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Horton Hears a Twerp: Myth, Law, and
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58 N.Y.L. SCH. L. REV. 569 (2013–2014)

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HORTON HEARS A TWERP: MYTH, LAW, AND CHILDREN'S RIGHTS IN *HORTON HEARS A WHO!*

For hyt ys old Englysch sawe: A mayde schuld be seen, but not herd.
—John Mirk, *Festial* (1380s)¹

A very small, *very small* shirker named Jo-Jo
Was standing, just standing, and bouncing a Yo-Yo!
Not making a sound! Not a yip! Not a chirp!
And the Mayor rushed inside and he grabbed the young twerp!
—Dr. Seuss, *Horton Hears a Who!* (1954)²

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
—Convention on the Rights of the Child (1989)³

I too am not a bit tamed . . . I too am untranslatable;
I sound my barbaric yawp over the roofs of the world.
—Walt Whitman, “Song of Myself” (1855)⁴

I. INTRODUCTION

A Messenger traveling between worlds brings knowledge to the People. They resist, he suffers, a Child mediates, and Wisdom is gained. This mythic essence is retained where the messenger is an amiable elephant, the people consist of a gang of monkeys, two kangaroos, and an eagle, and the child is a young twerp, as in Dr. Seuss's *Horton Hears a Who!* *Horton* tells the story of an elephant residing in the Jungle of Nool who one day hears “a very faint yelp / As if some tiny person were calling for help.” The sound comes from “a small speck of dust floating past through the air.” Convinced that the speck is a minute world inhabited by real persons, the Whos,

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1. JOHN MIRK, *FESTIAL* 229–230 (Theodore Erbe ed., 1905). The maxim that children should be seen and not heard was old by the late fourteenth century when Caxton first published the collected sermons of John Mirk, Canon of Lilleshall Abbey, Shropshire. Meant to entertain while teaching orthodox Christianity, the *Festial* was the most popular and influential collection of English sermons throughout the late medieval and early Tudor periods. A CRITICAL EDITION OF JOHN MIRK'S *FESTIAL* (Susan Powell, ed., Oxford Univ. Press 2010). A “child” was then an infant or a young man of gentle birth (“childe”). *Definition of Childe*, THE ONLINE ETYMOLOGY DICTIONARY, <http://www.etymonline.com/index.php?term=child> (last visited Mar. 12, 2014). A “mayde” was an unmarried man or a young woman (adolescent?). *Definition of Children Should Be Seen Not Heard*, THE PHRASE FINDER, <http://www.phrases.org.uk/meanings/children-should-be-seen-and-not-heard.html> (last visited Mar. 12, 2014).
 2. DR. SEUSS, *HORTON HEARS A WHO!* (1954).
 3. Convention on the Rights of the Child art. 12, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC]. This article, first proposed in the Polish draft treaty initiating the drafting process, is the first confirmation that children have expressive and participatory rights, not just the rights to protection and welfare with which the precedent 1959 Declaration of the Rights of the Child, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354 (Nov. 20, 1959) had been concerned. It signified the emergence of the child as rights-bearer.
 4. WALT WHITMAN, *SONG OF MYSELF* 54 (Paul Negri & Susan Rattiner eds., 2001). This line appeared in the first edition of 1855 and is unchanged in subsequent publications.

Horton promises his protection. He is violently persecuted by his fellow Nools for “chatting with persons who’ve never existed.” Only when the Who-child Jo-Jo, “The Smallest of All!,” joins his voice to the clamor of the Whos do the Nools hear them. They joyfully embrace Horton’s message: “A person’s a person, no matter how small.”⁵

Horton is a story for children, a fantasy, a fairy tale, a myth. The potency of its story and the power of its myth are undiluted by Seuss’s undainty slang, noodling pictures, and irreverent rhyme. Throughout it, Tolkien’s⁶ “Cauldron of Story” is constantly replenished with “new bits, dainty and undainty.”⁷ In his writing, Seuss brings children the gift of reading.⁸ In *Horton*, he has made a true fairy tale. As Tolkien explains, this does not mean a tale about fairies, but a sub-creation, a secondary world with its own rules and laws which give it the “inner consistency of reality.”⁹ In its resonance with old tales of messengers, origins, and the gaining of wisdom, *Horton* is myth. With its not-so-sideways moral¹⁰ about how to treat others, it is a text on human rights.¹¹

Myth requires a messenger travelling between worlds; a trickster, a magician, or a child, who locates for us the terrestrial world of the everyday within the realm of myth and mediates their resolution.¹² As Peter Fitzpatrick¹³ explains, “Myth’ would once have provided at least ‘some god endowed with contradictory attributes’ who could mediate between and encompass law’s transcendent and terrestrial existences and render the common ground between them eloquent with sacred meaning.”¹⁴ Like ibis-headed Thoth, recorder of the Egyptian gods and pleader for human souls

5. HORTON HEARS A WHO!, *supra* note 2.

6. J.R.R. Tolkien (1892–1973) was a university professor and author. See *About Professor J.R.R. Tolkien*, THE TOLKIEN SOCIETY, <http://www.tolkienesociety.org/tolkien/> (last visited Mar. 12, 2014).

7. J.R.R. TOLKIEN, *On Fairy Stories*, in THE TOLKIEN READER 52 (1966).

8. *The Book that Killed Dick and Jane: The Cat in the Hat Fifty Years On [Australian, 4/02/2007]*, RICHARD KING (Feb. 03, 2007, 8:53 PM), richardjking.blogspot.ca/2007/02/book-that-killed-dick-and-jane.html.

9. TOLKIEN, *supra* note 7, at 15. Fairy tales are not “stories about fairies or elves, but stories about Fairy, that is Faërie, the realm or state in which fairies have their being.” *Id.* at 12. His “fairy tale” is now better known as fantasy.

10. Henry Jenkins, *No Matter How Small: The Democratic Imagination of Dr. Seuss*, in HOP ON POP: THE POLITICS AND PLEASURES OF POPULAR CULTURE 187, 189 (2002).

11. A similar reading of Seuss is offered by Jonathan Todres & Sarah Higinbotham, *A Person’s a Person: Children’s Rights in Children’s Literature*, 45 COLUM. HUM. RTS. L. REV. 1 (2013). “The books children read and have read to them are a central part of their childhood experience; and yet, just as children have been dismissed as rights-bearing persons, so too has children’s literature been ignored as a rights-bearing discourse and a means of civic socialization.” *Id.* at 5. This article marks the beginning of a project intended “to connect and build upon the fields of children’s rights law, law and literature, children’s literature criticism, and human rights theory to forge a new multidisciplinary subfield of study: children’s rights and children’s literature.” *Id.* at 52.

12. See generally PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW 16 (1992).

13. Peter Fitzpatrick is Anniversary Professor of Law, School of Law, Birbeck, University of London. See *Professor Peter Fitzpatrick*, BIRBECK SCH. OF L., <http://www.bbk.ac.uk/law/our-staff/ft-academic/fitzpatrick/fitzpatrickblog> (last updated Oct. 1, 2013).

14. FITZPATRICK, *supra* note 12, at 9 (quoting Claude Lévi-Strauss).

at the judgment of the dead, his Greek counterpart Hermes, winged-foot messenger of the gods,¹⁵ Iris the rainbow who communicates between earth and sky,¹⁶ and Raven, whose trickery brings life, light, and a new way of living to the peoples of the Pacific Northwest,¹⁷ the divine mage Hermes Trismegistus travels to heaven and back with the message “The below is as the above, and the above as the below.”¹⁸ Horton’s message is its echo: “A person’s a person, no matter how small.” Although Horton struggles mightily to save the Whos, it is the Who-child Jo-Jo’s YOPP! that “put it over!” “Finally, at last! From that speck on that clover / *Their voices were heard!*”¹⁹

“A person’s a person” is the foundation of Horton’s undertaking to the minuscule Whos, the message he carries from their world to his own, and the moral of the tale. A metaphysician faced with the materialism of the jungle, Horton has found, or intuited, or heard the premise of the world’s human rights instruments, the basis of its declarations, constitutions, covenants, conventions, treaties, and bills of rights: a person’s a person, and personhood entails rights.²⁰ That the voice of the mythic Child saves Who-ville from annihilation and Nool from its isolationism (and the commission of genocide) shows that the message refers in a literal way to the smallest of all persons—children.

Childhood is a realm of myth. Its geography—the places and spaces of love and fear, hunger and desire, transgression and reconciliation, journeys out and ways home—is neither outgrown nor fully known.²¹ In mapping childhood’s landscapes of tangled forests, calm or turbulent seas, and labyrinths of streets, attics, rivers, and caves, stories for children fold other worlds into the everyday. They tell the meaning of being human and, innate in that telling, the nature of the law that sustains our communal species. The stories reflect much older myths of origin that tell of the creation of the world, messengers, and gifts of laws governing its dwellers. Childhood

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15. See generally Stephan A. Hoeller, *On the Trail of the Winged God: Hermes and Hermeticism Throughout the Ages*, GNOSIS: A JOURNAL OF WESTERN INNER TRADITIONS, Summer 1996, available at <http://gnosis.org/hermes.htm>.
 16. “Iris” is a collocation of the Greek “iris” (rainbow) and “eirīs” (messenger). *Iris*, THEOI GREEK MYTHOLOGY, <http://www.theoi.com/Pontios/Iris.htm> (last visited Mar. 12, 2014).
 17. See generally Ann Chowning, *Raven Myths in Northwestern North America and Northeastern Asia*, 1 ARCTIC ANTHROPOLOGY 1 (1962); DAWN E. BASTIAN & JUDY K. MITCHELL, HANDBOOK OF NATIVE AMERICAN MYTHOLOGY 40, 156 (2004).
 18. ALEXANDER ROOB, ALCHEMY AND MYSTICISM: THE HERMETIC MUSEUM 8 (2001).
 19. HORTON HEARS A WHO!, *supra* note 2.
 20. U.S. CONST.; U.N. Charter; European Convention on Human Rights, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).
 21. Anne McGillivray, *A State of Imperfect Transformation: Law, Myth and the Feminine in Outside Over There, Labyrinth and Pan’s Labyrinth*, in LAW AND CHILDHOOD STUDIES: 14 CURRENT LEGAL ISSUES 10 (Michael Freeman ed., 2012) [hereinafter McGillivray, *State of Imperfect Transformation*]; GOVERNING CHILDHOOD 1–24 (Anne McGillivray ed., 1997); Anne McGillivray, *The Long Awaited: Past Futures of Children’s Rights*, 12 INT’L J. OF CHILD. RTS. 209, 232 (2013) [hereinafter McGillivray, *The Long Awaited*].

matters. Being a human child is not just about becoming independent, sexually mature adults, as it is for other species. Childhood is, in itself, of central importance.

Of twenty-seven known hominids, only we survived.²² There is no other human species. We survived because only we evolved an extended childhood.²³ “Human children are the most voracious learners Earth has ever seen, and they are that way because their brains are still rapidly developing after birth.”²⁴ “Neoteny, and the childhood it spawned, not only extended the time during which we grow up but ensured that we spent it developing not inside the safety of the womb but outside in the wide, convoluted, and unpredictable world.”²⁵ Our long childhood lets us develop ourselves through our experiences and environment in ways unavailable to other species, leaving us “the last apes standing.”²⁶ Whether we continue to survive as we are, or hope to be, depends “on the child in us, the part that loves to meander and play, go down blind alleys, wonder why and fancy the impossible.”²⁷ Stories for children, as myth, as law, guide that meandering, show ways out of blind alleys, and enhance the fantasies necessary to unfold childhood into an enlightened legal subjectivity.

Part II of this paper considers relationships between myth and fantasy and myth and law, the fusion of literature and law in stories for children, and Seuss’s gift of “selling without shouting” in his promotion of a transgressive, inventive, incipient subject of law. Part III deploys the lens of (critical) legal pluralism to investigate the normative orders found in *Horton* and to shed light on the problem Seuss has set: how to reconcile the opposing world visions of Horton, defender of the Whos, and the sour kangaroo, prosecutrix for the Nools. Part IV addresses the roles of Jo-Jo the Who-child as rights-bearer, kangaroo courts, and the centrality of the child’s right to be heard. Part V investigates the rights of children as set out in the U.N. Convention on the Rights of the Child, the non-severability of children’s bodies and children’s rights, and the role of parents and the state in protecting and guiding the child’s exercise of rights. Part VI offers some concluding thoughts on rights, the Whos and the Who-child Jo-Jo as metaphors of childhood, and the power of myth in the making of the subject of law.

22. Chip Walter, *Why Are We the Last Apes Standing? How Childhood Let Modern Humans Conquer the Planet*, SLATE (Jan. 29, 2013), <http://goo.gl/JBXyoX> [hereinafter Walter, *Why Are We the Last Apes Standing?*]; see also CHIP WALTER, *LAST APE STANDING: THE SEVEN-MILLION-YEAR STORY OF HOW AND WHY WE SURVIVED* (2013).

23. Walter, *Why Are We the Last Apes Standing?*, *supra* note 22.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

II. "ALL I HEARD . . . WAS THE BREEZE"²⁸—FANTASY, MYTH, AND LAW IN STORIES FOR CHILDREN

Stories—as myth, as fantasy, as fairy tale—guide us through our long childhood. For Bruno Bettelheim,²⁹

Myths and fairy stories both answer the eternal questions: What is the world really like? How can I truly be myself? The answers given by myths are definite, while the fairy tale is suggestive; its messages may imply solutions, but it never spells them out.³⁰

Fairy tales offer the child “the chance to understand himself in this complex world.”³¹ The child “must be helped to make some coherent sense out of the turmoil of his feelings” through “a moral education which subtly, and by implication only, conveys to him the advantages of moral behavior, not through abstract ethical concepts but for that which seems tangibly right and therefore meaningful to him.”³² While Seuss would agree that the moral must be subtly implied,³³ Bettelheim’s Freudian approach to the German folk fairy tales collected by the Brothers Grimm³⁴ is anything but subtle. Grimm’s tales, Bettelheim argues, perform a psychoanalytical function: “Freud’s prescription is that only by struggling courageously against what can seem like overwhelming odds can man succeed in wringing meaning out of his existence.”³⁵ Fairy tales guide the child through the developmental stages and crises identified by Freud.

To the child it seems that his life is a sequence of periods of smooth living which are suddenly and incomprehensibly interrupted as he is projected into immense danger . . . in an instant everything changes, and the friendly world turns into a nightmare of dangers. This happens when a loving parent suddenly makes what seem like utterly unreasonable demands and terrifying threats.³⁶

Ann Swinfen³⁷ shows that modern fantasy is “frequently imbued with a profound moral purpose and, even when set in a different historical period or, more interestingly, in a complete otherworld, display[s] a concern for contemporary problems and offer[s]

28. *HORTON HEARS A WHO!*, *supra* note 2.

29. Bruno Bettelheim (1903–90) was a child psychologist and writer. See *Bruno Bettelheim*, JEWISH VIRTUAL LIBR., <http://www.jewishvirtuallibrary.org/jsource/biography/Bettelheim.html> (last visited Mar. 12, 2014).

30. BRUNO BETTELHEIM, *THE USES OF ENCHANTMENT: THE MEANING AND IMPORTANCE OF FAIRY TALES* 45 (1977).

31. *Id.* at 5.

32. *Id.*

33. Jenkins, *supra* note 10.

34. The tales under Bettelheim’s psychoanalysis include *Hansel and Gretel*, *Little Red Riding Hood*, *Jack and the Beanstalk*, and *The Jealous Queen in Snow White and the Myth of Oedipus*.

35. BETTELHEIM, *supra* note 30, at 8.

36. *Id.* at 145.

37. Ann Swinfen is an academic and novelist. See *About Ann Swinfen*, ANNSWINFEN.COM, <http://www.annswinfen.com/about/> (last updated 2010).

a critique of contemporary society.”³⁸ A fantasy may be set in this world (as in Aesop’s “Talking Beast” tales),³⁹ in the everyday world in juxtaposition with a secondary or otherworld (as in C.S. Lewis’s *The Chronicles of Narnia*),⁴⁰ or solely in a secondary world (as in J.R.R. Tolkien’s *The Lord of the Rings* cycle).⁴¹ Secondary-world or “pure” fantasies may be founded on “deeply felt moral and religious convictions, and frequently result in the presentation of metaphysical concepts as physical realities.”⁴²

The experience of reading works of fantasy is one of transgression, of treading on difficult ground in unfamiliar places where perhaps one ought not to be, and of trials, reconciliations, and return. In his definitive essay on the fairy tale, Tolkien writes,

Faërie contains many things besides elves and fays, and besides dwarfs, witches, trolls, giants or dragons: it holds the seas, the sun, the moon, the sky; and the earth and all the things that are in it. . . . Most good “fairy-stories” are about the *aventures* of men in the Perilous Realm or upon its shadowy marches.⁴³

This is the realm of myth. In her analysis of works of fantasy for children, Sheila Egoff⁴⁴ characterizes the roots of the genre as

deeper than those of any other literary genre, for they lie in the oldest literature of all—myth, legend, and folklore. Myths can now be seen as a dim vision of a reality that our ancestors saw very clearly—the true and fixed nature of things that made for a more orderly world.⁴⁵

For Egoff, the “familiar goals” of fantasy include

the affirmation of moral and emotional truths, the opening of the inner eye of the imagination to look beyond reality, the understanding that things are not always as they seem, and the creation of imaginary worlds and their inhabitants who . . . can have faith in the midst of disaster. Such fantasies keep us close to our ancestors—to a time when there was a spirit in every river, a demon in every cave, a life force in every tree.⁴⁶

38. ANN SWINFEN, IN DEFENCE OF FANTASY: A STUDY OF THE GENRE IN ENGLISH AND AMERICAN LITERATURE SINCE 1945, at 2 (1984). Tolkien’s analysis of fantasy, *supra* note 7, is pivotal in her discussion.

39. SWINFEN, *supra* note 38, at 2, 10.

40. *Id.*

41. *Id.*

42. *Id.* at 10.

43. TOLKIEN, *supra* note 7, at 9.

44. Sheila Egoff (1918–2005) was a librarian, educator, and author who was regarded as an authority on children’s literature. See Biography of Sheila Egoff, CAMBRIDGE ONT., http://www.cambridge.ca/cs_publicaccess/hall_of_fame.php?aid=14 (last visited Mar. 12, 2014).

45. SHEILA A. EGOFF, *WORLDS WITHIN: CHILDREN’S FANTASY FROM THE MIDDLE AGES TO TODAY* 3–5 (1988). (“Many modern fantasists have made use of the ‘matter’ of myth . . . [and] the structural patterns of the imagination found in the oral tradition.”)

46. *Id.* at 310 (“[I]n the present, it appears as if children will have to go to the literature of the past to partake of the enchantment of the world.”)

Bettelheim, Swinfen, and Egoff defend fantasy, in part, on the basis of a moral purpose, moral conviction, or moral truth. None, however, defines “moral.” Given the matter of which they write, it is clear that “moral” means something far beyond the simple dichotomies of right and wrong, good and evil, obedience and transgression. It is why the expression or exposition of that meaning requires a story and not a command, maxim, fable, or parable. Philip Nel⁴⁷ more cautiously observes that “Seuss offers preparation for the often dangerous world beyond his books, where flawed individuals need to remain mindful of the rights of others and strive to make choices that cause the least harm and the most good.”⁴⁸

If myth guides the child through the long childhood that is crucial to our unique species, then myth is law in its deep and difficult sense, and stories for children are the legal texts of childhood. Bettelheim finds it unproblematic that the child’s world becomes a nightmare “when a loving parent suddenly makes what seem like utterly unreasonable demands and terrifying threats.”⁴⁹ We now see this as unreasonable, perilous, and, at its extreme, unlawful. It is the realm of myth that is meant to be perilous, not the child’s world of the everyday. Childhood is never free of its peculiar terrors, but to deny rights to children is to limit their childhood by depriving them of respect, dignity, autonomy, and protection from violence, thus multiplying those terrors. Without rights, childhood may be a nightmare foreclosing what the child may become as an adult. If stories for children are legal texts, they are texts on human rights. When the stepmother and her daughters abuse and exploit Cinderella, the child is stung at the injustice.⁵⁰ When her personhood is recognized, we live happily ever after. When the Who-child Jo-Jo at last sounds his barbaric YOPP!, we know that he is heard and all will be well. If the concept of children’s rights was foreign to most in Seuss’s day, it was by no means unknown.⁵¹ In *Horton*, Seuss draws upon the deep

47. Philip Nel is a Professor of English at Kansas State University and a scholar of children’s literature. See Biography of Philip Nel, KAN. ST. U., <http://www.k-state.edu/media/mediaguide/bios/nelbio.html> (last visited Mar. 12, 2014).

48. Philip Nel, “*Said a Bird in the Midst of a Blitz...: How World War II Created Dr. Seuss*,” 34.2 MOSAIC 65, 66 (2001).

49. BETTELHEIM, *supra* note 30, at 145.

50. See generally Charles Perrault, *Cinderella or the Little Glass Slipper*, in THE BLUE FAIRY BOOK 64 (Andrew Lang ed., 5th ed. 1891). After reading *Cinderella*, the children in Hampshire, England’s rights-respecting schools comment on Cinderella’s rights:

10-year-old Daniel answers “The stepmother and her sisters were horrible to Cinderella. They kept her in a cellar and made her work like a slave, which infringed Article 19—the right to be protected from being hurt or badly treated.” Grace, aged 11 years, adds “Her stepmother was very cruel and denied her right to be protected from abuse and it infringed Article 31 when they didn’t let her go to the ball, because children have a right to play.” Children may also be encouraged to write a letter to the police in the role of someone worried about the way in which Cinderella was being neglected and abused by her step-family.

KATHERINE COVELL, R. BRIAN HOWE & JUSTIN K. McNEIL, *Implementing Children’s Human Rights Education in Schools*, in 13 IMPROVING SCHOOLS 117, 119 (2010).

51. For an excellent overview of the history, development, theory, and critique of rights for children, see 1 CHILDREN’S RIGHTS (Michael D. A. Freeman ed., 2004) (introduction and the essays collected therein).

power of myth to portray the child as rights-bearer. The inaudible and invisible Whos are a metaphor for the child who is to be seen and not heard. Jo-Jo, the emblematic Child, carries the message home.

In his study of Maurice Sendak's *Where the Wild Things Are*, Desmond Manderson⁵² asserts that "the mythological elements of children's stories ought *themselves* to be regarded as an essential site for the emergence of particular understandings of law."⁵³ Stories for children are not "a series of texts *about* the law" but "the *fusion* of law and literature" and "the key to the constitutive myths and narratives that begin to organize our relationships to law."⁵⁴ Myth, Peter Fitzpatrick writes, "sets the limits of the world, of what can be meant and done, and transcends these limits in its relation to the sacred," the place of "ultimate origins and ultimate identity . . . the source and foundational force of all that is."⁵⁵ Myth makes sense of where we come from, who we are, and how we conduct ourselves in our relations with one another and with the natural world.

In telling of origins, transgressions, and reconciliation, myth is law and the origin of the idea of law. Law is derived from myth and myth sustains it. "In nearly all societies, the laws are accompanied by myths explaining that they are of divine origin."⁵⁶ The Babylonian creation epic *Enuma Elish* tells of the slaying of the chaos dragon Tiamat by the god-hero Marduk who cleaves her body to make earth and heaven, and fashions humanity from her bones.⁵⁷ The tale turns to the founding of Babylon, the building of the ziggurat, and the establishment of the law. "It goes directly from the creation myth to the myth of the origin of law because law is naturally conservative, and a myth about its origin would naturally be concerned with the establishing of order out of an original chaos."⁵⁸ The mythic origins of Western law have a dual origin in classical Greek mythology and in the Bible. Themis personified divine law in Greek myth,⁵⁹ but the origin of law as a matter of courts, mediation, and social order lies in the Greek myth of Orestes. Having murdered his mother in retribution for her murder

52. Desmond Manderson is a Future Fellow and Professor of Law at Australian National University. See Biography of Desmond Manderson, AUSTL. NAT'L U., <https://researchers.anu.edu.au/researchers/manderson-dra#biography> (last visited Mar. 12, 2014).

53. Desmond Manderson, *From Hunger to Love: Myths of the Source, Interpretation, and Constitution of Law in Children's Literature*, 15 *LAW & LITERATURE* 87, 91 (2003).

54. *Id.* at 93, 97–98.

55. FITZPATRICK, *supra* note 12, at 16.

56. NORTHROP FRYE & JAY MACPHERSON, *BIBLICAL AND CLASSICAL MYTHS: THE MYTHOLOGICAL FRAMEWORK OF WESTERN CULTURE* 162 (2004). Additionally, see *id.* chapters 15 ("Law: Ordering a Society") and 16 ("Law and Revolution").

57. LEONARD WILLIAM KING, *THE SEVEN TABLES OF CREATION* (1902) (including the full translation of the *Enuma Elish*).

58. FRYE & MACPHERSON, *supra* note 56, at 162.

59. "In the Homeric poems, Themis [meaning 'that which is put in place,' divine law] is the personification of the order of things established by law, custom, and equity, whence she is described as reigning in the assemblies of men (Od. ii. 68, &c.), and as convening, by the command of Zeus, the assembly of the gods (Il. xx. 4)." *Themis*, THEOI GREEK MYTHOLOGY, <http://www.theoi.com/Titan/TitanisThemis.html> (last visited Mar. 12, 2014).

of his father, Orestes began a feud that must be mediated in order to end the cycle of revenge.⁶⁰ The *Oresteia* tells of the mythic origin of the Athenian law court, the Areopagus, which is the origin of the Western judicial system. The Bible, conversely, depicts the origin of law not in mediation but in the rebellion of the Israelites against their Egyptian masters.⁶¹ Only upon their escape into the desert do they become a nation and receive the law.⁶²

The founding myth of modern law is that law supersedes myth.⁶³ This myth of modernity relies on another myth for its authority, that of the myth-ridden other—the savage, the child—that lets law confirm itself as its opposite,⁶⁴ as rational, dispassionate, and civilized. But modern law has its own covert myths of origin and validation, less grand than classical and biblical myths, but more pernicious. In the patriarchal origin-myth, law's force is backed by the divinely willed power of the sovereign, successor to Adam and Abraham, whose power is that of every father.⁶⁵ This justified the legal suppression of women and the feminine,⁶⁶ the law of male primogeniture, the power of corporal punishment, and the paternal ownership and control of children.⁶⁷ Robert Filmer's⁶⁸ patriarchy excluded children from even the barest protection of the law.⁶⁹

60. *Orestes at Delphoi*, THEOI GREEK MYTHOLOGY, <http://www.theoi.com/Gallery/T40.6.html> (last visited Mar. 12, 2014).

61. FRYE & MACPHERSON, *supra* note 56, at 162.

62. *Id.*

63. FITZPATRICK, *supra* note 12, at 16.

64. *Id.*

65. The power of the father, the power of the patriarch granted by divine will to Adam and to Abraham, is the locus of the power of the sovereign. See ROBERT FILMER, PATRIARCHA OR THE NATURAL POWER OF KINGS 12 (1680), available at <http://www.constitution.org/eng/patriarcha.htm>.

66. PETER GOODRICH, OEDIPUS LEX: PSYCHOANALYSIS, HISTORY, LAW (1995).

67. In his *Second Treatise of Government* (1690), John Locke refutes Filmer's thesis quoted *infra* note 69. Paternal power rests on a different basis than state power, and while children may or may not be self-owning, any claim to ownership rests with the mother because of the much greater labor she contributes to the genesis of the child. See Anne McGillivray, *Children's Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada*, 19 INT'L J. CHILD. RTS. 21, 27 (2010) [hereinafter McGillivray, *Children's Rights*].

68. Sir Robert Filmer (1588–1653) was an English political theorist. See Biography of Sir Robert Filmer, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/207005/Sir-Robert-Filmer> (last visited Mar. 12, 2014).

69. “[N]ot only Adam, but the succeeding Patriarchs had, by Right of Father-hood, Royal Authority over their children . . . for as Adam was Lord of his Children, so his Children under him, had a Command and Power over their own Children; but still with subordination to the First Parent, who is Lord-Paramount over his Children's Children to all generations . . .” FILMER, *supra* note 65, at 12. “And this subjection of Children [is] the Fountain of all Regal Authority, by the Ordination of God himself.” *Id.* “[F]or as Kingly Power is by the Law of God, so it hath no inferior Law to limit it. The Father of a Family Governs by no other law than by his own Will, not by the Laws and Wills of his Sons or Servants. There is no Nation that allows Children any Action or Remedy for being unjustly Governed.” *Id.* at 78–79.

The origins of particular laws are often said by jurists to have been lost in antiquity, or the mists of time. Yet many lawyers have dipped into the Roman law collected and digested by Justinian in AD 535 and rediscovered in the twelfth century.⁷⁰ Justinian observed of Roman law that “[t]he power which we have over our children is peculiar to Roman citizens; for there are no other men possessing such a power over children as we have.”⁷¹ Although paternal power was comparatively diminished under the common law, its incidents of custody, control, and corporal punishment were retained. In Freud’s origin myth, law is forged from the guilt of the primal horde, an ancestral band of brothers who, desiring the women hoarded by their despotic father, devour him, and from their horror create the foundation of patriarchal law.⁷² That children could be rights-bearers was foreclosed by these law-myths. The foundation of the law of new nations is the myth that law is an ideal of balanced perfection created by that nation’s constitutional fathers and began anew with the proclamation of that constitution. A Darwinian metaphor was seized by late nineteenth-century jurists who saw law as a self-evolving, self-purifying entity to be discovered or recovered by jurists across time.⁷³ If law is no longer an emanation of the will of the sovereign but an “entity” with the power to endlessly purify itself through evolving case law and legislation, then its evolution will reflect the changing social environment. It is perhaps not entirely coincidental that the nineteenth century was a period of unprecedented reform in the governance of childhood in such areas

70. The rediscovery of Justinian’s *Corpus Iuris Civilis* had a profound influence on the development of common law principles governing the family; as of course did the ecclesiastical courts that applied Roman law. See T. LAMBERT MEARS, *THE INSTITUTES OF GAIUS AND JUSTINIAN, THE TWELVE TABLES, AND THE CXVIIIITH AND CXXVITH NOVELS* (1882).

71. *Id.* at 270.

72. SIGMUND FREUD, *TOTEM AND TABOO* (James Strachey trans., 1950).

They revoked their deed by forbidding the killing of the totem, the substitute for their father; and they renounced its fruits by resigning their claim to the women who had now been set free. They thus created out of their filial sense of guilt the two fundamental taboos of totemism, which for that very reason inevitably corresponded to the two repressed wishes of the Oedipus complex.

Id. at 142.

This tumultuous mob of brothers were filled with the same contradictory feelings which we can see at work in the ambivalent father complexes of our children and of our neurotic patients. They hated their father, who presented such a formidable obstacle to their craving for power and their sexual desires; but they loved and admired him too.

Id. at 143.

73. Peter Fitzpatrick writes:

[Law’s] entity is sustained despite the process of change by presenting transition as a step from one state containing the entity to another [from the primitive to the modern, and so on]. The overall transition is always one from the simple to the complex, from the unified to the diverse . . . differentiation is always accompanied by a continued social integration, by an encompassing order in which the part of law is heightened. The entity in evolving responds to and overcomes the inadequacies of its prior form.

FITZPATRICK, *supra* note 12, at 195.

as maternal access and custody, child labor, universal education, and protection from physical and sexual abuse and exploitation.⁷⁴

If modern law appears unconcerned with myths of origin, it continues to rely on lesser myths—the majesty of its courts, the impartiality of its judges, the righteousness of its edicts. Cases before the courts tell of passions and betrayals, love and fear, loss and despair, hardship and travail, transgressions and reconciliations, and lessons taught (and sometimes learned)—all the stuff of myth. Law draws upon mythic understandings of self and other in delineating limits that must not be transgressed, and in defining the punishment awaiting transgressors. It makes a special space for certain transgressors, for children among others. That children must grow up is the fundamental law of childhood. *Infantia*, without (legal) speech and therefore innocent, becomes *doli capax*, capable of malice and deceit.⁷⁵ Innocence yields to legal subjectivity. If the child's knowledge of good and evil brings expulsion from the garden of childhood, it is myth that brings her safely through the gates.

Stories for children reflect law in its mythic infancy and original power. They do more than shape the incipient subject of law. They *are* law. If childhood is a journey toward law, and if legal subjectivity is to be understood as something more (or other) than enforced obedience to fixed rules, then something more (or other) is needed than the moral foreclosure of the didactic homily—the girl disobeys her mother; she is eaten by a bear—and the positivist foreclosure of law. “You can't pour didacticism down little throats,”⁷⁶ Seuss explains. “Oh, you might *cram* a little bit down. But it won't stay down. The little throats know how to spit it right out again.”⁷⁷ That myth may be cloaked in modernity and the tropes of the everyday does not diminish its transformative power. The mythic is structured to reflect the everyday and the everyday invokes the mythic. “For myth *is* the instant vision of a complex process,” Marshall McLuhan⁷⁸ writes, the moment in which that process contracts or implodes.⁷⁹

Stories featuring child protagonists hold a special power. “The child motif represents the preconscious, childhood aspect of the collective psyche.”⁸⁰ The Child as

74. See generally Anne McGillivray, *Childhood in the Shadow of Parens Patriae*, in MULTIPLE LENSES, MULTIPLE IMAGES: PERSPECTIVES ON THE CHILD ACROSS TIME, SPACE AND DISCIPLINES 38 (Hillel Goelman, Shelia Marshall, & Sally Ross eds., 2004) [hereinafter McGillivray, *Childhood in the Shadow of Parens Patriae*]; Anne McGillivray, *Children's Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada*, 18 INT'L J. CHILD. RTS. 21 (2012).

75. McGillivray, *Childhood in the Shadow of Parens Patriae*, *supra* note 74, at 42, 50.

76. Jenkins, *supra* note 10, at 188.

77. *Id.*

78. Marshall McLuhan (1911–1980) was a Canadian philosopher who focused on the way we communicate. See Terrence Gordon, *Marshall Who?*, MARSHALLMCLUHAN.COM, <http://www.marshallmcluhan.com/biography/> (July 2002).

79. Lewis Lapham, *Introduction to MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 25 (MIT Press 1994) (1964).

80. C.G. JUNG, *The Archetypes and the Collective Unconscious*, in 9 THE COLLECTED WORKS OF C.G. JUNG 1, 161 (William McGuire, et al. eds., R.C.F. Hull trans., 2d ed. 1981); see McGillivray, *State of Imperfect Transformation*, *supra* note 21.

an image “unites the opposites [as] a mediator, bringer of healing, that is, one who makes whole.”⁸¹ This is the role of *Horton’s* Jo-Jo in the reconciliation of the Nools and the Whos. The Child at the heart of myth symbolizes “the strongest, the most ineluctable urge in every being, namely the urge to realize itself.”⁸² This self-realization is powerfully expressed in Jo-Jo’s triumphant YOPP! The Child of contemporary stories for children remains linked with the *conception* of childhood emergent in the work of Locke and Rousseau; a “pure point of origin” with access to a lost world or a primitive state of being which the child then restores to the adult.⁸³ This view centers the adult in stories for children. But what of the child for whom the story is made?

For Seuss, writing for children is a purposeful activity and that purpose is to enhance children’s participation in civil society.⁸⁴ “Children’s Reading and Children’s Thinking are the rock bottom base upon which this country will rise. Or not rise . . . writers are beginning to realize that books for children have a greater potential for good, or evil, than any other form of literature on earth.”⁸⁵ Stories for children, as myth, are legal texts. This returns us to the question of adult purpose. Whose story is it? As Jacqueline Rose⁸⁶ asks, who is it who does not want Peter Pan to grow up?⁸⁷ It is probably not his child reader. Where the aim of a story is to instill principles of civility, we may similarly ask, whose law is it? If we are not to cram didacticism down little throats, and if law requires a truly participatory subject who is transgressive,

81. JUNG, *supra* note 80, at 164.

82. *Id.* at 170.

83. JACQUELINE ROSE, *THE CASE OF PETER PAN OR THE IMPOSSIBILITY OF CHILDREN’S FICTION* 10 (U. Penn. Press rev. ed. 1992).

84. *See, e.g.*, Jenkins, *supra* note 10, at 187–208; Nel, *supra* note 48, at 178.

It is of paramount importance that both Horton and the smallest Who act not only each for himself, but also for the common good. Every individual is uniquely responsible. Without the personal and individual acceptance of responsibility, the very survival of the world is threatened. Dr. Seuss’s is thus not only a vision of individuals, but of community. It rests upon a faith that the exercise of individuality will build and strengthen social life. It will not initiate a dispersion into irreconcilable diversities but rather will serve as a common ground for respecting differences and making possible their expression and appreciation. As a social vision, it pledges itself to a community of unique, participating individuals, without which the individuals themselves, with their world, will perish.

Shira Wolosky, *Democracy in America: By Dr. Seuss*, 85 *SOUTHWEST REV.* 167, 178 (2000).

85. Jenkins, *supra* note 10, at 187.

86. Jacqueline Rose is a Professor of English at Queen Mary, University of London. *See Profile of Professor Jacqueline Rose*, QUEEN MARY U. OF LONDON, <http://www.sed.qmul.ac.uk/staff/rosej.html> (last visited Mar. 12, 2014).

87. The child of children’s fiction is

the one the category itself sets in place, the one which it needs to believe is there for its own purposes. . . . Suppose, therefore, that Peter Pan is a little boy who does not grow up, not because he doesn’t want to, but because someone else prefers that he shouldn’t. Suppose, therefore, that what is at stake in *Peter Pan* is the adult’s desire for the child.

ROSE, *supra* note 83, at 3.

choosing, and inventive, then a transgressive, choosing, and inventive protagonist is required. We find this protagonist in, among others, the nonsense tradition of Jonathan Swift, Edward Lear, Lewis Carroll, and Hilaire Belloc.⁸⁸ Gulliver ponders the nature of humanity in the foul Yahoos and their noble horses,⁸⁹ Lear's limericks mock the Victorian morality tale,⁹⁰ clever Alice solves the riddles set by Wonderland's childish adults,⁹¹ and Belloc's Jim who, having failed to "keep a hold of Nurse / For fear of finding something worse," is eaten by a lion.⁹² We also find this protagonist in the nonsense of Dr. Seuss. If the story is to have the mythic power that makes it law, it must leave space for the reader to make her own intuitive leap to an understanding of law. It cannot be didactic. As Seuss explains, "when we have a moral, we try to tell it sideways."⁹³

Behind *Horton* flickers another kind of myth. This is Roland Barthes's⁹⁴ "myth, today," produced by commercial and political words and images.⁹⁵ In this ad-myth, "there never is any contradiction, conflict, or split between the meaning and the form."⁹⁶ It has "an imperative, buttonholing character: stemming from an historical concept, directly springing from contingency . . . it is I whom it has come to seek. It is turned towards me, I am subjected to its intentional force, it summons me . . ." ⁹⁷ It is "poverty-stricken. It does not know how to proliferate; being produced on order

88. Jenkins, *supra* note 10, at 189.

89. *See generally* JOHNATHAN SWIFT, *GULLIVER'S TRAVELS* (Wordsworth Editions Ltd. 1992).

90. Edward Lear (1812–88) was an English author and poet, mostly known for his literary nonsense in his limericks, a form he popularized. *See* Biography of Edward Lear, POETRY FOUND., <http://www.poetryfoundation.org/bio/edward-lear> (last visited Mar. 12, 2014).

91. *See generally* LEWIS CARROL, *ALICE'S ADVENTURES IN WONDERLAND* (Lee & Shepard 1869).

92. Hilaire Belloc, *Jim, Who Ran Away from His Nurse and Was Eaten by a Lion*, in *CAUTIONARY TALES FOR CHILDREN: DESIGNED FOR THE ADMONITION OF CHILDREN BETWEEN THE AGES OF EIGHT AND FOURTEEN YEARS* 9, 16 (Alfred A. Knopf 1922).

93. Jenkins, *supra* note 10, at 189.

94. Roland Barthes (1915–80) was a French philosopher and literary theorist. *See* Biography of Roland Barthes, *ENCYCLOPAEDIA BRITANNICA*, <http://www.britannica.com/EBchecked/topic/54319/Roland-Barthes> (last visited Mar. 12, 2014).

95. ROLAND BARTHES, *MYTHOLOGIES* 107–09 (Annette Lavers trans., 1970).

96. Barthes writes further:

[I]f I am in a car and I look at the scenery through the window, I can at will focus on the scenery or on the window-pane. At one moment I grasp the presence of the glass and the distance of the landscape; at another, on the contrary, the transparency of the glass and the depth of the landscape; but the result of this alternation is constant: the glass is at once present and empty to me, and the landscape unreal and full. The same thing occurs in the mythical signifier: its form is empty but present, its meaning absent but full. To wonder at this contradiction I must voluntarily interrupt this turnstile of form and meaning, I must focus on each separately, and apply to myth a static method of deciphering, in short, I must go against its own dynamics: to sum up, I must pass from the state of reader to that of mythologist.

Id. at 122.

97. *Id.* at 123.

and for a temporally limited prospect, it is invented with difficulty. It lacks a major faculty, that of fabulizing.⁹⁸ Barthes's critique may apply to Theodore Geisel's advertisements in which Seussian characters first emerge.⁹⁹ Whether the critique applies to his books for children is a matter of taste, but what is clear is that, in both his ad-cartoons and his children's books, he displays "the great salesman's gift for distilling an idea, making it glamorous and amusing—selling without shouting."¹⁰⁰ If what Seuss is selling is a transgressive, choosing, and inventive legal subject, then this is the focus of a *critical* legal pluralism.

III. "IT'S ALL FULL OF PERSONS! THEY'LL PROVE IT TO YOU!"¹⁰¹—VALIDATING THE OTHER

Nested within the tale of *Horton* is a plurality of normative orders. A normative order is a schema or worldview which may or may not have the authority of law, but carries an authority, moral or otherwise. Most obvious of the normative orders in *Horton* are the worlds of the Jungle of Nool and the dust-speck world of the Whos. Within these worlds exists a plurality of orders whose representatives each seek to validate those orders. Horton, having heard the Whos and sworn to protect them, must validate their order by proving their reality to his fellow Nools. The Mayor of Who-ville, whose office requires that he preserve the Who order, must summon every citizen of Who-ville to prove the existence, the reality, of that order. The sour kangaroo, self-appointed ruler of Nool, has dedicated herself to preserving a Noolian order that includes no Whos. The Who-child Jo-Jo must decide whether the cause of the Whos is worthy of interrupting his own normative reality, a sort of sullen solitude. Only when Horton of the Nools and the Mayor of the Whos join the authority of their respective orders does Jo-Jo respond to the needs of the larger Who order.

The lens of legal pluralism helps to show how competing normative orders are navigated and mediated by their subjects. Legal pluralism is a way of thinking about law which recognizes the coexistence of a plurality of legal orders and a plurality of sites of normativity, of other forms of ordering which may or may not be characterized as law.¹⁰² The daily horoscope, one's elders, one's street gang, or Oprah may play a stronger role than law in shaping thought, conduct, and the form of everyday life. If "knowledge is a process of creating and maintaining myths about realities" and legal

98. *Id.* at 148.

99. A proto-Horton is seen in a Flit ad showing a circus elephant watching a tightrope-walker. See Jim Edwards, *These Ads Drawn by Dr Seuss Before He Was Famous Are Utterly Charming*, BUS. INSIDER (Jan. 30, 2012), <http://www.businessinsider.com/these-ads-drawn-by-dr-suess-before-he-was-famous-are-utterly-charming-2012-1?op=1> links.

100. Richard Corliss, *That Old Feeling: Seuss on First*, TIME (Mar. 2, 2004), <http://www.time.com/time/arts/article/0,8599,597240,00.html>.

101. HORTON HEARS A WHO!, *supra* note 2.

102. See generally Martha-Marie Kleinhans & Roderick Macdonald, *What Is a Critical Legal Pluralism?*, 12 CAN. J.L. & Soc'y 25 (1997); McGillivray, *State of Imperfect Transformation*, *supra* note 21, at 10–28.

knowledge is about “creating and maintaining self-understandings,”¹⁰³ then a *critical* legal pluralism takes this a step further by situating legal order within the individual subject of law. The legal subject becomes a subject of a plurality of normative orders. In navigating between orders, she becomes a law-inventing, law-subverting genetrix of normativity. In this view, law is neither outside nor above its subjects. It is not a matter of fiat but of reciprocal construction. Law exists “within all members of any society that purports to recognize them as legal subjects.”¹⁰⁴

Horton is a picture-book. If a normative order is also a schema, then a discussion of the worlds in *Horton* must also include Seuss's illustrations. As Louis Menand¹⁰⁵ notes of *The Cat in the Hat*,¹⁰⁶ a “Beginner Book” written three years and four books after *Horton*, it “stood for the idea that language skills—and many other subjects—ought to be taught through illustrated storybooks, rather than primers and textbooks.”¹⁰⁷ The idea can be traced to Comenius, a seventeenth-century educator who understood that illustrations carry at least as much information as text, and that pictures teach more than words.¹⁰⁸ The child sees the story in the words and the story in the pictures, each conveying different subtle meanings. *Horton*'s palette consists of a suffused blue paling into greyed-out baby-blues and a pink saturating into deep crimson. Outlines are black and bold. Maurice Sendak terms the style “a private Seussian dreamscape” of “slippery, sloppery, curvy, altogether delicious Art Deco palazzos” that “invite you to slide and bump along, in and out of flaming colored mazes . . . past grand, even apocalyptic, oceans and skies.”¹⁰⁹ Elements of surrealism, Dadaism, Gaudi, Dali, art deco, M.C. Escher, and even Picasso can be identified. Jon Agee¹¹⁰ attempts a definition: “Seussism (ˈv7 Soos-izm\ʌ7), n. Fine Arts. A style of art characterized chiefly by a grandubulous

103. Kleinhans & Macdonald, *supra* note 102, at 35.

104. *Id.* at 46.

105. Louis Menand is the Anne T. and Robert M. Bass Professor of English at Harvard University. See Biography of Louis Menand, HARV. U., <http://english.fas.harvard.edu/faculty/menand/> (last visited Mar. 12, 2014).

106. DR. SEUSS, *THE CAT IN THE HAT* (1957).

107. Louis Menand, *Cat People: What Dr. Seuss Really Taught Us*, NEW YORKER (Dec. 23, 2002), http://www.newyorker.com/archive/2002/12/23/021223crat_atlarge?currentPage=all.

108. Picture books have been used to instruct children since Comenius published his *Orbis Sensualium Pictus* in Nuremberg in 1658. “An enlightened and illustrated Latin vocabulary, with words in German, Latin, Italian and French,” it was translated into English by Charles Hoole in 1659 as *Orbis Sensualium Pictus... Visible World; or A Nomenclature and Pictures of All the Chief Things that Are in the World*. In 1664, Festin Corin published his English illustrated alphabet, *The Childes First Tutor: or, The Master and Mistris—Teaching Children an Easie and Delightful Way to Learn the Twenty Four Letters*. See *Historical Survey of Children's Literature in the British Library*, BRIT. LIBR., www.bl.uk/reshelp/findhelpsubject/literature/chillit/childhist/childhistorical.html (last visited Mar. 12, 2014). *Orbis Pictus* was used in European and North American children's education for over two centuries. Jean Piaget, *Jan Amos Comenius*, 23 PROSPECTS 173 (1993).

109. Maurice Sendak, *Introduction to AUDREY GEISEL, THE SECRET ART OF DR. SEUSS* (Random House 1995).

110. Jon Agee is an author of children's books. See Biography of Jon Agee, JONAGEE.COM, <http://www.jonagee.com/html/bio.php?nav=2&sub=0> (last visited Mar. 12, 2014).

sense of ornamentation and color, where exotic, snergelly architecture twists, turns and schloops into countless grickelly filigrees and flourishes”¹¹¹ The myth of *Horton* is enhanced by the floating timelessness of its fantastical landscapes, its gravity-defying architecture, and its weird dwellers, some of whom are barely subliminally identifiable (bugs?)¹¹² but familiar as family.

A second schema in *Horton* is its odd, compelling rhyme. Words, some freely invented, are arranged in rhymed anapestic dimeter,¹¹³ an arresting riffing galloping rap that creates a second world of sound and sense joined by rhythm. Seuss’s rhyming is not the sort of poetry¹¹⁴ that prohibits translation, whether academic or linguistic. As Claude Lévi-Strauss¹¹⁵ explains,

Poetry is a kind of speech which cannot be translated except at the cost of serious distortions; whereas the mythical value of the myth is preserved even through the worst translation. Myth is language, functioning on an especially high level where meaning succeeds practically at ‘taking off’ from the linguistic ground on which it keeps on rolling.¹¹⁶

Pictures and words convey the conflicting, competing normative values of the characters in the story. The title page shows a quizzical elephant looking out at the reader, having perhaps just noticed a random house in the field behind him. This draws our attention to the world of publishing (Random House) and to the incongruity of either the house or the elephant. There is a dedication, “For My Great Friend, Mitsugi Nakamura of Kyoto, Japan.”¹¹⁷ The Japanese cities of Hiroshima and Nagasaki were bombed into oblivion by American forces nine years before the book appeared.¹¹⁸ But that is another world and we do not dwell there.

We turn the page. We are transported to a pool in the Jungle of Nool in which a blissful elephant soaks. He is Horton, and he hears “a small noise . . . a very faint

111. Jon Agee, *The 500 Cats of Theodor Geisel: The Secret Art of Dr. Seuss*, L.A. TIMES (Dec. 3, 1995), http://articles.latimes.com/1995-12-03/books/bk-9687_1_secret-art.

112. A conversation between Seuss and his editor Helen Geisel confirms the uncertainty:

“Now he looks like a bug,” [stated Helen].

“Well, they are bugs,” said [Seuss] defensively.

“They are not bugs,” replied Helen. “Those Whos are just small people.”

PHILIP NEL, *DR. SEUSS: AMERICAN ICON* 110 (2004).

113. *See id.* at 16–21.

114. *Id.*, on whether Seuss-rhyme is ‘poetry’.

115. Claude Lévi-Strauss (1908–2009) was a French anthropologist and ethnologist. *See* Edward Rothstein, *Claude Lévi-Strauss, 100, Dies; Altered Western Views on the ‘Primitive’*, N.Y. TIMES (Nov. 4, 2009), <http://nyti.ms/qALOGu>.

116. FITZPATRICK, *supra* note 12, at 21.

117. HORTON HEARS A WHO!, *supra* note 2.

118. *But see* Nel, *supra* note 48, at 77 (“While the Whos could represent children or any minority populations, given that the book was written upon Seuss’s return from Japan and . . . influenced by his visits to Japanese schools, it is reasonable to assume that Seuss was thinking of the Japanese people when he created these Whos [but to equate Horton with the United States] may press this parallel a bit too much.”).

yelp / As if some tiny person were calling for help." Another world has floated into the everyday world of the jungle. Horton is a logical beast. As specks of dust "are not able to yell," he concludes that "there must / Be someone on top of that small speck of dust! / Some sort of creature of *very* small size." He makes an empathetic leap, envisioning "some poor little person who's shaking with fear." He makes a promise: "I'll just have to save him." He justifies it, first, on the argument that "Because, after all, / A person's a person, no matter how small" and, later, by his own bulk: "I've *got* to protect them. I'm bigger than they."¹¹⁹

The sour kangaroo, the joey¹²⁰ in her pouch, the simian Wickersham Brothers, and the black-bottomed eagle Vlad Vlad-i-koff see nothing on the dust-speck. Nor can Horton. He can only hear. He continues to listen to the voice on the speck through the noisy derision of his fellow Nools. "I think you're a fool!" laughed the sour kangaroo / And the young kangaroo in her pouch said, 'Me too! / You're the biggest blame fool in the Jungle of Nool!'" The jungle creatures join in the derision: "Through the high jungle tree tops, the news quickly spread: / 'He talks to a dust-speck! He's out of his head!'" Why, we will ask, are the jungle creatures so worked up? What is the harm in talking to a speck of dust? We stand with Horton, who learns that the voice on the speck is that of the Mayor of the tiny world of Who-ville, "a town that is friendly and clean" where Whos push prams and lawn-mowers, shop, type, and play ball amid twisted, canting housing complexes joined by impossibly cantilevered stairways.¹²¹ Who-ville and its inhabitants are visible only to the reader. The reader has also seen the small fearful figure and the tiny terrified family pictured in Horton's imagination. Does this mean that Who-ville, too, exists only in Horton's mind? If we think so, we will have allied ourselves with the jeering Nools. What proof do we (and they) need?

Seeing may be believing, but hearing is evidence. *Audi alteram partem*, the first branch of natural justice, applies even in Nool, and Horton's hearsay is rejected. The Wickersham monkeys take charge, shouting, "What rot! / This elephant's talking to *Whos* who are *not!* / There *aren't* any *Whos!* And they *don't* have a Mayor! / And *we're* going to stop all this nonsense! *So there!*" They snatch the clover on which Horton has placed the dust-speck and give it to the black-bottomed eagle. Horton follows the eagle across stony crags begging, "Please do not harm all my little folks who / Have as much right to live as bigger folks do!" The blue which colored his blissful pool at the beginning of the tale now suffuses the pages with the darkness of night. At precisely 6:56 a.m., the eagle drops the clover into "a great patch of clover a hundred miles wide! / 'Find THAT!' sneered the bird." Horton tries. "And by noon, poor old Horton, more dead than alive, / Had picked, searched, and piled up, nine thousand and five." Not until "the three millionth flower" does he find the right one.¹²²

119. *HORTON HEARS A WHO!*, *supra* note 2.

120. A "joey" is a baby kangaroo.

121. *Id.*

122. *Id.*

Who-ville has suffered much damage to its teapots. Horton's suffering at the hands of the Nools has just begun. The sour kangaroo, now self-appointed prosecutrix of the law of the Jungle of Nool, convicts him of some version of breaching the peace: "Such carryings-on in our peaceable jungle! / We've had quite enough of your bellowing bungle!" Horton is to be roped and caged. "And as for your dust-speck . . . *hab!* *That* we shall boil / In a hot steaming kettle of Beezle-Nut oil!" Horton answers, "Oh, that you *can't* do! / It's all full of persons! / They'll *prove* it to you!" The denizens of Who-ville cry out in 9-point type, "We are here! We are here! We are here! We are here!" The kangaroo hears only the breeze. She instructs her joey: "I heard no small voices. And you didn't either." The rope is carried in, the Beezle-Nut oil is steaming, and Horton is tied foot and tail. Despite resisting "with great vigor and vim," he is horribly mauled and beaten. He begs the Whos to shout louder. It is not enough. "Is anyone shirking?" Horton asks. The Mayor's search brings him to one small, silent Who-child who joins his voice to the clamor of the Whos. The invisible becomes audible. The Whos are heard. Horton delivers his closing argument: "They've proved they ARE persons, no matter how small. / And their whole world was saved by the Smallest of All!" The kangaroo and her joey pledge themselves to protecting the Whos and the gathering monkeys beam with approval.¹²³ Wisdom is gained. The people are reconciled.

Why are the jungle creatures angry? Talking to imaginary people is eccentric, not criminal, yet Horton is nearly lynched for it. This visceral response to difference is the law of the jungle. In its violence and cruelty, its retaliatory focus, its lack of a rule of law, the law of the jungle is the metaphorical antithesis of law. Horton is charged with breaching the peace by inflaming others. But he asked only a personal favor—"So please . . . as a favor to me, / Try not to disturb them. Just please let them be."¹²⁴ Only when his undertaking to the Whos is compromised by the threat to his own safety does he rebel. If anyone has disturbed the peace, it is the sour kangaroo. The jungle sees it differently. Horton's knowledge threatens the fundamental order of things. New people, people who are different and (socially) invisible, claim rights against the collectivity. Long-held beliefs are threatened. Having laid the charge, established guilt, set the penalty, and hired enforcers, the kangaroo is Horton's judge, jury, and executioner. Hers is a kangaroo court.¹²⁵ Her priority is to keep her world safe for her joey. Sameness is safest. Difference is danger. If the Whos are real, the

123. *Id.*

124. *Id.*

125. The phrase first appears in the magazine stories of Philip Paxton (Samuel Adams Hammett), published as *A Stray Yankee in Texas*. "By an unanimous vote, Judge G.—the fattest and funniest of the assembly—was elected to the bench, and the 'Mestang' or 'Kangaroo Court' regularly organized." PHILIP PAXTON, *A STRAY YANKEE IN TEXAS* 205 (1853). The reference is to the itinerant frontier courts of the mid-nineteenth-century American West. "These roving judges were paid on the basis of how many trials they conducted, and in some instances their salary depended on the fines from the defendants they convicted. The term *kangaroo court* comes from the image of these judges hopping from place to place, guided less by concern for justice than by the desire to wrap up as many trials as the day allowed." WEST'S ENCYCLOPEDIA OF AMERICAN LAW 103 (2d ed. 2005).

safe sameness of her joey's future is threatened and, worse, she will be proven wrong, undermining her authority in the eyes of Nool and her joey.

Horton as defender of the Who world, and the kangaroo as prosecutrix for the Nool world, represent competing normative orders. In one version of reality, the Whos exist. In the other, they do not. This problem is a familiar one to courts of law, as it is to the subject of multiple normative orders. Can these competing visions be reconciled? Which world, which order, is real? If both are real, is one subsidiary to the other? This intranormative conflict "flows only from its recognition and acknowledgment by the legal subject-self."¹²⁶ The Nools do not believe in the existence of the Whos, but the Whos do not doubt the existence of the Nools. The balance of physical power favors the Nools, but the balance of knowledge-power, of moral suasion, favors the Whos. Only the Nool Horton has heard the Whos. Having accepted their personhood he, as a Noolian subject, cannot submit to their extermination under Noolian law. For him, there is no conflict, "no a priori distinction between normative orders because these normative orders [Whos and Nools] cannot exist outside the creative capacity of their subjects."¹²⁷ The creative capacity to accept and to rationalize conflicting normative orders is Horton's gift as the messenger. He feels no need to seek "a separation, nor an eventual hierarchical reconciliation, of multiple legal orders" and understands that within and between orders or worlds, there is heterogeneity.¹²⁸ Nools differ from other Nools, and Whos from other Whos, just as their worlds differ from each other.

"How legal subjects recognize and react to relations within and between these regimes" brings tension.¹²⁹ The tension lies not just in disparity of knowledge. Horton knows the Whos are real. The kangaroo rejects not only his evidence but also his claim that persons exist outside her world. The turmoil of the Nools is the fear of the other. That they hid the clover on which Horton placed the Whos, rather than destroy it, suggests that they suspect not only that the Whos exist, but also that they may be persons with equal claim to the respect and protection of the law. With Jo-Jo's YOPP! the tension is resolved. A person *is* a person, however small. Other worlds, other normative orders, exist. With Jo-Jo's cry comes the wisdom that no world of conscious, sentient beings is subsidiary to one's own. This, the essence of the messenger's gift in every myth, reflects the pluralist approach to an understanding of law.

We see the joy of the jungle, we imagine the jubilation of the Whos, and we picture Horton again at peace in his blissful blue pool. What of the Who-child, the child who united these opposites, and who lies at the heart of myth as mediator, as the one who makes whole—Jo-Jo the young twerp of an order all his own?

126. Kleinhans & Macdonald, *supra* note 102, at 44.

127. *Id.* at 40.

128. *Id.* at 39 ("Normative heterogeneity exists both between various normative regimes which inhabit the same intellectual space, and within the regimes themselves.")

129. *Id.*

IV. “PERSONS WHO’VE NEVER EXISTED”¹³⁰—THE WORLD-SAVING RIGHTS-YEARNING SEUSSIAN CHILD

“Is anyone shirking?” a desperate Horton asks the Mayor of Who-ville.

Don’t give up! I believe in you all!

A person’s a person, no matter how small!

And you very small persons will *not* have to die

If you make yourselves heard! *So come on, now*, and TRY! . . .

They don’t hear a thing! Are you *sure* all your boys

Are doing their best? Are they ALL making noise?

Are you sure every *Who* down in *Who*-ville is working?

Quick! Look through your town! Is there anyone shirking?¹³¹

The Mayor’s search for a shirker is mapped on a stepped, snaking, crimson path ending at Fairfax Apartment 12J where a tiny figure dressed in crimson stands alone, his back to the door, his nose in the air, and a smirk on his face. He knows what is going on and he does not care. He is the kind of child who, in Fifties talk, is cruising for a bruising. He is “[a] very small, very small shirker named Jo-Jo” and he is “standing, just standing, and bouncing a Yo-Yo! / Not making a sound! Not a yipp! Not a chirp!” The Mayor grabs “the young twerp” and, leading him up an Escher stairway, lectures him on red-bloodedness and the need to come to the aid of his country in its darkest hour. “So, open your mouth, lad! For every voice counts!”¹³² “I too am not a bit tamed—I too am untranslatable; I sound my barbaric yawp over the roofs of the world,” Walt Whitman writes.¹³³ Precariously balanced on the Mayor’s outstretched hand atop the spherical tip of the swaying lightning-rod of the town’s highest tower, over the roofs of the Who-world, the untamed Jo-Jo “cleared his throat and he shouted out ‘YOPP!’”¹³⁴

That both worlds are saved by the Smallest of All! together with the visual prominence given to Jo-Jo, the emphasis on his physical insignificance among the physically insignificant Whos, and Seuss’s views on childhood suggest that *Horton* is a fable of childhood. The plight of the Whos is a metaphor of the child’s yearning for the right to be heard and for autonomy, for self-determination—not as a demographic, a psychological subject, a consumer, an object of protection, or a future citizen—but as a child. “I want to see a bunch of scrappy kids talking back to us,” Seuss writes. “And I want to sit [there] and tell the kid ‘O.K., Bud, I think . . . you’re wrong. But if

130. HORTON HEARS A WHO!, *supra* note 2.

131. *Id.*

132. *Id.*

133. WHITMAN, *supra* note 4.

134. HORTON HEARS A WHO!, *supra* note 2.

you're so sure of yourself that you think the back steps need to be painted magenta—get your gang together and paint them magenta. We'll buy the paint.”¹³⁵

Horton tells of the mythic journey of Horton and his people and hints at the journey of the child Jo-Jo toward a transgressive legal subjectivity. Because this is a story, we suspect that the journeys of the messenger and the child, who meet only at the story's apotheosis, must on some level be parallel. We know what the messenger suffered at the hands of his people. What did Jo-Jo suffer? Why is he alone, and why is he alone among the Whos in his refusal to participate in their world-saving cry? He is the only named Who, his voice is heard across worlds, he saves his people from extermination, and Nool from its racist insularity and the atrocity of genocide. He is a shirker according to Horton, and a young twerp according to the Mayor. He does not seem to be a particularly cute or lovable child. Even in his moment of triumph, he does not seem happy. “Children are thwarted people,” Seuss observed. “Their idea of tragedy is when some one says you *can't* do that.”¹³⁶ Jo-Jo's YOPP! is affirmation that he *can*. His accomplishment requires the mythic authority of the messenger and the civic authority of the Mayor but the decision and the power are his own. The story turns on hearing the child.

Henry Jenkins¹³⁷ describes the Seussian child as “born in an edenic state, outside of adult corruption, yet already possessing, as a birthright, the virtues of a democratic citizen—a sense of fairness and justice, a hunger to belong and participate within the community.”¹³⁸ Protecting children from corrupting, undemocratic adults and authoritarian institutions is the challenge Seuss set for himself.¹³⁹ Children, he believed, must “respect and trust their own internal responses to an unjust world.”¹⁴⁰ His fables intentionally subvert authority. The Seussian child, then, is a rights-instinct, rights-bearing child who is acutely conscious of injustice and unfairness. This child is a person in law deserving of dignity, equality, and respect. The idea that children are

135. NEL, *supra* note 112, at 93. In a 2004 *NBC Today Show* interview, Audrey Geisel said of Seuss, “He was afraid of children to a degree” and was unnerved by their unpredictability. “What might they do next? What might they ask next? . . . No, he couldn't just sit down on the floor and play with children. It was none of that. He just had to do what he had to do, and they loved him. And he loved them for loving what he did.” Associated Press, *Seussentennial: 100 years of Dr. Seuss*, TODAY (Feb. 26, 2004), <http://www.today.com/id/4362025/site/todayshow/ns/today-entertainment/t/seussentennial-years-dr-seuss/#.USp60lfLVmd>.

136. Jenkins, *supra* note 10, at 196.

137. Henry Jenkins is Provost's Professor of Communication, Journalism, Cinematic Arts and Education at the University of Southern California Annenberg School for Communication and Journalism. *See* Biography of Henry Jenkins, USC, <http://annenberg.usc.edu/Faculty/Communication%2520and%2520Journalism/JenkinsH.aspx> (last visited Mar. 12, 2014).

138. *Id.* at 188.

139. *Id.*

140. *Id.*

born with a moral instinct,¹⁴¹ and very possibly a legal or rulemaking one,¹⁴² is supported by contemporary research. Children are thwarted in the exercise of their rights and it causes them great pain. This underlies Seuss's 1953 musical film *The 5000 Fingers of Dr. T*.¹⁴³

Released the year before *Horton* was published, the film tells of a megalomaniac pianist who enslaves five hundred children to perform his musical masterpiece.¹⁴⁴ The child Bart, anagram of brat and brother in spirit to Jo-Jo the twerp, calls for a children's revolution.¹⁴⁵ "People should always believe in kids," says the film's music-loving plumber August Zabladowski.¹⁴⁶ "They should even believe their lies."¹⁴⁷ Bart's poignant solo captures the essence of children's yearning for rights and challenges the supposed 'right' of adults to physically punish and emotionally abuse and exploit them:¹⁴⁸

Now just because we're kids, Because we're sort of small,
Because we're closer to the ground And you are bigger pound by pound,
You have no right, You have no right To push and shove us little kids around.
Now just because your throat Has got a deeper voice
And lots of wind to blow it out
At little kids who don't dare shout, You have no right, You have no right
To boss and beat us little kids about.
Just because you've whiskers on your face to shave, You treat us like a slave
You know that isn't fair
I'd hate to grow, Like some I know,
Who push and shove us little kids around.¹⁴⁹

141. See *The Nature of Things: Babies: Born To Be Good?* (CBC television broadcast Jul. 4, 2013), available at <http://www.cbc.ca/player/Shows/Shows/The+Nature+of+Things/ID/2296544019/> ("Psychologists have made breakthroughs in our understanding of what babies might be thinking, and what they could possibly know about justice, helping, honesty, fairness. Even before they learn to talk."); see also Roxanne Khamsi, *Babies Can Spot the Good, the Bad, and the Ugly*, NEW SCIENTIST (Nov. 22, 2007, 10:44 AM), <http://www.newscientist.com/article/dn12948-babies-can-spot-the-good-the-bad-and-the-ugly.html.apes-rolling-up-a-hill-article/>.

142. See Michael D. Guttentag, *Is There a Law Instinct?*, 87 Wash. U. L. Rev. 269 (2010).

143. See *THE 5000 FINGERS OF DR. T* (Columbia Pictures 1953) (story, script, and lyrics written by Theodore Geisel).

144. *Id.*

145. *HORTON HEARS A WHO!*, *supra* note 2.

146. Corliss, *supra* note 101.

147. *Id.*

148. Tommy Rettig, *Because We're Kids*, on *THE 5000 FINGERS OF DR. T* (Mater Classics Records 2009). The solo is available for purchase at http://www.screenarchives.com/title_detail.cfm/ID/14536/THE-5000-FINGERS-OF-DR-T-/.

149. *Id.*

If grown-ups “have no right to boss and beat us little kids about” and “push and shove the little kids around” and “treat us like a slave,” then there must be a right of the child not to be bossed, beaten, pushed, shoved, and enslaved.¹⁵⁰ If “little kids . . . don’t dare shout” because grown-ups prevent them from being heard, then there must be a right of the child to be heard.¹⁵¹ If grown-ups get away with it “just because we’re sort of small” and they are “bigger by the pound,” then might makes right and “[y]ou know that isn’t fair.”¹⁵²

The U.S. Supreme Court in its 1967 decision *In re Gault* established the right of the child to due process of law, stating: “Under our Constitution, the condition of being a boy does not justify a kangaroo court.”¹⁵³ Jo-Jo’s self-imposed isolation suggests that he, with Horton, has felt the burning injustice of a kangaroo court. His peremptory treatment by the Mayor suggests that the Whos treat children much as we often do—bossing, beating, pushing and shoving, and silencing them in judicial and quasi-judicial proceedings as well as informal ones at home and school. The basis of due process and the basis of dignity and respect is the right to be heard. *Gault* marked a shift from a welfare protectivist approach to children to one based on rights.¹⁵⁴ While the decision is directed at the legal treatment of delinquent children, all children may claim the rights promised to “all men” in the U.S. Constitution and elaborated in its Bill of Rights and do have the rights promised to “everyone” in the Canadian Charter of Rights and Freedoms.¹⁵⁵

If promised rights are empty rights, “the very emptiness provides a vessel to be filled with possibility, with a plurality of autonomous yearnings.”¹⁵⁶ It is easy for those like the sour kangaroo who, secure in their rights, power, and privilege, and willfully deaf to the rights-claims of others, to claim that rights-discourse is barren, or that children have no rights and no need for them. Children cannot do it alone. Nor can the Whos. It may take a Horton to champion their cause, but lack of power is no bar to the status of rights-bearer. Rights are not about an improbable John Wayne autonomy gained at the point of a gun or some other emblem of power, nor

150. Corliss, *supra* note 100.

151. THE 5000 FINGERS OF DR. T, *supra* note 143.

152. Rettig, *supra* note 148.

153. *In re Gault*, 387 U.S. 1, 28 (1967).

154. The decision was significant in Canadian youth justice reform. See generally NICHOLAS BALA & SANJEEV ANAND, *YOUTH CRIMINAL JUSTICE LAW* (2d ed. 2009).

155. Anne McGillivray, *Why Children Do Have Equal Rights: In Reply to Laura Purdy*, 2 INT’L J. CHILD. RTS. 243 (1994) [hereinafter McGillivray, *In Reply to Laura Purdy*].

156. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: THE DIARY OF A LAW PROFESSOR* 16 (1991).

In the law, rights are islands of empowerment. To be unrighted is to be dis-empowered, and the line between rights and no-rights is most often the line between dominators and oppressed. Rights contain images of power and manipulating those images, either visually or linguistically, is central in the making and maintenance of rights. In principle, therefore, the more dizzyingly diverse the images that are propagated, the more empowered we will be as a society.

Id. at 233–34.

are they a libertarian license to do as one wills.¹⁵⁷ They are nodes in web-works of relationships of the sort that lets autonomy flourish.¹⁵⁸ They are markers of equality signifying mutual respect. Rights recognize the shared qualities, needs, and relationships of humans. Rights in their essence are about the human condition. The discourse is not barren, nor is it finished. Under the will or agency theory of rights, rights flow from power, autonomy, and rationality. Those lacking these attributes are excluded, making rights discourse the chosen discourse of the dispossessed. Like the Whos, children's rights-invisibility derives not from some set of qualities they lack, but from size—"because we're sort of small"—which is equated with power and thus with the status of rights-bearer. The interest theory of rights has no such exclusions, basing rights not on power, but on those interests which are sufficient ground to hold another to a duty.¹⁵⁹ Rights are no longer a zero-sum game. In the sour kangaroo we see reflected the common fear that according rights to children will threaten adult rights, rule, and authority.¹⁶⁰ When she at last accepts the personhood of the Whos, her fear is transformed into joy. No one's rights, not even those of an officious demagogue of a kangaroo, are diminished by the fact that others also enjoy them.

V. "WE ARE HERE! WE ARE HERE! WE ARE HERE! WE ARE HERE!"¹⁶¹—CHILDREN'S RIGHTS AND CHILDREN'S BODIES

Children's rights were given universal expression with the signing of the Convention on the Rights of the Child (CRC) by the U.N. General Assembly on November 20, 1989. More states took part in its signing, it was proclaimed in force more quickly, and it was ratified by more states than any U.N. human rights treaty before or since.¹⁶² The United States signed the CRC six years later, on February 16, 1995.¹⁶³ Its failure to ratify the CRC, though, joins it with only South Sudan and

157. McGillivray, *In Reply to Laura Purdy*, *supra* note 155; McGillivray, *Children's Rights*, *supra* note 67; Anne McGillivray, *Nowhere to Stand: Correction by Force in the Supreme Court of Canada*, in CHILDREN AND THE LAW: ESSAYS IN HONOUR OF PROFESSOR NICHOLAS BALA (Sanjeev Anand ed., 2011).

158. Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUD. 1, 7 (1993).

159. *See generally* J. Raz, *Legal Rights*, 4 OXFORD J. LEGAL STUD. 1 (1984). "To say that a person has a right is to say that an interest of his is sufficient ground for holding another to be subject to a duty . . ." *Id.* at 5.

160. Some fundamentalist groups oppose children's rights as an interference with parental and religious authority, and specifically with their use of corporal punishment. *See, e.g.*, The Home School Legal Defense Association's Position Statement on the CRC, PARENTALRIGHTS.ORG, http://www.parentalrights.org/index.asp?Type=B_BASIC&SEC={30FF0076-5974-4B3C-B658-BBF7931E3EF8}&DE= (last visited Mar. 12, 2014); *Corporal Punishment: Is It a No-No?*, HOME SCH. CT. REP., Dec. 1995/Jan. 1996, available at <http://www.hsllda.org/courtreport/V11N6/V11N6CA.asp?PrinterFriendly=True>.

161. HORTON HEARS A WHO!, *supra* note 2.

162. Cynthia Price Cohen, *The Role of the United States in the Drafting of The Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 185, 185 (2006).

163. LUISA BLANCHFIELD, CONG. RES. SERV., R40484, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: BACKGROUND AND POLICY ISSUES 1 (2012).

The George W. Bush Administration opposed the Convention, citing "serious political and legal concerns" with its impact on sovereignty and parental rights. . . . [Noting]

Somalia.¹⁶⁴ President Obama once, however, expressed interest in pursuing the possibility of ratification.¹⁶⁵ The signing of the CRC took place eleven days after the Berlin Wall fell. With it fell the communist threat which had been, as Jeremy Gunn¹⁶⁶ observes, “a core theme of American political life for more than forty years.”¹⁶⁷ The CRC took its place as “fodder in the American ‘culture wars’” waged by the religious right whose opposition continues to block U.S. ratification.¹⁶⁸ “Ironically,” Gunn notes, the U.S. State Department under the Reagan and George H.W. Bush administrations “played an active and extremely influential role in shaping the text of the document.”¹⁶⁹

Of the three treaties flowing directly from the 1948 Universal Declaration of Human Rights,¹⁷⁰ the CRC is the most detailed expression of the rights set out in

that while CRC may be a useful tool for protecting children in countries that have ratified it, it was “misleading and inappropriate” to use the Convention as a “litmus test” for measuring the United States’ commitment to children.

Id. at 6 (citations omitted).

164. The United States, Somalia and South Sudan are the only states which have not ratified the CRC. *The Convention on the Rights of the Child: (Almost) the Entire World Endorses Child Rights*, UNICEF USA, <http://www.unicefusa.org/campaigns/public-policy-advocacy/the-convention-on-the-rights.html> (last visited Mar. 12, 2014). On becoming a U.N. member state in 2011, Somalia has signaled strong support for ratification, and had its first formal parliament in over twenty years sworn in August 20, 2012. *Children's Rights in Somalia*, U.N. CHILD. RIGHTS (Aug. 27, 2012), <http://unchildrights.blogspot.ca/2010/05/childrens-rights-in-somalia.html>. The United States signed the CRC in 1995 but it has not been submitted to Senate where a two-thirds majority is required, hearings may be called, and a decision must be made on whether it is to be self-executing and thus directly enforceable in the courts, or non-self-executing and therefore non-binding absent further legislation. BLANCHFIELD, *supra* note 163, at 1. Canada ratified the CRC in 1991 after reviewing compatibility with federal and provincial law. *See* Current Status of the Convention on the Rights of the Child, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en (last visited Mar. 12, 2014). The CRC is not self-executing in Canada, nor has it been enacted as domestic law, but it plays a significant role in youth justice and a lesser one in judicial interpretation of fiduciary duty and children's rights. *See, e.g.,* Baker v. Minister of Citizenship and Immigration, [1999] 2 S.C.R. 817, 860–62 (Can.).
165. Responding to a question on whether the United States intended to ratify the CRC raised at the 2008 Presidential Youth Debate, President Obama stated: “It is embarrassing to find ourselves [the United States] in the company of Somalia, a lawless land. I will review this [treaty] and other treaties and ensure that the United States resumes its global leadership in human rights.” *See* BLANCHFIELD, *supra* note 163, at 5 n.19.
166. Jeremy Gunn is a human rights activist and scholar and an Associate Professor in the School of Humanities and Social Sciences at Al Akhawayn University in Morocco. *See* Biography of Jeremy Gunn, CTR. FOR THE STUDY OF L. & RELIGION, <http://cslr.law.emory.edu/people/person/name/gunn/> (last visited Mar. 12, 2014).
167. T. Jeremy Gunn, *The Religious Right and the Opposition to U.S. Ratification of the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 111, 111 (2006). Professor Gunn is Director of the ACLU Program on Freedom of Religion and Belief and a Senior Fellow in Religion and Human Rights at Emory University School of Law.
168. *Id.* at 111–12.
169. *Id.*
170. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948). The other two treaties are the International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N.

the Declaration. The Declaration Drafting Committee was chaired by Eleanor Roosevelt, its work in part inspired by Franklin D. Roosevelt's Four Freedoms, in turn inspired by H.G. Wells's concept of a universal declaration of rights.¹⁷¹ Canadian law professor John Humphrey, Director of the U.N. Division of Human Rights within the U.N. Secretariat, prepared the initial crucial draft, and much of the final draft, of the CRC. The non-binding 1959 Declaration on the Rights of the Child,¹⁷² like the 1924 Geneva Declaration,¹⁷³ speaks of doing things "to" and "for" children, as in helping, feeding, sheltering, reclaiming, and protecting. Seven of its ten principles are directed to care and protection. In using the language of rights rather than protection, the CRC recognizes children as rights-bearers.¹⁷⁴ Although the United States had no intent to ratify the CRC at the time of its drafting,¹⁷⁵ its influence on the decade-long drafting process was such that the convention was called "the US child rights treaty."¹⁷⁶ As Cynthia Price Cohen, U.S. contributor to the CRC drafting committee observes, "It may be true that U.S. proposals for articles protecting children's civil rights were inspired more by the desire to irritate the Soviet Union than from any grand philosophy regarding children's rights."¹⁷⁷ It also may be true that civil rights are conceptually available to children and their advocates in part because of the influence of Seuss's stories for children and *Horton* in particular. The Cold War continued through the decade of the CRC's drafting. In *Horton*, Seuss twists that potent symbol of democracy and power, the American bald eagle, into the sinister Cold War Commie black-bottomed eagle Vlad Vlad-i-koff, "a mighty strong eagle, of very swift wing" who readily agrees to "get rid of this thing"—the clover on which rests a rights-claiming child standing on his dust-speck world.

The quintessential right claimed by the Seussian child is the right to be heard. To honor the 1979 International Year of the Child, Poland proposed a binding children's

GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR], and the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966). The CRC, like the Declaration, sets out civil rights, economic, social and cultural rights, and humanitarian rights in a single document.

171. McGillivray, *The Long Awaited*, *supra* note 21, at 215.

172. Declaration of the Rights of the Child, *supra* note 3.

173. Declaration of the Rights of the Child, League of Nations, O.J. Spec. Supp. No. 21 at 43 (1924).

174. CRC, *supra* note 3, art. 12.

175. Cynthia Price Cohen, who participated in drafting the CRC, writes:

It should also be remembered that the Working Group drafted the Convention during the conservative Reagan administration, which had adopted a generally negative attitude toward this perceived Eastern Bloc treaty. In 1983, for example, the U.S. delegate essentially stated that the United States would never ratify the Convention but was participating in the drafting process primarily so that these other countries would have a better treaty.

Cohen, *supra* note 162, at 188.

176. *Id.* at 190. The U.S. delegation "not only added a number of new rights to the Convention, but it also wielded the power through the consensus process to prevent other rights from being included." *Id.* at 191.

177. *Id.* at 191.

rights treaty to be ready for adoption by the United Nations in 1989.¹⁷⁸ Poland's second draft gave the child "who is capable of forming his own views the right to express his opinion in matters concerning his own person."¹⁷⁹ This single civil right signified the emergence of the child as rights-bearer. From the right to be heard, now Article 12(1)¹⁸⁰ of the CRC, flowed related rights to freedom of association,¹⁸¹ expression and information,¹⁸² and freedom of thought, conscience, and belief.¹⁸³ All were initiated by the U.S. delegation to the drafting committee. The right to be heard is the lynchpin of the CRC. As in the *Gault* ruling, it turns welfare into rights, and saves children from the dark side of the best-interests principle¹⁸⁴ where indeterminate interests of the child are subsumed under competing adult desires.¹⁸⁵ Even so, if rights are to function as markers of relationships of equality, then they must be balanced with other rights and considerations. The weight given to the child's right to be heard in all matters affecting the child is tempered by the child's age and maturity. If what the child desires is manifestly and provably not in her best interests, then her voice will

178. *Id.* at 186–87.

179. *Id.* at 189.

180. Article 12 provides:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

CRC, *supra* note 3, art. 12.

181. *Id.* art. 15.

182. Article 13 provides that:

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; or (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Id. art. 13.

183. *Id.* art. 14.

184. See Michael Freeman, *Whither Children: Protection, Participation, Autonomy?*, 22 MAN. L.J. 307, 319 (1994).

185. Respecting the child's participatory rights "operates both to reduce the indeterminacy of the principle and to mitigate the potential for judges to substitute their own subjective or speculative preferences as to what amounts to a child's best interests." John Tobin, *Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?*, 33 MELBOURNE U. L. REV. 579, 592 (2009). Where the child is heard, the family is no longer "a site of exclusive and unfettered parental power." *Id.* at 587.

not prevail. The child's best interests must be a primary consideration in all actions concerning children,¹⁸⁶ but those interests are not the only consideration. That the child's best interests are the basic concern of parents¹⁸⁷ does not unduly limit a parent's choice in where these best interests lie. Children's rights frame the conditions of childhood. Driven by love and a voracious hunger to learn and to be part of things, children use what is at hand to make their childhoods. In a literal sense, children's bodies are their rights. As the body is not separable from the brain and the intellect, so too are children's rights in the CRC to be read together.

Horton is beaten for exercising his right to be heard and Jo-Jo refuses to speak for reasons known only to small frustrated children. Without the rights to speak, participate, and be informed, children cannot talk about the abuse of their rights. Conversely, abuse has a destructive impact on children's ability to speak, participate, and learn. Hitting children heightens their aggression in the present and their violence in future relationships of intimacy, lowers their intelligence and school performance,¹⁸⁸ and is strongly associated with depression and substance abuse.¹⁸⁹ The same is true when children are verbally and sexually abused, or denied love altogether.¹⁹⁰ All of these actions distort what children can make of their childhood and limit what they may become as adults.

186. CRC, *supra* note 3, art. 3(1).

187. *Id.* art. 18(1).

188. A study on corporal punishment found that

the use of corporal punishment (CP), such as slapping a child's hand or 'spanking,' is associated with restricted development of cognitive ability. Cognitive ability was measured at the start of the study and 4 years later for 806 children age 2–4 and 704 children age 5–9 in the National Longitudinal Study of Youth. The analyses controlled for 10 parenting and demographic variables. Children of mothers in both cohorts who used little or no CP at Time 1 gained cognitive ability faster than children who were not spanked. The more CP experienced, the more they fell behind children who were not spanked.

Murray A. Straus & Mallie J. Paschall, *Corporal Punishment by Mothers and Development of Children's Cognitive Ability: A Longitudinal Study of Two Nationally Representative Age Cohorts*, 18:5 J. AGGRESSION, MALTREATMENT & TRAUMA 459, 459 (2009).

189. A large-scale U.S. study found that physical punishment—pushing, grabbing, shoving, slapping, hitting—below the maltreatment threshold is associated with increased mood and anxiety disorders, alcohol and drug abuse, dependence, and several personality disorders. The study controlled for sociodemographic variables and family history of dysfunction.

The American Academy of Pediatrics strongly opposes striking a child for any reason, and the Canadian Pediatric Society recommends that physicians strongly discourage the use of physical punishment. A more explicit position statement to be considered in the future might include the statement that physical punishment (i.e., spanking, smacking, slapping) should not be used with children of any age. . . . Policies need to be focused on strategies to reduce physical punishment, which points to the importance of positive parenting approaches.

Tracie O. Afifi et al., *Physical Punishment and Mental Disorders: Results from a Nationally Representative US Sample*, 130 J. PEDIATRICS 1, 5–8 (2012).

190. The psychological maltreatment of children, also known as emotional abuse, "may be the most challenging and prevalent form of child abuse and neglect." Roberta Hibbard et al., *Psychological Maltreatment*, 130 J. PEDIATRICS 372, 372 (2012). Psychological maltreatment may consist of acts of omission including "ignoring need for social interactions", or acts of commission including spurning or terrorizing a child.

Promoting the child's best interests and protecting the child's rights have long been the fiduciary duty of both the state and the parent.¹⁹¹ The first substantive article of the CRC recognizes this duty.¹⁹² References to the parental role are threaded throughout its provisions, with several substantive articles deferring to parents.¹⁹³ The rights of children are entwined with the good of others. The silencing and punishment of girl children, for example, supports the abuse and denigration of women throughout the world. "The suggestion is sometimes made that prohibition of corporal punishment makes the lives of women, as the primary caregivers of children, more difficult."¹⁹⁴ It is now understood that "all forms of violence are linked to entrenched gender roles and inequalities" and "the violation of the rights of children is closely linked to the status of women."¹⁹⁵ The lynchpin of rights for children, as it is for all oppressed and excluded groups, is the right to be heard. Where children are silenced, their bodies speak.

VI. "SOME SMALL SPECK OF DUST THAT IS ABLE TO YELL"¹⁹⁶—CONCLUDING THOUGHTS

Stories for children map the psychic topography of childhood. The mapping of its complex neurology is just beginning. We know now how deeply blows, humiliation, and exploitation affect delicate transitions in the development of the brain and body.

The abuse "may be verbal or nonverbal, active or passive, and with or without intent to harm." *Id.* The impact on children is profound. These acts "negatively affect the child's cognitive, social, emotional, and/or physical development [and are] linked with disorders of attachment, developmental and educational problems, socialization problems, disruptive behavior, and later psychopathology." *Id.*

The sexual abuse of children causes similar damage. Sexual abuse studies consistently show "post-traumatic symptoms; depression; substance abuse; helplessness, negative attributions, aggressive behaviours and conduct problems; eating disorders; and anxiety. More recently child sexual abuse has also been linked to psychotic disorders including schizophrenia and delusional disorder." JUDY CASHMORE & RITA SHACKEL, CHILD FAMILY CMTY. AUSTR., *THE LONG-TERM EFFECTS OF CHILD SEXUAL ABUSE 7-8* (2013) (citations omitted), available at <http://www.aifs.gov.au/cfca/pubs/papers/a143161/cfca11.pdf>. Recently conducted studies of identical twins who were raised apart show that sexual abuse is linked with "a range of psychiatric disorders" including dependence on drugs, alcohol and nicotine, bulimia nervosa, severe depression, panic disorder, attempted suicide, conduct disorder, "social anxiety, rape as an adult, and divorce." *Id.*

191. See McGillivray, *Childhood in the Shadow of Parens Patriae*, *supra* note 74, at 38.

192. CRC, *supra* note 3, art. 5.

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Id.

193. See CRC, *supra* note 3; Cohen, *supra* note 162, at 196.

194. GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN, PROHIBITING AND ELIMINATING CORPORAL PUNISHMENT OF GIRLS—A KEY ELEMENT IN THE GLOBAL CHALLENGE TO ALL VIOLENCE AGAINST WOMEN AND GIRLS (Aug. 2012), available at <http://www.endcorporalpunishment.org/pages/pdfs/briefings/Corporal%20punishment%20of%20girls.pdf>.

195. *Id.* (quoting Paulo Sérgio Pinheiro, Independent Expert for the U.N. Study on Violence Against Children).

196. HORTON HEARS A WHO!, *supra* note 2.

To define rights is to journey deep into the body, into its development, needs, and multiple relationships with the family, the community, the social, and the natural. Children's rights are, profoundly, about their bodies, suggesting that rights for children are neither utopian nor extraneous but, instead, deeply practical. The confusion of liberty with rights has done much damage to the recognition of children's rights. Visions of permissive parents raising little monsters who rule the roost and wind up in jail continue to plague the discourse. Seuss's little monsters—Jo-Jo, Bart, and their literary kin—are more likely to wind up as responsible citizens in a democratic society which equally values individuality and communality. Seuss may shoulder less blame than Dr. Spock¹⁹⁷ for the civil rights movement of the 1960s but their views on childhood resonate strongly.¹⁹⁸ Seuss taught children to trust themselves and resist authoritarian adults.¹⁹⁹ “Maybe my book helped a generation not to be intimidated by adulthood,” Spock wrote.²⁰⁰ “When I was young, I was always made to assume that I was wrong. Now young people think they might be right and stand up to authority.”²⁰¹

The Whos offer seemingly endless possibilities for rights metaphors, a “your face here” for any cause pitting small against big. (But Horton sets a blastocyst on a very soft clover?²⁰²) *Horton* has been treated as a parable on democracy,²⁰³ civil rights,²⁰⁴ and the American Occupation of Japan.²⁰⁵ While a rich metaphor works on more

197. Dr. Benjamin Spock is best known for publishing the influential book, *Baby and Child Care*, in 1946. For a modern version, see BENJAMIN SPOCK & ROBERT NEEDLMAN, *DR. SPOCK'S BABY AND CHILD CARE* (9th ed. 2012).

198. Dr. Spock's child-rearing advice was widely blamed for the civil rights, anti-war, and nuclear disarmament movements of the 1960s. See Eric Pace, *Benjamin Spock, World's Pediatrician, Dies at 94*, N.Y. TIMES (Mar. 17, 1998), <http://www.nytimes.com/learning/general/onthisday/bday/0502.html>.

199. See Jenkins, *supra* note 10, at 198.

200. Pace, *supra* note 198.

201. *Id.*

202. Anti-abortion groups have printed, “A person's a person no matter how small” on t-shirts, websites, picket signs, posters, and pamphlets. Seuss once threatened to sue an anti-abortion group for its misappropriation of the line. In 2001, Seuss's widow Audrey Geisel “criticized Action Life Ottawa . . . for using the phrase with a picture of an 8-week old fetus on a pro-life poster” and a lawyer for the Seuss Foundation demanded that the group not use the line, as “this is not an area in which Dr. Seuss participates.” Elizabeth O'Brien, *New Film: Doctor Seuss's "Horton Hears a Who" to Raise Pro-Life Questions*, LIFESITENEWS.COM (Aug. 10, 2007, 11:15 AM), <http://www.lifesitenews.com/news/archive//ldn/2007/aug/07081002>.

203. Philip Nel remarked:

[Y]ou can read *Horton Hears a Who* in many ways, but one of the ways of reading *Horton Hears a Who* is a parable about democracy—that everyone needs to get involved for democracy to work. It's not until all the Whos on this tiny little dust speck speak up that they are heard and they are saved . . . when every last one does, they are heard.

Dr. Seuss: Icon and Iconoclast... (ABC Radio interview with Philip Nel, Apr. 30, 2004) (transcript available at <http://www.abc.net.au/radionational/programs/booktalk/dr-seuss-icon-and-iconoclast/3627444#transcript>); see also Jenkins, *supra* note 10.

204. See NEL, *supra* note 112, at 73.

205. *Id.* Seuss met Kyoto educator Mitsugi Nakamura, to whom *Horton* is dedicated, during his 1954 trip to Japan to study the impact of the American Occupation on children's upbringing and education. Two

than one level, none of these interpretations addresses the fact that Jo-Jo is a child and that hearing the child saves two worlds. The reader identifies with an Indian elephant living with Australian kangaroos in an African jungle but that is not her everyday world. Her world is Who-ville, a familiar place of houses with ceilings and floors, churches and grocery stores, ball games, teapots, potted plants, typewriters, baby buggies, orchestral instruments, and Yo-Yos, all made delightfully miniature and visible only to her. It is as if some gargantuan Horton of the mega-planet Nool saves the tiny planet Earth or, given Who-ville's sociospecificity, the modern West. The triumphant shout of the tiny child Jo-Jo confirms her identification with the Whos, joins her to Horton in his transgression against the Noolian legal order, and binds her to his message of personhood and rights. It is a message at the constitutional heart of every human rights instrument and contained within the messenger myths of cultures throughout the world.

As critical legal pluralism suggests, the law requires a transgressive, inventive, mediating subject who understands that law is not fixed and certain, sees its travails and weaknesses, and strives to make good the rights-promises of constitutions and conventions by challenging their tenets, interpretation, and application. The sour kangaroo's child with no thought of her own stands in stark contrast to the Seussian child, the anti-authoritarian Jo-Jos and Barts who save children from annihilation and free them from servitude. The Seussian child has gone *Where the Wild Things Are* with Maurice Sendak's Max to tame childhood's monsters and *Outside Over There* with Ida to brave its child-stealing goblins. Epithets—shirker and twerp—frame Jo-Jo's transgressions as they frame those of Max the wild thing and poor, mad, foolish, backwards, sly, and terrible Ida.²⁰⁶ These epithets reflect adult perceptions of children as incomplete adults, as weak, lacking, and dangerous.²⁰⁷ The stories themselves tell an altogether different tale, a tale informed by myth in which the child protagonist, invested with the knowledge and power of myth, bestows these powers on the child reader. The mythic element in stories for children does far more than prepare children as future legal subjects. It forms the stuff from which children construct their childhoods. It helps children make themselves. For this reason, as Seuss observes, stories for children “have a greater potential for good, or evil, than any other form of literature on earth.”²⁰⁸

Seuss titles had been translated into Japanese. *Horton* was intended to train children “in the relationship between individual and community” in emerging democracies. See Jenkins, *supra* note 10, at 188. That *Horton's* ubiquitous looped daisy is replaced on the last page with a pink chrysanthemum may reference Japan or Chrysanthemum-Pearl, the imaginary daughter to whom the childless Seuss dedicated *The 500 Hats of Bartholomew Cubbins* (1938). NEL, *supra* note 112, at 115.

206. McGillivray, *State of Imperfect Transformation*, *supra* note 21.

207. See McGillivray, *The Long Awaited*, *supra* note 21.

208. Jenkins, *supra* note 10, at 187.