendment's Establishment and Free Exercise Clauses,[11] seeking both a declaration that the 1954 Act violated the First Amendment and an injunction against the School District's recitation requirement.[12]

A three-judge panel of the Ninth Circuit Court of Appeals unanimously held that Newdow had "[Article III] standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter."[13] On the merits, the Ninth Circuit, with one dissenter, concluded that the 1954 Act and the School District's policy violated the Establishment Clause.[14] After this opinion was entered, Sandra Banning, the child's mother, filed a motion for leave to intervene to challenge Newdow's standing in the case, or alternatively, to dismiss the complaint.[15] By that time, a February 6, 2002, California Superior Court order had granted Banning "sole legal custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of [the child]."[16] The Superior Court, in a September 25, 2002, court order, also enjoined Newdow "from including his daughter as an unnamed party or suing as her 'next friend.'"[17]

Despite these orders, the Ninth Circuit panel, in a second opinion, proceeded on the basis that Newdow had sufficient rights under the new custody decree to retain Article III standing to sue on his own behalf because his "injury in fact"—the interference with his right to direct the religious education of his daughter—was fairly traceable to the School District's pledge policy.[18] The court held that "Ms. Banning may not consent to unconstitutional government action in derogation of Newdow's right to enforce his constitutional interests."[19] After this decision, in a January 9, 2004, order, the California Superior Court declared that Newdow and Banning have joint legal custody of their daughter but that Banning has the final say if the two parents disagree on decisions involving the child's health, education, and welfare.[20]

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[10] Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2306 (2004).

[11] U.S. CONST. amend I.

[12] *Newdow*, 124 S. Ct. at 2306–07.

[13] Newdow v. U.S. Cong., 292 F.3d 597, 602 (9th Cir. 2002) [hereinafter *Newdow I*].

[14] *Id.* at 612.

[15] *Newdow*, 124 S. Ct. at 2307.

[16] Newdow v. U.S. Cong., 313 F.3d 500, 502 (9th Cir. 2002) [hereinafter *Newdow II*] (alteration in original).

[17] *Newdow*, 124 S. Ct. at 2307. Federal Rule of Civil Procedure 17(c) provides that an infant may sue by a next friend or a guardian ad litem. *See generally* 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1572 (2d ed. 1990) (defining "next friend" as one who is "empowered to bring suit on behalf of an infant").

[18] *Newdow II*, 313 F.3d at 503–04; *Newdow I*, 292 F.3d at 605.

[19] *Newdow II*, 313 F.3d at 505.

[20] *Newdow*, 124 S. Ct. at 2310.

B. The Newdow *Supreme Court Majority Opinion*

When Newdow appealed to the Supreme Court, prudential standing was discussed for the first time. Justice Stevens, writing for a five-person majority,[21] held that Newdow lacked prudential standing,[22] "which embodies judicially self-imposed limits on the exercise of federal jurisdiction,"[23] and therefore reversed the Ninth Circuit decision.[24] At no point did the majority deny Newdow Article III standing. The Court reasoned that because the issue of standing was inextricably intertwined with family law rights that were in dispute at the time of the lawsuit, the Supreme Court should not interfere, but should defer to the state courts.[25]

In claiming that he had standing, Newdow argued that he had the right to sue on his own behalf as a parent because of his right to expose his daughter to atheistic beliefs free from governmental interference.[26] Newdow's argument failed because the Supreme Court found that his rights could not be viewed in isolation; the majority took into account Banning's rights as a parent, "the interests of a young child who finds herself at the center of a highly public debate,"[27] and the fact that Newdow's interests and those of his daughter may not have been aligned.[28] The Supreme Court interpreted the California state law concepts of "family privacy," "minimum state intervention," and "parental autonomy" to bestow upon Newdow only the right to discuss religion with his child and impart to the child his own religious perspective, and not the "right to dictate to others what they may and may not say to his child respecting religion."[29] The majority reasoned that a next friend could exercise the latter right, but the California Superior Court had deprived Newdow of that designation in the September 25, 2002 court order.[30]

C. The Newdow *Concurring Opinion*

In a concurring opinion, Chief Justice Rehnquist, joined by Justice Thomas as to the standing issue only, and by Justice O'Connor, deferred to the Ninth Circuit's interpretation of California law on the issue of standing,[31] following the Court's customary practice in handling issues of state

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[21] The majority consisted of Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer.
[22] *Newdow*, 124 S. Ct. at 2312.
[23] *Id*. at 2308 (internal quotations omitted).
[24] *Id*. at 2312.
[25] *Id.*
[26] *Id.* at 2310.
[27] *Id*.
[28] *Id.* at 2310–11.
[29] *Id.* at 2311.
[30] *Id.* at 2312.
[31] *Id*. at 2315.

law.[32] In their view, Newdow did in fact have standing, but on the merits each would have held that the Elk Grove School District's policy did not violate the Establishment Clause.[33]

The concurring Justices identified the source of Newdow's standing as his relationship with his daughter and framed Newdow's argument as centered around a conflict between his and the state's preferences for religious influences on his daughter.[34] If the issue were solely between Newdow and Banning, Banning's preference would trump Newdow's under the California Superior Court order,[35] however, the concurrence determined that "Banning's 'veto power' does not override [Newdow's] right to challenge the pledge ceremony."[36]

III. Analysis

A. Entrenching Parental Stereotypes

The Court's dismissal of Newdow's claims contributes to, and perhaps relies on, the societal assumption that noncustodial fathers are uninvolved in their children's lives. Professor Jane Jenson's theory of the citizenship regime and its effect on claims-making is a useful tool for analyzing the *Newdow* decision. A citizenship regime is the set of institutional arrangements, rules, and policy-guiding norms that influence how issues are defined by states and citizens, what claims may be legitimately made, and by whom such claims may be made.[37] Thus, "[a] citizenship regime encodes within it a paradigmatic representation of identities. . . . It also encodes representations of the proper and legitimate social relations among and within these categories. . . . These representations of identities and social relations are the foundation for claims-making."[38] The *Newdow* opinion perpetuated the social identity of noncustodial fathers as only minimally involved in their children's lives. This stereotype in turn affects how noncustodial fathers' claims will be viewed by others, and courts in particular. This citizenship regime prevented Newdow from being able to make a claim on behalf of his daughter and in turn maintained this stereotype.[39]

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[32] *Id.* at 2311 (stating that "[o]ur custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the state is located" (citation omitted)).

[33] *Id.* at 2312, 2321 (O'Connor, J., concurring); 2327 (Thomas, J., concurring).

[34] *Id.* at 2315.

[35] *Id.* at 2310 n.6.

[36] *Id.* at 2315–16.

[37] Jane Jenson & Ctr. for European Studies, Harvard Univ., A Third Wave? Women's Movements and State Institutions 7–8 (Apr. 30–May 2, 1998) (unpublished manuscript, on file with author).

[38] *Id.* at 8.

[39] Supreme Court decisions contributing to this citizenship regime have reified the gender roles of fathers as less connected to their children and thus less suited for the work of caring for their natural children than mothers. For example, the Supreme Court has stated:

The social identity of the biological mother, on the other hand, supports mothers' interests in relationships with their children. Given the validity of their interests, mothers' claims on behalf of their children will also be seen as more legitimate than similar claims brought by fathers. It is commonly assumed that "mothers are more unique, central and competent in child care and promoting the well-being of children" than are fathers.[40] Thus, even noncustodial mothers would likely be treated more favorably than noncustodial fathers in cases like *Newdow*.[41] If Newdow had been the child's mother, perhaps the Supreme Court would not have used the noncustodial status of the parent to deny standing to avoid a merit-based decision.[42] In this way, ingrained social identities can lead courts to import

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> A mother is far less likely to ignore the child she has carried in her womb than is the natural father, who may not even be aware of its existence. . . . "The putative father often goes his way unconscious of the birth of the child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother."

Miller v. Albright, 523 U.S. 420, 427–28 (1998) (quoting Parham v. Hughes, 441 U.S. 347, 355 (1979); Miller v. Christopher, 96 F.3d 1467, 1472 (1996) (circuit court opinion in the case); *see also* Nguyen v. I.N.S., 208 F.3d 528 (2000) (holding constitutional a statute making it more difficult for male citizens to confer citizenship on their offspring born out of wedlock and outside of the United States than for female citizens to do so even where in this case the natural mother abandoned child at birth in 1969, andthe child had no subsequent contact with his biological mother and was raised by his father in Texas); Lehr v. Robertson, 463 U.S. 248, 261–62 (1983) (stating that "the mere existence of a biological link [between a natural father and his child] does not merit equivalent constitutional protection" and that the biological link only presents the opportunity for a relationship); Michael H. v. Gerald D., 491 U.S. 110, 125 (1989) (denying natural father the power to assert parental rights over a child born "into" the natural mother's existing marriage with another man); FINEMAN, *supra* note 6, at 81 (stating that "[a] father's rights to his biological children arose from and were based upon the marital tie with the child's mother, and the significant affectional and familial legal tie for men was thus construed as marriage").

[40] E. Mavis Hetherington & Margaret M. Stanley-Hagan, *The Effects of Divorce on Fathers and Their Children*, *in* THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 191, 203 (Michael E. Lamb ed., 3d ed. 1997) (citation omitted) (also calling this phenomenon "the pervasive motherhood mystique"); *see also* FINEMAN, *supra* note 6, at 81 (noting a "biological connection of Mother and child—a perceived 'natural' connection that came to be mirrored in legal doctrine, and that the law recognized no such 'natural' tie governing rights of . . . fathers to their biological children").

[41] "[S]ociety's higher standard of parenting for mothers may place more pressure on nonresident mothers than on nonresident fathers to maintain contact with their children." Susan D. Stewart, *Nonresident Mothers' and Fathers' Social Contact With Children*, 61 J. MARRIAGE & FAM. 894, 895–96 (1999) (citation omitted); *see also* Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 929 (2005) (describing how society sees a nonresident mother as a mother, while the nonresident father is viewed as less of a father).

[42] Compare the Supreme Court's stance with that of the Seventh Circuit in *Navin v. Park Ridge School District 64*, 270 F.3d 1147 (7th Cir. 2001). The Seventh Circuit held that a noncustodial parent, in that case a father, does not automatically lack standing to challenge an action affecting his child. *Id.* A possible explanation for the different result in the *Newdow* decision and the Seventh Circuit's decision in *Navin* may be that the *Navin* court truly believed that the child was being harmed by the school's failure to provide adequately skilled tutors for the father's dyslexic son. *See id.* at 1148.

gender bias into the law through seemingly neutral legal requirements such as standing.

B. Language of Rights: Carework Exposes Illusions of Liberal Individualism

Besides further entrenching inequitable gender norms, standing jurisprudence as construed in *Newdow* reflects the entrenchment of rights-based liberal individualism, which limits the creation of new norms that would take seriously the value of human relationships. One common critique of liberal "rights-centred society [is that it] becomes little more than an aggregate of self-interested individuals who band together to facilitate the pursuit of their own uncoordinated and independent life projects—a relation of strategic convenience and opportunism rather than mutual commitment and support."[43]

A focus on parenting rights in childcare thus will predictably harm the children involved. During formative years, children are dependent on many others to care for them:

> If we ask ourselves what actually enables people to be autonomous, the answer is not isolation, but relationships—with parents, teachers, friends, loved ones—that provide the support and guidance necessary for the development and experience of autonomy . . . . We see that relatedness is not, as our tradition teaches, the antithesis of autonomy, but a literal precondition of autonomy, and interdependence a constant component of autonomy.[44]

In other words, the liberal individual's "autonomy" is not threatened by but instead thrives on such connectedness. Care, relationships, and support from others are crucial to a child's ability to develop a sense of self and to become autonomous.[45] The conception of autonomy reflected in the standing jurisprudence as construed in *Newdow* fails to account for such enriching relationships when they are not between a mother and her child.

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[43] Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 728 (1998) (quoting ALLAN C. HUTCHINSON, WAITING FOR CORAF: A CRITIQUE OF LAW AND RIGHTS 90 (1995)).

[44] Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 12 (1989). Even adults are not wholly separate and independent from others; modern individuals are constantly dependent on the services of others. JOAN C. TRONTO, MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE 162 (1993) (stating that "it is a part of the human condition that our autonomy occurs only after a long period of dependence, and that in many regards, we remain dependent upon others throughout our lives"). These services are predominantly provided by women, immigrants, and the poor, both in the home and in the public sphere. *See* NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION 52 (1997).

[45] *See* TRONTO, *supra* note 44, at 162.

Even focusing on fathers' rights misses the point.[46] If standing jurisprudence portrayed autonomy as involving human interdependence, the Supreme Court may not have found that noncustodial parents lack standing to challenge laws and practices that affect their children. In this way, the rhetoric of rights in *Newdow* diminished the "progressive potential of shared parenting."[47]

IV. Feminist Hesitations Concerning "Fathers' Rights"

Shaped largely by Newdow himself, much of the popular dialogue in the media on the standing issue in *Newdow* is dominated by the discourse of parental rights, and fathers' rights in particular.[48] Many feminists are wary of the language of fathers' rights because they argue that post-divorce fathers are seeking the patriarchal privilege they have lost.[49] Some "father's rights groups . . . openly declare radical feminists to be the enemy . . . ."[50]

Despite the validity of these concerns, feminists should still consider arguments that are sympathetic to noncustodial fathers. In fact, these ideas will be invaluable in informing new conceptions of fatherhood. Reacting unduly harshly to the fathers' rights movement only serves to reinforce stereotypes of who is able to and should "mother." Identity politics, as described by Professor Wendy Brown,[51] pit women against men, mothers against fathers, and oppressed against the oppressors, without radically transforming systems of domination and without destabilizing the subjects of the self-sacrificing mother and the patriarchal father that are produced by such systems. Thus, feminists must be careful not to define their positions solely based on opposition to dominating "others"—such as anti-

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[46] "The rhetoric of fathers' rights and fathers' responsibilities reflects the tendency to reduce family policy to mere discussions of individual rights." Fineman, *supra* note 6, at 201.

[47] Carol Smart, *Power and the Politics of Child Custody*, *in* Child Custody and the Politics of Gender 1, 17 (Carol Smart & Selma Sevenhuijsen eds., 1989).

[48] *E.g.*, Leslie Eaton, *Lawyer Who Fought Pledge Assails Courts on Custody*, N.Y. Times, Oct. 23, 2004, at B2, *available at* http://www.find-a-lawyer-online.com/lawyer_who_fought_pledge_assails_courts_on_bi.aspx (quoting Newdow discussing parental rights); Wendy McElroy, *Parental Rights and the Pledge* (Apr. 14, 2004), *available at* http://www.foxnews.com/story/0,2933,117019,00.html.

[49] *See, e.g.*, Deena Mandell, "Deadbeat Dads": Subjectivity and Social Construction 19 (2002) ("Arendell (1995) found that 'divorce unseated men, especially noncustodial fathers, from their positions of privilege in the family' . . . [and] that men's responses to divorce serve to distance them from feelings that are counter to the 'masculinist' ethic of competence, strength, and control."); Fineman, *supra* note 6, at 202 ("This strain of fathers'-rights rhetoric assumes that mothers can 'win' rights only at the expense of others—fathers or society at large.").

[50] Anna Gavanas, *Domesticating Masculinity and Masculinizing Domesticity in Contemporary U.S. Fatherhood Politics*, 11 Soc. Pol. 247, 250 (2004). "The fathers' rights movement extends considerably further the argument that fathers experience powerlessness. Victor and Winkler's analysis of this movement (1977) blames the women's movement for emasculating men in their role as fathers . . . ." Mandell, *supra* note 49, at 19–20.

[51] Wendy Brown, States of Injury: Power and Freedom in Late Modernity 69 (1995) (describing identity politics as "reiterat[ing] impotence [and] a substitute for action, for power, for self-affirmation that reinscribes incapacity, powerlessness, and rejection").

feminist fathers' rights groups—because such resistance does not challenge the merits of essentialist cultural notions about who can provide care and therefore fails to encourage redefinitions of gender roles. In addition, further entrenchment of the clash between post-divorce mothers and fathers fails to bring to the forefront the psychological and emotional needs of children in the post-divorce family.

The stakes involved in entertaining arguments that are sympathetic to fathers are serious. If we are to create a society in which all parents, not just biological mothers, may care for children, then there are substantial risks in opposing arguments supportive of noncustodial fathers' role in the family.

> [T]here is a critical need to value the mothering work of those who are not biological mothers and therefore not traditionally supported in the role. . . . [I]f we do not expand the definition to include nontraditional mothers—men, lesbians, poor women, and women of color—we deny ourselves the chance to benefit from the mothering they can provide our children. . . . [I]f as a culture, we believe in the value of every child, then an inclusive definition of mothering is imperative in reaching that goal.[52]

Additionally, children's development is affected by those who are deemed to be appropriate and meaningful caregivers. This is particularly true when children must adjust to changes caused by their parents' divorce or separation. There is a consensus among scholars of fathering that the active involvement of fathers leads to positive outcomes in the lives of children post-divorce, including better adjustment to the divorce itself, better academic performance, and fewer behavior and other developmental problems,[53] at least in low-conflict divorces.[54] The *Newdow* decision undermines the ability of noncustodial parents, in particular fathers, to play this role in child development. The denial of standing by the Supreme Court sends a powerful social norm-setting message that noncustodial fathers are not suitable to "mother," to decide what is best for their children, and to make constitutional claims on their children's behalf. Such normative

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[52] Adrien Katherine Wing & Laura Weselmann, *Transcending Traditional Notions of Mothering: The Need for Critical Race Feminist Praxis*, 3 J. GENDER RACE & JUST. 257, 258–59 (1999).

[53] Marsha Kline Pruett et al., *Family and Legal Indicators of Child Adjustment to Divorce Among Families with Young Children*, 17 J. FAM. PSYCHOL. 169, 170–71 (2003); Maldonado, *supra* note 41, at 949–61 (describing in detail the educational, societal, emotional, and psychological benefits of post-divorce paternal involvement).

[54] Hetherington & Stanley-Hagan, *supra* note 40, at 194 (stating that "requiring hostile acrimonious parents to share legal custody increases conflict . . . and maintains dysfunctional family processes, which in turn leads to problems in child adjustment") (citations omitted); Maldonado, *supra* note 41, at 950 (stating that "[r]esearchers have cautioned . . . that when parents do not cooperate with each other and visitation takes place in a high-conflict setting the benefits to the child can be minimal or nonexistent") (footnote omitted).

statements have broad-reaching effects because in 2002 twenty-four million American children lived without their biological fathers.[55] More than half of children born in 1992 "will spend all or part of their childhood apart from one parent, usually their fathers."[56] With so many children growing up in homes without fathers, messages and policies that discourage the involvement of noncustodial fathers in the upbringing of their children will have a substantial social impact.

Further, the inflexibility of gender roles has enormous implications for gender equality. Women, regardless of whether they are active in the job market, bear the burdens of what feminists have termed "reproductive labor," which includes buying household goods, cooking and serving meals, washing and repairing garments, maintaining household appliances, and providing care and emotional support for both children and adults.[57] The invisibility of this labor allows for the work to remain uncompensated or undercompensated.[58] Marxist feminists have pointed to this overwhelming gender imbalance in the performance of reproductive labor as central to gender inequality.[59] Thus, all fathers, including noncustodial fathers, have an important role to play in the restructuring of social norms to shift these burdens of reproduction.[60] Possible new allies in this effort to re-envision the family include strands of the fatherhood movement that embrace feminist agendas.[61]

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[55] National Fatherhood Initiative, *Father Facts: Top Ten Father Facts*, Fatherhood Online, *at* http://www.fatherhood.org/fatherfacts_t10.asp (last visited Mar. 25, 2005). The National Center on Fathers and Families believes that "children need loving, nurturing families; that families need support in providing nurturance; and that a critical component of support includes increasing the ability of fathers, mothers, and other adults to contribute to children's social, emotional, and cognitive development." NAT'L CTR. ON FATHERS AND FAMILIES, STRENGTHENING THE ROLE OF FATHERS IN FAMILIES: REPORT ON A FEDERAL CONFERENCE, at IV (1996), *available at* http://www.ncoff.gse.upenn.edu/specialrpts/fedconf.pdf (last visited Mar. 20, 2005) [hereinafter STRENGTHENING FATHERS' ROLE].

[56] STRENGTHENING FATHERS' ROLE, *supra* note 55, at 1.

[57] Evelyn Nakano Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, 18 SIGNS 1 (1992); *see also* FRASER, *supra* note 44, at 47 ("[E]quality [of leisure time] is highly pressing now, after the family wage, when many women, but only a few men, do both paid work and unpaid primary carework and when women suffer disproportionately from 'time poverty.'") (footnote omitted).

[58] *See* FINEMAN, *supra* note 6, at 26.

[59] *See* Glenn, *supra* note 57, at 2.

[60] "As women's participation in the labor market increases throughout the industrialized world and welfare states seek to reconcile work and care, fathers' involvement in care has become a hot topic." Gavanas, *supra* note 50, at 249; *see also id.* at 247 (describing fathers' involvement in childcare as a feminist issue); PAUL PIERSON, THE NEW POLITICS OF THE WELFARE STATE 94–96 (1994) (describing how women's increased participation in the workforce has strained "welfare states designed for a traditional 'male-breadwinner' household structure of intact . . . families").

[61] *See, e.g.*, Maldonado, *supra* note 41.

V. New Paradigms: Relational Rights and the Ethic of Care

A language of rights based on the ideal of the unencumbered and independent individual is not conducive to the resolution of highly divisive, emotionally charged, and at times hostile situations in the family law context. As argued above, the use of fathers' rights rhetoric ignores opportunities to discuss family policy taking into account the interests of children's post-divorce development and concerns of gender equity. What discourses could be helpful? Two alternative frameworks to a limited language of rights are Martha Minow's "relational rights" theory and the "ethic of care," developed by scholars such as Carol Gilligan and Joan Tronto.

Under her theory of relational rights, Professor Minow situates rights within human relationships.[62] The assignment and denial of rights shape patterns of human interaction as "rights are interdependent and mutually defining."[63] The Supreme Court's finding that Newdow lacked prudential standing reinforced a pattern of disengagement of noncustodial fathers from their children's lives. Exposing the agency and the sociopolitical possibilities that accompany the assignment and denial of rights reveals the "human responsibility for the patterns of relationships promoted or hindered by [the interpretation of rights]."[64] It is not self-evident that noncustodial fathers lack prudential standing to challenge governmental action affecting their children; there is no legal authority that demands such an interpretation.[65] If the majority had in mind the notion of "relational rights" and the accompanying "responsibility for patterns of relationships," perhaps the Court would not have so readily dismissed the case based upon lack of standing.

In fact, the majority's reasoning is counterfactual. Newdow and Banning shared "joint legal custody" of their daughter and were "required to consult with each other on substantial decisions relating to the health, education and welfare of the minor child."[66] Some scholars have argued that joint legal custody is symbolically important as it signals to fathers that their parental role is valued and respected.[67] The Court undermined this norm-changing message by creating a distinction between Banning as the custodial parent and Newdow as the noncustodial parent where no such legal distinction existed.[68] Through this move, it is clear that courts do have

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[62] Martha Minow, Making All the Difference: Inclusion, Exclusion and American Law 277 (1990).

[63] *Id.*

[64] *Id.* at 309.

[65] *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2312–16 (2004) (Rehnquist, J., dissenting).

[66] *Id.* at 2310 n.6 (quoting the California Superior Court's Jan. 9, 2004 custody order).

[67] *See, e.g.*, Maldonado, *supra* note 41, at 990. California was the first state to adopt a joint custody statute. *Id.* at 985.

[68] Despite the allocation of rights under the custody orders, Newdow retained a parental interest in matters relating to his daughter's education, and as previously stated, if the School District's actions were unconstitutional, Banning had no right to insist that those actions continue. *See* Navin v. Park Ridge Sch. Dist. 64, 270 F.3d 1147, 1149 (7th Cir. 2001) (stating,

agency in shaping human relationships and thus may be held responsible for the resulting gender and family norms and patterns.

Feminists like Carol Gilligan and Joan Tronto offer the "ethic of care" as an alternative to a "morality of rights."[69] The morality of rights is based upon fairness as defined by individual rights and the equal application of rules,[70] whereas the care ethic places priority on "sustaining human relationships,"[71] the value of peace,[72] conflict resolution,[73] and responsibility towards others.[74] The care ethic was developed by "[f]eminist scholars [who] have turned to the experience of women, who traditionally have been associated with care-giving and relationship building in family and community, to describe an ethic directed toward reducing alienation."[75] Neither Gilligan nor Tronto argues that women and men are by nature different in their moral understandings.[76] Instead, they argue that the experiences of women (or experiences traditionally associated with women, such as child-rearing) and female narratives shed light on a new conception of morality associated with care.[77]

In *Newdow*, both the majority and Newdow framed their arguments using a morality of rights. The majority described the issue as being whether "Newdow has a right to dictate to others what they may and may not say

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where a similar custody order existed, that "[n]othing in the divorce decree strips [the non-custodial father] of his parental interest in these [educational] matters, so the hearing officer erred in dismissing the proceeding solely on account of the divorce, and the district court erred in dismissing the ensuing suit for want of standing"). While it is entirely possible that Banning's interests would have trumped Newdow's in the end, denying Newdow standing at the outset undermines his involvement with and interests in his daughter's education and her life more broadly.

[69] CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 19 (1982).

[70] *Id.*

[71] TRONTO, *supra* note 44, at 1.

[72] *See* GILLIGAN, *supra* note 69, at 65; TRONTO, *supra* note 44, at 1.

[73] *See, e.g.*, GILLIGAN, *supra* note 69, at 38 (presenting the care ethic through psychological studies of moral development and describing a young girl's understanding of conflicting responsibilities: "seeking the solution that would be most inclusive of everyone's needs, she strives to resolve the dilemma in a way that 'will make everybody happier.'").

[74] *See generally id.* at 16–23, 64–105.

[75] Mary M. Brabeck, *Introduction*, *in* WHO CARES?: THEORY, RESEARCH, AND EDUCATIONAL IMPLICATIONS OF THE ETHIC OF CARE, at xi, xiii (Mary M. Brabeck ed., 1989).

[76] GILLIGAN, *supra* note 69, at 2.

> The different voice I describe is characterized not by gender but theme. Its association with women is an empirical observation, and it is primarily through women's voices that I trace its development. But this association is not absolute, and the contrasts between male and female voices are presented here to highlight a distinction between two modes of thought and to focus a problem of interpretation rather than to represent a generalization about either sex.

Id.; *see also* TRONTO, *supra* note 44, at 1–3 (arguing against the use of "women's morality" and instead for the care ethic).

[77] *See* TRONTO, *supra* note 44, at 3–4.

to his child respecting religion."[78] Newdow argued that he "retains an unrestricted right to inculcate in his daughter—free from governmental interference—the atheistic beliefs he finds persuasive."[79] These rights arguments fail to take into account the relationships between noncustodial parents and custodial parents in the upbringing of their children and the relationships between parents and their children. By denying prudential standing to noncustodial parents like Newdow, the Court provides little incentive for the collaborative resolution of familial conflict. In fact, allowing the custodial parent to trump the decisions of the noncustodial parent to challenge laws and practices affecting their children seemingly exacerbates the adversarial nature of family law.[80] Maintaining healthy familial relationships and conflict resolution, which proponents of the care ethic prioritize, appears not to be a priority for the Court.

Had the Justices of the *Newdow* majority considered the ethic of care and the accompanying values of conflict resolution and sustaining relationships, perhaps they would have found that all parents, regardless of whether they have custody of the child, have standing to challenge government actions affecting their children. Again, it is telling that Newdow and Banning have joint custody of their daughter; the Court's holding was therefore not necessitated by any distinction in custodial status.[81]

Further, the issues involved in the handling of this case implicate questions about the wisdom and workings of the current custody system. Such concerns, in fact, have a historical basis. In 1996, the U.S. Commission on Child and Family Welfare recommended the abandonment of the traditional notion of custody.[82] Instead of establishing one parent as the "winner" of the custody battle and another as the "loser," the Commission recommended a process of creating parenting plans by which parents collaboratively make decisions about the child's place of residence, the amount of time to be spent with each parent, and the division of parental responsibilities.[83] Proponents of the care ethic may also support rejecting the "winner-takes-all" system of custody battles.

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[78] Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2311 (2004).

[79] *Id.* at 2310 (internal quotations and citation omitted).

[80] Brief Amicus Curiae of United Fathers of America, and Alliance for Non-Custodial Parents Rights in Support of Respondent 16, Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004) (No. 02-1624), *available at* http://washingtonpost.findlaw.com/supreme_court/briefs/02-1624/02-1624.mer.ami.unitedfathers.pdf (last visited Mar. 20, 2004) (describing how denying Newdow standing will "infect" the "already broken" family court system).

[81] *See supra* note 68.

[82] U.S. Comm'n on Child and Family Welfare, Parenting Our Children: In the Best Interest of the Nation (1996), *available at* http://members.aol.com/asherah/majority.htm (last visited Mar. 20, 2005) [hereinafter Parenting Our Children]; *see also* Amato and Gilbreth, *supra* note 8, at 569.

[83] Parenting Our Children, *supra* note 82.

VI. Conclusion

To redefine the rigid traditional roles of the family, federal courts, through standing jurisprudence, should recognize the relationships between parents and children regardless of custodial status. We must be wary of the cumulative effects of decisions that further entrench stereotypes about social roles, particularly given the high stakes of child development and gender equity involved in a decision like *Newdow*. The combined result of such decisions is significant in the development of social citizenship; seen in this way, seemingly insignificant decisions, like the denial of standing to one noncustodial father, play an incredibly powerful role in furthering inequitable, stereotypical notions of who should care for children. Entrenchment of these ideas is evidenced by the fact that the denial of prudential standing to Newdow as a noncustodial parent has not been highly debated or contested in the public domain.[84]

The theory of relational rights and the ethic of care are helpful in our endeavors to reimagine the family. Of course, providing Newdow prudential standing alone will not radically alter the landscape of fatherhood nor lead to the societal and cultural changes necessary to relax gender roles. In addition to contesting these incremental entrenchments, proponents of social change and gender equity must take on the difficult task of changing social and cultural norms by bringing into public debate alternative visions and values. There must be a "transformation of the whole notion of 'father,' moving toward a redefinition that is neither hierarchical nor patriarchal"[85] in every sphere, not just the legal sphere.

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[84] For examples of articles that gloss over the issue of the denial of standing to noncustodial parents in favor of focusing on other aspects of the case, see David S. Savage, *Justices Keep "God" in Pledge of Allegiance*, L.A. Times, June 15, 2004, at A1; Charles Lane, *Courting O'Connor; Why the Chief Justice Isn't the Chief Justice*, Wash. Post, July 4, 2004, at W10; Matt Crenson, *Schoolhouse Is a Boon for Lawyers; Religious, Social Policy Disputes Increasingly Play Out in Nation's Classrooms*, Wash. Post, Feb. 6, 2005, at A05.

[85] Fineman, *supra* note 6, at 202.