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Placing Children's Rights in Historical Perspective

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In 1799, the notion that children might be rights-holders seemed laughable. In that year, the British moralist Hannah More made one of the very first known references to the concept of children's rights. In an attempt to reveal the absurdity of the egalitarian and libertarian ideas popularized during the Age of Revolution, she wrote:

> The rights of man have been discussed till we are somewhat wearied with the discussion. To these have been opposed, as the next stage in the process of illumination, the rights of women. It follows, according to the natural progression of human things, that the next influx of that irradiation which our enlighteners are pouring in upon us, will illuminate the world with grave descants on the rights of youth, the rights of children, and the rights of babies. [FN1]

Even though More dismissed the notion of children's rights as ludicrous, she understood that the language of liberty and equality could not be confined solely to the realm of politics or even exclusively to adults; it inevitably influenced ideas and behavior in the private realm as well.

What do we mean by the phrase “children's rights?” The term refers to the notion that children have a distinct legal identity and interests and needs separate and apart from those of their parents. A broad but somewhat nebulous phrase, children's rights encompasses both “protective” and “dependency” rights and civil, liberty, or autonomy rights. Protective rights refer to safeguards for children's welfare and well-being. These include a right to a stable home, adequate subsistence, and an education. Civil or liberty rights refers to freedom from state restrictions on a child's liberty or agency. Civil liberties include the right to due process and freedom of expression. In addition, children's rights often implies children's right to have their voices heard and their wishes attended to. [FN2]

Rethinking the History of Children's Rights

This essay challenges the notion that the history of children's rights can be understood in linear or progressive terms, as a movement from callous indifference to compassion and enlightenment. Rather, this history is best understood in terms of a succession of distinctive legal regimes, each the product of a specific social and intellectual context. Nevertheless, at no point in history has there been a consensus about children's rights; indeed, the concept has been embraced by groups with very different agendas. This concept has been repeatedly subject to rancorous debate and heated contestation. [FN3]

The essay identifies five overlapping phases in the history of children's rights in the United States. The first phase, a product of the pre-Civil War decades, involved recognition of children's special needs to maternal nurture, education, and time to mature. This era saw a host of innovations reflecting the notion that children were the mirror image of adults: dependent rather than autonomous, and innocent and malleable in ways that adults were not. This viewpoint found expression in new legal doctrines, including the best interests of the child doc-

trine, and new social institutions, including the house of correction, the juvenile reformatory, and the public school.

A second phase, which arose in the decades following the Civil War, emphasized child protection. In this era, heightened awareness of the perils posed by child abuse and neglect and other threats to children's well-being prompted the emergence of the first societies to prevent cruelty toward children and enactment of measures to censor obscenity and raise the age of consent to sexual activity.

A third phase, which began during the Progressive Era and extended through the Great Depression, greatly extended the definition of childhood, to age seventeen, and stressed the notion that all children, irrespective of class, had a right to a middle class definition of a “protected,” dependent childhood. The movement to abolish child labor, extend welfare payments to mothers with dependent children, and expand access to kindergartens and high schools, were products of this phase of reform.

A fourth phase, in the 1960s and early 1970s, placed a heightened stress on children's autonomy rights, including the right to freedom of speech and expression and the right to make decisions that have a substantial impact on their lives, such as abortion. We are now in the midst of a fifth phase, in which the courts and legislatures strive to achieve a balance between children's autonomy rights and child protection.

The justifications for and legal and institutional approaches to children's rights have taken very different forms in distinct historical eras. Sometimes advocates of children's rights have argued that such rights are best promoted through institutional segregation; at other times, through inclusion and mainstreaming. Sometimes, children's rights have been defended on the grounds of children's competence; at other times, on the grounds that children's immaturity and lack of brain development mandates special protections. Thus, in its recent decision barring capital punishment for crimes committed by juveniles, the Supreme Court took the position that juveniles' capacity for autonomous choice, self-management, risk perception, and calculation of future consequences are deficient compared to those of adults.

As we shall see, the history of children's rights is a story replete with ironies and contradictions. One striking irony is that many of our contemporary notions of children's rights arose partly in reaction to early state actions and interventions that were intended to promote children's welfare. One generation's reforms were subsequently viewed by a later generation as detrimental to children's rights.

A second conspicuous irony is that an expansion of children's rights has sometimes had consequences that are the opposite that advocates of reform anticipated. A notable example is that criticisms of the juvenile justice system had the unexpected effect of expanding the likelihood that juveniles would be tried as adults. A third noticeable irony is that the concept of children's rights has often been invoked to expand the power of adults, including judges, attorneys, caseworkers, and child welfare agencies-sometimes without actually expanding children's voice or agency in legal proceedings involving foster care, adoption, and visitation rights. [FN4]

Origins of the Notion of Children's Rights

The term “children's rights” is not a new one. In the decade before the Civil War, the phrase entered the popular American vocabulary. From the very beginning, the phrase had two opposing meanings. On the one hand, the expression referred to the notion that children had special needs and interests that adults had an obligation to protect. Children, according to this view, were fragile, vulnerable, and malleable creatures who required proper

nurture, protection, play, schooling, and time to mature. On the other hand, the phrase children's rights also suggested that children had a distinctive personhood and unique legal identity and status, separate and apart from those of their parents, and deserved a degree of autonomy in their actions.

The conception of children as weak, vulnerable, and defenseless creatures gave rise to three legal principles with profound consequences for the future. One was the “best interests of the child” doctrine, which held that children's welfare should be the preeminent consideration in any judicial decision involving custody or care. A second principle was the “tender years” doctrine that young children were best left to their mother's care. The third principle was parens patriae, that the courts had the authority to override parents' custody rights. Each of these doctrines gave judges broad discretion to grant custody as they saw fit, allowing them to take into account their perceptions of the parents' fitness. Judicial discretion, however, also meant that decisions could easily reflect various forms of bias based on racial, gender, ethnic, and class prejudice. Other innovations of this formative era included a new legal concept, adoption, the first organized campaigns against corporal punishment in schools, and new institutions to promote the welfare of dependent and delinquent children. [FN5]

In child custody cases, judges used the “best interests of the child” and “tender years” doctrines to undercut paternal claims to guardianship. As early as 1809, a South Carolina father, in the case of Prather v. Prather, [FN6] lost custody of his infant daughter because he had committed adultery. Changes in custody occurred as an incremental result of legal decisions, not as a result of statutory enactments. As late as 1900, only nine states and the District of Columbia had established a mother's statutory right to equal guardianship of children. Nevertheless, most courts took the position that young children belonged with their mothers. For many women, this presumption proved to be a double-edged sword, as new notions of “parental fitness” supplanted older assumptions about paternal rights. A woman could receive custody only if she conformed to Victorian notions of propriety and if the court found her character above reproach. [FN7]

The principle of parens patriae, which gave the state the authority to care for any children whose parents were unable to provide a proper upbringing, was established by an 1838 Philadelphia case known as Ex parte Crouse. [FN8] Ruling that the government had the authority to remove children “when [the parents were] unequal to the task of education,” the court declared that removal did not require due process. [FN9]

New ideas about children's welfare also prompted reconsideration of children born outside of marriage. Convinced that it was unfair to visit parents' sins upon their children, legislatures and courts extended limited rights to children born outside of wedlock. Common law had regarded an illegitimate child as filius nullius with no legal claims on a parent or relative. The only parental obligation was to provide sufficient financial support to ensure that the child did not become a public charge. But even before the Civil War, courts and legislatures reduced the stigma of illegitimacy by recognizing common law marriages and declaring legitimate the offspring of annulled marriages and of parents who subsequently married. State statutes also gave inheritance rights to illegitimate children who were formally acknowledged by their parents. Meanwhile, to prevent illegitimate children from being separated from their mothers, states allowed poor children to be a charge in their mother's place of residence rather than in their place of birth. [FN10]

Adoption-the notion that adults should be able to become the legal parents of a child who is not their own biological offspring-was another product of the mid-nineteenth century's commitment to new ideas about childhood. Unlike English common law, which refused to recognize adoption out of fear of undercutting blood relatives' inheritance rights, the American colonies allowed adoption on a limited scale. Many adoptions took place without a formal legal proceeding and some were established through a will. In the mid-nineteenth century, the

state legislatures of Mississippi (in 1846) and Texas (in 1850) responded to a growing number of requests for private adoption bills by enacting the first general adoption statutes, which provided for public registration of private adoption agreements. In 1851, Massachusetts adopted the first modern adoption law, requiring judges to determine whether adoptive parents were "of sufficient ability to bring up the child ... and furnish suitable nurture and education" before issuing a decree. [FN11] The statute also obliged the child's natural parents or guardian to consent to the adoption in writing. As older notions of parental rights rooted in religion, natural law, and property rights eroded, legal adoption presaged a new conception of parenthood emphasizing affection and stewardship. It also provided an alternative to placement of children in institutions and a way to assist abused and neglected children. [FN12]

Meanwhile, from the 1790s through the 1840s, reformers created congregate institutions to separate children from the corruptions of the public world and provide them with the order and discipline that their families lacked. Rapid urban growth, immigration, and the breakdown of the apprenticeship system greatly increased the number of dependent children, and institutionalization appeared to be the most cost-effective response. But institutionalization also reflected shifting ideas about childhood. The binding out or public auctioning of poor or orphaned children clashed with the sentimental view of the child as an innocent creature who needed care and nurture. Meanwhile, a heightened emphasis on children's plasticity made kids much more promising candidates for reform than adults. Orphan asylums, houses of refuge, and reform schools were to rectify the failures of impoverished families; insulate children from a contaminating social environment; and shape their character by instilling habits of sobriety, industry, and self-discipline. [FN13]

These institutions reflected a humanitarian impulse to rescue children from deprived and abusive conditions and a religious impulse to redeem children from sin. Less positively, institutionalization sought to cut the cost of poor relief, remove poor and unruly children from the streets, and place them out of sight. Child-saving was driven by a mixture of hope and fear-by a utopian faith that crime, pauperism, and class division could be solved by redeeming poor children; and a mounting concern over growing cities, burgeoning gangs of idle and unsupervised youths, and swelling immigrant populations.

The earliest and longest lasting child-saving institution was the orphan asylum. First established in the early eighteenth century, these institutions did not become widespread until a century later. Most inmates were not true "orphans," who had lost both parents, but half-orphans whose single parents could not earn enough money to care for the child at home. A surprising number came from intact but poor two-parent families. In a society in which half of all children lost a parent before the age of twenty, orphanhood was a well-known fact of life. [FN14]

In 1800, there were just six orphan asylums in the United States. But as childhood came to be seen as a vulnerable period demanding special protection, it seemed essential to shelter orphaned or homeless children from an unhealthy environment. By 1850, New York State alone had nearly 100 orphanages. By then, however, American orphanages had already acquired their Dickensian image as drab, regimented facilities, characterized by harsh discipline, rigid routine, and an absence of emotional care. A term arose to describe the passivity of children in orphanages: "institutionalism." Reports of physical and sexual abuse abounded. To address these concerns, some orphanages adopted a "cottage"-style, breaking down larger institutions into smaller home-like units, while urban missionaries and charity workers experimented with the first placing-out and foster care systems. But as the nineteenth century progressed, the size of the larger institutions increased sharply. In the early 1900s, more than 100,000 children resided in some 1,200 orphanages throughout the United States. [FN15]

Alongside the orphan asylum, houses of refuge for delinquent and homeless boys and girls arose. The refuges' regimen emphasized order, discipline, routine, plain food, and regular work. Although their founders insisted that the refuges were “an asylum for friendless and unfortunate children, not a prison for young culprits,” their architecture and internal organization resembled a penitentiary's. [FN16]

Children wore badges, slept in large dormitories, labored in group workshops, and ate in silence in a common dining hall. To maintain discipline, refuge authorities relied on isolation and corporal punishment, including the cat o' nine tails. [FN17]

During the 1840s, as the number of delinquent and neglected children outstripped the capacity of private benevolent societies, the house of refuge was superseded by a new institution, the reform school. Located in rural areas, these schools sought to remove wayward children from the moral contamination of the city and transform them culturally through a regimen of moral instruction, prayer, and physical labor. Like the refuge, the reform school melded the school, the prison, and the workhouse, but unlike the refuge, the reformatory was a state-run institution, publicly financed and administered. It quickly became clear that reform schools faced the same problems of discipline as refuges. Strict regimentation served to “darken, harden, and embitter” the young people placed in these institutions. [FN18]

Child Protection

During the decades following the Civil War, there was a widespread fear that the American family was in crisis. Many factors contributed to this sense of anxiety, including the discovery that the United States had the highest divorce rate in the Western world and that the birth rate of native born white women was falling sharply and lagging far behind that of immigrants and non-whites. There was a growing sense that government needed to step in to protect children, who needed to be regarded as rights holders in a very special sense. Children, in this view, had a right to protection from physical cruelty, neglect, sexual exploitation, immorality, and a host of other ails. Government and private philanthropies had a duty, according to an emerging body of thought, to protect children by criminalizing abuse and neglect, raising the age of consent, and suppressing “white slavery” (prostitution) and obscenity.

In retrospect, the limitations of child protection during the Gilded Age are striking. For instance, in the name of “killing the Indian and saving the man,” thousands of Native American children were separated from their parents and placed in boarding schools where they were denied the right to wear native dress, speak native languages, or practice native religions. In general, the late nineteenth century child-savers, as the reformers called themselves, were much more concerned with immorality than with poverty. The reformers tended to confuse neglect and abuse with conditions of life under poverty and to ignore the root causes of poverty. Even though it is certainly true that the poor and the working class were able to use the reforms for their own purposes-for example, some working class parents used statutory rape laws to help regulate their daughters' interactions with men-the effect of many of these reforms was to constrain and regulate young peoples' lives and to police working-class and immigrant families. [FN19]

Children's Rights in the Progressive and New Deal Eras

In 1905, the Progressive era reformer Florence Kelley asserted that a right to childhood existed. One of the most important catch phrases of the Progressive era, the right to childhood involved the notion that all children,

irrespective of class, had a right to secure, sheltered “middle-class” childhood. Through the establishment of the Children's Bureau, the world's first public agency devoted to children's needs, as well as efforts to reduce infant and maternal mortality, abolish child labor, build urban playgrounds, expand access to kindergartens and high schools, and address the problem of juvenile delinquency, the Progressive era greatly expanded the notion that childhood was a special period of life, that children had special needs and required special treatment, and that social policy should address the psychological, hygienic, and emotional needs of the “whole child,” rather than simply rescue dependent and delinquent children. [FN20]

One of the key reforms of the Progressive era was the invention of the juvenile court. Embracing the notion that juvenile delinquency was a social product, of faulty parenting and a toxic social environment, reformers lobbied for the establish of a separate court system for juveniles, where judges would make use of discretion, including probation, parole and indeterminate sentencing, to rehabilitate youthful offenders. Yet the stress on judicial discretion also had a number of negative consequences, above all, a lack of concern for due process and a tendency for judges to incorporate their own biases and prejudices in decision-making. [FN21]

In retrospect, the limitations of Progressive era reforms are striking. The Children's Bureau, for example, opposed the dissemination of birth control information and the provision of day care for children, which it associated with neglectful mothering. Yet even though the Progressive era's proposals to improve children's well-being were anything but radical, they encountered vigorous opposition, especially from physicians who feared federal encroachment into the practice of medicine, from the Catholic church and private charities, hostile to governmental intrusion into the family, and from businesses that relied on child labor.

The limitations of the Progressive view are especially glaring in regard to those children defined as the feebleminded. As many as fifteen percent to over forty percent of those identified as feebleminded were confined in institutions. Others were placed in special classes or denied schooling altogether. By 1930, twenty-seven states provided for the sterilization of “feebleminded” girls. Limitation was also evident in terms of public assistance to low-income households with dependent children. Only mothers deemed “worthy” were supported. Often aid was limited exclusively to widows. [FN22]

During the Great Depression of the 1930s, federal policies were far more concerned with youth-aged sixteen to twenty-five-than with younger children. With the sole exception of Aid to Dependent Children, the program that later generations would call welfare, most New Deal programs, such as the Civilian Conservation Corps, the National Youth Administration, focused on the transition of adolescents and young adults into the workforce, reflecting the large birth cohort of the teens and twenties, who entered adolescence during the 1930s, while the number of younger children remained much smaller. Nevertheless, the New Deal did have a significant impact on children's lives. The New Deal's job programs resulted in the construction of schools, playgrounds, and swimming pools serving children, while Aid to Dependent Children, instituted as part of Social Security, promoted the middle-class ideal of a stay-at-home mother and assisted about three times as many children by the early 1940s compared to state supported mothers' pensions had in 1931. [FN23] The Fair Labor Standards Act of 1938 prohibited work by children under sixteen, and limited work hours for those sixteen and seventeen. Despite its exemptions for child agricultural workers, the act helped extend the definition of childhood through age seventeen, a trend reinforced by the increasing number of students who remained in high school through graduation. [FN24]

Children's Liberation

In 1935, ten-year-old Billy Gobitis and his twelve-year-old sister Lillian Gobitis, who were members of the Jehovah's Witnesses, refused to salute the American flag in school, convinced that it amounted to the worship of a false idol, violating the law of God. The two children were expelled for insubordination. In 1940, in Minersville School District v. Gobitis, [FN25] the Supreme Court, by an eight to one vote, upheld the expulsion, ruling that the school district had a right to compel students to salute the flag as a symbol of national unity. Three years later, when the nation was embroiled in World War II, the court reversed itself. In the case of West Virginia State Board of Education v. Barnette, [FN26] the Court voted six-to-three that requiring students to salute the flag, when this violated their religious beliefs, infringed upon their constitutional rights. The major opinion held that the students' refusal to salute the flag did not interfere with the rights of others and posed no danger to public order.

During the 1940s, a number of books invoking the phrase “children's rights” appeared. In general the phrase involved enumerating children's needs, including a right to an education, a right to play, and a right to be loved and cared for. But advocates of children's rights during the 1960s and 1970s had a different goal in mind. They wanted to award minors many of the same legal rights as adults, including the right to make certain medical or educational decisions on their own and a right to have their voices heard in disputes over adoption, custody, divorce, termination of parental rights, or child abuse. As Justice Harry Blackmun wrote in the 1976 decision in Planned Parenthood v. Missouri, [FN27] which granted a minor the right to an abortion without parental consent: “Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess Constitutional rights.” [FN28]

During the 1960s and early 1970s, the children's rights movement was one of many movements to empower and liberate groups whose civil rights had historically been circumscribed. Issues that the courts addressed included abortion, corporal punishment, involuntary commitment in mental hospitals, school suspensions, political expression, equal protection in education, and protections against arbitrary state action that limited young peoples' freedom of speech and reproductive control.

In its landmark ruling In re Gault, [FN29] the Supreme Court in 1967 granted young people certain procedural rights in juvenile court proceedings. Two years later it guaranteed students the right to free speech and expression. [FN30] In 1977, the Court invalidated state laws prohibiting the sale of condoms to minors [FN31] and subsequently struck down state laws requiring parental notice or consent if their children sought contraceptive; it also extended access to abortion to juveniles. State and federal legislation reduced the voting and drinking ages. Other legislation actions and judicial rulings prohibited sex discrimination in educational programs and guaranteed children with disabilities access to a free and appropriate public education.

One key arena of change involved students' rights. Six weeks after the bodies of civil rights workers James Chaney, Andrew Goodman, and Michael Schwerner were discovered in Philadelphia, Mississippi, students in the town's all-black Booker T. Washington High School began to wear “freedom buttons” bearing the words “One Man One Vote” and the initials “SNCC.” The school's principal prohibited the buttons, claiming they would “cause a commotion,” and “didn't have any bearing” on the children's education. [FN32] When fifty students disregarded his order, he suspended them. The federal district court refused to allow the students to wear the buttons, but the Fifth Circuit Court disagreed in Burnside v Byars. [FN33] The “freedom button,” the judges held, communicated “a matter of vital public concern.” [FN34] Burnside served as a crucial precedent for a 1969 Supreme Court decision that upheld students' free-expression rights in a case known as Tinker v. Des Moines. [FN35]

In mid-December, 1965, four children in the Tinker family in Des Moines, Iowa, decided to protest the government's policies in Vietnam by wearing black armbands, emblazoned with a peace symbol. A lower court ruled against the Tinker children, concluding that schools could prohibit the wearing of armbands because this might disrupt the educational process. But in February, 1969, the Supreme Court ruled on the Tinkers' behalf, declaring: “In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” [FN36] Holding that freedom of expression rights does not vanish at the school gate, the Court announced that “School officials do not possess absolute authority over their students. Students in school as well as out of school are ‘persons' under our Constitution.” [FN37] For the first time, the Court ruled that First Amendment rights applied to students. [FN38]

Tinker was part of a broader children's rights revolution. In 1964, Gerald Gault, a fifteen-year-old in Globe, Arizona, was accused of making an obscene telephone call to a neighbor. The judge found him guilty and ordered him placed in a reformatory until he turned twenty-one. Because he was a juvenile, Gault's rights were severely limited. His parents were not notified that he was under arrest and he was not allowed to consult a lawyer. Nor, when he appeared before the juvenile judge, was he given a chance to prove his innocence. No evidence was presented at his hearing, no witnesses testified, and no record was made of the proceedings. Had he been an adult, Gault would have been able to present a defense, and would have faced a maximum punishment of a $50 fine or two months in jail. In a landmark 1967 ruling in the case of In re Gault, [FN39] the U.S. Supreme Court declared that juveniles charged with criminal offenses were entitled to many of the procedural protections in juvenile courts that adults enjoyed in criminal courts, including the right to legal counsel, to cross-examine witnesses, and to remain silent. “Neither the 14th Amendment nor the Bill of Rights is for adults only,” Justice Abe Fortas wrote for the 7-to-2 majority. “Under our Constitution, the condition of being a boy does not justify a kangaroo court.” [FN40]

A major battlefield in the contest over children's rights involved the treatment of juvenile crime. Children's rights advocates looked skeptically at the claim that the juvenile court system operated in children's best interests. Proponents of the juvenile court argued that a minor's interests were best served by a system that removed the formalities and rules of evidence required in adult criminal trials and emphasized treatment and rehabilitation rather than punishment. Advocates of children's rights denounced this argument as a myth. They noted that many of the cases that juvenile courts heard-about fifteen percent-involved status offenses, such as truancy or incorrigibility, which were not crimes if committed by adults. Children's rights reformers stressed that juveniles were denied basic due process protections, even after the high court's decision in Gault. While Gault gave minors the right to written notice of charges, the right to a lawyer, the privilege against self-incrimination, and the right to cross-examine witnesses, it denied them other rights, such as indictment by a grand jury, release on bail, a right a public trial, and a trial before a jury. [FN41]

Teenage sexuality became another significant arena of legal conflict over young peoples' rights. The most controversial issue was whether minors could obtain contraceptives or abortions without parental consent. In a 1977 case, Carey v. Population Services International, [FN42] the Supreme Court invalidated a New York law prohibiting the sale of condoms to adolescents under sixteen, concluding that the “right to privacy in connection with decisions affecting procreation extends to minors as well as adults.” [FN43] The Court held that the state interest in discouraging adolescents' sexual activity was not furthered by withholding the means to protect themselves. As Justice John Paul Stevens explained in a concurring opinion, to deny teenagers access to contraception in an effort to impress upon them the evils of underage sex is as irrational as if “a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets.” [FN44] The Constitution forbade this kind of “government-mandated harm.” [FN45]

In subsequent cases, courts struck down state laws requiring parental notice or consent if their children sought contraceptives. In Planned Parenthood Association v. Matheson, [FN46] a federal district court recognized that teenagers' “decisions whether to accomplish or prevent conception are among the most private and sensitive,” [FN47] and concluded that “the state may not impose a blanket parental notification requirement on minors seeking to exercise their constitutionally protected right to decide whether to bear or beget a child by using contraceptives.” [FN48] The two most important sources of federal family planning funds in the nation-Title X of the Public Health Service Act of 1970 and Medicaid (Title XIX of the Social Security Act of 1965)-required the confidential provision of contraceptive services to eligible recipients, regardless of their age or marital status. By 1995, condom distribution programs were operating in at least 431 public schools. [FN49]

Gender equity offered yet another front in the battle over children's rights. In recent years, much of the attention on the issue of gender equity has focused on athletics, but equal access to academic opportunity prompted the initial concern. In the late 1960s, high schools typically segregated vocational education classes by sex: girls took home economics, boys took shop. Pregnant students were expelled from school and not welcomed back after they gave birth. Those schools that did allow pregnant girls and teen mothers to remain in school forced them into special programs that emphasized a non-academic curriculum. The basic legal tool for attaining gender equity was Title IX of the Educational Amendments of 1972, which prohibited sex discrimination in any educational program or activity. Athletics quickly became the most visible field of contention. In 1971, 3.7 million boys, and just 294,015 girls participated in high school sports. By 2000, boys' participation had risen to 3.9 million and girls' to 2.7 million, a nearly ten-fold increase. In a 1974 case, a twelve-year-old Ohio girl sued for the right to play on a high school football team. In Clinton v. Nagy [FN50] a federal court found that the school district had failed to show that girls were more prone to injury than boys and that it violated the Constitution to deny a girl the right to compete solely on the basis of her sex. As a result of this and similar decisions, girls increasingly participated in such sports as lacrosse, wrestling, soccer, rugby and ice hockey. [FN51]

One other important area in the struggle over children's rights involved erasing the “stain” of illegitimacy. As recently as the early 1960s, children born outside of marriage were called bastards and had the word “illegitimate” stamped on their birth certificate. In 1968, in the landmark case of Levy v. Louisiana, [FN52] the Supreme Court ruled that the Fourteenth Amendment's guarantee of equal protection extended to the children of unwed parents. After Louise Levy died in a charity hospital in New Orleans, her children, who had been born out of wedlock, attempted to sue her doctor and the hospital for negligence and wrongful death. The Louisiana courts threw out the lawsuit, claiming that out-of-wedlock children had no cause of action for a parent's wrongful death. The Supreme Court reversed this decision. In subsequent rulings the high court declared that states cannot set an “unrealistically short time limitation” on a child's right to sue a father for financial support; nor can they deny children born outside of marriage a share of the inheritance. In addition, the Justices held that states cannot withhold welfare benefits from the children of unwed parents. Once paternity is established, children have a right to their parents' social security payments, health insurance, and child support. Despite these decisions, however, many legal distinctions still exist between children born within and outside of marriage. While most states require an unwed father to support his offspring financially, children of married parents have broader rights to the level and duration of support. In addition, children born outside of marriage do not have a clear right to their father's name or his physical company. [FN53]

A repeated complaint voiced during the massive student protests against the Vietnam war was that if young people were old enough to be drafted by, and possibly die for, their government, they had a right to have a voice in that government's affairs and to participate in the political process. When it extended the Voting Rights Act of 1965, Congress included a provision lowering the voting age to eighteen. In a 1970 decision, the Supreme Court

ruled that while Congress had the power to reduce the voting age in federal elections, it did not have the authority to alter the age in state elections. To end the threat that states might be required to keep separate voter registration lists and hold separate elections, the Twenty-Sixth Amendment to the Constitution, extending the vote to eighteen to twenty-year-olds, was ratified in 1971. [FN54]

The children's rights revolution also extended new legal rights to children with limited English proficiency and with physical or psychological disabilities. In 1959, following the Cuban Revolution and a massive influx of Cuban children into south Florida, Miami's public schools introduced the first bilingual education programs. In 1968, the Great Society inaugurated the first federally mandated programs for bilingual education. The Bilingual Education Act of 1968 (Title VII) provided supplemental funding for school districts that established programs to meet the needs of children with limited English proficiency. Title VII funded 76 bilingual programs its first year, serving students who spoke 14 different languages. In 1974, in Lau v. Nichols, [FN55] the Supreme Court ruled that any school district with students who spoke a language other than English, not just those that received Title VII funds, had to provide English language instruction. Lawyers for Chinese-speaking students in San Francisco successfully argued that the city's schools failed to provide English language instruction to some 1,800 students who spoke no English. [FN56]

For the first time, students with disabilities also received federal support. Among the most radical innovations of the era was the establishment of a legal right to special education. Until the mid-1970s, most states allowed school districts to refuse to enroll students they considered “uneducatable,” while physically disabled students of normal intelligence were routinely grouped with mentally retarded students. Not until 1966 did the federal government provide grants to school districts to provide services to students with disabilities. Two landmark 1971 court cases-Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania [FN57] and Mills v. Board of Education [FN58]-established the principle that states had a constitutional duty to provide a free public education to children with mental or behavioral disabilities. Yet despite more than thirty federal court decisions that upheld the principle that states had to provide these children with an education appropriate to their learning capacities, as late as 1975 almost a million children with disabilities received no education at all, and only seventeen states provided an education to even half of the known physically or mentally disabled children. In 1973, Congress enacted legislation prohibiting any recipient of federal aid from discriminating in offering services to people with disabilities, and empowering individuals to bring lawsuits to end discriminatory practices. Two years later, it passed the Education for All Handicapped Children Act, which required that students with disabilities receive a free public education appropriate to their unique needs. The law required that students be educated in regular classrooms, whenever appropriate, and mandated parental involvement in all decisions regarding students with special needs. [FN59]

A Backlash and a Quest for Balance

The elaboration of children's autonomy rights in the late 1960s and early 1970s prompted resistance and reaction. Fears erupted about teen pregnancy, stranger abductions, juvenile violence, pedophiles, and gang membership. Panics about children's well-being were nothing new; during World War II there was an obsession with latchkey children and a purported explosion in juvenile delinquency and after the war there were panics over youth gangs, and most remarkably, over the supposedly deleterious effects of comic books. Yet there can be no doubt that the panics that spread after 1970 had a greater impact on public perception and policy. Abstinence only sex education, V-chips in television sets, juvenile curfews, school dress codes, graduated drivers licenses, random drug testing of students in extracurricular activities, and zero-tolerance policies represented attempts to

counteract the impact of a permissive culture on young peoples' lives. Since the mid-1970s, courts and legislatures have sought to chart a middle ground between the advocates of children's liberation and children's protection.

In the majority opinion in the Tinker case, Associate Justice Abe Fortas wrote that schools were special places, and that civil liberties had to be balanced against "the need for affirming the comprehensive authority of the states and of school officials, to prescribe and control conduct." [FN60] In subsequent cases, the court sought to define this balance. In the 1975 case of Goss v. Lopez, [FN61] the Supreme Court granted students the right to due process when threatened with a suspension of more than ten days, and declared that a punishment cannot be more serious than the misconduct. But the Justices, fearful of disrupting principals' and teachers' authority, announced that schools needed only to provide informal hearings, not elaborate judicial proceedings. Students did not have a right, the Court ruled, to a hearing for a minor punishment, such as a detention, or if they posed a danger to other students or school property. In other cases, the Justices held that school officials may search student lockers, but only when they have grounds for believing that a specific locker contains dangerous or illegal items, and that they may impose random drug tests, but only on students engaging in extracurricular activities. The Court allowed school authorities to censor school newspapers only when they were sponsored by the school itself. [FN62]

Conclusion

A comparative, international perspective reveals that discussions in the United States about children's rights are surprisingly circumscribed and even impoverished. In Austria, Brazil, Cuba, the Isle of Man, and Nicaragua, sixteen-year-olds can vote in all elections. In Norway, since 1981, children with a grievance can call a government-appointed ombudsperson to receive, investigate, and act on their complaints. In Sweden, at the end of childhood, young adults can receive loans to ensure their financial independence.

It is ironic that the society that invented the concept of children's rights now lags far behind many other countries not only in the provisions that it makes for children's well-being, but even in its ability to imagine children's rights. Unlike many comparable societies, the United States remains much more committed to the privacy and autonomy of the nuclear family and to the notion that children should remain financially dependent upon their parents. Today, the United States is distinctive among advanced post-industrial societies in the prolongation of childhood dependence, especially among middle-class and upper-middle-class children. The high cost of a college education and housing has meant that for many young people, financial dependence persists well into their twenties and even their thirties. In contrast, in many European countries, young people attain financial autonomy at a much earlier age. In many of these countries, college is free and young people receive stipends while they attend a college or university.

The past two hundred years witnessed the emergence of two pivotal ideas. The first was that childhood was a distinctive and vulnerable stage of life that needed to be separated from the adult world. The second was that childhood must be prolonged to properly prepare children for adult roles. Throughout the nineteenth and much of the twentieth century, these ideas served a positive purpose: They ensured that all children benefited from a protected childhood, sheltered from exploitation.

In recent years, I believe it is fair to say, expert legal opinion has tended toward a view that has emphasized young peoples's deficiencies. Research in brain science has been invoked to suggest that children and adolescents are less competent decision makers than adults, that they have a less mature capacity for judgment, a more

unformed character, and greater susceptibility to peer pressure. Yet the history and sociology of childhood, as well as cognitive science, have revealed that young people are, in general, much more competent, resilient, adaptable, and knowledgeable at far earlier ages than we previously assumed (while adults engage in more risky behavior-including binge drinking, unplanned pregnancies, and use of illegal drugs-than do adolescents). [FN63] In pondering the issue of children's rights, we need, I think, to more fully embrace the notion of children's competence, while recognizing that the young are not blameworthy in the same sense as adults, and that young people are engaged in a developmental process in which their personal identity and values are formed through a process of experimentation and exploration.

An emphasis on children's incompetence and immaturity has had many negative consequences. It seems clear, for example, that the desexualization of children and the emphasis on childhood sexual innocence may have made the young more attractive as erotic objects. Meanwhile, our desire to strengthen the boundaries separating childhood and adulthood may have made children more vulnerable, not less. We lived in a violent, sex-saturated, highly commercialized society where even young children are exposed to temptations, pressures, stresses, and choices greater than their parents or grandparents faced; a prepared childhood, I would assert, is a better preparation for such an environment than a sheltered childhood. At the same time, our society's rigid age segregation makes it more difficult for young people to demonstrate their growing maturity and intensifies their feelings of marginality.

Far from being a static and unchanging concept, children's rights has been dynamic, flexible, and varying. The challenge we face today as we seek to formulate a notion of children's rights appropriate to our own time is to strike a much better balance between a conception of childhood as a period of growth and development (words than are much more accurate than immaturity and incompetence) and one that emphasizes young peoples' capacity for agency, responsibility, self-knowledge, and judgment. Rather than viewing childhood in opposition to adulthood, we need to foster those qualities that we associate with adulthood.

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[FN2]. Annette Appell, An Exploration of the Relationships Between Children's Rights and Justice (paper presented at the annual meeting of the Law and Society, J.W. Marriott Resort, Las Vegas, Oct. 5, 2006), available at http://www.allacademic.com/meta/p17922_index.html; Barbara Bennett Woodhouse, Children's Rights, in Youth and Justice (Susan O. White ed., 2001), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=234180.

[FN3]. Michael Grossberg, Children's Legal Rights? A Historical Look at a Legal Paradox, in Children at Risk in America: History, Concepts, and Public Policy 111 (Roberta Wollons ed., 1993); Michael Grossberg, A Protected Childhood: The Emergence of Child Protection in America, in American Public Life and the Historical Imagination 213 (Wendy Gamber et al., eds., 2003).

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for the advocate's own vision of those interests, unconstrained by clients?” Robert Mnookin, In the Interests of Children: Advocacy, Law Reform, and Public Policy 43 (1985).

[FN5]. Mintz, supra note 1, at 162.

[FN6]. Mintz, supra note 1, at 163.

[FN7]. Mintz, supra note 1, at 163.

[FN8]. Mintz, supra note 1, at 163.

[FN9]. Mintz, supra note 1, at 163.

[FN10]. Mintz, supra note 1, at 163.

[FN11]. Mintz, supra note 1, at 163-64.

[FN12]. Mintz, supra note 1, at 163-64.

[FN13]. Mintz, supra note 1, at 155-62.

[FN14]. Mintz, supra note 1, at 157-59.

[FN15]. Mintz, supra note 1, at 157-58.

[FN16]. Mintz, supra note 1, at 159-60.

[FN17]. Mintz, supra note 1, at 159-60.

[FN18]. Mintz, supra note 1, at 161-62.

[FN19]. Mintz, supra note 1, at 167-73.

[FN20]. Kriste Lindenmeyer, “A Right to Childhood”: The U.S. Children's Bureau and Child Welfare, 1912-1946 (1997).

[FN21]. Michael Willrich, City of Courts: Socializing Justice in Progressive Era Chicago (2003).

[FN22]. Philip R. Reilly, The Surgical Solution: A History of Involuntary Sterilization in the United States (1991).

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[FN24]. Kriste Lindenmeyer, The Greatest Generation Grows Up: American Childhood in the 1930S (2005).

[FN25]. Minersville School Dist. v. Gobitis, 310 U.S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375, 127 A.L.R. 1493 (1940) .

[FN26]. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, 147

A.L.R. 674 (1943).

[FN27]. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976).

[FN28]. Planned Parenthood, 428 U.S. at 74.

[FN29]. Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

[FN30]. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

[FN31]. Carey v. Population Services, Intern., 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675, 2 Media L. Rep. (BNA) 1935 (1977).

[FN32]. Mintz, supra note 1, at 328-29.

[FN33]. Burnside v. Byars, 363 F.2d 744, 746 (5th Cir. 1966).

[FN34]. Burnside, 363 F.2d at 747.

[FN35]. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

[FN36]. Tinker, 393 U.S. at 508.

[FN37]. Tinker, 393 U.S. at 511.

[FN38]. John W. Johnson, The Struggle for Student Rights: Tinker v. Des Moines and the 1960S (1997).

[FN39]. Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

[FN40]. Gault, 387 U.S. at 28.

[FN41]. Mintz, supra note 1, at 330-31.

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[FN43]. Carey, 431 U.S. at 693.

[FN44]. Carey, 431 U.S. at 715.

[FN45]. Carey, 431 U.S. at 716.

[FN46]. Planned Parenthood Ass'n of Utah v. Matheson, 582 F. Supp. 1001 (D. Utah 1983).

[FN47]. Matheson, 582 F. Supp. at 1008 (internal quotation marks omitted).

[FN48]. Matheson, 582 F. Supp. at 1008.

[FN49]. Mintz, supra note 1, at 331.

[FN50]. Clinton v. Nagy, 411 F. Supp. 1396 (N.D. Ohio 1974).

[FN51]. Mintz, supra note 1, at 332-33.

[FN52]. Levy v. Louisiana, 391 U.S. 68, 88 S. Ct. 1509, 20 L. Ed. 2d 436 (1968).

[FN53]. Mintz, supra note 1, at 333.

[FN54]. Mintz, supra note 1, at 333-34.

[FN55]. Lau v. Nichols, 414 U.S. 563, 94 S. Ct. 786, 39 L. Ed. 2d 1 (1974).

[FN56]. Mintz, supra note 1, at 323-24.

[FN57]. Pennsylvania Ass'n for Retarded Children v. Com. of Pa., 343 F. Supp. 279 (E.D. Pa. 1972).

[FN58]. Mills v. Board of Ed. of Dist. of Columbia, 348 F. Supp. 866 (D.D.C. 1972).

[FN59]. Mintz, supra note 1, at 324.

[FN60]. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 508, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

[FN61]. Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975).

[FN62]. Mintz, supra note 1, at 331-32.

[FN63]. Mike Males, This Is Your (Father's) Brain on Drugs, N.Y. Times, Sept. 17, 2007, available at http://www.nytimes.com/2007/09/17/opinion/17males.html.
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