

Children Under the Law

HILLARY RODHAM

Children's Defense Fund

The author examines the changing status of children under the law. Traditionally, the law has reflected a social consensus that children's best interests are synonymous with those of their parents, except under the few circumstances where the state is authorized to intervene in family life under the doctrine of parens patriae. Little consideration has been given to the substantive and procedural rights of children as a discrete interest group. At present, law reform is moving to change children's legal status in two ways: by extending more adult rights to children and by recognizing certain unique needs and interests of children as legally enforceable rights. Ms. Rodham summarizes recent Supreme Court decisions which will influence changes of both kinds, and suggests specific directions reform might take.

The phrase "children's rights" is a slogan in search of definition. Invoked to support such disparate causes as world peace, constitutional guarantees for delinquents, affection for infants, and lowering the voting age, it does not yet reflect any coherent doctrine regarding the status of children as political beings. Asserting that children are entitled to rights and enumerating their needs does not clarify the difficult issues surrounding children's legal status. These issues of family autonomy and privacy, state responsibility, and children's independence are complex, but they determine how children are treated by the nation's legislatures, courts, and administrative agencies.

This paper briefly sets out the legal conception of children's status underlying American public policy and case law, and suggests various ways in which this conception needs major revision. There are important new themes emerging in the

interpretation of children's status under the law, and several new directions which future litigation and legislation in the interest of children might take. Of particular interest is the trend toward recognizing children's needs and interests as rights under the law.

Attributing a right to a person may involve describing an existing relationship or prescribing the formation of a new one. The prescriptive aspect of right represents a moral judgment about how particular interests should be ordered so that certain ones will be given priority over others. The recent literature on children's rights is filled with such prescriptions, based on arguments from political, legal, and moral philosophy. Rarely, however, do the writers mention the important differences between an existing legal right and other claims of right. A legal right is an enforceable claim to the possession of property or authority, or to the enjoyment of privileges or immunities.¹ Moral prescriptions and political demands, on the other hand, are not formally recognized by the law and have the status of needs or interests, not rights. Adult Americans enjoy the legal rights set forth in the Constitution, statutes, regulations, and the common law of the federal and state governments.² Child citizens, although their needs and interests may be greater than those of adults, have far fewer legal rights (and duties). Indeed, the special needs and interests which distinguish them from adults have served as the basis for not granting them rights and duties, and for entrusting enforcement of the few rights they have to institutional decision-makers.

Current Legal Status of Children

"Children" is sometimes a term of legal classification, but it is more common to find the legal categories of "infancy" or "minority" describing people under twenty-one, or under eighteen for some purposes. The status of infancy, or minority, large-

¹ Defining "right" apart from the general usage which the term enjoys is difficult. The best attempt to unravel the jurisprudence of rights and to elucidate the various meanings which it has acquired in the law is Wesley Newcomb Hohfeld's analysis in *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1919). The definition used here is drawn from the Compact Edition of *Oxford English Dictionary*, v. II, pp. 2546-2547 (New York: Oxford University Press, 1971).

² As one commentator described adult rights: "... today liberty has been extended so far as *the law alone* may extend it to all adults, white or black, male or female, rich or poor, intelligent or stupid; subordinate relations to private persons must be consensual relations and probably cannot, under the Thirteenth Amendment and common law limitations on the freedom to contract, be total." Andrew Jay Kleinfeld, "The Balance of Power Among Infants, Their Parents and the State, Part II," *Family Law Quarterly*, 4 (December 1970), 409, 410.

ly determines the rights and duties of a child before the law regardless of his or her actual age or particular circumstances. Justifications for such a broad, chronologically determined classification rely on the physical and intellectual differences between adults and children.

There is obviously some sense to this rationale except that the dividing point at twenty-one or eighteen years is artificial and simplistic; it obscures the dramatic differences among children of different ages and the striking similarities between older children and adults. The capacities and the needs of a child of six months differ substantially from those of a child of six or sixteen years.

In eighteenth century English common law, the term children's rights would have been a nonsequitur. Children were regarded as chattels of the family and wards of the state, with no recognized political character or power and few legal rights. Blackstone wrote little about children's rights, instead stressing the duties owed by "prized possessions" to their fathers.³ Early American courts accepted this view.⁴ In this country children have long had certain rights resulting from their attainment of some other legal status, such as parties injured by tortfeasors, legatees under wills, or intestate successors. Even these rights, however, can be exercised only vicariously through adult representatives. Older children have a few additional legal rights, granted by statutes which reflect some legal recognition of their increased competence. Examples include the right to drive a motor vehicle, the right to drop out of school, the right to vote, the right to work, and the right to marry (although before a certain age marriage can be voided in the absence of parental consent). The doctrines of emancipation and implied emancipation release a child from parental control following his or her marriage, after entering military service, or after achieving economic independence or meeting another statutory definition of maturity. Finally, the Supreme Court has held on a few occasions, and with greater frequency in recent years, that the Constitution requires recognition of particular rights of children, among them the right to certain procedural protections in juvenile courts,⁵ the right to refuse to salute the flag in the

³ William Blackstone, *Commentaries on the Laws of England*, Vol. I, 12th ed. (London: A. Strahen and W. Wordfall for T. Caddell, 1700-1795).

⁴ See, e.g., James Kent, *Commentaries on American Law*, Vol. I, 14th ed. (Boston: Little Brown, O. W. Holmes ed., 1873).

⁵ *Haley v. Ohio*, 332 US 596 (1948) (protection of Fourteenth Amendment against coerced confession extended to fifteen year old boy in state criminal trial); *Kent v. US*, 383 US 541 (1966) (waiver from juvenile court to adult court has to meet minimum requirements of due process); *In re Gault*, 387 US 1 (1967) (adult procedural protections in criminal trial extended to delinquency proceedings); *In re Winship*, 397 US 358 (1970) (quantum of proof necessary for conviction in juvenile court raised to reasonable doubt standard).

public schools when doing so would violate religious beliefs,⁶ and the right to don a black armband to protest the Vietnam war.⁷

Beyond such instances, the law's concern with children has been confined to those occasions when the state may limit parental control in the interest of necessary protection or justifiable punishment of the child, or in the name of some overriding state interest. The theory of benevolent intrusion into families by the state seems to embody a contradiction. On the one hand, it operates within the context of a powerful social consensus that the proper relationship between parents and the state in their joint exercise of control over a child's life favors parental dominance. On the other hand, the doctrine of *parens patriae* has long justified state interference with parental prerogatives and even termination of all parental rights.

The social consensus that forms the first half of this apparent contradiction includes the following assumptions: a) America is a familial, child-centered society in which parents are responsible for their own children and have primary control over them, b) the community of adults, usually represented by the state, will not assume responsibility for the child unless the parents are unable to do so or will not do so, or until the child breaks a law; c) because ours is a child-loving society, non-parents and other adults representing the state want to and will do what is in the child's "best interests"; and d) children need not or should not be participants with the family and the state in making decisions which affect their lives. The tenets of this consensus, legitimized in the rules of law governing children's affairs, have represented outer limits beyond which child-oriented reforms cannot be effected. The other half of the apparent contradiction, however, involves regular challenges to family authority by state representatives. Certain social norms are enforced at the expense of family privacy, in the name of a child's best interests.

The most striking characteristic of children's law is the large degree of discretion permitted decision-makers in enforcing community norms. When intervention must occur, bureaucratic discretion replaces familial discretion. The statutes authorizing state intervention implicitly accept that the state's representative will know what children need and should not be straight-jacketed by legal technicalities. For example, laws against child neglect or abuse represent a community's decision to intervene in a parent-child relationship. Although the legislative decision favoring intervention may be widely supported, it proves difficult to specify the condi-

⁶ *Board of Education v. Barnette*, 319 US 624 (1943).

⁷ *Tinker v. Des Moines School District*, 393 US 503 (1969).

tions under which, it should occur. Our pluralistic beliefs about child-rearing do not lead to a uniform interpretation of the best interests standard. The allowance of some degree of discretion is necessary for any legal system to operate, especially one presumed to deal with the specialized needs of its subjects. When few standards guide the exercise of discretion, however, and when there rarely are careful reviews of the judgments it produces, the legal system will not only be likely to treat individuals capriciously, but will also subject members of social minorities to the prejudices and beliefs of the dominant sector of the community.⁸ This is especially true in children's law, where reservations against state intervention are most easily overcome in cases involving poor, non-white, and unconventional families. Children of these families are perceived as bearers of the sins and disabilities of their fathers, and as burdens which an "enlightened" society must bear.⁹ This attitude is especially prominent in regard to the labelling of certain behavior as delinquent. In addition to acts which are criminal for adults (e.g. armed robbery), children may be accused of delinquency for misbehavior that is not criminal for adults. The so-called status offenses, incorrigibility, truancy, running away, sexual precociousness, represent a confused mixture of social control and preventive care that has resulted in the confinement of thousands of children for the crime of having trouble growing up.

In practice, therefore, powerlessness of a family, because of political, psychological, or economic reasons, renders it susceptible to benevolent intrusion. Unfortunately, the state has not proved an adequate substitute parent in many of the cases where intrusion has resulted in the removal of a child from his home. In many instances, states have been guilty of neglect according to their own statutory standards. Fears about arbitrary and harmful state intervention have led to increased rights of parents and custodians so that they are now entitled to certain procedural guarantees before the state may remove their children.¹⁰ Only recently, however, has attention focused on the rights of the children who are the subjects of state intervention, both against their parents and against the state when it assumes the parenting responsibility. This attention is struggling for legal recognition against the

⁸ The amount of discretion necessary in a legal system handling children's needs is very difficult to determine, especially because the options for the exercise of any discretion are so limited by inadequate resources. But the abuses of discretion are well documented. See, e.g. Sanford N. Katz, *When Parents Fail* (Boston: Beacon Press, 1971).

⁹ See, e.g., Ten Broek, "California's Dual System of Family Law: Its Origins, Development and Present State," *Stanford Law Review*, 16 (1964), 257; Anthony Platt, *The Child Savers* (Chicago: University of Chicago Press, 1961), pp. 176-181.

¹⁰ See, e.g., *Stanley v. Illinois*, 405 US 645 (1972).

prevailing assumption in children's law that a child's interests are identical to those of his parents. Even when a child cannot or will not recognize the identity of his interests with his parents', the law ordinarily does so, confident that children usually do not know what is best for themselves. Necessarily, the law must presume that parents or the state as parent do know what is best. The force of this position is weakened by the fact that adults consistently refuse to support programs designed to meet the needs and interests of children either when they are still in their homes or when they are in the state's charge. As a recent history of the White House Conference on Children points out, this country has a "cultural recalcitrance toward assuming public responsibility for children's needs."¹¹

Rewriting laws has not substantially altered the long dominant consensus or dissipated public recalcitrance. The thrust of most reforms, amply supported by demonstrations of children's needs has been to persuade adult society to treat children better, but has not changed the position of children within society or made them capable of securing such treatment for themselves.¹²

Claims of Right

The needs and interests of a powerless individual must be asserted as rights if they are to be considered and eventually accepted as enforceable claims against other persons or institutions. The advocacy of rights for children, coming as it does on the heels of adult rights movements, highlights the political nature of questions about children's status. That children's issues are political may seem obvious. Political theorists from Plato onward have sought to specify proper child-rearing practices and have discussed the proper position of children within society, often coming to conclusions inconsistent with the prevailing American ones.¹³ In the United States, the problems of children have usually been explained without any consideration of children's proper political status. Accordingly, the obstructionist role of the unstated consensus and the laws reflecting it has seldom been appreci-

¹¹ Shelley Kessler, unpublished paper on the past White House Conferences on Children (New Haven, Conn.: Carnegie Council on Children, 1972).

¹² For histories of various child-saving reforms, see Platt, *The Child Savers*; Robert M. Mennell, *Thorns and Thistles* (Hanover, N.H.: University Press of New England, 1973); Robert J. Pickett, *House of Refuge* (Syracuse: Syracuse University Press, 1969); Sanford Fox, "Juvenile Justice Reform: An Historical Perspective," *Stanford Law Review*, 22 (1970), 1187.

¹³ Plato, *The Republic*, 235-264 (New York: Oxford University Press, 1945); Aristotle, *Politics*, 32-33, 316 (Sherman ed.; New York: Oxford University Press, 1962); J. Locke, *Treatise on Civil Government*, 34-50 (Sherman ed.; New York and London: Appleton Century, 1937); J. S. Mill, *On Liberty* (Chicago: Henry Regnery, 1955).

ated. The pretense that children's issues are somehow above or beyond politics endures and is reinforced by the belief that families are private, non-political units whose interests subsume those of children.¹⁴ There is also an abiding belief that any official's failure to do what is best by a child is the exception, not the rule, and is due solely to occasional errors of judgment.¹⁵ Moreover, nothing countervails against this pattern, since children are almost powerless to articulate their own interests or to organize themselves into a self-interested constituency and adults allied with them have seldom exerted an appreciable influence within the political system.

The basic rationale for depriving people of rights in a dependency relationship is that certain individuals are incapable or undeserving of the right to take care of themselves and consequently need social institutions specifically designed to safeguard their position. It is presumed that under the circumstances society is doing what is best for the individuals. Along with the family, past and present examples of such arrangements include marriage, slavery, and the Indian reservation system. The relative powerlessness of children makes them uniquely vulnerable to this rationale. Except for the institutionalized, who live in a state of enforced childishness, no other group is so totally dependent for its well-being on choices made by others. Obviously this dependency can be explained to a significant degree by the physical, intellectual, and psychological incapacities of (some) children which render them weaker than (some) older persons. But the phenomenon must also be seen as part of the organization and ideology of the political system itself.¹⁶ Lacking even the basic power to vote, children are not able to exercise normal constituency powers, articulating self-interests to politicians and working toward specific goals. Young children in particular are probably not capable of organizing themselves into a political group; they must always be represented either by their parents or by established governmental or community groups organized to lobby, litigate, and exhort on their behalf. The causes of younger children have not fared well, partly because these representatives have loyalties diluted by conflicts between children's rights and their own institutional and professional goals. Older children have organized themselves politically with some success, especially on the issues of the eigh-

¹⁴ For a discussion of the reasons why the family, as one of society's private units, is not properly a subject for political analysis, see Sheldon Wolin, *Politics and Vision* (Boston: Little Brown, 1960).

¹⁵ For the argument that the exception is the rule, see Justine Wise Polier, "Problems Involving Family and Child," *Columbia Law Review*, 66 (1966), 305, 306.

¹⁶ Dean Roscoe Pound suggested in a 1916 article, "Individual Interests in the Domestic Relations," *Michigan Law Review*, 14 (1916), 177, 186-87, that the law deprived children of their bargaining power so as to promote social values, like family unity.

teen-year-old vote, civil liberties of school students, and anti-war activities, but they too have relied heavily on the support of adults. "Successful" reforms on behalf of children—the establishment of juvenile courts, the institution of public schooling, the passage of child labor laws—were effected only after vigorous political struggles.

While these legal reforms may now seem, in the light of revisionist histories,¹⁷ to have been catalyzed by questionable motives, they did give children certain legally enforceable rights not previously held. Moreover, these reforms signalled some change in general public attitudes about children.

Whenever reforms have been enacted, however, the rights they provide are those which the state decides are in the best interests of the public and the child. Age and ability differences have not been entirely ignored, but the use of chronological dividing lines to mark legal distinctions has continued. Nor has the child been given any choice in the exercise of his rights; they are compulsory, not susceptible to waiver. Thus all children below a certain age are forbidden to work, regardless of individual desire, aptitude, and need.¹⁸ Similarly, all children below a certain age are required to attend school.¹⁹ Finally, the institutions created to embody and enforce these rights are endowed with essentially unchecked discretion. Therefore, even though special juvenile proceedings, exemption from work, and compulsory attendance are all rights in the strict sense of legally enforceable claims against the state or third persons, neither their rationales nor their implementation provide models for the rights movement.

Present claims of right follow two general approaches: advocating the extension of adult rights to children, and seeking legally enforceable recognition of children's special needs and interests. The first approach is exemplified by proposals for extending all the rights of adult criminal defendants to accused delinquents, proposals for empowering children to request medical care without parental consent, and proposals for providing a child with legal representation in any situation where his interests are affected. Such rights may either be extended in the precise form exercised by adults, as in recent legislation lowering the voting age, or they

¹⁷ See footnote 12.

¹⁸ In *Prince v. Massachusetts*, 321 US 158 (1944), the Supreme Court held that the application to Jehovah's Witnesses of a state statute providing that no boy under twelve and girl under eighteen should sell periodicals on the street was constitutional. The child involved in the case, a nine-year-old girl, had been selling religious literature with her guardian; both were members of the sect; the child testified as to her religious beliefs; and the guardian was convicted of violating the state Child Labor Law.

¹⁹ When the United Nations General Assembly promulgated the right of every child to a compulsory education in its *Declaration of the Rights of the Child*, a delegate reportedly asked how a person could be given a right that he was compelled to exercise.

may be tailored to special characteristics of children. Tailoring is found in court decisions holding that children have rights of freedom of expression under the First Amendment while at the same time taking children's immaturity and dependent status into account in defining the scope of those rights. Tailored standards are used to regulate exposure to obscenity,²⁰ authorize medical treatment without parental consent,²¹ and determine circumstances under which a child's contract may be binding.²² Even rights which appear to be extended whole cloth to children, with the exception of the right to vote, do not seem to escape modification in practice.

Modification apparently occurs not only because of the actual physical and psychological differences between children and adults, but also because of the discretion in legal proceedings involving children and because adults finally determine what seems best. These practical constraints on extending adult rights to children are illustrated by the experience of the juvenile court system in guaranteeing the right to counsel, as granted by the Supreme Court in *In re Gault*. A study of the actual implementation of *Gault* revealed:

The views of lawyers about the rights of children differ quite fundamentally from those expressed by the Supreme Court and academics. Lawyers apply different standards to juvenile clients, because they are children, not necessarily because lawyers have been constrained by the courts' welfare orientation. A lawyer typically has conscientious reservations about helping a juvenile to 'beat a case,' and, if a case is won on a technicality, he feels obliged personally to warn his client against the danger of future misconduct.²³

Thus, even the child's own lawyer will likely go beyond the scope of his professional responsibility in determining for himself and for the child where the child's best interests lie.

The second approach to children's rights begins with the belief that even if all adult rights were granted to children and were strictly enforced, this would not

²⁰ See, e.g., *Ginsberg v. New York*, 390 US 629 (1968).

²¹ In many states children are allowed to seek treatment for venereal disease and drug addiction without parental permission or knowledge.

²² Although the general rule remains that a child is not liable for his contracts, it is riddled with exceptions; e.g., when the contract is for "necessaries."

²³ This quote is from the summary of two studies that Anthony Platt participated in as reported in his book, *The Child Savers*, p. 167; footnote 108 on page 166. See also, the discussion in *Handbook for New Juvenile Court Judges*, 23 (Winter 1972), pp. 14-15, as to whether or not a juvenile judge has to strictly follow the rulings of the Supreme Court. Even though disregard of Court rulings is not uncommon in adult proceedings, it is there accomplished informally and less visibly, rarely dignified by the professional journals, and confined mostly to critiques of the law, not invitations and rationales for ignoring it.

guarantee that certain critical needs unique to children would be met. This line of reasoning is reflected in the various bills of rights which have been proposed for children, each unveiling a blueprint for the child's fullest development.²⁴ These "need manifestos" proclaim the rights of children to adequate nutrition,²⁵ a healthy environment,²⁶ continuous loving care,²⁷ a sympathetic community,²⁸ intellectual and emotional stimulation,²⁹ and other prerequisites for healthy adulthood. Although a child may be entitled to such rights under theories of natural law or moral philosophy, most claims based on psychological and even physical needs are not yet considered legal rights by our system. Even though such rights are beginning to achieve some recognition, particularly in judicial decisions concerning education and psychological treatment, their scope and content raise troublesome questions.³⁰ Given the great difficulty of specifying psychological prerequisites and devising workable governmental responses for meeting them, a distinction should perhaps be made between claims focusing on psychological needs and those specifying physical ones, because the latter are more easily defined. Many of us might agree that a child should have the right to "grow up in a world free of war,"³¹ or to live in a "reconstituted society,"³² but who should the law hold responsible for seeing that those rights are enforced? Or, how should a "right to be wanted" be defined and enforced? Doubtless there are definitions of these socio-psychological rights,³³ but if the law attempted to incorporate them, the necessarily broad and vague enforcement guidelines could recreate the hazards of current laws, again requiring the state to make broad discretionary judgments about the quality of a child's life. Moreover, the limits of the legal process itself would tend to undermine the integrity and effectiveness of such laws. These limits are rarely appreciated.

²⁴ See generally, Mary Kohler, "The Rights of Children," *Social Policy*, 39 (March/April, 1971); Paul Adams *et al.*, *Children's Rights: Toward the Liberation of the Child* (New York: Praeger, 1971); Henry H. Foster and Doris Jonas Freed, "A Bill of Rights for Children," *Family Law Quarterly*, 6 (1972), 343.

²⁵ *WHERE*, April 1971, publication of Advisory Centre for Education in Cambridge, England.

²⁶ Joint Commission on Mental Health of Children, *Crisis in Child Mental Health: Challenge for the 1970's* (New York: Harper & Row, 1969, 1970), pp. 3-4.

²⁷ *Crisis in Child Mental Health*.

²⁸ 1930 White House Conference on Child Health and Protection.

²⁹ *Crisis in Child Mental Health*, pp. 3-4.

³⁰ For examples of right to education and treatment cases, see: *Pennsylvania Association for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972); *Wyatt v. Stickney*, 325 F. Supp. 781 (1971); 334 F. Supp. 1341 (1972).

³¹ Adams, *et al.*, *Children's Rights*, p. 41.

³² See Joseph Goldstein, Anna Freud, Albert J. Solnit, *Beyond the Best Interests of the Child* (New York: The Free Press, 1973), for a thoughtful discussion of the concept of a "wanted" child and suggestions for incorporating it into the law.

³³ *Crisis in Child Mental Health*, pp. 3-4.

There is attributed to the law a magical power, a capacity to do what is far beyond its means. While the law may claim to establish relationships, it can, in fact, do little more than acknowledge them and give them recognition. It may be able to destroy human relationships, but it cannot compel them to develop.³⁴

It is important to recognize the limited ability of the legal system to prescribe and enforce the quality of social arrangements.

Although many special claims of rights are far from legal recognition, some perhaps fundamentally unsuited for it, this does not mean they should be dismissed as "meaningless exhortations."³⁵ The law is not unresponsive to societal values, and decisions are frequently influenced by notions of conventional morality, occasionally reflecting acceptance of changing morality. In recent years, courts have become somewhat more willing to ask whether children should have additional rights, and if so, how might they be secured. The concept of right is constantly in ferment and Constitutional theory may eventually be expanded to include at least some quality of life claims as citizenship rights. New statutes with enforcement and review mechanisms aimed at limiting state abuses of power may also create such guarantees.

Exemplary Supreme Court Decisions

Judicial decisions concerned with questions of children's rights provide one means for examining relevant legal opinions and conclusions. Because the Supreme Court has been active in this regard and because it remains the final arbiter of the Constitution, it is valuable to review a few of its recent decisions in the field of children's rights. These opinions, sometimes holding with the children's movement, sometimes against, reveal to what extent a more favorable judicial view of children's rights is emerging. Consideration of children's rights before the Supreme Court has primarily been in the areas of education, child welfare, and juvenile court procedures. The Court has avoided "taking the easy way" with a flat holding that all rights constitutionally assured for adults may be extended to children.³⁶ Instead, it has carefully tried to carve out an area between parental dominion and state prerogatives, where certain adult rights can be extended to children under specific circumstances. The Court has also tried to fashion modified versions of other rights.

³⁴ Joseph S. Goldstein, "Finding the Least Detrimental Alternative," *Psychoanalytic Study of the Child* 628, at 637 (1972).

³⁵ *Juvenile Justice Standards Project*, Final Report Planning Phase, 1971-72 (New York: Institute of Judicial Administration, 1972), 72.

³⁶ *McKeiver v. Pennsylvania*, 403 US 528, 545 (1971).

This delicate operation of inserting new elements into the control-of-children equation began during the compulsory schooling controversy. From the first confrontations between parents and the state, education has been the subject of continuous and often bitter struggles, primarily over the proper social role of education and the proper treatment of children within the schools. In enforcing state schooling laws, the Supreme Court took care to reinforce the parental right of supervision over their children's education.³⁷ The education cases reaching the Supreme Court, including the desegregation cases, reflect this emphasis. The significance of early education cases in regard to children's rights, however, rests more on what the Court did *not* consider than what it did consider in its deliberations: "These cases never mention rights or interests of children involved. Since they rest entirely on a doctrine of parental right, the question whether the parent may not be loyal to the interests of his child is not discussed."³⁸ Neither, the author might have added, was any question about the state's loyalty to the interests of the child raised.

But one of the first specific children's rights precedents, *Brown v. Board of Education*, occurred in the area of education.³⁹ In *Brown*, the Court held that the Constitutional rights of black school children were violated by segregated education and emphasized the critical importance of education both to children and to the general public:

Today education is perhaps the most important function of state and local government . . . it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust professionally to his environment. In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all children.⁴⁰

Brown's regard for rights in education and its willingness to enforce those rights with affirmative action mark it as a significant precedent.

Like the public education legislation, laws governing juveniles charged with violations of the law have assumed the benevolence of state action. For a long time these statutes and the case law interpreting them provided no substantive or procedural guarantees for the child. Before the 1960's only a few courts held that the Constitution required recognition of a child's right to procedural protections in

³⁷ See, e.g., *Meyer v. Nebraska*, 262 US 390 (1923); *Pierce v. Society of Sisters*, 268 US 510 (1925).

³⁸ Kleinfeld, Part II, 418.

³⁹ *Brown v. Board of Education*, 347 US 483 (1954).

⁴⁰ *Brown*, 493.

⁴¹ *In re Gault*, 387 US 1 (1967).

any kind of case, civil or criminal. Most courts continued to follow the non-recognition rule implicitly sanctioned by the social consensus.

In 1967 the Supreme Court decided *In re Gault*,⁴¹ the landmark case on procedural rights in juvenile court and still the most famous children's rights case. *Gault* held that children in juvenile court were constitutionally entitled to certain due process guarantees previously granted only to adults in criminal court: a) notice (to both parent and child) adequate to afford reasonable opportunity to prepare a defense, including a sufficient statement of the charge; b) right to counsel, and if the child is indigent, provision for the appointment of counsel; c) privilege against self-incrimination; and d) right to confrontation and cross-examination of witnesses. The Court restricted its holding to precisely these procedural guarantees and not others. It also limited the guarantees to those juveniles facing possible commitment to a state institution. But *Gault* declared, generally, that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."⁴² This and similar language in the opinion suggested future grounds for arguing the constitutional rights of children. In the six years since *Gault*, the Court has continued to hear children's rights cases with mixed and at times incongruous results. The Court has decided that children are "persons" under the Constitution⁴³; it has removed some of the disabilities traditionally imposed upon illegitimate children⁴⁴; it has protected the exercise of some First Amendment rights of students in the public schools⁴⁵; and it has upheld the constitutionality of the eighteen-year-old vote.⁴⁶ On the other hand, during this same short span, the Court has denied that jury trials for alleged delinquents in juvenile court are Constitutionally required⁴⁷; it has declined to review a lower court decision upholding the right of school systems to use corporal punishment for disciplinary purposes⁴⁸; it has rejected the claim, *Brown* notwithstanding, that there is a fundamental, personal right to education under the Constitution⁴⁹; and it has generally revealed an unwillingness to pursue the broad promise of *Gault*.

The Court's present reluctant mood is reflected in Justice Blackmun's plurality

⁴¹ *Gault*, 13.

⁴² *Tinker v. Des Moines School District*, 393 US 503, 515 (1969).

⁴³ See, *Levy v. Louisiana*, 391 US 68 (1968); *Weber v. Aetna Casualty and Surety Company*, 406 US 164 (1972).

⁴⁴ *Tinker*.

⁴⁵ *Oregon v. Mitchell*, 400 US 112 (1970).

⁴⁶ *McKeiver v. Pennsylvania*, 403 US 528 (1971).

⁴⁷ *Ware v. Estes*, 328 F. Supp., 637 (N. I. Tex. 1971), cert. den., in 409 U.S. 1027.

⁴⁸ *San Antonio Independent School District v. Rodriguez*, 93 S. Ct. 1278 (1973).

opinion in *McKeiver v. Pennsylvania*,⁵⁰ in which the Court refused to hold that jury trials for juveniles are constitutionally required. Justice Blackmun acknowledged the many defects of the juvenile court system, but denied that they were of "constitutional dimension."⁵¹ He gave the Court's sanction to the juvenile court's rehabilitative goals:

The juvenile court concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise, and we are particularly reluctant to say, as do the Pennsylvania petitioners here, that the system cannot accomplish its rehabilitative goals.⁵²

The present inability of the system to realize its goals was attributed by the plurality to inadequate resources, rather than to any inherent unfairness in the juvenile court system. As one commentator noted:

To say that these shortcomings resulted from lack of resources rather than inherent unfairness seemed irrelevant to those who realized that until such shortcomings were rectified, regardless of their source or cause, there could be no justification for failing to afford juveniles facing incarceration and stigma the same procedural rights accorded adults accused of crime.⁵³

The plurality's answer to that criticism again indicates the Court's reluctance:

If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps *ultimate disillusionment* will come one day, but for the moment we are disinclined to give impetus to it.⁵⁴

Thus the present Supreme Court appears to have "limited efforts toward the 'constitutional domestication' of juvenile procedures begun during the Warren Court years."⁵⁵ This same post-*Gault* restraint can be found in the areas of welfare law and education.

In a 1972 Supreme Court case, *Jefferson v. Hackney*, Justice Rehnquist, writing for the majority, held it consistent with both the Constitution and the Social Security Act that the state of Texas could provide a lower standard of welfare benefits

⁵⁰ *McKeiver v. Pennsylvania*, 403 US 528 (1971).

⁵¹ *Id.*, 547-48.

⁵² *Id.*, 547.

⁵³ Note: "Parens Patriae and Statutory Vagueness in the Juvenile Court," *Yale Law Journal* 82 (1973), 745, 753.

⁵⁴ *McKeiver*, 550-551.

⁵⁵ Note, 82 *Yale L.J.*, 745, 746.

to recipients of AFDC than to eligible or disabled persons receiving welfare assistance under the Act.⁵⁶ The federal program for Aid to Families with Dependent Children is this country's most comprehensive child welfare legislation. Under the program, the care and protection of needy children has been entrusted to states and localities, who in turn have usually relied heavily on private voluntarism. The rights and duties of children under resulting programs have been adjudicated primarily by state courts, with patchwork results. Consequently, to evaluate the status of dependent children the laws and court decisions of fifty states must be examined. A less exhaustive but more manageable approach is to explore congressional and Supreme Court reactions to the problems of dependency, also complex but at least enabling certain generalizations. In passing AFDC legislation the Congress admitted that some children needed assistance because of their family's financial status. They have periodically qualified that admission, however, with a number of value judgments about reasons for a family's poverty. State governments have been given considerable discretion in screening potential welfare recipients and in policing their conduct. The Supreme Court has brought constitutional standards into the process. One result of the Court's decision has been to ensure that irrational state rules against parental behavior would not be allowed to interfere with the rights of dependent children to minimum financial security.

In *Jefferson v. Hackney* the Burger Court refused to "second guess" state officials charged with the difficult task of administering welfare and brushed aside the argument that children might suffer irreparable harm from insufficient welfare benefits.

Applying the traditional standard of review under that [14th] Amendment, we cannot say that Texas' decision to provide somewhat lower benefits for AFDC recipients is invidious or irrational. Since budgetary restraints do not allow the payment of the full standard of need for all welfare recipients, the state may have concluded that the aged and infirmed are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living. While different policy judgments are of course possible, it is not irrational for the state to believe that the young are more adaptable than the sick and elderly, especially because the latter have less hope of improving their situation in the years remaining to them. Whether or not one agrees with this state determination there is nothing in the Constitution which forbids it.⁵⁷

Setting aside issues of constitutional and statutory interpretation, Justice Rehn-

⁵⁶ *Jefferson v. Hackney*, 406 US 535 (1971).

⁵⁷ *Id.*, 549.

quist's view that the state's decision to provide needy and eligible children an inadequate standard of living was "not irrational" reveals a grim adherence to the convention that the authorities know what they are doing and will not harm the children whose needs they are charged with meeting. In this opinion there is also a heavy dose of the old-time belief that for the young, however poor, survival is only a bootstrap away. Justice Marshall, in a vigorous dissent, asserted that the Texas policy was inconsistent with a congressional finding in the legislative history of the AFDC Act: "Many of these children will be seriously handicapped as adults because as children they are not receiving proper and sufficient food, clothing, medical attention, and the other bare necessities of life."⁵⁸

The logic of *Jefferson v. Hackney* was extended in the recent education case, *San Antonio Independent School District v. Rodriguez*.⁵⁹ That case arose out of the claim that the Texas method of financing public education through the property tax, which resulted in widely varying per pupil expenditures, violated the constitutional rights of students in San Antonio's poorest, lowest tax base district to equal protection of the laws and to education itself. The Supreme Court denied the claim, reversing a three-judge Texas district court. Writing for the majority, Justice Powell held first that the students of the school district in question were not a suspect class under the Equal Protection Clause, and thus were not entitled to a strict judicial review of the Texas financing scheme, and second that the Constitution provides no explicit right to education, nor can education be construed as an implicit, fundamental right under the Constitution, "essential to the effective exercise of First Amendment freedoms and to the intelligent utilization of the right to vote."⁶⁰ Instead, the majority held that the importance of education for the effective exercise of rights is arguably less than the significance of adequate food, clothing, and housing, none of which are constitutionally protected rights.⁶¹ Thus the Court declined to invalidate the Texas scheme, leaving the matter of educational finance to the discretion of the state:

The very complexity of the problems of financing and managing a statewide public school system suggest that 'there will be more than one constitutionally permissible method of solving them,' and that, within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect.⁶²

⁵⁸ *Id.*, 581.

⁵⁹ *San Antonio Independent School District v. Rodriguez*, 93 S.Ct. 1278 (1973).

⁶⁰ *Id.*, 1298.

⁶¹ *Id.*, 1299.

Justices White, Brennan, Marshall, and Douglas dissented, asserting that invalidation of the Texas scheme was compelled. They each gave somewhat different reasons for disagreeing with the majority opinion, but four reasons predominated. First, some took direct issue with the argument that education is not a fundamental, Constitutionally recognized interest, "inextricably linked to the right to participate in the electoral process and the rights of free speech and free association guaranteed by the First Amendment." Instead, it was argued that "any classification affecting education must be subjected to strict judicial scrutiny,"⁶³ i.e., the state must prove that the financing system does *not* discriminate against poorer students and their parents. Second, the school children in poorer districts and their parents are indeed a suspect class under the Fourteenth Amendment because they are allocated school funds under the Texas law on the basis of wealth, and therefore the strict scrutiny standard applies.⁶⁴ Third, regardless of whether a fundamental right to education exists, there are rights in education, once the state has undertaken to provide it, which, under *Brown*, "must be made available to all on equal terms."⁶⁵ Finally, even if plaintiffs are not a suspect class, education not a fundamental right, and the *Brown* test not controlling on the issue of educational finance, the Texas law must meet the rationality test of the Fourteenth Amendment. While Texas's objective in preserving local control over the public schools is a constitutionally permissible one, the financing scheme is not rationally related to it because it accords " 'different treatment . . . to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.' "⁶⁶

In the *Rodriguez* case, the Court was unwilling to restrict the scope of the state's discretion by defining the educational needs and interests of children as rights. Even when the Court is prepared to limit state control, however, it often avoids formalizing the status of such needs and interests. Decisions are inclined to follow the traditional formula of balancing the state's interests with those of the parents, simply assuming that these reflect what is best for the child. This method was employed by the Court in *Wisconsin v. Yoder*,⁶⁷ even though in that case the children whose interests were at stake had the capacity to evaluate their interests for themselves. It was by no means evident that the interests of the children were identical

⁶³ *Id.*, 1301-2.

⁶⁴ *Id.*, 1312 (J. Brennan's dissent).

⁶⁵ *Id.*, 1336 (J. Marshall's dissent).

⁶⁶ *Id.*, 1339 (J. Marshall's dissent).

⁶⁷ *Id.*, 1314 (J. White's dissent).

⁶⁷ *Wisconsin v. Yoder*, 406 US 205 (1972).

to those of their parents. *Wisconsin v. Yoder* involved a challenge by several Old Order Amish parents to Wisconsin's statute which imposed an affirmative duty on parents to require their children to attend high school, and made violation of this duty a crime. Three parents, Mr. Yoder, Mr. Miller, and Mr. Yutzy, claimed that the compulsory school law violated their religious freedom and that of their children. Only one of the children, however, actually testified in court that she shared her parents' religious views and did not wish to continue to attend school. The other two children did not testify.

Chief Justice Burger, writing for the majority, upheld the right of the Amish parents to exemption from the statute. The opinion held that this exemption was necessary to promote free exercise of religion. The Chief Justice took pains to distinguish the genuine religious claims of the Amish from those of others who merely had unconventional life styles and might also be tempted to seek such a First Amendment exemption from compulsory schooling laws.⁶⁸ Having made this distinction, the majority opinion then reaffirmed the Amish parents' rights to control the upbringing of their children—to the point of depriving them of an advanced, worldly education.

Justice Douglas took a different and ground-breaking view of the case. He joined the Court's opinion only regarding the schooling of the child who had publicly subscribed to her parents' religious objections.⁶⁹ As to the children of the other two defendants, Justice Douglas dissented from the majority. He held that the majority opinion was inadequate because these defendants had raised their children's religious beliefs in defense but had not brought their children to testify. Reviewing various cases holding that "children themselves have constitutionally protectible interests,"⁷⁰ Douglas asserted first that the critical interests at stake were those of the children, not those of their parents, and second that the dispute could not be properly resolved until the children had represented their own interests in court.

I agree with the Court that the religious scruples of the Amish are opposed to the education of their children beyond the grade schools, yet I disagree with the Court's conclusion that the matter is within the dispensation of parents alone. The Court assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children. . . .

⁶⁸ *Id.*, 215-219.

⁶⁹ *Id.*, 243.

⁷⁰ *Id.*, 243.

⁷¹ *Id.*, 241-42, 44-46.

On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so, he will have to break from the Amish tradition.

It is the future of the student, not the future of the parents, that is imperilled in today's decision. . . . It is the student's judgment, not his parent's, that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.⁷¹

Douglas based his opinion not only on available legal precedents, but on psychological and sociological findings that children of the relevant ages possess the moral and intellectual judgment necessary for making responsible decisions on matters of religion and education. To rebut the presumption that children lack sufficient maturity to make such decisions, Douglas relied on the works of Piaget, Kohlberg, Kay, Gesell, and Ilg. He also argued that "the maturity of Amish youth, who identify with and assume adult roles from early childhood . . . is certainly not less than that of children in the general population."⁷²

The majority opinion does not deal with the merits of Douglas' views; it only notes that the children are not parties to the litigation.⁷³ Only two justices, Brennan and Stewart, acknowledged in their concurring opinions that the issues raised by Douglas "are interesting and important."⁷⁴ They agreed with the majority, however, that these issues should not be before the Court because "there is no suggestion whatever in the record that the religious beliefs of the children here concerned differ in any way from those of their parents."⁷⁵ This statement reiterates the presumption of identity of interests between parent and child, and here the consequences of acting in accord with the family's religion may be quite different for children than for their parents.

Establishing the Rights of Children

These opinions illustrate two persistent, general problems of legal theory which children's rights advocates seek to overcome. First, legal policy is ambivalent about

⁷¹ *Id.*, 245-246, footnote 3.

⁷² *Id.*, 230-31.

⁷⁴ *Id.*, 237 (Justices Brennan and Stewart concurring).

⁷⁵ *Id.*, 237.

the limitation of parental control and the assertion of state control over children. There is an absence of fair, workable, and realistic standards for limiting parental discretion and guiding state intervention. Second, the state generally fails to evaluate a child's independent interests, giving a competent child the chance to articulate his interests for himself.

Ascribing rights to children will not immediately solve these problems, or undermine the consensus which perpetuates them. It will, however, force from the judiciary and the legislature institutional support for the child's point of view. As was once said, in another context: "rights to have any meaning must adhere to particular institutions: the rights of Englishmen are indeed, necessarily more secure than the 'Rights of Man.'" ⁷⁰ Children's rights cannot be secured until some particular institution has recognized them and assumed responsibility for enforcing them. In the past, adult institutions have not performed this function, partly, as we have seen, because it was thought children had few rights to secure. Unfortunately, the institutions designed specifically for children also have failed to accomplish this aim, largely because they were established to safeguard interests, not to enforce rights, on the assumption that the former could be done without the latter.

Securing children's rights through the legislatures and the courts will include generating new lines of legal theory, grounded in past-precedent but building on it to more reasonable laws and legal interpretations for the future. Certain interesting legal theories have been introduced already, which are being utilized by children's rights advocates in pressing further claims, and which, if accepted, could resolve the theoretical problems outlined above. While the resolution of theoretical problems may not eliminate the main obstacles to the enforcement of children's legal rights or to the creation of services to meet their needs, it will at least strip away the legalistic camouflage surrounding the continuing problems of unchecked discretion, inadequate resources, and widespread public indifference.

As stated earlier, claims of rights for children fall into two broad categories: claims that the rights which adults enjoy be granted to children, and claims that the special needs and interests of children be recognized as rights. Legislation granting rights in either category probably is preferable to judicial opinions decreeing them, but both governmental branches should be pressed to reexamine and revise children's status under the law. Legal positions will contribute to a new social attitude toward children's rights.

Turning to the first strategy for obtaining new rights, the following three posi-

⁷⁰ Bernard Crick, *In Defense of Politics* (London: Penguin Books, 1962), p. 48.

tions focus attention on the independent status of children: a) the legal status of infancy, or minority, should be abolished and the presumption of incompetency reversed; b) all procedural rights guaranteed to adults under the Constitution should be granted to children whenever the state or a third party moves against them, judicially or administratively; and c) the presumption of identity of interests between parents and their children should be rejected whenever the child has interests demonstrably independent of those of his parents (as determined by the *consequences* to both of the action in question), and a competent child should be permitted to assert his or her own interests.

Devising acceptable arguments to support recognition of special rights based on physical and psychological needs is more difficult. Rather than specifying particular needs that the legal system could meet, the following suggestions concern a methodology for constitutionalizing such rights and a procedural device for overseeing the needs of children for whom the state assumes primary responsibility. The strictures of the new equal protection theory should apply to children, i. e., classifications of children *qua* children, or of certain classes of children, should be considered suspect, and needs which from a developmental standpoint are fundamental should be protected as fundamental interests under the Constitution. Also, in areas where decision makers will necessarily continue to exercise discretion they should no longer just be guided by the best interests of the child standard, but should be subjected to a review process which focuses not only on the child but also on the state's responsibility as a substitute parent.

These arguments will now be discussed more fully.

Abolition of minority status

Age may be a valid criterion for determining the distribution of legal benefits and burdens, but before it is used its application should be subjected to a test of rationality. Assessing the rationality of age classifications could be expedited by legislative abolition of the general status of minority and adoption of an area-by-area approach (as has already been done to a degree, for example, in the motor vehicle statutes). It could also be accomplished by judicial declaration that the present classification scheme is over-inclusive, after which the state would bear the burden of justifying its restrictions on infants. As Foster and Freed point out, "... the arguments for and against perpetuation of minority status have a familiar ring. In good measure they are the same arguments that were advanced over the issues of slavery and the emancipation of married women."⁷⁷ The abolition of slavery and the emancipation

⁷⁷ Foster and Freed, p. 343.

of married women did not automatically invest previously “inferior” persons with full adult citizenship rights, but the state at least had to begin to rationalize its treatment of those groups. The abolition of minority, more justifiably, need not mean that children become full-fledged miniature adults before the law. Their substantive and procedural rights could still be limited or modified on the basis of supportable findings about needs and capacities at various ages.

If the law were to abolish the status of minority and to reverse its underlying presumption of children's incompetency, the result would be an implicit presumption that children, like other persons, are capable of exercising rights and assuming responsibilities until it is proven otherwise. Empirical differences among children would then serve as the grounds for making exceptions to this presumption and for justifying rational state restrictions. For example, in his dissent in *Wisconsin v. Yoder*,⁷⁸ Justice Douglas presumed that the children involved in the case were intelligent and mature enough to express opinion when their interests were affected. In essence, Douglas reversed the presumption of incompetency. He then looked for evidence to contradict the presumption of competency and when he found none, he argued that the children should be given full rights as parties to a lawsuit. If the children involved had been younger, Douglas might have concluded that the presumption of competency should have been suspended. However, young children are known to possess strong opinions on some issues, and many such opinions may have a rational basis. In custody suits, for example, many states now require that the opinions of children over twelve be followed and that the opinions of younger children be accepted as evidence in a case. Feelings of the young should at least be recorded and weighed. This argument is reinforced by the fact that very young children have at times been found competent to give evidence in trials where adult interests are at stake.

The difference between a rebuttable presumption of incompetency and a presumption of competency is that the former places the burden of proof on children and their allies, while the latter shifts it to the opponents of changing children's status. Many legislatures now regard the presumption of incompetency as rebuttable and are legislatively removing some of children's legal disabilities. When Congress and the states extended the right to vote to eighteen-year-olds through the Voting Rights Act of 1970 and the Twenty-Sixth Amendment to the Constitution, they went through the process of reversing the presumption of incompetency regarding enfranchisement. Through hearings and other fact finding procedures, a

⁷⁸ See pp. 504-505 in text; *Wisconsin v. Yoder*, 406 US 205, 240-246.

majority of Congressmen and state legislators were persuaded by available evidence that the presumption should be rebutted, and voting rights granted in the same form enjoyed by adults.

Granting all procedural rights

The argument for this position is simple. A child is now considered a person under the Constitution. When the State moves against persons and threatens to take away their liberties or otherwise affect their interests adversely, they are entitled to the protective procedures of the Bill of Rights, as applied to the states through the Fourteenth Amendment. As the late Mr. Justice Black said, concurring in *In re Gault*:

When a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment. . . . Appellants are entitled to these rights not because 'fairness, impartiality, and orderliness—in short, the essentials of due process'—require them and not because they are 'the procedural rules which have been fashioned from the generality of due process,' but because they are specifically and unequivocally granted by provisions of the Fifth and Sixth Amendments which the Fourteenth Amendment makes applicable to the States.

Undoubtedly this (entitlement to Constitutional guarantees) would be true of an adult defendant, and it would be a plain denial of equal protection of the laws—an invidious discrimination—to hold that others subject to heavier punishments could, *because they are children*, be denied these same constitutional safeguards.⁷⁹

The only effective means for securing these Bill of Rights guarantees in our current legal system is by the provision of legal counsel. Although the introduction of the adversarial system into juvenile court proceedings is deplored by many, lawyers representing children should ensure three critical prerequisites for fairness. First, they can articulate and argue the child's position, even though filtered through their own adult and professional perspectives. Second, they can require that the law be strictly followed. And third, they can make new law in the area by appealing cases and lobbying for statutory changes. Independent counsel for children should not be restricted to children accused of delinquency, but should be required in any case where a child's interests are being adjudicated. The courts must become more

⁷⁹ *In re Gault*, 387 US 1, 61 (1967). Cf., also, J. Douglas's dissent joined by J. Black and J. Marshall in *McKeiver v. Pennsylvania* arguing the same point.

sensitive to such cases, recognizing that children in neglect or custody proceedings may have interests independent of their parents or the state.

Substitution of an evaluation of consequences for the implied identity of interests between parents and children

This point was treated clearly and at length by Justice Douglas in his opinion in *Wisconsin v. Yoder*.⁸⁰ Only one aspect of the arguments requires further stress. Justice Douglas chided the majority for subsuming the rights of school children under their parents' rights, and for not giving the children the opportunity to be heard. Justice Douglas might have added that the majority presumed an identity of religious opinions was the same as an identity of interests. In general, it is not clear whether the implied identity of interests operates as a legal presumption or only a permissible assumption in the absence of contrary evidence. Regardless, the values it represents should be treated only as an assumption, and in cases of potential conflict between parent and child the consequences to the child of parental action or inaction should be considered. Where the consequences appear irreversible, the assumption should be discarded in favor of an extrafamilial decision that takes into account the opinions of all interested parties. If the consequences seem reversible or insubstantial, the assumption that the parent knows best should probably continue to govern.

Application of the new equal protection theory

The Equal Protection Clause of the Fourteenth Amendment guarantees that all people similarly situated will be treated alike by the state. The Supreme Court and lower federal courts use two standards of judicial review for assessing the constitutionality of state action under this clause. Under traditional equal protection analysis, a state has broad discretion to classify persons, so long as the classification bears a reasonable relationship to a permissible state objective. The measure of reasonableness is "the degree of its success in treating similarly those similarly situated."⁸¹ A classification, under this standard, is unreasonable if it is over- or under-inclusive or in some other way not rationally related to the achievement of a legitimate state objective. Under the so-called new equal protection analysis, the state bears the burden of justifying its classification on grounds of a "compelling state interest" whenever that classification is suspect because of its effects on the group of persons in the class or whenever it seems to be in conflict with a funda-

⁸⁰ See, pp. 504-505 in text.

⁸¹ Tussman and Ten Brock, *The Equal Protection of the Laws, Selected Essays 1938-62*, 789 (1963).

mental personal interest. The Supreme Court has been restrained in its use of this strict form of judicial review.

The argument for defining various developmental needs of children as fundamental interests is well-stated, with respect to education and AFDC benefits, in the opinions of Justices Marshall and Brennan, quoted above.⁸² Under their test of fundamentality, a child's need or interest only has to be shown to relate to "the effectuation of those rights which are in fact constitutionally guaranteed."⁸³ Thus, ". . . as the nexus between the specific constitutional guarantee and the non-constitutional interest draws closer, the non-constitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly."⁸⁴ The argument that certain types of children form suspect classifications is also made in the dissenting opinion of Justice Marshall in the *Rodriguez* case, with respect to poor children living in low tax base school districts.⁸⁵ The courts already recognize as suspect those classifications based on race,⁸⁶ national origin,⁸⁷ alienage,⁸⁸ indigency,⁸⁹ and illegitimacy.⁹⁰ Thus, application of the doctrine to poor school children is arguably within its traditional scope. The *Rodriguez* majority disagreed with this application, however, apparently on the theory that economic deprivation is suspect only when actual or functional indigency obtains and not when there is "comparative poverty vis-a-vis comparative affluence."⁹¹ Some courts have found classes of retarded or handicapped children suspect, which supports strict judicial scrutiny of the state's treatment of them.⁹²

There is less support for the contention that children *qua* children should be treated as a suspect class, but an argument may be constructed using the original rationale for suspect classifications. The suspect character of classifications based on racial or ethnic characteristics or wealth differentiations originated in the recog-

⁸² See, pp. 502-503 in text.

⁸³ *Rodriguez*, 41 LW 4407, 4426.

⁸⁴ *Id.*, 4426.

⁸⁵ *Id.*, 4441.

⁸⁶ See, e.g., *Brown v. Board of Education*, 347 US 483 (1954); *McLaughlin v. Florida*, 379 US 184 (1964).

⁸⁷ See, e.g., *Oyama v. California*, 332 US 633 (1948).

⁸⁸ See, e.g., *Graham v. Richardson*, 403 US 365 (1971).

⁸⁹ See, e.g., *Griffin v. Illinois*, 351 US 12 (1956).

⁹⁰ *Weber v. Aetna Casualty & Surety Company*, 406 US 164 (1972).

⁹¹ *Rodriguez*, 93 S. Ct. 1278, footnote 6, 1311 (Stewart, J. concurring); see the majority opinion discussion, 1290-94.

⁹² See, e.g., *Colorado Association for Retarded Children v. Colorado*, C.A. No. C-4620 (N. Colo., filed Dec. 22, 1972).

nition that certain groups of persons comprise "discrete and insular"⁹³ minorities who are relatively powerless to protect their interests in the political process. The use of age as a classifying characteristic has rarely been questioned.

In his dissent to the Supreme Court case upholding the constitutionality of the eighteen-year-old vote in federal elections, Justice Stewart flatly asserts that: "The establishment of an age qualification is not state action aimed at any discrete and insular minority."⁹⁴ But age categories should be open to scrutiny for some of the same reasons well established suspect classifications are. The assumption that age qualifications are generally rational is not borne out by much of the evidence about the abilities of children at various ages and developmental stages before twenty-one. Thus, a group discriminated against on the basis of age could constitute a discrete and insular minority if their access to the political system were limited solely because they were young. They might possess the requisite rationality to participate, but be forbidden to do so. If this were the case, then they would be a suspect minority and state action affecting their interests should be required to demonstrate a compelling governmental interest in maintaining legal disabilities. If, however, some or all of the members of the age-defined minority were not rational or mature enough to participate in the political process, then state action affecting them should also be subjected to strict judicial scrutiny, because of their powerlessness. On the basis of either set of conclusions about children's abilities, the state should no longer be allowed to assume the rationality of regulations based on age, and should at least be required to justify its action on the basis of modern legislative or administrative findings. Under the new equal protection doctrine, it would additionally have to demonstrate a compelling state interest in its legislative objective.

Moving away from the "best interests" standard

The argument against the continued reliance on the "best interests" standard has particular reference to instances of state intervention when a child is "neglected," "dependent," "abused," "in need of supervision," or "wayward." The statutory descriptions fitting these labels are imprecise, often deliberately so, in order that concerned state agents will not be hampered in their efforts to free a child from an unhealthy or dangerous family environment. Some children, of course, do suffer incalculable harm while in the custody of their parents, and the community should protect these children from the harm which would result were

⁹³ The quote is from *United States v. Carolene Products Co.*, 304 US 144, 152, n. 4 (1938). See generally the discussions in *Serrano v. Priest*, 5 Cal. 3d 584, 487 P 2d. 1241, 1265 (1971); Note, "Developments in the Law-Equal Protection," *Harvard Law Review* 82 (1969) 1065, 1124-26; Merle McClung, "School Classification: Some Legal Approaches to Labels," *Inequality in Education*, 14 (July 1973), pp. 17-37.

⁹⁴ *Oregon v. Mitchell*, 400 US 112 (1970).

parental discretion left unchecked. But the unchecked discretion of the state has vices of its own. The best interests standard, initially followed in most state interventions and explicitly used as the standard for adjudicating children's interests in proceedings evaluating parental care, is not properly a standard. Instead, it is a rationalization by decision-makers justifying their judgments about a child's future, like an empty vessel into which adult perceptions and prejudices are poured. It does not offer guidelines for how adult powers should be exercised. Seductively, it implies that there is a best alternative for children deprived of their family. This implication prevents both the decision-maker and those to whom he is accountable from carefully weighing the possible negative impact of any decision.

Recognizing the weaknesses of the best interests standard, Professor Joseph Goldstein has suggested another guideline for decision-makers in custody cases: "that which is least detrimental among available alternatives for the child."⁹⁵ Although this guideline may appear only a semantic change, Goldstein argues that:

Introducing the idea of 'available alternatives' should force into focus from the child's vantage point consideration of the advantages and disadvantages of the actual real options to be measured in terms of that which is least likely to preclude the chances of the child becoming 'wanted.' The proposed standard is less awesome, more realistic, and thus more amenable to relevant data gathering than 'best interest.' No magic is to be attributed to the new formulation, but there is in any new set of guiding words an opportunity at least for courts and agencies to re-examine their tasks and thus possibly to force into view factors of low visibility which seem frequently to have resulted in decisions actually in conflict with 'the best interests of the child.'⁹⁶

Goldstein's guideline may result in a new focus on the probable harm of state intervention into a parent-child relationship, but it still falls short because it does not specify the standards which should govern such intervention. The principles which compete whenever there are efforts to draft workable standards are not amenable to any comfortable resolution.

Sentiment against state intervention stems from the state's poor record in caring for children removed from their families. Restricting state intervention to instances where there is evidence of physical abuse would eliminate from judicial jurisdiction cases of emotional or psychological neglect. Ironically, reaction against state intervention in cases of non-physical abuse is consistent with consensus romanticism about the family, accepting as inevitable that families can deny children rights. Even though state interference with family privacy should be minimized because of the state's unwillingness, or inability, to care for children as well as most families

⁹⁵ Goldstein, "Finding the Least . . .," p. 633.

⁹⁶ Goldstein, "Finding the Least . . .," p. 637.

do, the state, representing the community of adults, has the responsibility to intervene in cases of severe emotional deprivation or psychological damage if it is likely that a child's development will be substantially harmed by his continued presence in the family. The state not only has the responsibility to intervene, but to nurture the child after intervention. The absence of a commitment to post-intervention care does not necessarily negate the reasons for the original intervention. Some children, even in these days of inadequate services, do benefit from a temporary or permanent removal from their families.

The principal challenge lies in determining which children could benefit from removal. Standards that limit the amount of discretion vested in decision-makers must be drafted. This will involve specifying acceptable reasons for intervention and providing workable review mechanisms for both the initial decision and the child's placement. Intervention should be allowed only after the state has attempted to provide services for the child and his parents aimed at ameliorating the conditions of neglect. Only medically justifiable reasons for intervention should be acceptable. Such reasons should include inadequate psychological care, as in cases of children presenting symptoms of maternal deprivation or severe emotional disturbance. Parental behavior that does not result in medically diagnosable harm to a child should not be allowed to trigger intervention, however offensive that behavior may be to the community.

A common complaint about the exercise of discretion in neglect cases is that alien values, usually middle-class, are used to judge a family's child-rearing practices. One way to answer that complaint is to entrust the discretion necessary for evaluating a child's needs to persons representing the milieu in which a family lives. Boards composed of citizens representing identifiable constituencies—racial, religious, ethnic, geographical—could make the initial decision regarding intervention or review judicial decisions. Additionally, they should be responsible for periodically reviewing placements and making recommendations about terminating parental rights. The board membership should include parent and professional representatives, perhaps children as well. Decisions to intervene and to terminate parental rights should require a three-fourths vote to overcome the presumption against intervention. Membership might be elected and should rotate often to avoid institutional calcification. Providing a check on judicial and bureaucratic discretion, this form of community involvement also might broaden the constituency of adults actively concerned about services for children. Without an increase in community involvement, the best drafted laws and most eloquent judicial opinions will merely recycle past disappointments.

This article has been reprinted with permission of the *Harvard Educational Review* (ISSN 0017-8055) for personal use only. Posting on a public website or on a listserv is not allowed. Any other use, print or electronic, will require written permission from the *Review*. You may subscribe to *HER* at www.harvardeducationalreview.org. *HER* is published quarterly by the Harvard Education Publishing Group, 8 Story Street, Cambridge, MA 02138, tel. 617-495-3432. Copyright © by the President and Fellows of Harvard College. All rights reserved.