2016

Dignity Rights: A Response to Peggy Cooper Davis's *Little Citizens and Their Families*

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DIGNITY RIGHTS: A RESPONSE TO PEGGY COOPER DAVIS'S *LITTLE CITIZENS AND THEIR FAMILIES*

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Peggy Cooper Davis has proposed that human dignity shoulders the burden of managing—if not resolving—the complex relationship of the state to the family as an entity and to the individual members of that entity, in particular the child.[1] She is not alone in asking dignity to do this hard work. Supreme Court Justice Anthony Kennedy has placed dignity at the center of our understanding of the state's role in intimate relationships.[2] Defining dignity is difficult, however, and the specific "smell test" for its use that Davis proposes reaches beyond the "histories and traditions" that have identified a dignity right as fundamental and worthy of protection to consider two additional circumstances.[3] One is the development of international human rights standards since the end of World War II, and the second is to consider under what conditions the victim of an affront to their dignity—and the rest of us—finds that affront intolerable. The verifying source of this test is the resistance to this treatment through counterdemonstration and reasoned protest.[4] What complicates the analysis in the family context is the competing dignity rights of the individual members of the family and the family as an entity entitled to its own dignitary respect.

Nowhere is this complexity more clearly identified than in the Convention on the Rights of the Child (CRC), the global community's

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1. *See* Peggy Cooper Davis, *Little Citizens and their Families*, 43 FORDHAM URB. L.J. (manuscript at 1, 5-6).

2. Obergefell v. Hodges, 135 S. Ct. 2584, 2593-94, 2599, 2606, 2608 (2015).

3. *See* Davis, *supra* note 1 (manuscript at 2-3, 5).

4. *Id.* (manuscript at 5).

statement of commitment to nurturing and supporting the best interests of the child.[5] Those interests are served, first and foremost, by respecting and protecting the family:

> [T]he family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community . . . [and] the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.[6]

After situating the child's best interests firmly in the family, the Convention then compels the state and its institutions to protect the child and her family against discrimination, ensure that state action to protect the child's best interests be taken only after consideration of the role of the child's parents, and to support the economic, social, and cultural rights of those children, as enumerated in subsequent articles of the Convention.[7] The child is not, however, only a creature of the family or the state. Rather, the child is an emerging individual with perspectives, ideas, interests, and beliefs, all worthy of support and protection.[8] Davis refines our conception of human dignity by employing international human rights standards to augment the American constitutional meaning of the term.[9] She implicitly (and in her conclusion perhaps explicitly) proposes what the Convention has already recognized: that the tensions inherent in the "child-family-state" triangle can be mitigated by the provision of positive obligations by the state.[10] That is, families cannot be the nurturing protective site where children grow, thrive, and develop to their full capacities without affirmative and sustained assistance from the state in the many facets of the child's life: education, health, food, and shelter at a minimum. The "thoughtful and simultaneous respect" that Davis advances to manage these tensions is,[11] in many ways, a call for the state to take an affirmative role in creating and sustaining the object of this colloquium: flourishing families. Yet to get there requires not only difficult conversations about supporting

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5. Article 3 specifically states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Convention on the Rights of the Child art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3.

6. *Id.* at Preamble.

7. *Id.* arts. 2-4.

8. *Id.* arts. 12-16.

9. *See* Davis, *supra* note 1 (manuscript at 4).

10. *Id.* (manuscript at 15).

11. *Id.* (manuscript at 6).

families but renewed attention to constitutional rights to address significant and growing inequity.

Let's start with having the conversation. In her wonderful book, *Failure to Flourish,* Clare Huntington identifies how different moral beliefs about the state's role in family life impact our ability to talk across those differences to support families.[12] The competing moral systems employ strict-father and nurturing-parent metaphors to ascertain the appropriate role of government in family life.[13] In the strict-father system, the government's role is to promote morality, self-discipline, and self-reliance, while in the nurturing-parent system the state promotes fairness, self-fulfillment, and helping those in need.[14] Huntington notes these moral systems are hardened by our tendency to discount factual information that is not consistent with our beliefs[15] and, as Davis pointed out many years ago, our tendency not to change our minds but to maintain the status quo.[16] These moral system metaphors analogize, if imperfectly, to negative and positive rights theories: the protection from government intervention rather than promotion of government support.

Huntington has contributed to having conversations that bridge such a serious divide in many ways—including identifying why it is so hard to have the conversations[17]—but I want to focus on her effort to debunk the paradigm of the autonomous family and to surface, from what has been termed "the submerged state," how all families get and need state support.[18] Then I want to move more front and center the burgeoning inequality in our country that requires us to rethink our ideas about rights and ultimately our understanding of dignity.

Huntington pinpoints how government programs assist all families, only differently. For most majority and upper-income-families, the benefits the state provides respect privacy and do not come with intrusive and demeaning requirements: home mortgage deductions, an ability to live in school districts with better schools, and government-backed student loans serve as examples. Public education is just available—Huntington calls it background noise[19]—and many other programs require little more than checking a box or filling out a form. These families do not experience the

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12. CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 207-11 (2014).

13. *Id.* at 208.

14. *Id.*

15. *Id.* at 209.

16. Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 145-46 (1995).

17. HUNTINGTON, *supra* note 12, at 207-11.

18. *Id.* at 71-73.

19. *Id.* at 72.

government as messing in their lives.[20] Programs that provide a safety net, such as Temporary Assistance for Needy Families (TANF), require substantial paperwork, invasive certification interviews, regular recertification meetings, and varied conditions of receipt beyond financial need.[21] For many minority and low-income families, instead of friends with benefits, they get benefits with friends: a constant stream of government officials invading and interrupting their lives.[22] These families experience the state without the dignity that Davis hopes will mediate the child-family-state tension and the supports that Huntington hopes will make families flourish. And the assistance they do get often exacerbates their troubles.

Poverty remains an intractable problem in the United States. In the half-century since President Lyndon Johnson launched his War on Poverty, the poverty rate has barely been reduced from nineteen percent to fifteen percent with forty-six million Americans now living in households with barely adequate income.[23] During the same period, the "great compression" of the post-World War II era, which built a political economy of the middle class, especially of white men, and harkened the possibility of greater racial and gender equality, ended and the distributive patterns of the Gilded Age reemerged.[24] Children's extreme poverty increased in the United States by seventy-five percent between 1995 and 2005 with fifteen million Americans living in this deep poverty.[25] This inequity is intensified by the re-segregation of America's schools.[26] And the strict-father approach to poor families has triumphed from the Clinton-era dismantling of the welfare system to monitoring the contents of food stamp recipients' shopping carts.[27]

How does this combination of factors affect Davis's proposal of dignity rights mediating the relationship between the family, child, and state? By some accounts, the possibilities look grim. Anthropologist and legal

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20. *Id.* at 72, 78.

21. *See* 42 U.S.C. §§ 601; Michele Estrin Gilman, *Welfare, Privacy, and Feminism*, 39 U. BALT. L.F. 1, 4-6 (2008).

22. Gilman, *supra* note 21, at 2, 5.

23. Susannah Camic Tahk, *The Tax War on Poverty*, 56 ARIZ. L. REV. 791, 793 (2014).

24. Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 693-94 (2014).

25. Tahk, *supra* note 23, at 834.

26. *See* Nikole Hannah-Jones, *Segregation Now*, PROPUBLICA (Apr. 16, 2014, 11:00 PM), http://www.propublica.org/article/segregation-now-full-text [https://perma.cc/S5CN-RHT7].

27. *See* Alan Pyke, *How the Conservative Obsession with Policing Poor People's Shopping Carts Got Started*, THINKPROGRESS (May 12, 2015, 8:00 AM), http://thinkprogress.org/economy/2015/05/12/3657467/food-stamps-junk-food-ban-history/ [https://perma.cc/TT8N-47Z2].

scholar Khiara Bridges has challenged the idea that poor families, especially those headed by women and women of color, even have dignity rights to lose. In her ethnographic study of women applying for the Medicaid Prenatal Care Assistance Program (MCAP), Bridges exposes the invasive and demeaning requirements to receive publicly financed prenatal care.[28] Bridges argues that poverty has stripped away the traditional privacy rights enjoyed by families, exposing them to extreme scrutiny and setting conditions in areas of their lives that have nothing to do, in this instance, with the prenatal health of their child.[29] Bridges contends that impoverished families are denied the presumption that parents will do their best to raise their children and the state will only interfere when the children are at risk.[30] Instead, impoverished families' failure to achieve economic self-sufficiency denies them that presumption.[31] In other words, since these families cannot be presumed to raise their children well and in ways that will make them productive citizens, they are subject to such extreme and pervasive scrutiny when they seek government assistance that they become "public families" without privacy rights at all. They have not lost them by bartering for essential health care; they never had them.[32]

> It is not that [these] patients, because of their poverty, do not have presumptions of privacy; rather, their privacy is presumed altogether nonexistent. So framed, it does not appear that wealth helps to buy the presumption of privacy, but rather wealth is the condition of possibility for privacy.[33]

In characterizing the non-existence of privacy rights for these families, Bridges warns that even if rights were reformulated to be positive obligations—rights to rather than against the government as Davis suggests and the CRC provides—such rights would still be meaningless for poor families.[34]

Are there ways around this dispiriting formulation? While Huntington's effort to surface the ways that the state assists all families will help, the

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28. *See* Khiara Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 127-35 (2011).

29. *Id.* at 164-65. These rights could alternatively be framed as family autonomy or family integrity. The Supreme Court after reviewing the cases that established "perhaps the oldest of the fundamental liberty interests recognized by this Court," concluded: "In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." Troxel v. Granville, 530 U.S. 57, 65-66 (2000).

30. Bridges, *supra* note 28, at 162-64.

31. *Id.* at 152-153.

32. *Id.* at 168-71.

33. *Id.* at 172.

34. *Id.* at 174.

significant difference in the way that assistance is structured reinforces Bridges's point. Tax scholar Susannah Camic Tahk has reported that tax-embedded programs engender more bipartisan support and that the public supports tax-embedded programs more favorably than cash assistance programs.[35] The Earned Income Tax Credit (EITC) is the prime example. The EITC has been rightly hailed for lifting millions of children out of poverty.[36] Tahk shows, however, that when Aid to Families with Dependent Children (AFDC) was the country's primary anti-poverty program before Clinton's welfare reform, AFDC filled an average of about twenty-one percent of the poverty gap while, despite the increased spending on EITC in the first decade of this century, the EITC only fills about 5.4% of the poverty gap.[37] And yet EITC is twice as effective at filling the poverty gap as TANF, the current cash assistance program.[38] Critically, the EITC does not impact families in extreme poverty because it requires income other than public benefits, leaving these families out entirely.[39] Including these families in a tax-based structure may be the only program solution in a strict-father system because, as Tahk concludes:

> Insofar as the non-tax war on poverty lacks political viability, the real choice for policymakers and advocates may not be between the tax and the non-tax war, but between the flawed tax war on poverty and *no* war on poverty at all.[40]

Using an improved tax-based system may diminish the intrusive nature of government assistance for families in deep poverty, even helping to reinstate the privacy rights Bridges says have disappeared. Yet this remains a political, not a constitutional, response to the inequities at the heart of this inquiry. And political solutions do not provide the same assurances as articulations and defenses of constitutional rights.

Bridges contends that economic self-sufficiency is the basis for securing family dignity rights. Legal scholars Joseph Fishkin and William Forbath offer a way to reimagine securing that self-sufficiency by asking us to reconsider the very way that we understand the Constitution. Alarmed by persistent poverty, a shrinking middle class and a wealthy, entrenched elite, they contend that the political-economic problem of this growing inequity is also a constitutional problem and was understood to be so for a

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35. *See* Tahk, *supra* note 23, at 822-25,

36. *Id.* at 801-02.

37. *Id.* at 802-03.

38. *Id.* at 803.

39. *Id.* Tahk recommends ways to counter this problem through improvements on the tax-based approach to poverty. *See generally id.* at 837-51.

40. *Id.* at 826 (emphasis in original). Tahk recommends ways to accomplish this goal. *See generally id.* at 837-51.

significant period in our history.[41] The *Anti-Oligarchy Constitution* they explore "makes demands on our economic and political order—and that among those demands is the need to avoid oligarchy."[42] Equal citizenship and equal opportunity cannot be achieved within an oligarchy, and all three branches of government are responsible for achieving those objectives.[43] This understanding was lost, they argue, as the Constitution in the second half of the twentieth century came to mean, "the Court-enforced Constitution" where anti-oligarchical principles have been erased.[44] Nevertheless, they hope that the time is right for renewing our historic understanding that all branches of government share responsibility for the "nation's constitutional political economy" because "[e]xtreme concentrations of economic and political power undermine equal citizenship and equal opportunity [making] oligarchy . . . incompatible with, and a threat to, the American constitutional scheme."[45]

Let's tie together the various threads of this essay, circle back to Davis's dignity test, and apply it to a specific subject that deeply implicates the relationship among the family, child and state: the right to an education. As Davis outlines, the "public school cases" provide a template for understanding Fourteenth Amendment family liberty jurisprudence.[46] The state can require children to be educated, but parents retain some prerogative over the kind and place of that learning. Children are the recipients of this "balance" but are not independently entitled to pursue their own educational interests.[47] The Court may have established an important principle of family autonomy, but Davis warns that the price may have been losing "our best collective response to class-based gaps in the quality of childhood education—gaps that grow as they mirror and perpetuate an expanding crisis of income disparity."[48] That collective response was further imperiled by the Court's decision in *San Antonio Independent School District v. Rodriguez*, which failed to hold that children had a constitutional right to an education.[49] Davis's dignity test, along with the lessons learned from the scholars considered earlier, revives the

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41. Fishkin & Forbath, *supra* note 24, at 670-71.

42. *Id.* at 673.

43. *See id.* at 693.

44. *Id.* at 692-93.

45. *Id.*

46. *See* Davis, *supra* note 1 (manuscript at 1).

47. *See id.* (manuscript at 7-11) (describing Meyer v. Nebraska, 262 U.S. 390 (1923), Pierce v. Soc'y of the Sisters, 268 U.S. 510 (1925), and Wisconsin v. Yoder, 406 U.S. 205 (1972)).

48. *Id.* (manuscript at 8).

49. 411 U.S. 1, 35 (1973).

possibility of securing that right to the benefit of children, parents, and the state.

Davis's test enhances the understanding of dignity rights in two ways: applying human rights protections and employing collective resistance to intolerable conditions.[50] The human rights protections that most closely align with a careful balance among the family, child, and state are elucidated in the CRC and offer the best standard to counter Chief Justice John Roberts's contention that "[o]ur cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State."[51] The Court has already used the CRC as a shield, invoking it as a basis for prohibiting the juvenile death penalty,[52] so the possibility of using human rights standards as a sword are less unfathomable than they were when *Rodriguez* was first decided. Moreover, if we apply the test's second prong—resistance to intolerable conditions—the current state of inequity in our country demands exploring every avenue to diminish that inequity, including revisiting our constitutional interpretation of basic rights. *Brown v. Board of Education* identified the right to education within the balancing test of family dignity by declaring:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[53]

The anti-oligarchy framework entreats us to revisit *Brown's* declaration in light of current economic conditions and re-segregation.[54]

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50. Davis, *supra* note 1 (manuscript at 4-5).

51. Obergefell v. Hodges, 135 S. Ct. 2584, 2620 (2015) (Roberts, C.J., dissenting).

52. Roper v. Simmons, 543 U.S. 551, 576 (2005).

53. 347 U.S. 483, 493 (1954).

54. *See* Hannah-Jones, *supra* note 26; Patrick Wall & Monica Disare, *Small Number of Schools Enrolls Large Share of Public Housing Residents, Report Says*, Chalkbeat (Jan. 15, 2016, 7:11 PM), http://ny.chalkbeat.org/2016/01/15/small-number-of-schools-enrolls-large-share-of-public-housing-residents-report-says/#.Vp1fccCANBe [https://perma.cc/SXZ5-ETDE].

Resistance can be employed in a second way. *Obergefell* sets a standard for dignity that recognizes "that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[55] The work that has been done to find a right to education has taken many forms: in pursuing the right in state constitutions, in finding new bases for re-litigating *Rodriguez*, in organizing grassroots efforts to amend the Constitution, and in congressional efforts to improve education systems or even create a federal statutory right to education.[56] These efforts help to provide the unnoticed insights and understandings that mirror the remarkable transformation of our understanding of intimacy rights in relationships. Joshua Weishart, in his forthcoming *Reconstituting the Right to Education,* reminds us that "if there is a federal constitutional right to education, its principal function is to protect children, and thereby, society at large."[57] This protection is against the harms of racial discrimination and education deprivation that will disadvantage them in their lives as citizens and in the market economy.[58] If wealth is "the condition of possibility" of rights that Bridges alleges,[59] then children must be protected from this education deprivation or face exile from their place in the market and in the democratic process. When Justice Kennedy wrote that "[o]utlaw to outcast may be a step forward, but it does not achieve the full promise of liberty," he echoed Bridges's warning that poor families now live outside the protection of the constitutional right to dignity that *Obergefell* has articulated.[60] We must bring them back inside for their sake and for ours.

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55. Obergefell, 135 S. Ct. at 2603.

56. Joshua E. Weishart, *Reconstituting the Right to Education,* 67 ALA. L. REV. (forthcoming 2016) (manuscript at 2-3), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2711910 [https://perma.cc/TEU6-MRTG].

57. *Id.* (manuscript at 42).

58. *Id.* (manuscript at 43-44).

59. Bridges, *supra* note 28, at 172.

60. Obergefell, 135 S. Ct. at 2600.