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Should the Injustice Done to Her be the Law's Concern?
The Case of Cinderella

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1. Of law, harm and injustice in fairytales and life: an introduction

Fairytales tell of grave wrongs in lawless worlds. Yet most also tell of conduct that would be readily classifiable as both criminal and tortious. Though questions of how good law and law enforcement would intervene in fairytales are entirely beside the point of the stories, they are also, as a rule, easy to answer. Snow White's stepmother is guilty of her attempted murder. Hansel and Gretel are victims not only of parents who fail to provide the necessities of life, but of the witch who attempts their murder, while planning to offer indignity to their corpses by way of cannibalizing them. Any viable legal system would prohibit, punish, require compensation for harm caused by these fairytale wrongdoings and would intervene to prevent the conduct.

Not so in the story of Cinderella, one of the oldest and most popular fairytales of all time. There the stepmother forces the orphan Cinderella to act as servant, possibly even slave, to her and her two daughters. The three isolate Cinderella and treat her with contempt. It is a vivid tale of injustice, yet questions of whether and how an ideal legal system would prohibit, punish, prevent or compensate the stepmother's or the sisters' conduct are not so easy to answer. Cinderella might, even in our contemporary world, be on her own with no law to look to, just as she is in the story. And many might think that is as it should be. In this paper I consider the question: should the law concern itself with the kind of injustice encountered by Cinderella?

In addressing that question I want to rely upon a well-articulated, if somewhat stylized, distinction between injustice and harm where injustice is a matter of allocation—that is the fair allocation of benefits and burdens—and harm is a matter of injury or damage.[1] In asking about whether the law should be concerned with Cinderella's plight I think we should understand the primary wrong done to her as one of injustice rather than harm. What engages us so intensely in Cinderella's story is the grossly wrongful allocation of the benefits and burdens of the household. It may well be that Cinderella is also injured by the cruelty and

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1. See John Gardner, "Discrimination as Injustice" (1996) 16:3 Oxford J Leg Stud 353 [Gardner, "Discrimination"]. At 353 Gardner writes: "Reasons of justice are reasons for or against altering someone's relative position. The word 'relative' is of the essence here." See also John Gardner, "What is Tort Law For? Part 1 The Place of Corrective Justice" (2011) 30:1 Law & Phil 1 at 46 [Gardner, "Tort Law"].

brutality of the others, but it's the way that they get all the goodies and she gets all the work that really is so wrong. So in asking about the proper scope of the law's concern, the question I am most interested in is whether the law ought to be concerned with the allocative injustice suffered by Cinderella.[2]

In times past, even recently past, the law would not have been concerned at all with Cinderella's plight. Things now are shifting, but only in relation to the potential harm.[3] Law is increasingly beginning to concern itself (at least on paper) with the emotional wellbeing of children in the family.[4] The law's concern is focused on emotional harm to children and is usually subject to some kind of limiting condition often measured in terms of developmental or intellectual damage to the child resulting from emotional abuse.[5]

Increasingly, child welfare statues might bring Cinderella's plight within the law's concern. But these statutes deal not with injustice in the narrow sense I am engaging but with emotional harm by way of damage or abuse. We would have to transpose the injustices Cinderella suffers into harms before the law would be willing to take notice. This, in my view, mistakes what is at stake in Cinderella's story and obscures the more urgent question her example raises for the law. This again is because Cinderella's story is primarily about *injustice* and only incidentally about harm: what is at stake is a wrongful relative positioning between her and her stepsisters and a wrongful allocations of the benefits and

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2. There have been many iterations of Cinderella's story through the centuries. I rely primarily on the Disney version from 1950 (*Cinderella*, 1950, video (Walt Disney, 1950) [*Cinderella (1950)*]) which borrows heavily from the 17th century version by Charles Perrault, (*Cinderella, or, the Little Glass Slipper*, New York: Atheneum Books for Young Readers, *1954*). I doubt anyone will be unfamiliar with the story but here is a short composite version of it just in case. Once upon a time there was a beautiful and loving child whose virtuous parents loved her dearly. But when she was just a little girl her mother died. Some time later, hoping to provide his beloved daughter with a new mother to care for her, her father remarried. But this new stepmother and her two daughters were jealous of the beautiful girl. When the girl was around 12 years old her father also died leaving her in the sole custody of her stepmother. Now in a position of unfettered authority the stepmother made the girl do *all* the chores. She isolated her, she ridiculed and humiliated her and she encouraged her daughters to do the same. They even gave her a new name "Cinderella," an expression of contempt for the lowliness they imposed on her by forcing her to sleep in the ashes. Cinderella forbearingly accepted her fate, turned the other cheek and stoically did as she was told. When she came of age, however, Cinderella, with the help of magical friends (birds, animals and a fairy godmother) went to a royal ball where she met and fell in love with the Prince. The story ends as Cinderella and the Prince are married and we are assured that they lived happily ever after.

3. Janice Tokar, *Legislative approaches to protecting children from emotional abuse* (Department of Justice Canada, 1999).

4. See, e.g., British Columbia's *Family Law Act*, SBC 2011, c 25, s 1 [BC *Family Law Act*] ("'family violence' includes … emotional abuse of a family member"); Alberta's *Child Youth and Family Enhancement Act*, RSA 2000, C-12, s 1(2) [AB *Youth & Family Act*] "a child is in need of intervention if … the survival, security or development of the child is endangered because … the child has been emotionally injured"); Saskatchewan's *Child and Family Services Act*, SS 1989-90, C-7.2, s 11a [SK *Child & Family Act*] ("a child is in need of protection where … there is no adult person who is able and willing to provide for the child's needs, and … emotional harm to the child has occurred"); Ontario's *Child and Family Services Act*, RSO 1990, C-11, s 37(2) [ON *Child & Family Act*] ("a child is in need of protection where … the child has suffered emotional harm").

5. See, e.g., AB *Youth & Family Act*, *ibid* at s 1(3) ("a child is emotionally injured if there is impairment of the child's mental or emotional functioning or development"); ON *Child & Family Act*, *ibid* at s 1(2)f ("emotional harm [must be] demonstrated by anxiety, depression, withdrawal, self-destructive behaviour, or *delayed development*") [emphasis added].

burdens of the household. So, I want to ask whether the injustice *as distinct from any harm* done to Cinderella by her stepmother and stepsisters ought or ought not to concern the law.

Treating Cinderella's case as one of emotional abuse (though it might provide a more politically palatable means of getting help to Cinderella) would bypass the core question of whether combatting not just harm but injustice in the private realm of the family is a legitimate and important function for the law. To examine this core question I will begin by sketching three theories of the proper scope of the law's concern. I will then go on to explain how those theories are modified and constrained by the value of privacy and how the value of privacy is at work in the intuition that the law ought not to intervene to help Cinderella. I will analyze the wrongs done to Cinderella in relation to the categories of harm and injustice and I will map the ways in which the value of privacy argues for non-intervention in relation to both.

Ultimately, I argue that the law should be more willing to step in to correct not just harms but serious injustices in the lives of children. This is especially so where the law has had a direct or even an indirect hand in bringing about or supporting the allocative injustice suffered by the child. I conclude by drawing on the example of the Canadian law's response to the wrongs suffered by First Nations children in the Residential Schools and argue that law's response to the atrocities of the Residential Schools shows a willingness to begin at least to attend to the harms done to First Nations children through physical and sexual abuse. There is little or no willingness, however to attend to the allocative injustices that were at the core of both the theory and practice of residential schools: allocative injustices that persist as impediments to flourishing for Aboriginal peoples. I claim that the law is more willing to concern itself with the rights of children when it is asked to attend to the violated body of the child than when it is asked to take children seriously as justice-deserving and justice-demanding subjects in relation to allocation. I argue that this ought to be reconsidered.

2. Three theories of the law's business

Liberal theory gives us a number of different and sometimes competing principles that both limit the law's scope of concern and authorize its action. The first, 'the harm principle' comes from John Stuart Mill, who famously wrote, "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[6] Harm to another on this theory is at least a necessary (though not, as we will see, a sufficient) condition for the legitimate exercise of the coercive power of the state.

The second principle, let's call it the justice principle, comes from John Rawls and it holds that the proper job of the law is to do justice.[7] On this view law should be concerned with relative allocations and competing claims in relation

6. "On Liberty" in *On Liberty, Utilitarianism and Other Essays* (Oxford World Classics, 2015) at 13 (generic pinpoint: I.9).
7. John Rawls, *A Theory of Justice* (Belknap Press, 1971) at 3.

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to benefits and burdens.[8] Both of these principles are indeed limiting principles. As John Gardner notes, "Both Mill and Rawls … were addressing the same fundamental problems about the relations between morality and authority in a liberal regime. Both saw their principles as dealing adequately with the same basic objection to the moralistic state, namely that such a state leaves people too little space to lead their lives by their own lights, making their own mistakes in the process."[9] But both are also authorizing principles. They invite the law to step up and act: to prevent harm or do justice.

A third theory of the proper role of the law, the autonomy principle, is associated with the work of Joseph Raz, who argues that the law has a role not just in preventing harm or doing justice but also in securing the conditions for subjects to exercise autonomy.[10] According to Raz a full understanding of the proper role of freedom in the liberal state includes a role for the state in creating valuable life options and fostering the capacity and conditions for citizens to exercise that autonomy.[11] Raz writes, "the state has the duty not merely to prevent denial of freedom, but also to promote it by creating the conditions of autonomy."[12] [13]

3. The privacy proviso

While each of these theories authorizes the law's intervention; each stakes out territory that *is* the law's business, each also has embedded within it an implied limitation derived from the notion of privacy. Privacy acts as an additional limit reining in the authorizing force of the harm and justice principles. Not all harms legitimately attract the law's concern. And neither do all injustices. The concept of privacy qualifies both the harm and the justice theories as authorizing principles of the law's concern. And it shares the goals of both those theories as limiting principles. Privacy too aims at reining in a moralistic state and preserving a space of freedom for human flourishing. It too is concerned with the institutional shortcomings of the law as an instrument of social control. It too worries about the law, however well intentioned, doing more harm than good. As Hugh Collins puts it, "Privacy is primarily a political value. It addresses not the morality of behaviour but its suitability for state control."[14] Thus the concept of privacy within these authorizing principles further delineates limits on what aspects of injustice should be the law's concern, saying *these* matters, harms or injustices though they may be, are private and therefore not the law's concern.

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8. *Ibid* at 60-75.
9. Gardner, "Discrimination", *supra* note 1 at 365-66.
10. Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) [Raz].
11. *Ibid* at 418 ("autonomy-based duties, in conformity with the harm principle, require the use of public power to promote the conditions of autonomy, to secure an adequate range of options for the population.").
12. *Ibid* at 425.
13. As Gardner points out these principles can contradict each other. See Gardner, "Discrimination", *supra* note 1 at 366. I take the view, however, that we can reconcile the three of them by seeing all three as authorizing the concern of the law and the harm and justice principles as jointly limiting the coercive power the law.
14. Hugh Collins, "The Decline of Privacy in Private Law" (1987) 14:1 JL & Soc'y 91 at 91.

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Indeed, if we have an intuition that the law ought not to intervene in Cinderella's case that intuition probably points to an anxiety around privacy. Cinderella is treated unjustly and she's also (arguably) harmed. But the reason why the law might not (probably does not) care, at least about the injustice, has to do with the value of privacy. The concept of privacy (while it inheres to some degree in both principles) also has independent content. The idea, the ideology, and the politics of privacy map onto and further limit both the Millian and Rawlsian, and perhaps also the Razian, conceptions of the moral limits of the law.

Let us now take a more detailed look at the wrongs done to Cinderella and then return to this point about privacy so as to make more explicit the privacy-based reasons for deflecting the law's concern away from Cinderella's plight.

4. What Cinderella suffers: is it injustice or is it harm?

I have been relying on a distinction between harm and injustice that gives a narrow meaning to the notion of justice.[15] Let me say more about that here. Justice in this sense is a value that concerns itself with allocations of benefits and burdens and relative positions of individuals. Harm, by contrast is about damage. So a witch who fattens up a child, roasts him in an oven and then eats him, harms him but does not do him an injustice. A stepmother who makes one child do all the work treats that child unjustly but may, as it turns out, not harm her. To borrow a nice turn of phrase from John Gardner the witch "violates obligations of humanity" whereas the stepmother violates "obligations of justice."[16]

Obviously nothing turns on the fact that something is only an obligation of humanity and not an obligation of justice when it comes to the question of whether the law ought to be concerned. In fact, we're more inclined to think that the law should enforce obligations of humanity than that it should enforce obligations of justice. The harm principle has, in that sense, had more clout as an authorizing principle than has the justice principle. With this classification in mind, let's go on to take a closer look at the wrongs Cinderella suffers.

The *core* injustice of the story has to do with unequal distribution of work. Cinderella does it all and the other three do none. Perhaps you remember those little singing mice from the 1950 Disney version?

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15. I think that this question of the definitional boundaries of the idea of justice is probably also political, much in the same way that the definition of other virtues like courage, for example, are self-evidently political—see for example, William Ian Miller, *The Mystery of Courage* (Harvard University Press, 2000) at 10 and 52 (where he discusses the highly contested (and occasionally self-serving) meanings of the word courage: Plato saying that true courage was in doing philosophy (10); Aristotle saying that true courage was only within the military context (52)—but if we take justice to be this ultimate kind of thing then I have no problem confining it to this allocative concern because this is the realm that I'm trying to highlight as in need of more intervention from the law. In any event the conceptual distinction between what I'm calling justice and what I'm calling harm is evident (—though sometimes we might take an injustice, reframe it conceptually as a harm and then repackage it rhetorically as an injustice!). The particular words we apply don't matter that much but I'm happy to harness the rhetorical power of the word justice to my own admittedly political ends.

16. See Gardner, "Tort Law", *supra* note 1 at 46; see generally Tom Campbell, "Humanity before Justice" (1974) 4 British J Political Science 1.

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'Cinderelly, Cinderelly'
Night and day it's 'Cinderelly!'
'Make the fire, fix a breakfast,
Wash the dishes, do the mopping.'
'And the sweeping and the dusting!'[17]

Cinderella is put into the role of servant (possibly even of slave) of the others. Her work has class meaning and creates a hierarchy that is exactly contrary to nature and desert. The distribution is in violation of a notion (widely attributed to Aristotle) of justice as equality according to merit.[18] Cinderella is virtuous, beautiful, kind and noble. Her stepmother and stepsisters are vicious and vulgar (not to mention, (in the 1950's Disney version, at least) ugly (and flat-chested)). She's aristocratic and they are low. Yet Cinderella is positioned as working-class constituting the others as ladies of leisure.

Next consider the allocation of goods, those desirable things to which people make competing claims. Cinderella is given less, and less desirable, food (table scraps) less desirable space (she is relegated to the cinders) and inferior clothing (she is in rags while the others have lovely clothes and jewelry.)

Likewise, with the distribution of blame. Are questions about the household distribution of affective blame, questions of who is and who is not the target of others' anger and resentment in a family also questions of justice?[19] I think they are. And Cinderella gets the blame for everything.[20] What about the distribution of love and affection? That too is I think a question of justice. Love, affection, admiration and positive affirmation are all assignable goods that people make competing claims to in any family. And here again, Cinderella gets none at all.

There is another complication in all this. It's not just Cinderella's better nature that makes her more deserving. Cinderella also has a greater historical entitlement or claim to the benefits of the household than do the others. The house and all its wealth was the property of *her* father who loved her and whom she loved. The stepmother married him instrumentally. The stepsisters are mere hangers-on. Cinderella is the only one who has a legitimate tie back to the beneficent man as the original source of all the family resources.

So I am going to say that all these wrongs, and I think they are the main ones, are properly understood as injustices: wrongs in the relative allocation of benefits and burdens. Indeed, it is debatable as to whether Cinderella is harmed at all by her stepmother and stepsisters' conduct. She is perhaps an instance of Socrates's

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17. *Cinderella (1950)*, *supra* note 2; Mack David, Al Hoffman & Jerry Livingston, "Work Song (Cinderelly, Cinderelly)" in Album: *The Disney Collection* Volume 1 (Disney, 1987).

18. See, for example, Aristotle, *Nicomachean Ethics*, translated by Joe Sachs (Focus, 2002) at bk 5, ch 3 (where Aristotle says "for all people agree that what is just in distributions must be in accord with some sort of merit, although not all people mean the same thing by merit.").

19. *Cf* Gardner, "Tort Law", *supra* note 1 at 6-9. (Gardner notes that he agrees with H.L.A. Hart that questions of the allocation of *punishment* are questions of justice. Gardner suggests that punishment, unlike torture, must have an answer to the question "for what?" making the question of allocation of punishment also a question of justice.)

20. This is especially true in the 1950 Disney version where Cinderella is continually accused of intentional wrongdoing as a way of excusing others' mistakes or inadequacies.

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claim that "no evil can happen to a good man, either in life or after death"[21] or that a *better* person (let's say) cannot be harmed by a worse one.[22] Cinderella's virtue protects her, in part by giving her enchanted allies (the birds and animals) but also simply by allowing her to rise above the injuries her stepmother and stepsisters would seek to inflict on her.

Were she not so protected, however, there certainly would clearly be some wrongs that we ought to categorize, not as allocative injustices, but as injuries or harms. For example, the others treat Cinderella with cruelty and contempt. They ridicule her and attack her sense of self. They gratuitously humiliate her. These wrongs viewed as harms are violations of the obligation to humanity, not violations of the obligation to justice. As we shall see, they might indeed, come within the purview of child welfare law in Canada where the purely allocative injustices (unless reframed as harms) would not.

5. The logic and rhetoric of privacy and the exclusion of law in the family

Let's take a closer look at the idea of privacy and how it argues for the law to butt out. There are two strains of the argument that the family is not an appropriate realm for legal intervention corresponding to our two categories of injustice and harm.

The argument that the law should stay out of injustice in the family has historically been buttressed by an idealized vision of the affective nature and communality of family life. The family is a realm governed by feelings of natural love and altruism. It is a realm of mutual sharing and self-sacrifice. Norms of justice are both inappropriate and unnecessary within the family because within this private and intimate realm the circumstances necessitating justice (mutual competing self-interest) do not obtain.[23] Not only then is legal intervention not necessary in the family, the imposition of legal norms and relations would destroy family life as the fundamental human good that it is. Because the family is the realm of virtues such as compassion, caring and sharing, legal intrusion—or even any intrusion of the norms of justice—would be destructive.

Regarding harm, privacy arguments asserted, even more implausibly, that harm simply didn't happen there. The family was a safe haven where all its members could take shelter from the perils and pressures of the outside world. Because this notion was based more on a factual claim than a set of aspirational ideals, feminist theorists had a reasonably easy time debunking this aspect of the rhetoric of privacy as it applied to the family.

It was quite possible to show that there was plenty of harm going on in the family that was defined out of existence by the power of the law. Rape was not

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21. Plato, "Apology" in *Five Dialogues*, translated by Benjamin Jowett (Neeland, 2015) at 41d.

22. *Ibid* at 30c-d ("Meletus and Anytus will not injure me: they cannot; for it is not in the nature of things that a bad man should injure a better than himself.").

23. See Frances Olsen, "The family and the market: a study of ideology and legal reform" (1983) 96:7 Harv L Rev 1497 [Olsen] at 1505; see generally Collins, *supra* note 14; see, e.g., Aristotle, *Ethics*, *supra* note 18 at bk 8, ch 1 ("And when people are friends there is no need for justice, but when they are just there is still a need for friendship.").

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rape (rape having been defined as forcible sexual intercourse with a woman other than a man's wife),[24] torts were not torts (the marital unity doctrine making it impossible for spouses to sue one another),[25] assaults were not assaults (the 'rule of thumb' as well as general unwillingness to intervene in domestic violence),[26] and contracts were not contracts (as *Balfour v Balfour* told us, intimates have no intention to create legal relations and natural love and affection are no consideration in these "cold courts").[27]

The law's choice to stay out of the family was exposed as all about giving power to individual men as deputized and unlimited sovereigns within the household. Privacy was exposed as nothing but sentimental window-dressing for the entrenchment of patriarchal power; a rhetorical trick used to bring about a situation where law would be concerned with the kinds of harms that are suffered by property-owning men in the public sphere and would not be concerned with the kinds of harms suffered by women and children: harms that took place largely within the family. The feminist critique of these assumptions about harm embedded in the politics of privacy worked and inspired many important reforms. All those legal rules excepting harm within the family from legal intervention are thankfully now gone.[28]

But the rhetoric of privacy has been less vulnerable to the feminist arguments that the law ought to have a role in combating injustice as opposed to harm in the family; particularly injustice in the allocation of housework. While the argument that harm isn't really harm if it happens in private was wholly implausible, the argument that the communal and altruistic nature of the family, where intimates ideally give of themselves freely, was more plausible. While a broken arm was manifestly still a broken arm if it happened in the family, the aspect of sharing and communality in the family really did give a different cast to questions of distribution and allocation in that realm.

Moreover, in relation to injustice, the privacy argument also evidently operates in the (also private) realm of the market.[29] The kind of injustice that is done to Cinderella in the family, if it were done to an adult person by an employer in

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24. See Christine Boyle, "Married Women—Beyond the Pale of the Law of Rape" (1981) 1 Windsor YB Access Just 192.

25. See William Blackstone, *Commentaries on the Laws of England* (Clarendon, 1765) at 430-31 (generic pinpoint bk 1, ch 15).

26. *Cf* Henry Ansgar Kelly, "Rule of Thumb and the Folk Law of the Husband Stick" 44:3 J Leg Educ 341 at 345-48 where one North Carolinian judge is cited as actually relying on the 'rule' in his judgment, though this was overturned on appeal; and see generally, for the proposition that a man's 'moderate chastisement' of his wife was not only legally permissible, but also so commonplace that the 'rule of thumb' was widely believed to be fact rather than fiction.

27. See Blackstone, *supra* note 25; *Balfour v Balfour* [1919] 2 KB 571, [1918-1919] All ER 860 (in reference to the reasons given by LJ Atkin).

28. See Theresa Fus, "Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches" (2006) 39:2 Vanderbilt J Transnat'l L 481; *cf* Claudia Zaher, "When a Woman's Marital Status Determined her Legal Status: A research Guide to the Common Law Doctrine of Coverture" (2002) 94:3 Law Libr J 459 at 461-62 (she credits the industrial revolution and economics to the shift); note that love and affection remain insufficient consideration for a contract.

29. See Olsen, *supra* note 23.

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the workplace, would likely also not be the concern of the law.[30] An employer who demanded 100 times more work from Cinderella than she did of the stepsisters and who paid the stepsisters a million dollars a year and Cinderella minimum wage would not run afoul of the law. Cinderella's only remedy would be to quit and find a better job.[31]

The unjust (private) family then is a training ground for the also unjust (private) workplace. Being treated unjustly should only strengthen people's resolve to learn to stand up for themselves. Legal intervention to bring about justice in the family would only lead to unrealistic expectations. "Who ever told you that life was going to be fair?" There is then a certain tough-love appeal to the notion that suffering injustice within the family is not just unavoidable but is actually good for one, that it builds character and that it readies one for the rough and tumble of the wide world. This can combine with a kind of Nietzschean valuing of the robust—"out of life's school of war"—a "what does not destroy me, makes me stronger" kind of thinking,[32] as well as the Nietzschean notion that law should stay out of the fallout of luck and natural preeminence. The thinking is that we must preserve space for the free play of alpha qualities and the will to power. And connected to this we see also the idea that the family should be a realm in which complete relaxation of the soul is permissible; that you are free to behave howsoever badly you like within the family. As George Eliot puts it "entire freedom from the necessity of behaving agreeably was included in the Almighty's intentions about families."[33]

Another privacy based argument, somewhat along Millian lines, is that it is not so much that the state has no justification for intervening—not that it would not *in theory* be a good idea for it to intervene—but that in practice the law deploying the force of the bureaucratic state is so hopelessly ham-fisted that it is bound to make things worse in this most delicate realm of human relations. There are two strands of this, one drawn from the inherent ineptitude of the law as an institution and the other from the sense of intrinsic value in the familiar. One's own family, howsoever terrible, is still one's own. It may be hell, but it's your hell. On both counts, legal intervention cannot help but bring about an even greater sense of alienation and loss of belonging for the child.

We don't want the intrusion of what theologian Henri Nouwen calls "they-people."[34] There's no place like home precisely because it's the one place that

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30. Here again, however, the law is shifting to become increasingly concerned about emotional abuse and psychological harm, though not allocative injustice that does not amount to discrimination. For a discussion of psychological abuse as constructive dismissal in employment law see David J Doorey, "The Emerging Implied Duty of Decency" (27 Aug 2016) *Law of Work Blog*, online: http://lawofwork.ca/?p=971.

31. See Geoffrey England, *Individual Employment Law* 2nd ed (Irwin Law, 2008) at 166-86 for an overview of how Canadian pay equity legislation addresses only inequity based on sex, see especially on page 168 his example of a statute that specifically allows for differential payment "based on a factor other than sex."

32. Friedrich Nietzsche, *Twilight of the Idols*, translated by RJ Hollingdale (Penguin Books, 1990) at 33 (generic pinpoint: Maxims and Arrows—12).

33. George Eliot, *Middlemarch* (Oxford World Classics, 1998) at 100 (generic pinpoint: bk 1, ch XII): this being the belief of the character Jane Waule.

34. Henri Nouwen, *The Wounded Healer: Ministry in Contemporary Society* (Crown, 2013) at 56.

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is off limits to the officious intervention of professionals. Let them in and home will end up like every other heartless public domain. There is also the idea that the family should be a unit of loyalty as against the potentially over-intrusive state. This is consistent with a sense that the law should not offer incentives for family members to rat on one another—should not entice family members to defect from the family unit.

Of course, there are also various strands of the floodgates argument. Where would it end? The private family, for all its communality is also full of intractable squabbles and perceived injustices. A legal right held by each child in a family to fair and equal distribution of household work, clothes, jewelry? How could parents possibly comply? And how could the law possibly enforce compliance? Imagine the hoards of lippy and entitled suburban teenagers running to court to demand justice in relation to their siblings.

Bruno Bettelheim's highly influential interpretation of the story of Cinderella in his book *Uses of Enchantment: the meaning and importance of fairytales* lends support to this kind of thinking about why the law should stay out of Cinderella's troubles. Bettelheim reads Cinderella's story as essentially one of sibling rivalry.[35] He takes the view that while sibling rivalry may present as competing justice-based claims over benefits like food and clothing and burdens like chores, it's really all about the competitive longing for parental love and affection. According to Bettelheim boys and girls alike powerfully identify with Cinderella because all children, from time to time, experience life as injustice: a violation of equality according to merit.[36]

But for Bettelheim the injustice in the story can be presumed to be imaginary.[37] It's all about the perception rather than the reality of injustice. Parents don't really favour one child over the other. The purpose of the story, in Bettelheim's Freudian account of it, is that it helps children to weather feelings of wounded merit by bifurcating their mother into the real one who is good and the imaginary wicked stepmother who is cruel and unjust. Likewise for Bettelheim the story helps parents to understand "that as an inescapable step in their child's development toward maturity, they must seem for a time to have turned into bad parents."[38] Misconstruing oneself as a victim of injustice then is a normal and necessary part of individuation. Hence, nothing the law should be concerned about.

Marina Warner is critical of Bettelheim's ahistorical and depoliticized reading of the story. She writes, "His argument, and its tremendous diffusion and widespread acceptance, have effaced from memory the historical reasons for women's cruelty within the home and have made such behavior seem natural, even intrinsic to the mother-child relationship. It has even helped to ratify the expectation of strife as healthy, and the resulting hatred as therapeutic."[39] Warner then surveys the social conditions, the serious problems of scarcity and allocation within the

35. *The Uses of Enchantment* (Alfred A Knopf, 1976) at 237.
36. *Ibid* at 239.
37. *Ibid* at 237-38.
38. *Ibid* at 275.
39. Marina Warner, *From the Beast to the Blonde: on fairytales and their tellers* (Vintage, 1995) at 213.

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family that created the conditions for stepmotherly injustice. Many women used to die in childbirth. And their widowers sought to replace lost domestic labour. As Warner notes, "In France, 80 per cent of widowers remarried within the year in the seventeenth and eighteenth centuries. When a second wife entered the house, she often found herself and her children in competition—often for scarce resources—with the surviving offspring of the earlier marriage, who may well have appeared to threaten her own children's place in their father's affection too."[40]

Warner's method asks us to try to bring to light the law's historical role in bringing about that situation of injustice. We shouldn't ask whether law ought to intervene in the situation as it is presented to us without also asking whether the law played a part, direct or indirect, in the creation of the injustice. We ought not then to assume the law's absence (the law's innocence) too quickly.

6. "By Royal Command": what the law does in the story itself

So far I've been assuming that the law in fact does not intervene in the story itself. But that's not quite true. Consider the invitation that arrives at the door. By royal command every eligible maiden is to attend a ball at the royal palace.[41] The law has made its entrance!

Here the stepmother must be cautious. She can't openly violate the command of the sovereign. So she says Cinderella may go *if* she gets all her (impossible to do) chores done and *if* she can find something suitable to wear. Here again we have a clear case of injustice in the distribution of benefits and burdens: the stepsisters are given no chores at all and beautiful new ball gowns and Cinderella is given impossible chores and nothing to wear. It's only because she has the magical help of the animals that Cinderella is able to complete her chores (even in Grimm's version the birds come to help Cinderella separate out lentils her stepmother has thrown into a pile of ashes).

Note here though that harm, (the first actual violence) is added to injustice when the stepsisters assault Cinderella and rip to pieces her deceased mother's dress that her animal friends have lovingly refurbished for her. Enter, of course, the fairy godmother who gives her the new dress, coach etc. Cinderella goes to the ball, the prince falls in love with her and she with him. But to comply with the midnight pumpkin curfew she leaves before anyone knows her name. Luckily she drops one of her glass slippers.

The next day another royal proclamation marks the second intervention of the law. This time the king decrees that every maiden in the kingdom is to try on the glass slipper and the one it fits will be presumed to be the true love of the prince. (And she can marry him *if* she wants to.) It is at this point that the stepmother becomes fully coercive. It's here that she commits, for the first time, a readily

40. *Ibid*.

41. See especially Walt Disney's *Cinderella (1950)*, *supra* note 2 (in which the 'invitation' reads "by royal command, every eligible maiden is to attend"); *cf* Jacob Grimm & Wilhelm Grimm, "Aschenputtel" in *Kinder und Hausmärchen* (Volksausgabe, 1900) at 72 (where the king 'ordained a festival' (*ein Fest anstellte*) to which all 'were invited' (*eingeladen wurden*)).

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recognizable legal wrong (both in our world and the world of the story). She locks Cinderella in the attic. (In the Grimm's version the stepmother also brutally harms her own daughters by convincing them to cut off their toes and heels to fit the shoe—tiny feet as an infallible sign of female virtue, of course, bespeaks the story's Chinese origin.)[42]

How then might we interpret the normative message of these two interventions of the law in the story? Does the story itself have a view about the proper role of the law in correcting the injustice of Cinderella's world? On a feudalistic reading of the story we might say that the law, in consort with nature and magic, acts so as to give each her due. Law ought to and does reestablish just hierarchies. It steps in and redistributes along lines of natural desert and merit. Law does and should bring about justice by elevating Cinderella to her aristocratic role, deposing the unnatural female authority of the stepmother and reposing ultimate power, in public and in private, in the hands of a beneficent male authority, in the person of the prince.

I think that interpretation is there. But it is a testament to the versatility of the story that we can, if you'll go along with me here a little bit, read the intervention of the law in other ways as well. In the royal command that every eligible maiden should attend the ball we could also see something of a Rawlsian concern with justice. If we can set aside (somewhat artificially I admit) the distinction between purpose and effect we can, I think, read it that way. Though the law's purpose is to find a suitable bride for the prince, its effect is to secure fair equality of opportunity to all—an equal shot at the jackpot of marriage to the prince. The law acting with the authorization of the justice principle ensures that the career of princess is open to anyone with the appropriate virtues. Certainly, yes, childhood might be the site of injustice. The law can't do anything about that. What it can and should do, however, is to secure the possibility that adulthood will be a genuine opportunity for redemption.

The proclamation is an answer to the Rawlsian question of what law should do to make sure that social and economic inequalities are attached to positions and offices open to all. Careers should be open to all (though Kenneth Branagh's 2015 version does create some anxiety on this score because there is pressure for the prince to marry royalty)[43] and there should be fair equality of opportunity in the competition for those positions. Everybody should be invited.[44]

Although the second intervention of the law (the proclamation requiring all maidens to try on the shoe and its execution by the grand duke) can be read as in aid of the same justice-based aim we can also (if we stretch things a little further still) see the autonomy principle at work here. By sending out its officers (the grand duke) to ensure that every young woman try on the slipper, the state is in fact doing something to secure conditions for the exercise of autonomy for Cinderella. It springs Cinderella from the freedom-denying coercive control of

42. Grimm, *supra* note 41 at 77-78.
43. *Cinderella*, 2015, video (Walt Disney Pictures, 2015).
44. Though the Grimm version may also create some anxiety on the invitation score, since only the beautiful and young are invited ("alle schönen Jungfrauen"): Grimm, *supra* note 41 at 72.

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the stepmother while also providing her (though just her) with a valuable life choice to pursue.[45]

We can look at this two ways. It might just be that as she is now an adult, the state has a clear mandate to support Cinderella's desire to break from the freedom-denying actions (the coercion) of others within the family. This action of the law is fully supported by the harm principle and is not undermined by any contrary argument from privacy. (Cinderella after all is now being held in the attic). Her guardian's authority is at an end and the state has a clear role in securing her freedom; springing her, as it were, from the oppressive private realm when she has the capacity and the desire to leave.

But the state (if not the law) is doing more than that. It is also providing Cinderella with at least one good choice; one way of leading a meaningful and autonomous life (on the terms of the story). The state springs her not just out of oppression but also into a situation perfectly calibrated to support her flourishing. For the moment, just go along with me here, and read marriage to the prince as a context provided by the state that optimally sets up the conditions for Cinderella's creation of an autonomous life. Whether we view the law's intervention in the story as primarily about reestablishing feudal hierarchy or as securing fair equality of opportunity, law's intervention in the story itself clearly addresses the injustice *and not the harm* suffered by Cinderella.

7. What would contemporary law do?

So would contemporary law concern itself with the wrongs done to Cinderella?

To answer this let's begin by looking at coercive law authorized by the harm principle. The law of England and Wales is representative of a sort of default position. There nothing done to Cinderella (with the possible exception of wrongful confinement in the attic) is prohibited under either the criminal law or child welfare legislation. The *Children and Young Person's Act* does make it an offence for someone responsible for a child to ill-treat, neglect, abandon, or expose a child or "cause or procure him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement)."[46] But the case of *R v Sheppard* has been understood to interpret that legislation as not including emotional neglect, abandonment, or ill-treatment.[47]

Many jurisdictions in the English speaking world, however, have moved on

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45. This, again, is a nice demonstration of the distinction between purpose and effect of law. It's not the law's purpose to create conditions of autonomy or to insure that offices are equally open to all but it is its effect; see generally Cathleen Kaveney, *Law's Virtues: fostering autonomy and solidarity in American society* (Georgetown University Press, 2012).

46. *Children and Young Persons Act, 1933* (UK), 23 & 24 Geo V, c 12, s 1.

47. *R v Sheppard and another*, [1980] 3 All ER 880 (in which Lord Diplock, for example, says that "to neglect a child is … to fail to provide adequately for its needs, and, in the context of … the 1933 [*Children and Young Persons*] Act … its physical needs rather than its spiritual, educational, moral or emotional needs.").

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from this position and now regard emotional abuse as unlawful.[48] Again *at least on paper*, emotional abuse is beginning more frequently to be seen as a punishable offence and as warranting the state's intervention in the family to protect the child.

Under the Alberta *Child, Youth and Family Enhancement Act*, to take a representative example, a child is "in need of intervention" if, among other things either the child has been "emotionally injured" by her guardian or her guardian is "unable or unwilling to protect [her] from emotional injury"[49](note here, the stepmother is perhaps obliged to protect Cinderella from emotional injury inflicted by her stepsisters). The statute provides that emotional injury can be caused by: "rejection, emotional, social, cognitive or physiological neglect, deprivation of affection or cognitive stimulation, … inappropriate criticism, threats, humiliation, accusations or expectations."[50]

This looks as though it could be very broad. But the statute (like most others that prohibit emotional abuse of children) also has a limiting principle. Under its terms a child is emotionally injured only "if there is impairment of the child's mental or emotional functioning or development."[51] In most such statutes, metrics of developmental delay, intellectual disability and impairment of mental health, place limits on the scope of law's concern.[52] Law is engaged only when there is damage not capable of being remedied through the emancipation of coming of age. The limiting principle's effect is, I think, not to eliminate emotional harm to children but to preserve adulthood as a realm of potential redemption for the sufferings of childhood.

Let's take a look then at whether this law would come to Cinderella's aid. Certainly the stepmother emotionally neglects Cinderella, she rejects her, deprives her of affection, she inappropriately criticizes, humiliates and accuses her, and subjects her to inappropriate expectations. She also fails to protect her from the like treatment by her stepsisters.

But even if we just focus on the harms, it's not at all clear that the statute would apply in Cinderella's case. Cinderella's mental and emotional functioning are *not* impaired—nor is her development. Despite the way she's treated, Cinderella is still the sanest and smartest and the most emotionally mature, the healthiest, possibly even the happiest person in the story (the stepsisters and stepmother are miserable, grasping and petty). Of course, she owes much of her emotional health to enchantment. The friendship of the animals (which is there in all the versions), along with the supportive gaze of centuries of sympathetic spectators, vastly improves Cinderella's situation. A Cinderella with no friendly mice and birds, no fairy godmother, no biographer, and no audience, a completely lonely Cinderella, might well suffer the kind of developmental

48. See Tokar, *supra* note 3.
49. AB *Youth & Family Act*, *supra* note 4 s 1(2)(f)-(g).
50. *Ibid* at s 1(3)(a)ii.
51. *Ibid* at s 1(3)(a)i; see also s1(2) for the limiting principle on intervention "a child is in need of intervention if there are reasonable and probable grounds to believe that the survival, security, or development of the child is endangered."
52. Though some point instead to the (much broader notion of) inflicting unnecessary suffering.

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or cognitive damage that would attract the law's concern. But in the story as it comes to us, she does not.

The law does not, however, concern itself with the injustice *per se*. In order to come within the concern of the law, the injustices, the allocative wrongs suffered by Cinderella, would have first to be reconfigured as harms (as humiliations or inappropriate expectations; as a violation of the obligations of humanity, not justice).[53]

Turning now to tort law, it is possible that Cinderella might have an action in tort against her stepmother and possibly even her stepsisters for intentional infliction of emotional distress. With a civil action as well, however, the wrongs would have to be framed as harms rather than injustices and Cinderella would have to prove through the use of psychiatric evidence emotional damage.[54] Under the law of tort she would have to demonstrate that she has suffered a "visible and provable illness."[55] Here again, in the story as it comes to us, while Cinderella suffers, she does not suffer in this way. And it is her virtue, her resources of personality, that protect her from this kind of psychiatric damage.

But what if we follow Marina Warner's advice, back up our analysis in time, and ask what the law's role may have been in bringing about the unjust situation? Ought the law to have been concerned earlier on in the picture? How might the law have behaved differently up front to avoid the situation happening in the first place? Here we might again inquire into possible interventions of the law authorized, not on the harm principle, but on the justice principle and the autonomy principle.

For starters, the law would require Cinderella and her sisters to go to school. Providing free and compulsory education is something that the state, with the assistance of law, does in the interest of just allocation of benefits, fair equality of opportunity and, hopefully, with a view to helping children develop a capacity for autonomy. The effect of that law would necessarily be to limit the potential scope and impact of injustice in the home. Cinderella wouldn't be able to spend her *whole* day cleaning. Of course, in Canada we take for granted that providing state funded compulsory education for girls is the law's concern. But it doesn't appear to be the case in the story and it also isn't the case in many countries in the world today. It's not difficult to imagine how lack of effective provision of free, compulsory, safe education for girls makes the law complicit in private injustice in the home for literally millions of Cinderella's in countries

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53. *Cf* Quebec's *Youth Protection Act*, CQLR, c P-34.1 s 38(c) which comes closer, but stops short of, articulating a justice-based concern—it provides that the development and security of a child is considered to be in danger where the child suffers psychological ill-treatment which includes "exploitation, particularly if the child is forced to do work disproportionate to the child's capacity." (While Cinderella is exploited, while the work she is forced to do is wildly disproportionate to what is asked of others, it is in fact not disproportionate to her own capacity so there again Cinderella might be on her own.)

54. See Allen M Linden, Lewis N Klar & Bruce Feldthusen, *Canadian Tort Law Cases Notes and Materials* 13th ed (LexisNexis, 2009) at 73: "In order to make out the tort of intentional infliction of mental distress … the plaintiff must show … extreme, flagrant or outrageous … acts caused harm"; "There is no liability for the intentional infliction of mental suffering unless there is some 'recognizable physical or psychopathological harm'."

55. *Rahemtulla v Vanfed Credit Union*, [1984] 3 WWR 296, 51 BCLR 200 (BCSC) at para 53.

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like Somalia, Niger or Pakistan.[56]

Of course, relying on the justice and autonomy principles, there are other ways in which we might see the law as complicit in Cinderella's plight. What was the law's role in making marriage to the Prince the one and only good opportunity for seemingly all the young women? Did the law have a hand in shaping the stepmother's motivations to marry Cinderella's father so heartlessly?[57] Did law help to teach her to view her daughters not just as high-stakes competitors, but as players in a zero sum game?[58]

8. Should the law be concerned with the injustice to Cinderella?

Having looked at the kinds of harms she suffers (or only narrowly skirts), the way law acts in the story and the way law might act in our world today, let's now take a look at the core question that I've promised to address. Should the law be concerned with this injustice?

One point of entry for the law's legitimate concern might be through the issue of discrimination. We have seen that historically there has been a kind of parity in the two private realms of the family and the market here. Just as the law does not intervene to impose an obligation of distributive justice on a guardian in relation to her charges, likewise the law does not intervene to force an employer to treat employees fairly as regards benefits and burdens of the workplace. But the employer is free to be unjust in the distribution of benefits and burdens of the workplace only insofar as that employer does not engage in unlawful discrimination.[59] If an employer were to pay an employee less and make her do more because she was a woman or black or Muslim that, of course, *would* engage the law's concern.[60] We might want to begin by asking then, whether the norms of anti-discrimination law that prevail in the workplace ought also be brought to bear in the private realm of the family? Here again, however, we come up against a problem. Cinderella, though she is forced into the very stereotypically female role of domestic servant, is not discriminated against on grounds of sex.

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56. See Pauline Rose, "Bottom Ten Countries for Female Education," *World Education Blog*, online: https://gemreportunesco.wordpress.com/2012/11/09/the-bottom-ten-countries-for-female-education/; in 2010 the 18th Amendment to the constitution of Pakistan created a right to free and compulsory education for all children aged 5 to 16—see *Constitution of the Islamic Republic of Pakistan*, s 25A as amended by *Constitution (Eighteenth Amendment)* Act 10 of 2010—however, the shooting of Malala Yousefzai two years later by the Taliban for daring to attend school, and Yousefzai and others' ongoing struggle to secure education for girls in Pakistan shows that the constitutional change has not been fully implemented—see Malala Yousefzai, *I Am Malala: the girl who stood up for education and was shot by the Taliban* (Little, Brown and Company, 2013).

57. See Megan Garber, "In Defense of *Cinderella*'s Stepmother" (16 March, 2015) *The Atlantic*, online: http://www.theatlantic.com/entertainment/archive/2015/03/in-defense-of-cinderellas-stepmother/387790/ (discussing Kenneth Branagh's remake, Garber says Lady Tremaine's cruelty is "an indictment not just of her character, but of her world.").

58. See Wendy Brown & Janet Halley, "Introduction" in *Left Legalism, Left Critique* (Duke University Press, 2002) (for a persuasive account of the formative aspects of even seemingly benign laws).

59. See, e.g., *Canadian Human Rights Act*, RSC 1985, c H-6, ss 7-11 and *Alberta Human Rights Act*, RSA 2000, c.A-25.5, ss 7-8.

60. *Ibid.*

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It is here that I really want to indict the politics of the story. *Cinderella* has, for centuries, asked us to consider the question of domestic injustice in light of a wildly inaccurate picture of what that injustice usually looks like. By making the whole household female, by setting up a woman as the powerful authority within the family, the details of the story deflect our attention from the ways in which distribution of household work and benefits have historically been allocated unjustly on grounds of sex, with women and girls consistently getting the short end of the stick relative to boys and men. The story asks us to imagine that it is the absence of the beneficent male head of household (the death of Cinderella's father) that gives rise to problems of domestic injustice. Depose female authority, put a beneficent man back in charge and we will all live happily ever after.

Melinda Gates has recently taken up the issue of gender injustice in the distribution of domestic work in the family. Gates tells how she laid down the law with her own family, "No one leaves the kitchen until Mom does" was her rule.[61] Melinda Gates had the power to articulate and enforce that justice measure. But many women and girls don't.[62]

Gates tells another story of living with a family in Tanzania[63] where the 14 year old daughter had to do domestic chores until after 10:30 every night. What the girl most coveted of the Gate's possessions was a headlamp so that she might be able to see to do her homework after she'd finished her chores. Meanwhile this Tanzanian girl's brother, without the burden of chores, was able to start his homework at 4:00 in the afternoon.

Ought the law of Tanzania be concerned with this, not just as an injury, not just as an impediment to development in Tanzania (though it clearly is that) but also and simply as an injustice? I would say yes, and that it should take the justice principle as well as the autonomy principle as mandates for intervention in the matter of just distribution of domestic work within the family. Though Cinderella's story gives us a vivid tale of domestic injustice it depoliticizes by de-gendering that injustice—leading us to conclude that such injustice is not something the law ought to concern itself with.

But let's look at another wrinkle. Cinderella is not discriminated against on grounds of sex. But she is discriminated against as a stepchild. Should the law be concerned with discrimination in families against stepchildren? Are non-biological children within a family a historically disadvantaged group analogous

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61. Olga Khazan, "The Scourge of the Female Chore Burden" (23 Feb 2016) *The Atlantic*, online: http://www.theatlantic.com/business/archive/2016/02/the-scourge-of-the-female-time-crunch/470379/.

62. I wondered at first why Melinda or Bill Gates or any of their kids were doing dishes at all. As I continued to read interviews with Melinda Gates, however, it became clear that her commitment to sharing household work within their immediate family members was driven by her desire for their family to be a role model for others—see for example Clair Cane Miller, "How Society Pays When Women's Work Is Unpaid" (22 Feb 2016) *New York Times,* online: http://www.nytimes.com/2016/02/23/upshot/how-society-pays-when-womens-work-is-unpaid.html?_r=0 where Melinda Gates is quoted, "Moms started going home and saying to their husbands, 'If Bill Gates can drive his daughter, you better darn well drive our daughter or son' …. If you're going to get behavior change, you have to role-model it publicly."

63. David Brancaccio, "Melinda Gates on balancing the burden of unpaid work" (23 Mar 2016) Marketplace, online: http://www.marketplace.org/2016/03/21/world/melinda-gates.

to those targeted under human rights legislation? The question is tricky because their disadvantage is relative to the other children in the family not to other children generally.

I doubt we could support the claim that stepchildren are disadvantaged relative to blood-related children in the general population. Still the child is suffering because of membership in a kind of a group not of her choosing and because of a kind of immutable characteristic somewhat analogous to gender, race, religion and the like. And both historically and currently such children do suffer disadvantage in the family relative to siblings who are the natural children of the stepparent.

Though women dying in childbirth no longer contributes significantly to the creation of stepfamilies we now have a different set of social conditions resulting in families being disassembled and reassembled with the creation of many step-relations. Should the law, as a matter of human rights, be concerned about injustices that result? While the law might not be able to impose an obligation on stepparents to love their stepchildren equally, could it not impose an obligation to make reasonable efforts to ensure at least rough material distributive justice as between stepchildren and biological children?

Further, might the law be justified in singling out stepparents for higher levels of scrutiny of their parental role on the assumption, which is supported with plenty of social science evidence, that stepparents (and particularly stepfathers) are more likely to mistreat their stepchildren?[64] Further still, is injustice (or even abuse) at the hands of a stepparent actually different from and worse than injustice or harm inflicted by one's own biological parent? Finally, if the law has a moral mandate to be concerned about injustice in the family should that concern only be engaged where there is also some prohibited ground of discrimination? Or ought the law to be concerned with any egregious injustice in the distribution of benefits and burdens of a household?

Of course, the answers to these questions would in some ways depend on whether we could envision effective methods for the law's intervention to prevent this kind of injustice or discrimination. The inability to envision a viable framework for the law's intervention might be a sufficient reason not to undertake the experiment. Best not to try to intervene (even if in principle intervening is the right thing to do) if trying is risky and you don't know what you're doing. But we should be mindful of the ways in which the deeply gendered politics of privacy help to make plausible the attitude that difficulties around *how* the law might effectively intervene in the case of injustice to children should shut down serious examination of the reasons why the law ought to intervene.

Leaving the narrow question of step relations to the side, however, I would argue that it might well be very beneficial for the law to cultivate a greater willingness to take seriously injustice in the distribution of benefits and burdens in the family as serious grounds for intervention on the authorization of both the

64. See Martin Daly & Margo Wilson, "The Cinderella Effect: parental discrimination against stepchildren" (2002) 4 Samfundsøkonomen 39: in Canada stepfathers beat stepchildren to death at a rate of 120 times greater than biological fathers did (in 1974-1990) at 55 deaths over 0.17 million child-years at risk.

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justice principle and the autonomy principle independently of any harm done. The law's role there might well be limited to cases of discrimination on grounds traditionally thought salient in human rights law and in the case of housework on the ground of gender would obviously be of greatest concern. The Tanzanian girl's case is most compelling. Girls' who are saddled with overwhelming domestic demands relative to their brothers cannot be expected to catch up with their brothers in the workforce in later life. They are unlikely to get an invitation to the ball. A private culture that results in the crippling of girls' capacities and expectations through domestic overburdening should be the state's concern. The optimal mode of law's intervention will likely not be through criminal or tort or even child welfare legislation. In keeping with Raz's vision of the mechanisms of state intervention in pursuit of the autonomy principle, the best way for the law to intervene might well be in granting tax and other incentives for families who commit to equal distribution of domestic burdens and benefit.[65]

Obviously much thought would need to be given to the details of how law ought to intervene and it is far beyond the scope of this article even to attempt to envision those details. My point is only to suggest that there is nothing in sound principle regarding the scope of the law's concern that would militate against the law intervening to prevent injustice for children in the distribution of domestic work. Further there is much in both the justice and the autonomy principles that ought to argue in favour such intervention particularly in cultures where discriminatory domestic practices are prevalent and hamper the life chances of young people.

9. Harm vs. injustice in *Brown v. Board of Education*

I have been taking the view that not just private harm but private injustice, in particular in relation to children, should engage the law's concern. I've tried to express a discomfort with the way in which law tends, particularly in its relation to children, to be more willing to act on the harm principle than on the justice or autonomy principles. I'd like now to look briefly at two additional examples that I think show the way that the law, *even when it was directly involved in bringing about injustice to children*, requires that we reconfigure injustice as harm before its willing to do justice by way of rectification.

Brown v. Board of Education is perhaps the most famous constitutional case in the history of the United States.[66] The celebrated breakthrough is often understood as the moment the US Supreme Court's decided to consider expert psychological evidence claiming to show that segregation in schools resulted in harm to Black children's self-esteem: harm that in turn resulted in developmental damage. The acceptance of the evidence that segregation was *harmful* to black children, was pivotal in the Courts' decision to overrule the "separate but equal" doctrine of *Plessey v. Ferguson*. That psychological evidence has now

65. See Raz's discussion of how the law's legitimate role in the creation of the conditions of autonomy can be reconciled with the Millian commitment to forbear from coercive use of law unless there is harm to another. Raz, *supra* note 10 at 420.

66. *Brown v Board of Education of Topeka*, 347 US 483 (1954).

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been discredited. Black children do not have lower self-esteem.[67] But what remains is the sense that it was a great thing for the court to finally *get it* that the injustice was actually harmful.

I, and others, remain troubled by what seemed to be a necessity here of reframing the injustice as injury in order to engage the law's concern.[68] The reason to overturn *Plessy v. Ferguson*[69] was not that school segregation was a violation of obligations of humanity owed to Black children but rather that it was in violation of obligations of justice. Black schools were, and predominantly black schools in the US still are, anything but equal. The wrong was one of wrongful allocation of goods subject to competing claims. Casting the Black children as damaged, vulnerable and lacking in self-esteem was a more effective (perhaps the only effective) way to get the court to budge. But I remain troubled by the need to cast children not as justice-deserving and potentially justice-demanding subjects but as injured objects of pity to get the law to be concerned.

10. Harm vs. injustice in the law's response to Residential Schools

Over the past two decades Canada has been grappling with how to redress wrongs done to First Nations children in residential schools.[70] For almost the entire 20th century the Canadian government, in pursuit of a goal of assimilation of Aboriginal people, forcibly removed First Nations children from their homes and required them to attend residential schools run by churches. The Indian Residential School Settlement agreement reached in 2006 is the largest class action settlement in Canadian history.[71]

The settlement provides for Common Experience Payments (for anyone who attended).[72] But the focus of the work of the Independent Assessment Process has been on identifying the nature and extent of physical and sexual abuse in individual cases.[73] The process has uncovered many egregious violations of obligations of humanity in relation to First Nations children. And these violations have been the focus of both the media and, as I say, the legal mechanisms of compensation.

But what has also been uncovered through the TRC's report is the way in which the strategic plan of the residential schools was not just wicked in its inhumanity but wicked also in its injustice to First Nations children. The initial hope of the Canadian Government was that the residential schools would be self-funding.[74] In many of the schools children were required to work to maintain and clean the school buildings and to grow and prepare their own food and to

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67. Gwen Bergner, "Black Children, White Preference: *Brown v. Board*, The Doll Tests, and the Politics of Self-Esteem" (Jun 2009) 61:2 American Q 299.
68. See Toni M Massaro, "Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?" (1989) 87:8 Mich L Rev 2099.
69. *Plessy v Ferguson*, 163 US 537 (1896).
70. Truth and Reconciliation Commission of Canada, *Final Report Volume One: Summary* (Lorimer, 2015).
71. *Ibid* at 130.
72. *Ibid* at 106.
73. *Ibid*.
74. *Ibid* at 58 *et seq*, "Funding: The Dream of Self-Supporting Schools."

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produce other agricultural products for sale at a profit to defray school expenses. Children were required to work, for example, at dairy farming where cream and butter were sold at a profit to be used to pay staff or building costs and the skim milk was kept for the children. The schools were staffed with missionaries, few of whom had any qualification to teach and most of whom had taken "vows of obedience, poverty and chastity."[75] This conveniently yielded a pool of employees who (though many, with breathtaking inhumanity, broke their vows of chastity sexually violating the children) upheld their vows of obedience and poverty, to go where they were told and to work for next to no pay. Children were rarely in the classroom and learned next to nothing.[76]

Though the dream of fully self-funding residential schools was never realized, the policy of forcing Aboriginal children to do the work of feeding and clothing themselves, of cleaning and maintaining the school buildings and staffing the schools with cheap or even free labour of missionaries was absolutely central to the residential school project.[77] The schools were funded at a *per capita* rate far less than other schools and Aboriginal children continued to spend more time performing forced labour than they did in the classroom.[78]

Obviously the law was entirely responsible for the injustice in the first place. But my question is this, does the law now, do Canadians now, in attempting to reconcile and repair, to redress the wrong suffered by Aboriginal people in the residential schools, prefer to focus on the injuries and harms these children suffered rather than the injustices? And if so, why? Are we still more comfortable with urging the law to take a paternalistic interest in the injured First Nations child than we are with urging the law to recognize those children as having been justice-deserving and legitimately justice-demanding subjects? Does the law take an interest in the violated body, particularly the sexually violated body of the Aboriginal child, while remaining aloof from the material injustice she is subjected to? In the course of reconciliation do non-Aboriginal Canadians congratulate ourselves on deploying law to redress harms done to Aboriginal people as a result of the residential school system while shifting focus away from the injustices of those schools so that we can also shift focus away from persisting injustices, for example, the lack of provision of clean water on many reserves in Canada[79] and the hugely disproportionate incarceration rates for Aboriginal people?[80]—to name but two glaring allocative injustices that are the legacy of the residential schools and colonization.

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75. *Ibid* at 121.
76. *Ibid* at 70, 77-80.
77. *Ibid*.
78. *Ibid* at 59.
79. See Indigenous and Northern Affairs Canada, *2016-17 Report on Plans and Priorities* (Government of Canada, 2016) at 48 (available online: http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/16-17_1457122360970_eng.pdf) where the *target* is set at 54 percent of the drinking water systems that the department funds having a low risk rating by April 2019 (only 27 percent were rated low risk in 2011).
80. See Canadian Human Rights Commission, *Report on Equality Rights of Aboriginal People* (Government of Canada, 2013) at 53 (available online: http://www.chrc-ccdp.gc.ca/sites/default/files/equality_aboriginal_report.pdf).

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I would argue that as we embark on the process of reconciliation these questions should give Canadians serious pause. The material injustices, matters of egregiously wrongful allocation of benefits and burdens, are matters equally if not more deserving of attention, compensation, and rectification than are the harms suffered by victims of the residential school. Yet they are not the focus of the compensatory schemes. They lack the pornographic interest so vivid in cases of sexual and physical violation of Aboriginal children, yet in rebuilding equitable relationships between Aboriginal and non-Aboriginal Canadians it is matters of injustice, and not just harm, that Canadian society, with the help of law, must ultimately address.

11. Conclusion

In a 1974 article entitled "Humanity before Justice" Tom Campbell argued that it was conceptually confusing and rhetorically unwise to speak of issues of welfare in terms of justice.[81] Far better, Campbell argued, to utilize the conceptual structure and rhetorical power of the notion of humanity rather than justice in arguing for the distribution of benefits among those in need. Justice was risky in Campbell's view because it necessarily prompts inquiry into desert. "You don't deserve it" is ever an available retort to claims of need. Talking about humanity instead of justice forestalls that move.

Cinderella's story puts us right up against the problem because, as I have said, it is all about relative desert. Cinderella deserves more and gets less. The stepsisters deserve the oblivion to which they are implicitly consigned in the end. But before we go along with Campbell to reject the idiom of justice as a persuasive tool to argue that law might intervene to effect a more equal distribution of benefits and burdens of the household in the family, consider this: children's lives are disproportionately lived in the confines of a sometimes dangerous, often unfair, and usually unseen private realm. It is in that private realm that a great deal of one's capacity for autonomy is either fostered or crushed.

We should consider that if children are subjected to egregious injustice in the distribution of benefits and burdens in the household that it may be impossible for the law thereafter to fulfill its obligation to create fair equality of opportunity or to create the conditions and capacity for autonomy in the wider world. And further with children at least we should be able to view them as equally deserving little bundles of human potential, and to the end of the fulfillment of that potential constitute them, by law, as justice-deserving and potentially justice-demanding subjects. And that way instead of waiting patiently for a prince, Cinderella might be able to enlist the power of the law to make her sisters help out. As Yaa Gyasi's puts it in her new novel about slavery, *Homegoing*, "sometimes you cannot see that the evil in the world began as the evil in your own home."[82] Likewise, sometimes you cannot see that the injustice in the world began as the injustice in your own home.

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81. Campbell, *supra* note 16 at 1-16.
82. Yaa Gyasi, *Homegoing* (Alfred A Knopf, 2016) at 242.

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