Puzzling Over Children's Rights

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Childhood reform is an aspiration that has come easily to this generation of lawyers. This is not necessarily because of increased affection for the young; our predecessors may have liked children as well as we. What is special to our time is the predisposition, born of the legal experience of women, blacks, and others, to see children as another discrete minority seeking aid from the courts.

In 1967, the United States Supreme Court helped establish this interpretation of childhood with *In re Gault*.[1] Imposing the due process clause on juvenile court proceedings, the Court insisted that "[u]nder our constitution, the condition of being a boy does not justify a kangaroo court."[2] Similarly, in 1969 in *Tinker v. Des Moines Independent Community School District*,[3] the Court said that students do not "shed their constitutional rights . . . at the schoolhouse gate."[4]

These decisions and others triggered the formation of several child-advocate groups. The Children's Defense Fund, an impressive Washington-based lobbying and litigating group, is a product of this era. Today, San Francisco alone is home to two national children's legal units that arose out of the activism of the 1960s--the Youth Law Center and the National Center for Youth Law. This agitation by lawyers has been contagious. Americans in general seem open to expanding the legal rights of children. Many seem to believe that children's existing rights are regularly being violated.

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1. 387 U.S. 1 (1967).
2. *Id.* at 28.
3. 393 U.S. 503 (1969).
4. *Id.* at 506.

Through nearly twenty years of collaboration, we three authors have looked for a way to think systematically about children. We share the concerns of the child advocacy groups, but we remain baffled by the notion of children's rights. Certain empirical matters, of course, are clear. A high proportion of American children are poor, which usually means that they are ill-fed, poorly housed, and effectively cut off from decent medical attention and preventive health care. Many children are abused, fare poorly in school (if they stay in school), become involved in crime, and are excluded from self-respecting employment. We concede that "something must be done," even if consensus on that "something" remains elusive.

Nevertheless, our concern in this article is not the shape of policy reforms in education, health care, welfare and the like. Rather, we explore the intellectual foundations of our conventions about children, and we share some of the puzzles we have identified.

The first section probes enigmas along the dimension of time. When does childhood begin and end? Are kids worse off now than in the past or better off? Is the purpose of childhood a matter of the here and now? Or is it preparation for future adulthood?

The second section delves into quandaries concerning a child's entitlement to the goods of the world. What is a fair division between children and their parents? And how should children rate in competition for resources with adults from other families, and with children from other families, including those children luckier in their choice of parents?

In the third section, we examine a child's duties. For what should a child be blamed? And what do we mean by a virtuous child?

In the fourth section, we consider the idea of adults representing the interests of children. If there is to be child advocacy by adults because children cannot do it alone, should these advocates be parents only? If there are to be others, such as lawyers, how do these advocates decide what position to take if there are conflicting solutions? When there are two plausible paths, may advocates promote their own ideas? And how can the audience for these ideas be certain that the child's interests are the basis of the advocates' arguments?

Eventually the child becomes an adult and no longer needs an advocate, either the parent or the state. The final section

probes the riddle of when and how the separation should occur. We must decide when the state should simply withdraw and permit younger people to do what older people do. We must also decide how much the state should actively help parents to control their children, and conversely, how much the state should help children to escape their parents.

I. Of Time and the Child

A. When Does Childhood Begin?

The defining of children's rights is difficult in part because it is unclear when a child comes into existence. At some threshold, one becomes a child. At some historical moment, a child is suddenly created.

Many hold the decisive point to be birth—the rather certain moment when this creature becomes the separated live offspring of a woman. This view has the virtue of simplicity. But the development of the individual begins long before birth. From the perspective of biology, conception initiates a developmental process that continues in each of us until we die. Contemporary developmental psychologists agree that a child has many important individual experiences before birth. They laud the wisdom of ancient Chinese culture which treats each child at birth as already one-year-old.

Consider the following examples which raise contemporary legal questions about the beginning. Suppose Michael Martin dies leaving children five and nine years of age and a wife who is seven months pregnant. In his will, he leaves $20,000 to his "children." Does the unborn child have the right to a share? For purposes of inheritance, both at common law and under modern statutes, a child in the womb, provided that he or she is subsequently born alive, is regarded as life in being. The California Civil Code, for example, provides that "[a] child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth . . . ."[5] But what would be the outcome if Martin's will had read "to my living children?"

All states require a father to provide economic support to his children. Suppose Robert Rosen is criminally prosecuted for willfully failing to provide support for an unborn child he has

5. Cal. Civ. Code § 29 (West 1989 & Compact Ed. 1990).

fathered by refusing to furnish economic assistance to the destitute mother during her pregnancy. Does his duty of child support extend to a "child conceived but not yet born?" A California appellate court said yes, and affirmed the conviction of someone in Rosen's position.[6]

Suppose Sally Scott, unmarried, becomes pregnant and applies for welfare under the federal government's program of Aid to Families with Dependent Children (AFDC). Is her fetus a child for this purpose? Although several courts had earlier ruled in favor of the eligibility of persons in Scott's situation, the United States Supreme Court finally decided that, when Congress used the term "dependent child" in the AFDC statute, it did not intend to include unborn children.[7]

In short, an unborn is sometimes a "child" and sometimes is not. The outcomes reached in every one of these cases could easily have been the opposite. They show how difficult it is to mark the beginning of childhood, even where economics is the only concern. The difficulty increases when the underlying legal issue is protection of life.

Suppose, for example, that a fetus is accidentally killed by a careless doctor during delivery. Should the parents recover damages from the physician? California's wrongful death statute provides that "[w]hen the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death."[8] Is the fetus a "person" for purposes of this statute? The California Supreme Court has said no.[9] However, a majority of state courts that have considered this question have come to the opposite conclusion, at least where the fetus is "viable." Does it make sense to be able to get damages for the death of your "child" when the fetus is negligently killed, but not welfare for your "child" in order to help the fetus to live?

Consider next the scope of the homicide laws. Suppose Harvey Hansen assaults his ex-wife, who is thirty-five weeks pregnant; as a result, the baby is still-born. Should Hansen be con-

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6. *See, e.g.*, People v. Clarke, 146 Cal. App. 2d Supp. 904, 304 P.2d 271 (1956).

7. Burns v. Alcala, 420 U.S. 575, 580 (1975).

8. CAL. CIV. PROC. CODE § 377(a) (West 1989 & Compact Ed. 1990).

9. Justus v. Atchison, 19 Cal. 3d 564, 580, 565 P.2d 122, 132, 139 Cal. Rptr. 97, 107 (1977), *disapproved on other grounds*, Ochoa v. Superior Ct., 39 Cal. 3d 159, 171, 703 P.2d 1, 9, 216 Cal. Rptr. 661, 669 (1985).

victed of murder? The California Supreme Court answered no on the grounds that an unborn fetus, even thirty-five weeks old, is not a "human being" for purposes of the California homicide statute.[10] Does it make sense that the fetus could have inherited as a child had his father died, but is not protected from being killed?

The raging political controversies concerning abortion perhaps most vividly underline the legal question: "When does childhood begin?" In 1973, the United State Supreme Court had to decide when, if ever, a state may prohibit abortion.[11] The Court saw a conflict primarily between a woman's privacy interest in deciding the issue for herself and the state's interest in preserving prenatal life. The Court resolved the issue by drawing a line at the point of viability. The majority concluded that the state may not protect the fetus from the mother's decision before it is viable.[12]

Why does protection start only at viability rather than conception, birth, or age one? Viability is generally understood to be that point of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-support systems. In other words, the fetus' right to live turns on the hypothetical ability of others, not the mother, to keep the fetus alive. This dividing line seems more than a little odd, because once the fetus is capable of surviving outside the womb, the state may require the woman to maintain it inside her womb. Indeed, if viability is supposed to be the key idea, the Court seems to have the rule reversed. That is, should not the mother be permitted to expel the fetus from her womb only once it has the ability to survive, thus promoting both privacy and life? In any case, it is hard to see that viability marks a special change in her privacy interest which is the essential basis for the Court's decision.

To further complicate things, the Supreme Court did not equate the rights of a viable fetus with those of a newborn. Even after viability, abortion may not be prohibited if, "in appropriate medical judgment," it is necessary "for the preservation of the life or health of the mother."[13] But no one argues that a

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10. Keeler v. Superior Court of Amador County, 2 Cal. 3d 619, 628, 470 P.2d 617, 622, 87 Cal. Rptr. 481, 486 (1970).

11. Roe v. Wade, 410 U.S. 113 (1973).

12. *Id.*

13. *Id.* at 165.

mother whose health is jeopardized by the burdens of caring for her two-year-old twins is free to kill her children. So why are viable fetuses different? Here, Mr. Justice Blackmun thought it significant that the "unborn have never been recognized in the law as persons in the whole sense."[14] But this logic proves too much. Does the law recognize a three-year-old child as a person "in the whole sense?" Does the three-year-old child have the legal right to vote? To buy and sell property? To get married?

Predictably, someone turned Blackmun's logic around to undermine the rights of disabled newborns. Since a newborn is arguably indistinguishable from a mature fetus, Michael Tooley argues that recognition of the rights of human young as persons can be delayed until we perceive their "self-consciousness."[15] Depending upon the definition of this concept, newborns could be at risk for a sustained period. Tooley specifically suggests postponement of legal rights of children of ambiguous health until two weeks *after* birth.[16] This delay would permit the hospital to make a complete medical check of the child. At any point before the deadline, those found to have severe defects could be left unattended to die.

B. When Does Childhood End?

Even more doubts exist about when childhood ends than when it begins. As the young person passes through those years vaguely labeled adolescence or youth, he or she gradually gains the autonomies of adulthood and loses the securities of childhood. But at what point then, is childhood over? The army wants men, but when it enlists an eighteen-year-old, what does it get? Should the answer depend upon whether eighteen-year-olds can order beer? Does childhood end with the right to drink? The end of childhood could be defined as occurring when one obtains the full accumulation of adult legal rights and duties. On that view, however, no one is grown up at least until he or she is entitled to run for president. Another view is to treat childhood as ending with, not the last, but the first attainment of some specific area of autonomy. But does merely having the right to drive, or the right to choose an abortion, mean you are no longer a child?

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14. *Id.* at 162.
15. M. TOOLEY, ABORTION AND INFANTICIDE 411-12 (1983).
16. *Id.* at 424.

Of course, the simple solution is to say that childhood both begins and ends at different times for different purposes. Yet this means that whether you are a child, legally speaking, does not depend on how old you are. Moreover, the very idea that you are to be given certain rights, duties and disabilities because you are a child is undermined.

C. Progress: Is Life Better for Children Today Than in the Past?

One justification that might be offered for children's rights is that children today are in special need of legal protection, because their lives are worse than in the past. Is this really true?

Children and their problems have become popular subjects for print and electronic media. It is difficult to find a copy of a daily urban paper that lacks a tale of woe featuring either some unfortunate child or some group of children. Reports of child abuse, child neglect, parental stupidity, and bureaucratic indifference often give an impression that modern life is carefully designed to make life hell for children. This media phenomenon coincides with the appearance of a school of historians focusing upon the previously neglected history of childhood. Oddly enough, much of that historic work suggests that the recent centuries have brought a steady improvement of the position of the child in relation to adults.[17]

Which is the more accurate picture? Is the quality of childhood improving or deteriorating? Let us first stipulate that things are better for those children who in earlier times would have perished of various maladies that are now controllable. By definition it is better to survive. Our query, however, is about the quality of children's lives. Were those who actually survived in the past better or worse off during childhood than are their counterparts today?

The question of progress may seem straightforward, but it is actually quite ambiguous. First comes the puzzle of which set of historical lives we should compare with the lives of today's children. Is it the children of 1780 or of 1950? Should we compare urban children to urban, or rural to urban? Among the sets of lives that we choose to compare, should we consider the "worst-

17. P. ARIES, CENTURIES OF CHILDHOOD (1962); L. DEMAUSE, THE HISTORY OF CHILDHOOD (1974); G. STEINER, THE CHILDREN'S CAUSE (1976).

off" children of both eras, or should we imagine some "average" child?

A second difficulty is the lack of a common scale of values. Even if there were an "average" child of each era, surely some things would be better and some worse. Perhaps the child in nineteenth-century America had more open space and fresher air, but the diet was not so good and the local school may have been primitive and punitive. Making historical comparisons in such circumstances requires that we be able to measure disparate goods and bads against each other. But it is difficult to imagine how this could be done. On the subjective level, there is no consensus as to the relative worth of historical forms of experience. There is Miniver Cheevy, and there is Buck Rogers. Some wish they had lived in the eighteenth century; others would choose the twenty-fifth.

Third, measuring gains and losses can be very bewildering. For example, in today's society, a larger percentage of mothers are working outside the home. Some observers see such a change as a threat to the crucial bond of trust and intimacy between mother and child—strictly something on the minus side. Others disagree; perhaps working women perform better as mothers precisely to the extent that they can fulfill themselves in the outside world. Besides, their work brings in money that benefits the child. Or consider today's toys. Perhaps they amuse children very well and even teach them more of what society and schools expect of them. But how do we reckon the loss of childhood pastimes, including homemade playthings, that today's mass-produced toys have largely replaced?

Finally, learning even a little about what the past was like can in some cases be very difficult. Consider the data on child abuse. An explosive increase has occurred in the number of reported cases. What is unclear is whether this reflects anything more than aggressive detection methods. We do not know whether the physical abuse of children by their parents is more or less common today than it was twenty or fifty or one hundred and fifty years ago. Assuming that the experience of being beaten has always been bad for children, our perception of its frequency may be nothing but a social artifact. If it were agreed that children's lives are deteriorating over time, then the urgency of the "children's rights" movement might be considerably enhanced. But on what basis could we agree?

D. Ecstasy or Apprenticeship?

To what sort of childhood might children have a right? Is childhood essentially a preparation for adulthood? Or does it have independent significance here and now? Are the present activities and the emotional state of a child to be judged as ends? Or is the child nothing but "the father of the man?"

The idea of childhood as a preparation—a period when the little beast must be tamed and shaped for the future—strikes a responsive chord in most of us. Public spending on schools is typically justified as an investment in America's future. Educators use metaphors of industrial production such as "inputs" to describe the resources and experiences provided to children along the way to graduation. These inputs contribute to the making of an end product or output—the educated adult.

On the other hand, there is the rich tradition that glorifies childhood as a special time to be valued as the supreme experience of one's life, an interval of unique capacity for joy. We reminisce about the good times of our youth and feel sorry for those who grew up too fast and who never had a childhood. By contrast, adult life can seem nasty, brutish, and short—not merely for its new burdens, but from a consciousness of something lost. The sense that childhood provides fleeting access to some special happiness convinces some to make the delight of the young a responsibility of adults that transcends their personal convenience.

Which view of childhood is right? It may not be possible to have it both ways in every case. This is certainly so if a degree of frustration or pain in childhood is necessary to produce superior adults. Consider this problem in the context of the debate about pre-school education. Should a child's earliest years become more constricting, or ought they to be filled with toys, games, and freedom to roam? This dilemma is evident not only in public, but in every individual family. Should Johnny spend the summer at camp or with a reading tutor? Should the family take Mary on a picnic tonight, or should she stay home and work on her multiplication?

Some would finesse the issue by arguing that whatever activity delights the child luckily turns out to be precisely what is best for long term development. Childhood pleasure is not only an end desirable in itself but is also the optimal preparation for maturity. Fun and sound investment are not only compatible but indistinguishable. Many American parents have been ex-

posed to popular versions of this theme. Support for it has sometimes been sought in anthropology. In some non-Western societies, permissive child-rearing is said to strengthen the social order.[18] However, common Western experience gives us little confidence that this happy coincidence of interests necessarily exists or, if it does, that it could be successfully imported to modern life. The belief in today's self-denial as the key to tomorrow's rewards remains widespread and plausible.

A more subtle view of this issue holds that, although childhood experience is to be valued both for the present and for its consequences, government can have little confidence that it knows how to prepare children for the future. Hence, it should concentrate on the present. For example, some conclude that schooling has only an indeterminate, or at best, a feeble influence on one's future life chances. Therefore, children should have the right to more humane, enjoyable schools that abandon their painful stress upon formal learning.[19] For most citizens, however, the belief that good schools can prepare a child for a better adult life is not easily abandoned.

This puzzle about the purpose of childhood has an even more profound dimension. We have spoken as though there were some single societal vision of children's future adult life and of their good life in the here and now. Such a unitary outlook may have characterized certain historical times. In Christian Medieval Europe, for example, people of all ranks shared a common view of human life deriving from specific assumptions about a transcendent and governing order. Ultimately, what counted was the personal salvation of the individual, and salvation was available by doing good and avoiding evil in ways that were reasonably clear. Moreover, since children beyond the age of reason were considered capable of moral decision, their present choice counted in the ultimate order and the rule for conduct was reasonably clear. By contrast, our society shares no one view of the ultimate meaning of human life. What heroes should children be taught to endear? Which Marx would we enthrone—Karl or Groucho?

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18. M. MEAD, COMING OF AGE IN SAMOA: A PSYCHOLOGICAL STUDY OF PRIMITIVE YOUTH FOR WESTERN CIVILIZATION 207-08, 223-26, 246-48 (1928).

19. C. JENCKS, M. SMITH, H. ACLAND, M. BANE, D. COHEN, H. GINTIS, B. HEYNS, & S. MICHELSON, INEQUALITY 256-57 (1972).

II. The Child's Entitlement

A. Protection from Parents

Whatever their lifestyle, child and parent generally seem fated to share one another's burdens and blessings. Their lot is to be interdependent so long as they remain together, and sometimes much longer. One is tempted to say that whatever is good for one is good for the other. On that theory, children would not need rights against their parents, because we could count on either parental altruism or parental self-interest to serve the child well.

Reality is more complex, and to the disinterested observer, the interests of parent and child can appear to be in conflict. Little Sally might best be served if her mother took her to the theme park. Mom, however, may feel the need for a Saturday at the baseball game with her own adult friends. Conflict such as this is an everyday experience in the best of families. Similar conflicts exist between the separate economic interests of parent and child. In modern societies, a child's labor has little economic value, and few parents have reasonable expectations of being sustained in old age by their offspring. In economic terms, the child takes and the parent gives. Hence, there is an inevitable conflict of interest when the parent's income has to be split between them. Superficially, this competition within the family might suggest giving children legal rights against their parents. Yet this metaphor of economic conflict is plainly inadequate to express the relation. The adults who choose to have children are not rational actors trying to maximize the household's cash flow. Even the most selfish adults generally lavish what they have on their children.

Consider an example of the parent/child conflict taken from a wholly different context. Parents who face the decision whether to save and raise a severely defective newborn are usually deeply torn. At one level, they want the best for the child; at another level, they wish to be rid of the child. The same is true of the family facing the decision whether to commit a schizophrenic child to an institution. Conflict of this sort can also arise when the divorcing parents in a custody battle seek to punish each other in a way that may be harmful for their child. Do such conflicts of interest by themselves justify public intervention on behalf of the rights of children? Some say we should first be confident that the public, or some public official, really knows

how to identify and implement a better result for the child. If we waited to be sure of this though, would intervention ever occur?

Most people seem confident that children have the right to protection by the state against their parents in cases of serious physical abuse. However, except for these obvious cases, it is difficult to know what parental behavior should trigger public investigation and intrusion.

B. Cutting the Pie With Adults

To what share of society's resources do children have a right? Americans have become accustomed to arguing that society should act "in the best interest of the child." Many statutes in the family law area use this or a similar set of words as the test for judicial or administrative decisions in cases of neglect or abuse. Taken literally, the slogan seems to imply a dramatic shifting of resources away from adults and toward children. Youth gets the best. But we doubt whether this sort of redistribution is really what most people have in mind. Their object is to further the interests of children, but they do so with little thought about the inevitable tradeoffs that might be entailed. Because of children's innocence and impotence, it is easy to say that they have strong claims on adults, including a "fair share" of the family's and society's resources. But how much is a fair share? That is difficult to determine.

Consider first the child's claim within his or her own family. When is it fair for Mom to devote her paycheck to a new boat and to go out fishing by herself? Conversely, when are the family's money and time more fairly devoted to the child by buying the child a bicycle and teaching the child to ride? The states' child neglect laws currently allow the parents great discretion in this regard, intervening on behalf of the child only in cases of gross indifference to the child's well being. Intervention seldom occurs except where the child is physically endangered, and rarely then. Should society insist that the child receive what is collectively thought to be a fair share of a family's attention and resources? The "how much" question becomes unavoidable for society in divorce disputes. Assume that it is decided that the mother will have custody of the child, and that the father will make child support payments to her. If the best interests of the child are paramount, should Dad be soaked until he is impoverished? Or should he at least be made to turn over his earnings

until his bitterness will threaten to offset in emotional terms the economic benefits to the child?

Children living with both their parents have no legal right to be supported through college, even though many have a practical expectation of financial assistance while pursuing a degree. When the parents divorce, should the non-custodial parent be ordered to contribute to college costs? Is the child entitled to the amount of generosity that the parent probably would have felt had the family stayed together?

Nearly all legal regimes that seek to transfer money from adults to or for children are vexed by the reality that family members who live together engage in joint consumption. Therefore, in a divorce setting, it is naive to think that an allocation of the father's payments of two-thirds for alimony and one-third for child support will produce separately measurable benefits. In reality, the child and mother will jointly use the house, the car, and so on. As a result, it may be impossible to say just what share of resources the children are getting. Thus, even if we could abstractly determine a child's fair share, we would not know whether that entitlement is being satisfied.

In most income transfer plans, such as Social Security and welfare, payments are greater for adults than they are for children. But the underlying rationale is rarely articulated. Is the premise that adults are more deserving? Or is it that they require more money than children do to satisfy their needs, even in the same proportion? Or is it that we are simply accustomed to more spending by adults who tend to take the larger bedrooms and spend more for their clothes and recreation?

Under such public programs, do children get a fair share? Again the answer is complicated; although monies may be designated within the public budget for adult or child beneficiaries, the actual spending of the those funds will be largely invisible. Inevitably, the money will go for many things that are jointly consumed. For example, under the Social Security system, a worker who is totally disabled qualifies for a pension. If the claimant has a young child, an additional sum will be paid in the form of a "child's benefit." Both payments are usually combined, however, and no one from the Social Security Administration inquires as to how each one is spent.

The consequence is that if society wants to maintain a given standard of living for children, it is difficult to deny their caretakers an equivalent standard. This is why the Aid to Families

with Dependent Children program is so annoying to many persons. They perceive that welfare is paid to households composed not only of innocent children but of the mothers who are responsible for the problem in the first place.

Broad public spending programs not specifically aimed at children add a new dimension to the problem of a fair share for children. Federal support for medical research is but one example of potential competition between adults and children for scarce resources. Some diseases are essentially afflictions of childhood, whereas others are largely problems of old age. When the government selects problems on which to focus its limited tax resources, how should children fare as against adults? One might start by suggesting that research money should be put into problems that appear to have the greatest payoff. But what counts as payoff? Is saving the life of a seventy-year-old the same thing as saving the life of a seven-year-old? Perhaps we can add ten years to one life and seventy to the other. Does this suggest that a child's life is worth more and, therefore, deserves greater efforts to save?

Consider the case of some disease which is debilitating, but temporary. For example, children get chicken pox and adults get gallstones. Assume that the harm is essentially the same in both cases—you are out of commission for a week. Assume further that medical research in both areas is equally promising. Now what is the fair share of effort that should be made for children?

Finally, consider the school lunch program. School districts generally try to serve children a lunch which, if fully eaten, provides them with a level of nourishment that mainstream nutritionists deem appropriate. Apart from the fact that many school lunches remain uneaten, why is it that children are entitled only to that sort of lunch? That might mean spaghetti and salad one day, a hamburger and vegetables the next, and so on. Why not a three-star lunch? On the other hand, why not a peanut butter sandwich, a vitamin pill and a glass of milk every single day? The decision affects the money left in the pockets of adult taxpayers (or in the budget for other programs). From the viewpoint of nutritional intake, the three alternatives could be thought equivalent. To which is the child entitled?

C. A Child's Rights Against Other Children

How should public schools allocate their resources? Should they spend more on kindergarten or on high school? Giving

older children the larger share may, of course, be defended on various theories, but so might a preference for the beginner. Do adolescents or beginners "have greater needs," and what could such an expression mean? Would it help to ask which group "merits" more? By what standard of virtue could one be more deserving than the other? Similar issues arise in deciding the age at which public subsidy for education should begin. Why should a four-year old be ineligible for the very substantial social investment enjoyed by her five-year-old brother? Some argue that "children deserve equal treatment." But what does equal treatment mean?

Suppose a family has three children. They can be given the same allowance, taken to the same number of movies, bought new shoes at the same time, and so on. Similarly, at the societal level with respect to education as an example, these children can be provided with the same program, or the same quality teachers, or have the same amount of money spent on their schooling. In short, one could take an ethic of equal treatment to mean that each child should receive the same level of resources or inputs.

Is this an appropriate definition of equal treatment? Would it matter that the three children in our example are two, eight, and fourteen years old and of different tastes and abilities? If these children differ in their affinity for learning, exposure to the same educational offerings will not produce the same educational achievement. Since children have different physical endowments and metabolisms, identical medical treatment or diet will not produce uniform health. Nor will all three be equally well dressed, even if the parents buy new clothes for each with the same frequency. The children may wear out or grow out of clothes at different rates, and the younger children will receive "hand-me-downs" as well. In some cases, identical treatment may be possible to achieve, but it will seldom be sensible.

A common alternative definition of equal treatment would turn the prior example inside out. For inputs (or the amount spent on each child) it would substitute outputs (or the consequence of the expenditure). The object now becomes to make our three children read equally well for their age, be toilet trained by the same age, learn how to drive a car in high school, be in equally good health, and so forth. Clearly, in order to achieve equal results, unequal inputs (educational or medical or whatever) may have to be provided. In fact, when it comes to

many things worth having (such as learning and health), equal outputs are simply unobtainable. Differences in ability, taste, proneness to illness, and luck are too much for all our adult art. The only reliable way to achieve equal outcomes among children would be to exterminate them.

Could we not pursue equality by matching a child's actual achievement with his or her "potential?" In such a regime, society would try to attain an identical proportion of each child's possible development by arranging the dispensation of resources to this end. Although this is in some respects an appealing notion, on closer inspection it proves vapid. In the first place, how does one determine a child's potential? Second, what is the measure of actual attainment in comparison to this potential? What is meant by being two-thirds healthy or being able to dance half as well as you might? There is no index of a child's attainments as a proportion of his potential. Hence, it would be impossible ever to know whether equality in this sense had been achieved.

Nor can these difficulties be avoided by pursuing one hundred percent fulfillment of potential for all. Since one cannot be simultaneously dancing and playing the cello, choices must be made among activities. We could leave the choice among talents to the child. At best, however, this solution would be limited to older children who have the experience necessary to know the alternatives and to make informed choices.

Take yet another scenario. Suppose you have three children and enough money either to send all three to community college or to provide the finest college education for one and none for the others. If one of the children shows far more academic potential than the other two, might you fairly spend all the money on that child in the name of equal treatment? Possibly so. What holds for the family might also hold for society as a whole. That is, the government might direct public support of education toward whoever will learn the most. Thus, we would continue to spend money on gifted and hardworking children long after we had ceased to spend on those who had neither of these attributes. This would be a commitment to a different sort of equity—what the economists would call equal marginal (and hence maximum) achievement.

Many would take the opposite view and turn the idea of equal treatment into a concern for each child's "need." To appreciate the ambiguity of this "need" formula, imagine that you are the lawyer drafting the will for a parent of three children.

Rather than dividing the estate in thirds or directing a trustee to spend equally on the children, the good parent might give the trustee discretion to spend more for any child who develops "special needs." In addition, the donor may specifically provide more for a child who is presently rheumatic, or gifted, or has political ambition. A parallel solution can be observed at the societal level. Extra public dollars can be spent on children who are learning disabled, retarded, or talented; an equal respect for needs seems to dictate such differences.

Yet a moment's reflection exposes the complexity of the "need" formula. "Need" itself is wholly ambiguous, being a function of the values of the observer. In a children's hospital, for example, those in greatest need could be either the terminally ill, those in greatest pain, those with the least capacity to endure suffering, those for whom a cure is possible, or those whose social condition will make life most pleasurable once they leave the hospital. The reason trustees and public authorities are given discretion is not that need is clear, but that it is unclear. Implementation of a need formula is not a process of cool rationality, but a choice among values by one holding the power of choice.

We have not yet exhausted our treasury of "equalities." Many hold that the equality impulse can and should be satisfied by providing all children access to the same goods and services, such as education. This is commonly called "equality of opportunity." The principle is not concerned with whether the opportunity is actually pursued or that any particular outcome is attained. Rather, its aim is to provide the same starting point in a race, whatever the prize may be. This concept is widely understood and applies to adults as well. For example, the norm of equal opportunity approves of equal access to rental housing and disapproves of quotas for various types of tenants. But for children, the ideal of equal opportunity is satisfied when somebody else exercises it. It is fully realized, for example, where parents decide to take none, any or all three of their children to visit the public zoo or local fire station. Children's equal opportunity is exemplified again when society makes free day care available to any three-year-old, but parents have the choice whether to enroll. What is actually provided to the child is not the result of the child's choice. Instead, the opportunity comes in the form of an option to the adult(s) in charge to select a certain experience on the child's behalf. Responsible adults,

however, have different values, levels of sophistication, and make different decisions about how to exercise their options. This is not necessarily bad, but it gives "equal opportunity" a meaning unique to children.

Another problem is that there is no social agreement about what kind of equal opportunity should be provided for children. Is it enough to offer to every child the opportunity of the zoo or fire station, when some would prefer the art museum? Suppose it turns out that Brian's love of opera and his hope to be a singer are neglected by the state? Is it a sufficient answer for the state to say that operatic training is too expensive? Or turn the facts around; if Brian is in fact provided free operatic training, do children with less costly tastes and talents have a plausible complaint?

What if society focused upon providing equality to groups? The goal could be to ensure that children classified by a certain characteristic (such as race or sex) have outcomes similar to groups of children lacking that characteristic. Under such a view of things, it would be proper, for example, if educational attainment differed by individual. It would be improper if the differences were related to the classifying feature of race or family wealth. Applying this criterion at the family level, the father of a large family might conclude that his children would achieve sexual equality if his daughters were professionally as successful as his sons. Such an approach, however, abandons any hope of equal treatment for any individual child compared with any other individual child. It would be all right for one daughter to be a professional flop as long as one son also failed. Moreover, this definition requires the use of some principle other than equality for selecting the characteristics to be compared (such as sex, race, height, or I.Q.). It thereby abandons the original egalitarian objective of treating children themselves as a uniform class. No longer is the principle that all children deserve equal treatment, but the narrower, negative notion that some other characteristic should not matter.

D. The Child's Right to be Lucky

Parents can provide various advantages to their children materially, personally, and genetically. As long as some parents lavish these benefits on their children rather than on children generally, some children will be comparatively disadvantaged. Other parents either have less to give, or they choose to give

less. Should lucky children be permitted to enjoy their luck, or do those less advantaged children have a right to the reduction or elimination of these inequalities? A substantial price may be paid in trying to level such things out.

For example, if a father dies or deserts his family, his child is usually disadvantaged compared to other children. But insisting that the child be provided an equal input—a new father—would tread rather heavily on adult liberty. That liberty would also be sacrificed were we to guarantee all children the same number of siblings. These are merely exaggerated examples of the clashes that would constantly arise if society tried to make up for every disadvantage caused by family circumstance.

Even among families in the same social class, parents voluntarily provide differing mixtures of experience for their individual children. Education is a good example. Children receive different amounts of learning before they are of school age, during after-school hours, in the summertime, at private schools, etc. Any effort to equalize total education inputs, therefore, would either require matching everyone with what the most generous parents would provide, or imposing restrictions on what parents are allowed to do privately. But the former may not be a real option because it would dissuade individual parents from voluntarily providing anything. Since their own efforts would not improve their own children's situation, why not give the state complete responsibility? The result would be uniform public provision for all, and the cost would be measurable in more than just economic terms. This result would also inhibit parental liberty and the advantages that individual children would have obtained if their parents were permitted to do more. Is it right to make some children worse off in the name of fraternity?

Many people feel that families' willingness to sacrifice for their children is a crucial civic virtue. For them, any collective action that would frustrate this instinct is absolutely wrong; some would even view voluntary parental efforts as a "natural" human right. Indeed, they may give it a utilitarian twist. Society relies on parents to have children, and parents value the incentive of being able to control the distribution of their genes, their capital, and their culture. Not all agree with this, however. They criticize such parental devotion as being selfishly directed toward their children's success at the expense of others. In their view, it would be better to end some children's privileges and then raise the minimum level for all. This view, of course, as-

sumes that a higher minimum level would follow in the wake of equality.

Much of the pressure for equality among children stems from the belief that our childhood opportunities determine much of the quality of our adult lives, especially in the area of income. This consideration, however, further complicates the issue. The principle that children deserve equal treatment does not necessarily imply the same for adults. Indeed, equality for children might be consistent with a society in which inequality for adults is tolerated. Based on this rationale, there was considerable concern in the 1960s about improving the education of the poor; if children could begin on more equal terms, then American adult society, with its income inequalities, would be more acceptable. Nevertheless, inequality among adults significantly accounts for parents' differing ability to voluntarily provide for their children. This seemingly vicious circle explains the temptation to impose parental restrictions so that children are likewise effectively limited. As long as people live in families, however, it may not be possible to make children's lives equal without making the lives of adults equal as well. Moreover, even if incomes were equal, the equality of children would remain problematic. Much more than money is involved. Maybe the conclusion will be that equality is either unattainable, incoherent, or both. But if inequality is not the real problem, exactly what is? In short, whether we compare children with adults or with each other, specifying a child's entitlement remains a bewildering task.

III. A Child's Duties

A. Blame: Are Children Responsible?

Perhaps an understanding of the moral and legal responsibilities of the child will ease the difficulty in defining the child's rights. If a child does something objectively wrong, should the state hold him or her accountable? To ask this question first of a two-year-old and then of a fifteen-year-old presents one aspect of the conundrum. Suppose the two-year-old is visiting a neighbor's house, happily stumbling around the living room. During those wanderings, if the child lifts a valuable vase off a table and smashes it on the floor, should the child be blamed for this action? Would it be appropriate for the parent to punish the child? Should the neighbor be able to sue the child for the value

of the vase? Should the criminal law punish the child? Now suppose the same vase is destroyed by two teenagers who break into the house on a dare and smash the vase against a wall. How should society view such conduct? As a prank to be deplored and forgiven? As evidence of immaturity the child will eventually outgrow? Or as a tort and a crime that should be legally punished in an adult manner?

A lot depends upon one's view of human will and capacity for choice. Absent a belief in human choice, most would find blaming adults an irrational social response. A fully deterministic ideology leaves no room for responsibility, even if it accepts the possibility of behavior modification. Americans generally accept the reality of free will, at least where adults are involved. They concede that physiological, economic, and psychological conditions can influence behavior and occasionally determine it, but few suppose that all is determined. Hence, most Americans find it plausible to hold individual adults accountable for most of their misdeeds.

Children, however, are another matter in the common perception. They do not lack will; indeed, very definite preferences may be strongly felt by young people. Their freedom, however, is hindered by inexperience; self-restraint and a concern for others can only develop fully over time. Moral autonomy is partially inchoate; its perfection is an object of civilized child-rearing. The capacity to deserve blame is thus indistinguishable from the maturing process. At any stage of childhood, the question for each child is: "To what portion of adult responsibility is he or she properly subject (and entitled)?"

This question seems abstract, but crucially important legal policies rest on the answer. This is exemplified by the application of the criminal law to children. Recall our vase-breaking examples. Since most crimes require proof of a mental element—"mens rea"—for conviction, the common law asked whether a transgressing child had sufficient maturity or capacity to know right from wrong to be capable of the necessary moral choice. In practice, the common law developed special rules concerning this capacity. Children under age seven were held conclusively to lack the potential for mens rea. Children between ages seven and fourteen were presumed to lack capacity, but this presumption could be rebutted. Finally, children ages fourteen

and above were held to the same standards as adults.[20] Under this law, the two-year-old vase breaker would not be legally punished, but the fifteen-year-olds would be as legally vulnerable as adults.

The common law origins of children's liability lie in the religious psychology of Medieval Europe and Aristotelian ethics. Canon and secular law presumed children had the capacity to make moral choices at age seven, the "age of reason." At that age, the sacramental system permitted the child to confess and to take communion. From then on, he was free to decide his eternal destiny by the choices he made in his life. This outlook on children's responsibility helps explain the canonization of ten-year-olds and the toleration of a children's crusade. It is also consistent with the occasional historical report of the application of the criminal law to this age group.

Since the late nineteenth century, however, western jurisprudence has experimented with new forms for the disposition of the youthful offender. Nowadays, the case is typically processed in juvenile court, where the concept of responsibility has been considerably blurred. No sharp lines of guilt or innocence traditionally existed. Rather, the system is founded primarily on the medical model of "treatment."[21] The child's act is viewed not so much as something for which the child should be blamed as a symptom that the child needs help. The object of intervention is not punishment, but rehabilitation.

This mindset has had important consequences for the juvenile court process. For example, since the underlying justification is prevention and treatment, the youth's general behavior is emphasized more than his commission of a particular crime and requisite state of mind. First, a child is determined to be "delinquent." What follows next is in theory different from the consequences for an adult with equivalent behavior. Though the particular act is objectively criminal, the judges typically have exercised an extremely broad discretion with respect to the form of intervention. There are no sentences, there are "dispositions." Dispositions typically have been indeterminate so that the treatment of the youth could continue as long as necessary. Even during the judicial proceeding, an effort is made to keep the am-

20. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 191-92, 351-52 (1972).

21. Teitelbaum, *Youth Crime and the Choice Between Rules and Standards*, 1990 B.Y.U. L. REV. 351.

bience one of helpful concern. The ideal atmosphere is that of a session with the social worker.

Recently, however, the juvenile court's rehabilitative ideal and procedures have been criticized as being hypocritical in purpose and both punitive and unfair in practice. As a result of judicial and legislative reforms, young people accused of delinquency are now afforded many of the same procedural safeguards that are guaranteed to adults.[22] These reforms have introduced a more adversarial tone to the proceedings. At the same time, the objectives of blame and responsibility have resurfaced. In some cases, punishment has reemerged as the real purpose of "treatment."[23]

These shifts in perception and practice are partly explained by considerations of justice to the child, who is viewed as having been a victim of the juvenile process. Often, the child has been incarcerated longer than if he or she had been treated as an adult. The new attitude is also influenced by the high incidence of juvenile crime. In the words of one Presidential Commission, "America's best hope for reducing crime is to reduce juvenile delinquency and youth crime."[24]

Furthermore, the ideal of rehabilitation does not seem to have been realized. The term "treatment" has not only proved a pious facade for punishment, but appalling numbers of juvenile offenders have returned to the criminal justice system as adult offenders. Accordingly, many critics are calling for clear, increased sanctions against teenagers, or even younger children, who use violence against others.

The troubling question of responsibility still remains. Are we prepared to punish a fourteen-year-old as severely as a thirty-four-year-old? The truth may be that society is not certain how much it wants to blame (and punish), and how much it wants to shelter (and treat) its youthful offenders. The difficulty is compounded by the reality that society knows how to do one but not the other. This ambivalence is understandable, but the proper legal choice becomes a difficult task.

The law of civil responsibility also reflects ambivalence. For example, on her sixteenth birthday, Barbara buys a 1969 Chev-

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22. *Id.* at 352-53, 390-95.

23. *Id.* at 351, 374-398. *See, e.g.*, Stanford v. Kentucky, 109 S. Ct. 2969 (1989)(upholding death penalty for 16- and 17-year-olds).

24. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 55 (1967).

rolet from a local dealer. She makes a $200 down payment, and promises to pay the remaining $300 out of her summer earnings. On the same day, she successfully passes her driving test and gets her license. Later that afternoon, she is involved in an automobile accident which destroys the car and injures a pedestrian. Assume that the accident occurred in the rain when Barbara turned her car the wrong way in reaction to a skid, and that nothing was wrong with the car itself. Two interesting issues arise from this incident. First, in the pedestrian's lawsuit against Barbara, should the law consider Barbara's age and lack of experience as a driver? Secondly, what about Barbara's promise to pay the remaining $300 for the car? Should she be able to avoid her contractual obligations by reason of her youth?

Traditionally, tort law has considered maturity, age, and experience to determine whether a particular child is negligent and therefore liable for damages.[25] Under this law, Barbara's inexperience in driving and her general immaturity would have counted in her favor. A jury might have been authorized to relieve her from responsibility for an accident in which an adult defendant would have been liable. These exonerating factors would still apply had Barbara been in an accident on an ice skating rink. In recent years, however, most states have decided that driving a car is an "adult activity." As a result, everyone engaged in the activity must have their conduct evaluated by the "reasonable man" standard that applies to adults. No allowance is made for the learner or the immature.[26] In short, for purposes of evaluating the adequacy of his or her driving, a sixteen-year-old is supposed to be judged by the same standards as a forty-five-year-old. Is this a change for the better?

Contract law has generally taken the opposite view. In most states, a young person who contracts to buy a car is not subject to the same liability as an adult entering into a similar contract. Consequently, in many places, Barbara might completely escape her contractual obligation by simply returning the damaged automobile to the dealer.[27] Young people are justified in breaching their contracts because they lack experience and can be exploited too easily. Holding Barbara responsible for the accident but not for her promise to pay perhaps can be reconciled, but

25. RESTATEMENT (SECOND) OF TORTS § 283A (1965).
26. *Id.*, comment c.
27. 2 W. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 238 (3d ed. 1959).

the ethical contrast is unsettling. She is allowed to injure the seller deliberately, but is liable for a good faith misjudgment in driving.

B. Virtue: What is a Good Child?

Society wants its members to be good. It uses families and schools to foster the acceptance of proper values by children. What is unclear is whether virtue is the same quality in a child as in an adult. Indeed, this question is seldom asked, even in the burgeoning literature on value education. Recent research testing new theories of the moral development of children have ignited both academic and popular interest in the psychological processes by which children acquire their moral views.[28] Under Lawrence Kohlberg's theory for example, we are to imagine a moral ladder ascending from primitive narcissism to something resembling Albert Schweitzer.[29] The assumption is that the normal child climbs, over time, from imperfection toward perfection, some never reaching the top.

What is missing in the ladder metaphor is any theory of the morality of children qua children. Viewing morality as an ascent through time does not easily permit the child to be presently virtuous. Imagine an eight-year-old who in fact behaves like Schweitzer. Would this be virtue? Some would view such a child more as pest than paragon. Consider the precocious and maddening charity of young Saint Bridget who "drove the family mad" because in McGinley's words, "An easy touch for poor and lowly, She gave so much and grew so holy."[30] Bridget took seriously, but perhaps too early, the altruistic ethic she had heard preached by her elders.

Independent of adult models, a children's ethic could be imagined. But would a special children's ethic be traditional in its substance? What about the duty to obey? For example, in the case of Bridget, true virtue might have led her to subordinate or postpone her own altruistic impulses and to seek her parents' permission before serving her (or at least their) dinner to the poor. This ethical territory is virtually unexplored except by broad implication in children's stories and etiquette

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28. *See* L. KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT, in 1 ESSAYS ON MORAL DEVELOPMENT (1981).

29. *Id.* at 409-12.

30. McGinley, *The Giveaway*, in TIMES THREE 21-22 (1960).

books. No theory of children's virtue exists—there is only the Fourth Commandment ("Honor thy father and thy mother") on the one hand and holy Bridget on the other.

Adult Americans seem to differ greatly in the importance they attach to children's obedience. For some, obedience is a virtue that simply subsumes all possibilities of an infant ethic. For others, they question whether obedience should even be thought a virtue. If they exact it of their own children, it is not with a sense of pride.

For the young conscience, it is quite natural that tension occasionally arises between the demands of a universal morality and the morality of authority. The irresistibility of adult force or the moral arguments employed by adults may temper the younger child's sense of guilt. As the age of emancipation approaches, however, moral conflict for the child is less easy to submerge. For example, suppose some parents unlawfully remove their eight-year-old from school for a week of skiing because they believe it is wholly virtuous and in the child's best interest. The child, by contrast, may believe it is wrong to be away from school. The conflict would also be compounded if, upon the family's return, the parents direct the child to lie about the absence. Similarly, other parents may choose to avoid an integrated high school because they believe it is in a physically dangerous neighborhood. However, their child may believe that participation in integration is a moral duty despite the risk. Finally, suppose a child is pregnant and opposed to abortion on moral grounds. Unfortunately, she faces parents who consider it morally proper and in her best interest to abort.

In cases of extreme and obvious moral failure by the parents, the answer to such conflict may be easy. We will concede, for example, that it is always virtuous for the child to resist an adult command to injure an innocent third person. However, in the common case of conflicting moral imperatives both of which are plausible or ambiguous, the answer is not so easy.

The issue is complicated by the distinction between two kinds of moral issues. One is the negative morality of sin and duty—one may not lie, kill, or otherwise injure others without justification. In contrast, the "morality of aspiration" urges people to improve what they encounter, including themselves. Such a positive morality may usually be pursued in various ways and can even be postponed, while the duty not to injure generally requires an immediate and specific commitment. Could it be vir-

tue in a child to defy an adult order to injure another, but virtue also to obey an adult order respecting the child's personal fate when the child's best interest is in conflict? For example, ought the child who wishes to go to art school feel bound to accept the parents' judgment that it would be better to attend military school?

Such dilemmas are rendered even more complex by a plausible debt relationship between child and parents. In a contraceptive society, there is a notion that children may "owe" their lives to their parents. Moreover, this sort of moral indenture to parents is solidified by the unending economic and personal largesse bestowed by the family upon its children. Do parents who so sacrifice thereby purchase their right of dominion? Is it fatuous to suppose that, honoring that sacrifice, the child ought to obey? In sum, deciding when children should have the right to disobey their parents and when they should have the right to harm others without being held publicly accountable for their conduct remain stubbornly intractable moral issues.

IV. Advocates for Children's Rights: Who Speaks for Children?

Even if they could vote, children could not be relied upon to participate effectively in the political process. Most children lack the control over money that is necessary to hire persons or organizations to represent their interests. Although young children are often effective in articulating their own interests in intimate settings such as the family, political and social actions are hard for them because they lack the expertise to pursue their interests in public forums. This begins to change in high school, because older children can lobby effectively, and they have time to devote their labor to a cause. Nonetheless, the reality is that children cannot press their interests in public forums in the manner generally employed by individual adults or adult groups. As a result, children may not be heard when public decisions are being made that affect them.

Perhaps this problem could be reduced if children had representatives who argued effectively on their behalf. To this end, some have recommended developing a variety of "child advocacy" groups and appointing separate attorneys for children in legal matters. We are skeptical, however, about whether such representatives fully solve the problem or whether they can even claim to represent anyone but themselves.

The first difficulty confronting the potential child advocate is to identify the appropriate point of view in circumstances that are often unclear. To be sure, the child's interest sometimes is obvious as in the case where the father's will leaves everything to his alma mater. You are asked to represent the child. If you are successful in invalidating the will, the child inherits. Even if the child is only one-year-old, you can fairly assume that the child's interests would be better served by having the inheritance. After all, when he or she becomes an adult, the child can always choose to give the money away, even to Dad's old school. Likewise, you may be asked to represent all of the state's illegitimate children in a legislative debate to determine whether illegitimates can inherit from their intestate biological fathers. Again, it seems reasonably clear that the best interests of such children would be that society enact legislation to change the old rule that barred such inheritance.

In other cases where the answer is less obvious, children may be quite capable of deciding their own best interests. They only need help to represent that choice. Imagine the situation of a seventeen-year-old girl who prefers to compete on the boys' high school varsity team rather than on the newly established girls' swimming team. In the abstract, one could argue either way whether it would be in her best interests to swim on one team or the other. But here, with the girl's knowledge of the sport, her enthusiasm for it, her age and so on, she is prepared to exercise autonomous judgment. One representing her should attack the "boys only" rule on her behalf (whether in legal or political forums) without worrying whether this is truly in this young woman's best interest. Similarly, consider a person representing a seventeen-year-old who is the object of a divorce custody dispute. If the child clearly wants to live with one parent instead of the other, a representative should have little difficulty in concluding that this solution is indeed in the child's best interests.

By contrast, consider the court-appointed role of representing a five-year-old in a divorce custody dispute. What should the attorney argue? Although talking with the child might help, that will not completely solve the problem. The child might not be able to clearly articulate which custodial arrangement he or she wants. Moreover, regardless of the child's expressed preference, the attorney might question its soundness. Because such an important, long-term issue is at stake, age would be a substantial

reason to suspect the child's competency in deciding the best alternative. Indeed, with a two-year-old, it would not even be feasible for the attorney to ask the child. This leaves the "representative" in the difficult position of having to define the interest that is to be represented. Is it possible in such a case to take the child's perspective in arguing for placement with mother, or with father, or for split time?

Suppose an attorney is asked to lobby on the day-care issue for the interests of all preschool-age children who have working mothers. Perhaps the attorney should advocate fiscal incentives that would entice mothers to drop out of the work force to take care of their children at home. Perhaps the attorney should recommend large-scale day-care centers, or the enhancement of a network of family day-care homes in the neighborhoods, or for more flexible working hours for parents. Which view is right? One would face a similar dilemma if asked to represent *all* children on the issue of the inheritance rights of illegitimate children. The financial interests of two groups of children would conflict. What position should be taken?

Often the selected "representative" will have a preconceived view of children's interests. For example, one representative may strongly believe that except in extreme cases, children under age five should be in their mother's custody when parents divorce. But while the chosen advocate strongly believes in the child's primary need for Mother, perhaps the next advocate believes just as strongly that three-year-old boys should be in the custody of Father. In that case, the final proposal presented to the decision maker is determined by the appointment process. This may be quite all right. In the absence of consensus about the child's interests, there may be no other way to choose the child's advocate. We might wish for some "neutral" representative who would gather the facts, weigh the alternatives, and ultimately make a rational choice. But every advocate has value preferences, and can proceed only by deciding which "facts" and "alternatives" are relevant and how they are to be weighed.

Next, imagine that the representative has something to gain financially by suggesting that the child's best interest is one thing instead of another. Suppose there is a legislative proposal to lower the driving age to fifteen, and the advocate owns a used car business. The representative can easily choose to advocate a position for the child which is substantially affected by self interest. The same point can be applied to organizers of children's

libraries who argue that libraries should be better funded because they are in the best interests of children. The organizers might be right. However, they stand to gain personally if the proposal is adopted, and there is a substantial risk that they will overlook valid, opposing arguments. Perhaps the money should go to school books or children's television programs. Children's interests can in fact be sacrificed for those of the representative.

Yet an "interested" representative is not necessarily a bad thing. It could be the very best thing. If the child could have as his or her representative someone whose self-interest is consistently in alliance with the child's own interest, then the advocate could be depended upon to try to do a good job. The difficulty is specifying who has an interest that is in fact allied without first deciding what is good for the child—the very point at issue. One possibility is to look for an adult who might automatically suffer if the wrong decision is made for the child. Clearly that person has an incentive to determine the child's real interest and assure that it is advocated. Parents may typify this kind of representative, because as long as they live with the child, and often thereafter, they bear the consequences of the child's misfortune or unhappiness. This is not true for every circumstance, however. The parent may be a better representative when trying to get the child into the school band than when putting the child in a mental institution.

Moreover, parents are not the only ones who might fit the role of fellow sufferer. Perhaps a teacher who finally gets a particular child into his or her class may be hurt if the experience turns out badly for the child. Maybe a doctor also suffers when he makes the wrong choice in recommending an operation for a child. However, these examples are ambiguous because the effects upon the representative may be multiple. The same person may have interests that are both consistent and inconsistent with those of the child. Like a doctor who gets paid even when the patient dies, one might suffer as well as gain from a bad choice for the child. The same may be true of parents who decide to put their disturbed child into an institution.

We will now concentrate more narrowly upon how children are actually represented in the political process. As noted earlier, children have almost never selected their own representatives. Nor is there any procedure for picking out independent and neutral political advocates. Parental groups generally have been unable to muster much political weight because it is so difficult

for those with similar views to organize. In theory, a set of conflicting parental lobbies could arise, each representing a subclass of children with specialized interests. The parents of the blind, the dyslexic, the athletic, and the musical would vie politically among themselves for resources for school programs they think are good for their children. In reality, a certain amount of this sort of organizing does occur. Most of it appears at the local level as small groups represent their own children and a few others in schools or community organizations. Occasionally organization occurs at the state and federal level, where a certain number of zealous parents lobby on special matters such as children's television, mental retardation, and crib death.

However, most parental organizations start small and perish early. One reason is the difficulty of specifying an ongoing program of public intervention that satisfies more than a fragment of the families involved. An individual child develops in ways that make his or her needs vary over time from those who once shared his or her plight. Eventually, parents of youngsters become parents of grown children. Thus, only the parents of those children with extreme, chronic, or uncommon abnormalities have common, long-term objectives that facilitate collaboration.

Broad parental politics is also impeded by what is known as the "free rider" problem.[31] An identity of interest alone is insufficient to justify an individual in voluntarily sharing the costs of effective organization when non-joiners also get the benefits. The rationale is that the individual does not need to support the organization if other people will do so. And, if others do not, one individual's contribution is inconsequential. This theory is tailor-made for parents' situations. Parents would logically conclude that they can best serve their children's interests by directly spending time and money on them. Children may be discriminated against in the rental housing market, but few families would readily reduce their children's present living standard to contribute to the Family Housing Lobby which might obtain the right legislation for their children. As a result, an organization that would have made the free riding families better off is never formed.

To be consistently effective, lobbying organizations either need to compel membership by law or extra-legal threat, or they

31. *See* M. OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

must command the dispensation of some special good that they control. For example, some trade and professional associations survive because of their control of crucial information to members, the publication of an indispensable journal, or the capacity to bestow important honors and prestige on cooperating members. A parental lobby commanding equivalent threats or benefits, however, is hard to imagine. Usually, lobbying organizations that are dependent upon parents seldom get beyond the original cadre of enthusiasts who are willing to risk the bird in the family hand.

The thousands of professionals that do make claims for children in the political process tend to have serious conflicts of interest. The government's child-saving bureaucracy and professional child welfare associations are good examples. For them, economic and professional rewards follow whenever officials recognize the childhood malady which the experts have identified. The science teaching explosion illustrates the point. After Sputnik went up in 1957, dogmatic proclamations of a national regression in scientific pedagogy stimulated an avalanche of benefits for those who taught science. The legislative perception of the problem was primarily due to the coordinated lobbying efforts of professionals who thereafter presided over the deployment of benefits. The same could be said of professional efforts to reduce class size, impose teacher certification requirements, provide free lunches, or protect pupils from earthquakes. What is more rare than an expert's testimony that children are already receiving enough services from his own profession?

Nevertheless, no one should expect adult groups to remain idle if economic opportunity exists, and the case they argue for the child's interest may well be from the heart. It may be right. Teachers are not hypocrites because they feel they should dominate the day-care industry. No clear linkage exists, however, between the well-being of the child and the advocates. The child could flounder while the "representative" prospers. Indeed, what may be worse for the client is often better for the professional whose services will be needed. Hence, it is expected that the solutions promoted in legislative forums tend to reflect the self-interest of the advocates. Although a few active child advocacy groups and individuals appear to be more altruistic, their economic support often depends upon the special ideologies of foundation or government grant-givers or the hiring practices of universities.

Next we consider the *legal* process. Whether lawyers who are appointed to represent children are neutral and independent remains uncertain. In many jurisdictions, judges select from panels of lawyers who are available to represent children. In other cases where lawyers have represented a child independently of the child's family, the lawyers have personally arranged for their appointment because of their particular viewpoint of the child's needs. This arrangement happens in both individual cases and in class actions. The view asserted in court as the child's best interest depends on who gets to the child first.

Given these realities, those who must decide on behalf of children face a dilemma. Judges, legislators, or whoever else may be deciding a matter involving a child's interests should be very cautious about the reliability of the relevant information provided. Where the child's interest is unclear, a representative with a personal stake in a particular solution will most likely be advancing the corresponding argument. Indeed, the problem remains even if the representative is genuinely altruistic and compassionate.

In sum, appraising the quality of a child's representation is extremely difficult.[32] The solution should not be to ignore the self-proclaimed representative, but traditional assumptions of similar interests between spokespersons and clients must be rejected. Deciders must realize that child advocates view the world as they, not the child, see it. The crusaders for children are, by the nature of the relationship, patriarchs who would impose upon children what they see as a good life.

V. CHILDREN'S LIBERATION

Society constrains the child's will in two general ways. First, it uses *rules* which prohibit or command. The rule may be imposed by the state, such as a criminal statute which forbids persons under fifteen to operate motor vehicles upon a public highway. Alternatively, the rule may be imposed by the parent. For example, a mother may impose a consistent mandate that the child shall be in bed by ten.

The other form of constraint does not operate by general rules. Rather, it employs the broad *discretion* of some adult who

32. *See generally* R. MNOOKIN, IN THE INTEREST OF CHILDREN: ADVOCACY LAW REFORM AND PUBLIC POLICY (1985)(for an analysis of five landmark child advocacy cases and the dilemmas facing advocates).

has authority over the child. Like rules, discretion can be lodged in either an officer of the state, a parent, or both. For example, a highway patrol officer could be empowered to license young drivers, one by one, as the officer thinks they are ready. And a parent could send a child to bed at a different time each night, depending on an appraisal of how tired the child is. With this framework of rules and discretion, we will discuss the limits imposed upon the child by the state and by parents.[33]

A. Child v. State

In this section, the role of parental authority will be ignored on the assumption that the parents' will is in accord with the child's, while both are in conflict with the state. The issue in each instance is whether the state can overrule the will of the united family in order to command or forbid the particular act.

State-family conflicts can come in a variety of forms. For example, even where their parents approve, persons below a certain age are not allowed to vote, hold public office, write a will, work in various occupations, drive a car, buy liquor, or be sold certain kinds of reading materials.[34] Offended by such legal limitations on the child's autonomy, certain reformers suggest that a children's liberation movement should follow the civil rights and women's movements. Virginia Coigney, for example, has proposed the adoption of "A Child's Bill of Rights,"[35] based on Richard Farson's argument that "[c]hildren should have the right to decide the matters which affect them most directly. This is the basic right upon which all others depend."[36]

Although Farson and Coigney may take this seriously, we cannot. A number of writers use hyperbole of this sort, but we have yet to meet the liberationist who will adamantly maintain that a four-year-old has the physical dexterity—much less the

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33. The child's legal order is also ambiguous in another dimension. Does it include private ordering by persons outside the family? How shall we characterize the practice of imposing higher automobile insurance rates upon children? Though this is a "private" practice, it is as important to our economy and culture as many public laws affecting children. The same holds for organizations and individuals who determine what kinds of goods or experience shall be available to children. For example, the television networks often speak explicitly of having "rules" in regard to children's programming.

34. *See generally* R. MNOOKIN & K. WEISBERG, CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW (2d ed. 1989).

35. V. COIGNEY, CHILDREN ARE PEOPLE TOO: HOW WE FAIL OUR CHILDREN AND HOW WE CAN LOVE THEM 178-79, 197 (1975).

36. *Id.* at 197; *see also* R. FARSON, BIRTHRIGHTS 27 (1974).

judgment--to operate a motorcycle. Nor will such liberators defend the child's capacity to earn a living in our modern economy. In their early years, and often later, children are physically weak, intellectually raw, and psychologically frail. They are incapable of caring entirely for themselves or deciding many important matters that directly affect them. Children will be either paternalized or victimized. There is no alternative.

What does it mean, then, to say that a four-year-old should have the "right" to decide where to live, whether to go to school, or what career to follow? Clearly, the extreme liberationist can be understood only as provocateur. Yet to dismiss him or her completely is to miss the point. Buried in the rhetoric of "kiddie lib" is an important problem. Children are not static; each is a moving target of social policy. Furthermore, since dependency ends gradually, society must determine just when young persons should be given the legal right to make autonomous decisions regarding a wide range of particular matters. Just how should society decide when a child must start school and when he or she may operate a motorcycle?

For many functions in modern America, age alone liberates the individual. Minimum age requirements govern the right to vote, liquor sales, the execution of binding contracts, and admission into movies rated NC-17. The age minimum also varies from function to function. One can marry at age sixteen but cannot run for president until age thirty-five. To some degree, minimum age requirements are inevitably arbitrary. Although age and competence usually are related, they do not mesh for all persons. For example, some fifteen-year-olds would be better qualified to vote than many forty-year-olds, and some thirteen-year-olds would be better drivers than their parents. Any age requirement will qualify some incompetent older people while it disqualifies some competent younger people.

Perhaps the state should liberate on an individualized basis rather than using minimum age requirements. Each child's competency could be tested, so that one would be licensed (irrespective of age) once he or she demonstrated the specific capability. Proposals of this sort parallel the civil rights and women's movements. The main principle is that legal rights should not be affected by "irrelevant" personal qualities such as race, sex, and age. A four-year-old will be barred from driving a car, not because of the child's age, but only because of relevant characteristics like an inability to steer.

Unfortunately, making an individualized judgment about when a particular child should be permitted to engage in particular activities is quite difficult. One major problem is that the relevant factor of maturity lacks operational criteria. Although a test or an administrative process can accurately determine whether a driver is mechanically competent, how could we evaluate the maturity and judgment necessary to be a safe driver? If there is more to driving a car than mechanical competence, the inability to test individuals for the maturity factor leaves society in a dilemma. Either we license anyone who has mechanical competence and thus abandon our concern for maturity, or we use a specific age as a fallible proxy for maturity. Because our society is unwilling to give a driver's license to every person who is able to pass the existing tests, it has chosen the latter course. One consequence is that some licensed adults are too immature to be safe drivers, but that outcome is implied in the nature of the test.

Moreover, even if maturity could be determined on an individual basis, making the necessary judgments for the various functions would be enormously expensive to administer. At the very least, this process would require many wise, seasoned, and well-paid decision makers. Hearings might be necessary, followed by appeals for the unsuccessful. Perhaps legal counsel would participate. The process would also be repetitive because individual "maturity" may change in a matter of months. If this is what is necessary to liberate from the state, would we not prefer to let a precocious child bear the temporary burdens of an arbitrary age line?

An alternative approach, however, does exist. An official could be given unreviewable discretion to decide whether particular applicants are sufficiently mature for the particular function. The difficulties with this alternative appear when it is applied, as in the case of voting rights. Voting involves more than book knowledge. There is a legitimate social concern for maturity, a political counterpart to the maturity of an automobile driver. Suppose prospective young voters were invited to convince a state official that they are "responsible and mature." Formally speaking, this would solve the problem. Nevertheless, such a subjective measure could involve unacceptable risks of administrative abuse of the sort associated with the literacy tests once administered to exclude minorities from voting. True, since the maturity test would be required only of children, its

introduction could only increase the number of voters. But suppose that most enfranchised adolescents turn out to be white Republicans?

A more plausible variation of this theme can be imagined. Suppose the decision maker was not a state bureaucrat but the child's own parent. A young person could be allowed to vote after parental certification. Although some might be concerned that parents would certify only those children who promised to vote their way, the secret ballot ought to protect against that risk. At least the decision to enfranchise would be made by someone who knows the applicant intimately.

If this idea seems odd (we do not propose it), it reminds us that the parental power to determine the child's readiness for some particular activity is not an exotic exception. It is the rule. Rarely does the state impose specific constraints which override the license of tolerant guardians. Voting is a vivid exception. Most of the subordination experienced by children is due to parental discretion, not a general societal rule. The child's autonomy may be threatened less by the state than by adult guardians, which is the next topic discussed.

B. Child v. Parent

People tend to think of law in terms of state activity. In the case of children, this mind-set can mislead. The child's legal world is more than just statutes, judicial norms, and bureaucratic decisions made by teachers and social workers. Indeed, the state is a minor legal actor in the lives of children. With few exceptions, the parent mandates, forbids, or permits the specific experiences of the child. For children, the questions of who is government and what is law cannot be answered in terms of large institutions or public rules. As long as diet, curfews, clothing, associations, chores, games, television, pets, trips, money and music are the parental prerogative, it is misleading to say that law is monopolized or even dominated by the state. Enforcing parental rules and discretion involves every attribute of law, including physical punishment and incarceration.

In the last section, we assumed that the child's will and the parents' will were in harmony against the state. In this section, we will assume the more common case: the parent wants X, the child wants Y, and the state is indifferent between X and Y. The parents' problem is determining when the child should be allowed to choose for himself. Children continually grow and de-

velop new capacities and independent preferences. Every issue of liberty involves a relationship between relatively formed, unchanging adults and a child who is in subtle yet constant transformation. With age and experience, the child's autonomy becomes more easily imaginable, while the rationale for restraint of that autonomy becomes more confusing.

The relationship of the child to adult society can involve more than the bilateral link of parent and child. When a conflict arises, there is always a latent issue whether the state should support the parental will, or whether it should permit or even assist the child's will. How long and under what circumstances should parents have a legally enforceable right to impose their will on their children?

Consider these examples. An unhappy fourteen-year-old runs away from home. Should the parents be able to rely upon the state to return the child? A sixteen-year-old is pregnant. Should her parents have the legal right to stop her from securing an abortion? Suppose she wishes to marry the child's father. Should her parents have the legal right to prevent the marriage? Finally, a twelve-year-old wishes to subscribe to a pornographic or politically radical magazine, but the parents object. What power should the parents have over the child's right to read what he or she chooses?

Puzzling questions like these arise because of the tension between two principles that are widely accepted but seldom analyzed. The first principle, discussed earlier, is obedience which gives parents the primary right to determine their children's activities. The second principle is autonomy. Since children have individual interests and a growing capacity for self-determination, a clash occurs when parents disagree with their older children about the latter's readiness for autonomy in a particular matter.

With these principles in mind, consider the present allocation of legal power between the child and the family. For the most part, this power is established according to the first principle, that of obedience. Parents have the legal right to compel their children to obey. They are privileged to use reasonable physical force to achieve the proper control, training, or education.[37] A parent who spanks or "grounds" a child for eating too many cookies, or watching a forbidden TV show, or staying out

37. RESTATEMENT (SECOND) OF TORTS § 147(1) (1965).

too late commits no legal wrong. This is unlike the ordinary legal relation between persons. Parents may treat their children in ways that would be assault, battery, or false imprisonment if committed upon any other person, and their decision does not have to involve complex procedures to ensure fairness and deliberation.

Nevertheless, an increasingly elaborate legal response to the problems of child abuse has come to limit the right of parents to enforce their will physically. Nearly every state has reporting laws that require certain professionals to identify parents whom they suspect of inflicting serious injuries. Moreover, there are statutes that permit criminal prosecution and intervention through the juvenile court's jurisdiction. These laws, however, do not entirely revoke parental authority—they merely set boundaries to it. The laws only prohibit the use of excessive force to protect children from serious physical injury. They do not increase children's autonomy.

On the other hand, parents have a practical problem of achieving their will even within the range of their legal authority. Controlling the sexual activities of every sixteen-year-old is difficult, especially when many teenagers have access to vehicles. Nor can parents completely monitor the intellectual environment of even their younger children. Such monitoring not only would encompass home television, but also would require the parent to follow the child constantly. Parents offended by "girlie" magazines are powerless to cloak the material the child is exposed to on a daily basis. Society may try to help by enacting laws to ban the sale of certain magazines to minors and to exclude "adult" bookstores from locations near schools. Nevertheless, in an open society, children will spend a lot of time away from their parents. Often they will be with other children, whose parents' values may differ. In effect, children may have a *de facto* deliverance from parental control.

Even older children have a very limited legal right to disobey. Whether these special exceptions to parental power over adolescents should be expanded or reduced is the current issue. For example, in the case of adults, a constitutional "right of privacy" protects the purchase and use of contraceptives and, sometimes, the decision of the adult woman to have an abortion.[38] What should be the parents' legal role when young people

38. Roe v. Wade, 410 U.S. 113 (1973).

face similar decisions? A number of states have passed statutes requiring written parental consent for an unmarried daughter's abortion if the daughter is under age eighteen. This exception to the abortion right was challenged in the Supreme Court. The Court declared that "constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority," and held that it was unconstitutional for a state to give parents "an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding consent."[39] The converse also seems apparent—that a parent does not have the legal right to require the child to obtain an abortion.

Similarly, parents do not have the legal right to force the pregnant child to marry. In other aspects the law, however, tends to support parental control. For example, most states require parental consent before minors can enter into a valid marriage.[40] Why should parents be able to veto marriage when they lack the power to veto an abortion? In both of these situations, the child may argue that it is her body and her future that are being affected. That is true, however, in every obedience situation: it is her body that is sent to the private school that she despises.

Suppose that the state merely requires the child to consult with her parents before making the abortion decision? The Supreme Court has struggled with this issue and other related questions in its more recent decisions. Although the Court has limited the parents' right to be consulted, it has recognized the state's power to request a brief notice to the parents that their child is planning to have an abortion.[41] The consultation question is difficult. What children's interests are involved? Obviously, consultation requires disclosure to the parents of the child's sexual behavior. Maintaining that secret may be the daughter's strongest motivation for seeking the abortion because she may fear not only embarrassment but also punishment.

Still, society already recognizes the parents' legal right to forbid sexual behavior they oppose and to take private preventive measures they think wise. Should this right be practically

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39. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

40. Often the age is different for males and females. *See* W. WADLINGTON, DOMESTIC RELATIONS 164-73 (2d ed. 1990).

41. H.L. v. Matheson, 450 U.S. 398, 409-13 (1981).

implemented by the state? If daughters were aware of a pre-abortion consultation requirement, might this not help parents in the enforcement of their right to forbid certain sexual activity? And if pregnancy has already occurred, a prior consultation rule would at least force the daughter to interact with her parents and to encounter conflicting arguments. Parents opposed to abortion might be able to disclose consequences that the child would otherwise not consider, and to support her with the affection that paradoxically she wishes to maintain by her secrecy. Should the child be forced to listen to her parents, or should disclosure of her pregnancy remain wholly under her control?

In other circumstances, parents seem entitled to a captive audience for the expression of their beliefs. Indeed, even older children can be forced to attend the church or school of the parents' choice. Put in behavioral terms, the child can be forced to act as if he or she believed something. For example, the Supreme Court's World War II opinion in the *Flag Salute Case*[42] seems to imply that parents can forbid participation in patriotic school exercises regardless of the child's own view. Similarly, in 1972, the Court concluded that Amish parents may remove their children from school and train them in the Amish way (in the community) notwithstanding the compulsory school attendance laws.[43] That case was decided without even determining the views of the affected children.

Political protest inside the schools provides a related though ambiguous example. In 1969, the Court held that schools could not prohibit children from wearing black armbands in the classrooms as symbols of their opposition to the Vietnam War, so long as the behavior was not disruptive to education.[44] The Court's opinion and the case record suggest that the beliefs of the parents and children were consistent. But suppose the child had opposed the war and the parent had supported it, or vice versa. Could the parents punish the child at home for an act of protest that the schools could not legally prohibit? Conversely, do parents have the authority to make an unwilling child behave as a protester? Traditional doctrine suggests that parents could insist upon obedience even in this setting. A lot may be said, however, for the child's right to express his or her opinion or at

42. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
43. Wisconsin v. Yoder, 406 U.S. 205 (1972).
44. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

least for not being forced to express an opinion the child opposes. Parental authority over children's beliefs is an unsettling notion for many Americans. Yet there is a real risk that liberating the child from parents could be achieved only by damaging the very institution, the family, upon which the child depends for ultimate autonomy. By shattering family authority, the child's present liberty to dissent could be the enemy of his or her future self-determination.

Finally, consider the problem of the runaway. The child wants to leave home, but the parents object. Should the law be available to the parents to force the child to remain at home and, if he or she escapes, to be returned? By what rationale does society provide police, juvenile court, and other social services to enforce the parental will? Should not the child be able to call upon the same societal support to protect the child's freedom by providing perhaps a government-funded runaway home?

Today in most states, juvenile and family courts have jurisdiction over youths who have committed offenses like staying out late, disobeying parents, running away, or truancy. Such acts are illegal only for persons under a specified age, usually sixteen.[45] Whether parents should be able to invoke this jurisdiction of the juvenile court to do their will is a disputed matter. Not too many years ago one study found that forty to fifty percent of all incarcerated minors were charged with non-criminal misbehavior, and approximately one-half of these situations involved angry parents who invoked the law only to punish an ungovernable child.[46] Perhaps it would be better for young people if this jurisdiction were abolished. That is, youths could no longer be brought to court by their parents for "help" in the wake of disagreements within the family. Rather, families would have to rely upon their own personal resources and upon the range of voluntary community resources that may now be underutilized. This resolution still preserves the parents' right; they only lose the state's aid in enforcing the parental decision. Whether the children's liberty would thereby be increased would depend upon the alternative private courses chosen by parents and children—including resort to physical coercion.

Recognizing the child's right to move out of the house would

45. *See* R. MNOOKIN & K. WEISBERG, *supra* note 34, at 906-71.

46. Note, *Ungovernability: The Unjustifiable Jurisdiction*, 83 YALE L.J. 1383, 1394-95 (1974).

raise a different and equally troubling set of questions. If the child runs away from home with state approval, ought this not terminate the parents' responsibility for the child including the obligation to pay for the child's necessaries?[47] Justifying the continuing burden of supporting a self-declared outsider is difficult. If the child demands separation from the parent in the name of liberty, why should the parent not also be liberated?

The deliverance of parents would not, however, exhaust the emancipation issue. The child may change his or her mind and wish to return home. Shall the parent be hostage to the ephemeral will of the child to obey or disobey? If the state in addition provides safe homes for fickle runaways, what would remain of parental authority?

Enforcing the child's own will may be imaginable in a limited set of cases, but the claim that these instances epitomize victories for human liberty is not so easy to sustain. Perhaps the primary assurance of the child's liberty lies in the sovereignty of the normal parent whose affection and self-interest combine to make the child's autonomy a principal goal of the family. Most parents seem to give children the particular liberties that they are capable of exercising. Often, the parent is the only practical judge of that capability. At the same time, such a regime of bounded but progressive autonomy may be the best training ground that society has found for adult autonomy. The system is imperfect; it is human, and it is generally effective. If the hope for children's liberation—now and in adulthood—rests upon the power of parents to act with authority, the reformer who would compromise parental sovereignty is a questionable ally of liberty.

VI. Conclusion

As this article begins to drift toward declarative sentences and positive claims, it is time to end. The message here is simple enough: The conceptualization of children's rights cannot proceed from the foundation laid for the protection of "discrete and insular minorities."[48] If there is some tidy solution to the diverse problems caused here, it has yet to be found. Perhaps society has taken an ad hoc approach toward children because the pro-

47. *See* 2 W. Jaeger, *supra* note 27, at § 225 (parents have duty to support emancipated minors).

48. United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

tection of both their personal welfare and their self-determination frequently requires the state to risk one or the other. Whether children would be better served than they are today by an increased public responsibility for their well being or by an effective empowerment of their parents remains a puzzle of the most confounding sort.