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Annette R. Appell

Washington University School of Law

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Gendered Due Process of Juvenile Justice

Annette R. Appell*

A. CONSTITUTIONAL JUVENILE LAW

The United States was founded on (incomplete)¹ democratic notions that adults have the ability and authority to determine the course of their lives, to define their own values, to choose their religions, their politicians, and to govern themselves. This attribution of power to adults—initially white men, later African-American men,² and finally women³—affords adults the right to create and follow their own values and belief systems, and to inculcate their children and wards in the parents' fundamental beliefs regarding religion, morality, cultural practices, values, and language.⁴ This Essay illustrates how the United States Constitution has developed a gendered jurisprudence for children and families that affords children a higher level of due process in juvenile courts than is afforded to their parents. Specifically, parent respondents in juvenile child protection matters are disproportionately mothers, while children on the juvenile delinquency docket are disproportionately males.

United States constitutional law constructs the family as a fundamental social and political unit that is both public and private, a

* I want to thank Kathleen DuBois, an attorney who represents parents in child welfare and other matters in juvenile and family court in St. Louis County, and who has worked with me and our Washington University law and social work students on behalf of mothers, fathers and other kin in child welfare matters. Ms. DuBois and I spent many hours in courts, client meetings, and student meetings. I and my students learned a great deal from her. I am also thankful to the Law School's support of my research.

1. By "incomplete" I refer to the institution of slavery as well as the disenfranchisement of women.

2. The Civil War Amendments brought legal freedom to slaves. U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

3. U.S. CONST. amend. XIX.

4. *E.g.*, *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). These opinions defer to an adult guardian, parent, or teacher to provide education, protection, and nurture to children.

social and legal institution that serves a variety of political and social objectives for the nation, families, and children, such as caring for and supporting vulnerable subjects—primarily, but not exclusively, children.⁵ In addition, the family provides a service not just in managing the vulnerability of children, but also in creating and maintaining a robust democracy, which supports a variety of values, cultures, and beliefs. The family and childhood embody, facilitate, and protect important constitutional rights aimed at preserving individual liberties, such as values related to faith, morality, religion, language, and other cultural practices.⁶ Under this scheme, the Constitution protects these parental liberties until children emancipate and become independent under the law. Until emancipation, the law constructs children as incompetent, dependent, and lacking authority in their own lives;⁷ while most adults are presumptively competent by virtue of their age.⁸

These fundamental liberties are bedrock for a democratic republic that promises individual freedom of conscience and depends on democratically elected leaders to govern. The private family creates and maintains both diverse norms and values, and serves to rein in government and protect individual liberties that are important in a nation founded on freedom of thought and republican democracy.⁹ Over time, the Supreme Court has carved out and shaped American constitutional liberties and enhanced them through the Civil War Amendments that ended legal slavery and enhanced individual freedoms against state power and abuse via the Thirteenth, Fourteenth, and Fifteenth Amendments. These amendments abolished legal slavery;¹⁰ required due process when citizens are faced with deprivations of life, liberty, or property;¹¹ the right (of men) to vote

5. See also *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (describing the privacy of the family and the right of parents to rear their children in the parents' private norms and values).

6. *Id.*

7. The mature minor doctrine affords children more freedom regarding their bodies and health as they age. See, e.g., *Bellotti v. Baird*, 428 U.S. 132 (1976).

8. Annette Ruth Appell, *The Pre-Political Child of Child-Centered Jurisprudence*, 46 HOUS. L. REV. 703, 706 (2009) [hereinafter Appell I].

9. *Id.* at 743.

10. U.S. CONST. amend. XIII.

11. U.S. CONST. amend. XIV.

regardless of their prior status as slaves;¹² and eventually the extension of the franchise to women.¹³

As a result, the modern Constitution constructs adults as legal, moral, and autonomous agents able to govern themselves and the polity, in contrast to children who have few autonomy rights.¹⁴ As such, adults—parents, guardians, and teachers—are responsible for caring for and training the next generation to become democratic citizens who will carry on or create and propagate diverse norms and values in their wards, which help to carry on both their kin's or their own norms. This system balances the needs of the state, even as it hands the government mantle to, while respecting the private norms and values that produce diversity in a liberal democracy. As a result, children serve important roles in producing democracy by absorbing and protecting the private values that our democracy places in families.

Despite the important roles childhood performs in a liberal democracy, children are largely without legal and political authority regarding their families, their choices and the polity.¹⁵ Indeed, the law divests children of authority over their own lives until they are emancipated, generally at age eighteen. Until then, generally¹⁶ they have little legal agency and if they become involved in a legal matter they will likely be represented by guardian ad litem (GAL) or next friend rather than an attorney.¹⁷

12. U.S. CONST. amend. XV (guaranteeing the right to vote regardless of a citizen's "race, color, or previous condition of servitude).

13. U.S. CONST. amend. XIX.

14. Originally, these rights were reserved for White free men. Eventually the system of slavery was legally if not socially and economically, vanquished, via constitutional amendments to emancipate slaves (Thirteenth Amendment), to institute due process of the law (Fourteenth Amendment), to protect the rights of African Americans to vote (Fifteenth Amendment), and women to vote via the Nineteenth Amendment's guarantee of women's franchise in 1920). See U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV; U.S. CONST. amend. XIX.

15. This is down from twenty-one years old. U.S. CONST. amend. XXIV.

16. See Appell I, *supra* note 8 (describing the mature minor doctrine).

17. Generally, the GAL represents the child's "best interests." See Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573, 597 (Summer 2008) [hereinafter Appell II]. See collectively *Santosky v. Kramer*, 455 U.S. 745 (1982); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (identifying school and religion cases that developed the doctrines of parental rights).

The privileges and freedoms the Constitution affords parents (and guardians) to mold children in the parents' and guardians' images and values is foundational to adult civil rights and liberal democracy. In addition, adults serve to mitigate children's vulnerability while also rearing them in the family's culture and values. This private labor helps to maintain pluralism in the polity. While the Constitution enumerates a number of rights and freedoms, the Supreme Court has identified rights the Constitution does not directly articulate or name, but which are essential to preserve the freedom promised in the Constitution. For this purpose, the Supreme Court established a theory of substantive due process to carve out, identify and protect fundamental liberties that are not enumerated but which undergird the liberal democracy of the Constitution. These cases established that adults—usually parents or guardians—have the right (and duty) to rear children privately in families and according to the culture and values of the parents or parent-like guardians. These substantive due process rights not only serve the parents, but also the democratic state, which depends on citizens with independent thought and values who can check the hegemony of the state.

Thus, children are both burden and bounty for adults: burden in that adults must mediate children's vulnerability through care, protection, education, support, and training for liberal adulthood; and bounty because parents have freedom to inculcate the child with norms, values, customs, and identity—and through that inculcation to carry forward parents' culture, values, rituals, and beliefs.¹⁸ This adult freedom to determine one's own values, goals, beliefs, and governance has developed through Supreme Court jurisprudence that childhood provides. The category of childhood also delineates the adult (adulthood) as the opposite of child, in that the category of childhood renders adults as categorially free and autonomous in contrast to children, who are vulnerable and developmental. In this way, children and families serve as pipelines to and create and

18. See *Santosky v. Kramer*, 455 U.S. 745 (1982); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); see also Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501 (1998–1999) (describing substantive due process).

maintain value pluralism.¹⁹ Thus, I rely largely on families to protect vulnerability and rear children in the family's image and propagate liberal democracy through the bodies and minds of children raised within the culture, values, and norms of their families, faith, and culture. These practices, parents and guardians, private and idiosyncratic values, in theory, protect democracy because our children have been raised with diverse norms, such as religion, language, culture, and other plural values and identities. The constitutional freedoms of religion, conscience, speech, due process, and cultural practices inform and reinforce democracy and liberal freedoms that the state and democratic institutions depend on to foster democratic citizens. Over time, for these reasons the Supreme Court has privileged families in the constitutional order in what has become known as "substantive due process."²⁰ This doctrine is based on the notion that there are constitutional rights that are necessary to a democratic republic and the utility of the Constitution.

B. JUVENILE COURT PROCESS: CHILD PROTECTION AND DELINQUENCY

Illinois established the first Juvenile Court in 1899 to provide protection, shelter, and discipline of children who were neglected, orphaned, impoverished, or otherwise without effective parents or guardians.²¹ These courts are therapeutic in that the role of the court is not necessarily to punish, but to place the child into a safe setting and create the conditions for return of the child to the parents, or if not possible, placement of the child within another family.

The post-Civil War liberties created the doctrine of substantive due process, which holds that certain liberties are so fundamental to the liberal democratic process that they deserve heightened protection.²² Through this vehicle, the Supreme Court identified protected liberties not constitutionally enumerated, but which the

19. *Id.*

20. As Peggy Cooper Davis observed, "[t]he Constitution of the United States does not contain the word 'family.'" PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 5 (1997).

21. 23 REV. STAT. OF ILL. § 171 (1899).

22. Chemerinsky, *supra* note 18.

Supreme Court adjudicates as fundamental in a liberal democratic republic. These freedoms are substantive and procedural;²³ and they are also gendered in that parental rights afford lower procedure for parents than they do for *children* in juvenile delinquency matters, even though children are always under the care of an adult.

This anomaly in the hierarchy of constitutional liberty that affords *higher* protection for children's freedom in the juvenile justice system than the freedoms parents receive in the child welfare system is anomalous because parental liberty interests in rearing their children are fundamental. In child protection matters the state has great powers to disrupt, remove, or terminate the parental relationship with children. Yet, in this context, the parents' family liberty interests in the care and nurture of their child affords *lower* process and protection of their liberty to parent their children than children—whose liberties are not coextensive with adults' liberty—receive in the juvenile justice docket, which adjudicates and punishes children who commit what would be crimes if children were adults. Thus in juvenile court child protection matters,²⁴ parents (disproportionately mothers as compared to fathers),²⁵ receive less process for their family liberty, than *children* receive on the delinquency docket (which is disproportionately populated by boys)²⁶ and provides heightened process for the juvenile respondents, including the requirement of proof beyond a reasonable doubt to take the child into state custody.²⁷ The process the Constitution affords parents in juvenile court child protection cases, is lower than process children

23. PEGGY COOPER DAVIS, *NEGLECTED STORIES THE CONSTITUTION AND FAMILY VALUES* (1997); Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. Ill. L. Rev. 171 (2003).

24. The child protection docket of the juvenile court addresses parental abuse and neglect of their children.

25. Nationally, women were perpetrators more often than men, with 283,027 women maltreating children as compared to 234,098 men maltreating children. CHILDREN'S BUREAU OF THE U.S. DEP'T HEALTH & HUMAN SERVS., *CHILD MALTREATMENT 71* (2014), <http://www.acf.hhs.gov/sites/default/files/cb/cm2014.pdf>.

26. See U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *DELINQUENCY CASES IN JUVENILE COURT, 2013* (2015), <http://www.ojjdp.gov/pubs/248899.pdf> (reporting juvenile court delinquency dockets heard 293,700 involving females and 764,800 involving males).

27. *In re Winship*, 397 U.S. 358 (1970) (requiring proof beyond a reasonable doubt for juvenile adjudication).

on the juvenile justice docket, which is quasi criminal, but still technically civil. The state must prove the parent is unfit by clear and convincing evidence.²⁸ With the exception of termination of parental rights proceedings, which afford a heightened process for the parents whose parental rights are at stake, the Constitution permits removal of abused and neglected children from their families based merely on preponderance of the evidence.²⁹ Thus the protection of a parent's parental rights is *lower than* the process due children in the juvenile justice docket.

In other words, the process that is due *parents* in child protection matters in juvenile court is *lower* than the process afforded children in delinquency dockets (preponderance of the evidence) compared to the process afforded *children* in juvenile delinquency matters in juvenile court (beyond a reasonable doubt). This anomaly places the delinquent *child's* procedural rights higher than the procedural rights of *parents* in child protection docket.

Moreover, even though children are legally disabled and without autonomy until they reach adulthood, the rights and process afforded *parent* respondents³⁰ (mostly mothers) in child protection matters are *lower* than the rights and process afforded children (mostly boys) who are respondents in juvenile delinquency proceedings.³¹ In other words, parents receive *less* process when their constitutional relationship to their children is at risk, than children receive on the juvenile justice docket. Thus, the juvenile delinquency docket affords *more* process to children who have committed what would be crimes if the children were adults than does the child protection docket protect the parents' constitutional liberties in the child protection

28. Santosky v. Kramer, 455 U.S. 745, 748 (1982) (holding that “[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence”).

29. Santosky v. Kramer, 455 U.S. 745 (1982); Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18 (1981).

30. See Annette Appell, *The Child Question*, 2013 MICH. ST. L. REV. 1137, 1178. [hereinafter Appell III].

31. E.g., Schall v. Martin, 467 U.S. 253 (1984) (addressing the right to due process with regard to pre-adjudication detention); *In re Gault*, 387 U.S. 1 (1967) (addressing the right to counsel).

docket, despite the fundamental freedom the Constitution bestows on the status of parenthood.³²

The child protection docket utilizes civil process and addresses abuse, neglect and dependency of children whose parents or guardians are failing to provide adequate care and protection to their children or who abuse their children. These cases involving parents (or other custodians or guardians) of abused, neglected and dependent children afford the parents lower legal process than children receive in the delinquency dockets.³³ Parents (usually adults) in child protection cases have lower legal protection and less process than the children in juvenile justice dockets.³⁴ This treatment suggests that the juvenile justice³⁵ dockets are gendered in this specific way: parents in the child protection docket are predominately mothers,³⁶ while children in the delinquency docket, who are predominately boys,³⁷ receive higher process than autonomous adults who are parent respondents.

The juvenile delinquency docket, which addresses offenses that would be crimes if the children were adults, affords children *more* procedural protections than parents receive in the child protection docket.³⁸ The constitutional rights for children involved in the two arms of the juvenile court—the juvenile delinquency docket and the child protection docket—provides protections for children (against their parents) and the delinquency docket disciplines and punishes the children who commit what would be crimes if they were adults. This docket is a quasi-criminal justice system that provides a lighter touch on juveniles than the adult judicial system metes out on adults who commit crimes. This docket also, while disciplining children, disproportionately targets boys as compared to girls. The juvenile delinquency docket provides higher protection for children than the

32. *E.g.*, *Santosky v. Kramer*, 455 U.S. 745 (1982).

33. *Id.*

34. *See* Appell I, *supra* note 8.

35. I use the term “juvenile justice” for proceedings in Juvenile Courts.

36. *See* U.S. DEP’T HEALTH & HUM. SERV.’S, ADMIN., *supra* note 25.

37. *See* U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *supra* note 26.

38. The juvenile court is a therapeutic court which is in theory designed to protect children and seek to reform, rather than punish children. DAVID S. TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* xiii 23–24 (2004).

child protection docket, which affords lower process to parents than children in the JJ docket.

This structure is an anomaly because children in the JJ docket, who do not have the same freedoms as adults, receive higher process in the juvenile court than do parents in that same court's child protection docket. This process presents an anomaly in that the heightened protection for juveniles in the JJ docket for children is higher than parents (mainly mothers) receive in the CP docket. Thus, children on the JJ docket receive higher process in Juvenile Court than do the parents in the CP docket, despite the foundational liberties of parental rights. This hierarchy of liberty is anomalous in light of the position of parental liberty in our constitutional system. In the juvenile court, parents have less liberty than children who commit what would be crimes if they were adults.³⁹

C. JUVENILE COURT: PROTECTING AND PUNISHING CHILDREN OUTSIDE THE FAMILY

As noted above,⁴⁰ the United States, a liberal democracy, prizes adult freedom and the rights of parents, teachers, and guardians to rear children in the values of these adults. This structural privatization of children (and of vulnerability more broadly) provides for a rich, vibrant and diverse nation, but the privatization of care and protection is centered in families. While this private caregiving serves political freedom, it can fail some children. For this reason, in 1899 Cook County, Illinois established the first Juvenile Court in the nation on the west side of Chicago. This court's purpose was to protect and govern children who did not have adults to care for them.⁴¹ These were children whose parents or caregivers could not or would not care for them or abandoned, abused, neglected or otherwise left them without support or the care of adults. These children worked, begged, stole or were otherwise unable or unwilling to be cared for by their families.⁴² At the time, the administrative

39. See generally Appell III, *supra* note 30 (addressing the justification for limiting children's rights as compared to adult rights).

40. See *supra*, note 15 and accompanying text.

41. Illinois Juvenile Court Act, ILL Laws 131 (1899).

42. See *supra* Part A. of this this Essay.

state was nascent at best⁴³ and the court system served as protector, parent, and disciplinarian for these children who do not have homes or support. Missouri established its juvenile court system in 1903.⁴⁴

The juvenile courts created and continue to utilize a model of “therapeutic justice” that Illinois developed to manage, protect, and regulate children who were without parents or guardians; who were orphaned, abandoned, abused or neglected; and who were, by virtue of their circumstances, on the streets, stealing, fighting, trespassing, and loitering because they had no homes or no parents or guardians to care for them. The juvenile court’s mission was to protect and regulate children who were without parental figures or whose parents or guardians were not willing or able to care for or control their minor wards. The innovation of this court was, in theory, not to punish or fine the children or their parents, but to protect them and to put them on the right track toward placement back home, in another home, or prepared for independence. The juvenile court movement spread through the nation. Over the years these problem-solving courts grew and spread through the country to provide adjudication and oversight for children and parents who needed assistance.

The two main branches of juvenile justice are child protection (CP), which concerns itself with parental abuse, neglect, abandonment, and other inability of children to receive care; and juvenile justice (JJ) system which addresses juvenile offenses that would be crimes if the child were an adult. The JJ system is a mix of quasi-criminal and quasi-civil systems. In JJ, the children are the respondents while the in the CP system the parents are the respondents.

The child abuse and neglect (CAN) system includes child abuse, neglect and dependency, the Child Abuse Hotline, and state children’s agencies. The juvenile justice docket is a semi-parallel system for the juvenile justice/delinquency (JJ) docket, which seeks

43. The first national administrative office was the Children’s Bureau, which concerned itself with child welfare. The Bureau sought to identify and certify each child for the dual purposes of counting and cataloging people and most importantly to give them an identity to afford a way of tracking the person and to provide rights and protections for them. Annette R. Appell, *Certifying Identity*, 42 CAP. U. L. REV. 361, 373 (2014) [hereinafter Appell IV].

44. MISSOURI JUV. JUST. ASS’N, CELEBRATING 100 YEARS OF JUVENILE JUSTICE IN MISSOURI 1903–2003 (2003), <http://www.njjn.org/uploads/digital-library/100years.pdf>.

to reform children who commit what would be crimes if they were adults. These two dockets also established divergent treatment for the parents in the CP system and the children in the JJ system. The Supreme Court has created procedural protections for juvenile respondents, who are disproportionately male.⁴⁵ These protections include a variety of quasi-criminal rights in JJ dockets for the juvenile respondents.

Over the years, the Supreme Court has carved out rights for JJ respondents that are based on the Constitution's protections for adults in the criminal system. These protections include the right of the juvenile to and the standard of proof the same as an adult, "beyond a reasonable doubt," the same as adults receive.⁴⁶ In contrast, the parent-respondents in CP cases, disproportionately mothers, receive a less robust set of protections, in part because the CP hearings are solely civil matters in nature, unlike the quasi-criminal JJ docket. The Supreme Court has developed a series of due process protections for the children on the JJ docket, but fewer for the CP docket, where the wrong-doers are the parents and the children are without legal agency.⁴⁷

The protections for parents⁴⁸ include basic procedural and substantive due process rights, including heightened burdens of proof for state termination of parental rights.⁴⁹ These rights and protections

45. See *Miller v. Alabama*, 567 U.S. 132 (2012); *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011); *Graham v. Florida*, 130 S. Ct. 2011 (2010); *Roper v. Simons*, 543 U.S. 551 (2005); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Schall v. Martin*, 467 U.S. 253 (1984); *Fare v. Michael C.*, 442 U.S. 707 (1979); *Ingraham v. Wright*, 430 U.S. 651 (1977); *Breed v. Jones*, 421 U.S. 519 (1975); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966) (encompassing thirteen juvenile justice cases in juvenile court versus five child welfare cases in juvenile courts).

46. *In re Gault*, 387 U.S. 1, 30 (1967).

47. For example, children in the child welfare docket are represented by guardians ad litem, who protect the child's best interests rather than the child's wishes. See Appell II, *supra* note 17.

48. Or parent-like individuals, such as teachers, guardians, or aunts. *E.g.*, *Santosky v. Kramer*, 455 U.S. 745 (1982); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

49. There are statutory and case law protections in place to shield Indian children and their parents from the hegemony of the state in adjudicating child abuse and neglect. See *The Indian Child Welfare Act of 1978* 25 U.S.C. §§ 1901–1963 (2012); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley v. Illinois*, 405 U.S. 645 (1972).

are foundational to the United States' political and constitutional system, a system that depends on a democratic populous with plural norms and values passed down through families to maintain a vibrant and diverse populous who can freely govern under democratic rule based on individual and family norms and beliefs. Indeed, the Constitution, with its checks and balances among government branches and the Bill of Rights, works to protect individual, family, cultural, and religious liberty. Substantive due process, which applies to the value of the familial relationship, is both integral to adult freedom and the development of children in a liberal democracy. These well-known and longstanding freedoms apply not just to the nuclear or extended family, but to adults such as teachers, preachers, guardians, and parents.⁵⁰

D. CONCLUSION

The Supreme Court has a busy juvenile crime docket (as compared to the child protection docket).⁵¹ Juvenile crime dockets are where these rights and relationships become skewed. The children who commit what would be a crime if the child was an adult receive higher levels of due process than do the parents in the child protection system, despite the substantive liberties that are afforded to children's caregivers (generally parents).⁵² Children who commit

50. *Supra* notes 44–45.

51. The Supreme Court has addressed the rights of juvenile justice respondents numerous times since deciding *In re Gault*, 387 U.S. 1 (1967), while the Supreme Court has addressed parental rights in just four cases coming from the juvenile court's child protection docket. *See* *Hogan v. Kaltag Tribal Council*, 131 S. Ct. 66 (2010) (declining to hear the state's appeal); *Suter v. Artist M.*, 503 U.S. 347 (1992) (holding that the Adoption Assistance and Child Welfare Act of 1980, 42 USC 1983, did not create a right to sue based on for purposes of federal child welfare law); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53–54 (1989) (upholding application of the Indian Child Welfare Act for adoptions of Indian children and upholding Tribal court jurisdiction over state courts); *Smith v. Org. of Foster Families for Equality & Reform et al.*, 431 U.S. 816 (1977) (holding parents have a liberty interest in their children that requires consideration of private interest affected by official action; risk of erroneous deprivation of interest through procedures used; and value of any additional safeguards).

52. *Santosky v. Kramer*, 455 U.S. 745, 768–69 (1982) (holding that the Due Process Clause of the Fourteenth Amendment requires that the state apply the clear and convincing standard to terminate parental rights). Even so, the U.S. Supreme Court in *Lassiter* held that the parent has no clear right to an appointed attorney for a mother when the state seeks to terminate

juvenile offenses have a variety of constitutional protections regarding freedom including the right to counsel, and softer versions of the constitutional criminal provisions.

Yet the due process rights for parents in the juvenile court's CP docket are the same as the general civil law for torts and contracts: preponderance of the evidence. It is not until the state seeks to terminate parental rights permanently that a higher burden of proof applies and a parent has the right to counsel. In this context, the rights of children who break the law are more robust than are the rights of parents, who play such an important role in the constitutional lexicon. This anomaly suggests that the minimal freedom of children—who are always in the custody of adults—is actually more robust for children who break the law than is the process afforded parents' liberty regarding their children. Finally, I am not advocating for lesser rights for children accused of what would be crimes if they were adults, but noting that juvenile justice is more robust for children who commit juvenile crimes than it is for mothers on the child protection docket.

her parental rights. *Lassiter v. Dep't Soc. Serv. of Durham Cty.*, 452 U.S. 18, 33–34 (1981); *see also* *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Smith v. Org. of Foster Families for Equal. & Reform.*, 431 U.S. 816 (1977); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).