

CHILDREN'S OPPRESSION, RIGHTS, AND LIBERATION

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This paper advances a radical and controversial analysis of the legal status of children. I argue that the denial of equal rights and equal protection to children under the law is inconsistent with liberal and progressive beliefs about social justice and fairness. I first situate children's legal and social status in its historical context, examining popular assumptions about children and their rights, and expose the false necessity of children's current legal status. I then offer a philosophical analysis for why children's present subordination is unjust, and an explanation of how society could be sensibly and stably arranged otherwise. My first conclusion from this analysis is that age-based classifications should not be presumed to be rational. From this point, the paper suggests an argument for treating children as a suspect class for the purposes of equal protection analysis. The paper further advances the claim that many of the ways children are legally discriminated against implicate their fundamental rights, and that many age-based classifications should therefore be subject to strict scrutiny and found unconstitutional. I then go on to analyze specific legal issues such as voting rights, corporal punishment, runaway children, and due process in juvenile justice using these considerations.

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INTRODUCTION

That it is wrong for adults to harm children in ways that exceed the socially prescribed norms of adult-child interaction seems uncontroversial. It is extremely controversial, however, to consider how the socially prescribed and state enforced relationships between children and adults may contain constant, normalized harms. This paper will examine and expose how the legal status of children in society is an oppressed, subjugated one, and why this exceptional oppression is inconsistent with prevailing notions of social justice and equal protection under the law.

It is common to describe equal rights, liberties, and protection under the law as principles necessary for social justice, democracy and human dignity. Equally it is common to take for granted that equal civil and political rights are necessary and desirable only for mature adults and need not be extended to children. The law denies children the rights of citizens, such as the right to vote,¹ to full due process,² and even to effective constitutional protections against cruel and unusual punishment,³ and further denies children the basic rights of persons to be free to live their own lives. Instead, children are subject to their parents' will with regard to their living conditions,⁴ personal conduct,⁵ domicile,⁶ education,⁷ and religion.⁸ The legal status of minority under the dominion of a child's parents is one of custody⁹ not liberty, but this almost property-like status is said to be for children's benefit.¹⁰ This paper aims to challenge the justifications for the legal subordination of children and to make at least plausible, the possibility that society could be organized differently.

The first hurdles to overcome are the socially ingrained assumptions about the basic nature of children and the false necessity of the legal and social disadvantages thought to naturally follow. I will argue instead that those legal disadvantages constitute socially and political contingent policy choices. The inferior legal status of children is often taken to be

¹ See *Oregon v. Mitchell*, 400 U.S. 112 (1970).

² See *McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (1971).

³ See *Ingraham v. Wright*, 430 U.S. 651, 657, 682 (1977).

⁴ See generally 65 AM. JUR. *Trials* 127 (2010) (Relocation of Children by the Custodial parent.)

⁵ So-called "incurability" laws may be a statutory basis for state intervention to force children to obey their parents, though this varies from state to state. See 43 C.J.S. *Infants* § 15.

⁶ See 65 AM. JUR. *Trials* 127 § 49 (2010) (Relocation of Children by the Custodial Parent).

⁷ For an extreme example, see *Wisconsin v. Yoder*, 406 U.S. 205, 231-34 (1972).

⁸ See *id.*

⁹ See *Schall v. Martin*, 467 U.S. 253, 266 (1984).

¹⁰ See HOWARD COHEN, *EQUAL RIGHTS FOR CHILDREN* 11 (1980).

natural as it is assumed to be a direct and necessary result of their inferior mental capacities.¹¹ Far from being demeaning or exploitive, children's lack of an equal right to liberty and equality under the law is said to protect them and enable proper development.¹² Since these legal disadvantages are socially construed as protective of children or arising from childhood innocence, they escape the critical scrutiny that identical disadvantages would draw if applied to other groups.

This paper will call for a paradigm shift away from this type of thinking and argue that the law should abolish age as a requirement for equal civil rights. Rather than assuming children do not generally need equal civil rights, I argue that the state should extend the same rights to children as are extended to adults by default—shifting the burden onto the state to demonstrate why particular children should be treated differently.

This paper is composed of three parts. The first two parts challenge the presumption that age-based classifications for rights, privileges and legal disabilities are rational, so as to shift the burden of persuasion against the status quo; the third part addresses how the law should treat children absent this presumption. In the first part of the paper, I will attempt to problematize common assumptions about children, their abilities and their role in society, by comparing the arguments advanced against children's rights to arguments that have been advanced against other historically oppressed populations. In the second part, I will attempt to build a philosophical framework for thinking about children's rights, how they might exercise rights competently and how society might function with emancipated children. In the third part, I will apply the skepticism about children's status introduced in Part One, and the argument for children's liberation advanced in Part Two, to analyze children's current legal status. In light of the conclusion that discrimination on the basis of age should not be treated with a presumption of rationality, most laws that restrict children's rights should be rejected on equal protection grounds.

This paper intends to offer a critique against the most common (or even "common sense")¹³ general guiding perspective on children's rights, that assigning rights and privileges according to age is consistent with a liberal democratic view rights. I argue for an alternative outlook, one that recognizes that while many (though not all) of the motives for

¹¹ See JOHN STUART MILL, ON LIBERTY (1869) (advancing this view); Hillary Rodham, *Children Under the Law*, 43 HARV. ED. REV. 489 (1973) (considering this view while dissenting from it); LAURA M. PURDY, IN THEIR BEST INTERESTS, THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN 211 (1992) (advancing this view); HOWARD COHEN, EQUAL RIGHTS FOR CHILDREN 11 (1980) (describing this view as a presumption).

¹² See MILL, *supra* note 11.

¹³ See LAURA M. PURDY, IN THEIR BEST INTERESTS, THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN 211 (1992).

legally distinguishing adults from children are legitimate, age is not generally a relevant or fair classification within a liberal rights framework. In fact, age is almost always both an over and under inclusive proxy for the characteristics relevant to legitimate state interests, and as such is neither a precise nor a just basis on which to allocate rights. As a result, this paper does not attempt to definitively address every legal difference between adults and children, but instead to provide an alternative framework with which to approach these current legal differences.

At the outset, it is important to clarify what possessing a right means for the purposes of this paper. To possess a legally protected right does not of course mean that the right's holder *must* exercise that right.¹⁴ Infants and toddlers so young that they cannot communicate their wishes coherently are physically unable to exercise many rights that adults enjoy or make their choices known, so for these very young children, possessing rights may not have many functional effects.¹⁵ Adult citizens have the right to vote, except when deprived of it by due process of law, but many are unable to exercise their right,¹⁶ and many more choose not to. Similarly, people may have a right to various state entitlements without deciding to claim them. To possess a right then, does not necessarily entail actually exercising that right. Rather, to possess a right means that others may not legally prevent the rights holder from exercising their right by force. For example, in cases where a trauma patient is unconscious and therefore unable to communicate their desires, physicians must act according to what a reasonable patient would most likely wish.¹⁷ This does not mean that trauma patients lack the right to refuse treatment: if they are able to communicate their wishes, they cannot be forced to undertake treatment against their will absent a legal finding of incompetence, even if their doctors believed it to be in their

¹⁴ For example, Cohen writes "We are, correctly, reluctant to say that a right has been violated in the absence of some indication that the person in question tried to claim it. To have a right to something does not mean that you are required to do it or have it; it means that you are entitled to it if you claim it." HOWARD COHEN, EQUAL RIGHTS FOR CHILDREN 71 (1980).

¹⁵ "Children who are unable to claim their rights will not get what they are entitled to . . . very young [children]—say under four years of age—and not developed enough to even make the kinds of claims we are referring to here. All we need to say in these cases is that when these children are developed enough to make their claims, they will be entitled to do so. That is why the difference [between granting and withholding rights] is not semantic." *See id.* at 71-72.

¹⁶ Even psychiatric patients and mentally retarded people have a technical right to vote even if they cannot exercise it, *see* PENN. ADVISORY COMM. TO THE UNITED STATES COMM'N ON CIVIL RIGHTS, THE LAST SUFFRAGE FRONTIER: ENFRANCHISING MENTAL HOSPITAL RESIDENTS I (June 1978) (As cited in Ben O'Meara, *Children and the Most Essential Right*, working paper, NATIONAL YOUTH RIGHTS ASSOCIATION).

¹⁷ *See* 61 AM. JUR. 2D *Physicians, Surgeons, Etc.* § 167.

‘best interest.’¹⁸ Similarly I will not argue that children *must* assume the decisions that adults routinely make, but that they should not be prevented from doing so by the law.

It is also important to clarify that this paper is primarily concerned with children’s codified *legal* status, arguing that this status is inconsistent with a liberal belief in equal individual rights under the law. It would of course be valuable to consider much more radical critiques of children’s uncoded *social* status. There is also interesting work to be done challenging liberal individual rights discourse as a whole, rather than accepting its basic assumptions while questioning the way it is applied to children as I do in this paper. However I believe that before more radical approaches to children’s status will be widely considered, it is first necessary to problematize the status of children from within existing liberal thinking on legal rights. Just as second and third wave feminists were able to challenge women’s social roles and question the applicability of basic liberal thought on gender only after the suffragettes won basic legal rights—while children’s legally codified oppression is almost universally regarded as unproblematic, we must delegitimize this prevailing legal regime before we can debate more complex social questions.

Recognizing that the systematic discrimination against children in the law is a great injustice does not entail a belief that this discrimination is motivated by any personal prejudice or animus against children. Most adults have an overwhelming sense of sympathy and affection for children. An institution can be institutionally racist and produce consistently racist results that privilege one race against another, even without a single member of its hierarchy acting with racial animus or thinking racially prejudicial thoughts.¹⁹ Similarly, despite all good intentions, society is institutionally oppressive to children while privileging adult wishes, desires and interests.²⁰

¹⁸ To treat a patient without express permission in an emergency is lawful, as consent is taken to be implied, but to treat a patient who objects, *even in an emergency*, is a battery absent narrow exceptions. *See id.*

¹⁹ *See* Judith Lichtenberg, *Racism in the Head, Racism in the World*, in PHILOSOPHICAL DIMENSIONS OF PUBLIC POLICY 91, 91 (Verna V. Gehring and William A. Galston eds., 2003). *See also* Daria Roithmier, *Locked In Segregation* 12 VA. J. SOCIAL POL’Y & L. 197 (2004), Daria Roithmier *Them that Has, Gets*, 27 MISS. C. L. REV. 373 (2008) (for example, institutions that advantage people with preexisting multigenerational wealth will continue to favor racial groups with preexisting wealth even without anyone consciously deciding to favor those groups.)

²⁰ Some might protest at this point that society is very “child centered” and that many or even most families’ decisions revolve around the needs of their children. Of course parents and other adults caring for children often go to great lengths to accommodate their children’s desires and wishes. But they do not *have* to—they could choose not to without any legal ramifications. Parents could choose to ignore their children’s wishes and many do. Children do not have the option to simply leave, to

This oppression occurs without any maliciousness; quite the opposite, it is perpetrated out of concern for the best of children. Paternalistic appeals to the “best interests” of legal subordinates in order to justify that subordination is not unique to children. Similar arguments were advanced to justify the power of slave owners over slaves,²¹ and the power of husbands over wives.²² Whatever differences may exist between white and black people and between men and women, we find these paternalist arguments repulsive not merely because we disagree as an empirical matter that slavery and coverture were in the best interests of black people and married women, respectively, but because we recognize that equality under the law and civil liberties are intrinsically valuable to people.²³ The loss of liberty and equality under the law constitutes a loss of personal dignity that trumps any paternalistic appeals to the ‘*real*’ best interests of subordinated peoples.²⁴ For this reason and others, to deny equal rights on the basis of irrelevant differences such as race and sex offends our sense of social justice.²⁵ This paper seeks to show that despite the real and significant differences between most adults and most children, these differences do not logically entail discrimination

disregard their parent or guardians wishes. In this way, while children’s wishes and desires are often met, they are not legally privileged—their parents and guardians are.

²¹ Slavery was actually argued for this way. John C. Calhoun in a speech to the Senate in 1837 declared that “the African slave, kindly treated by his master and mistress and looked after in his old age, is better off than the free laborers of Europe” CHARLES A. BEARD & MARY R. BEARD, HISTORY OF THE UNITED STATES, (Project Gutenberg, 2005) (1921) available at http://www.gutenberg.org/files/16960/16960-h/16960-h.htm#Page_316. Arguing for slavery, George Fitzhugh wrote “He the Negro is but a grown up child, and must be governed as a child, not as a lunatic or criminal. The master occupies toward him the place of parent or guardian. We shall not dwell on this view, for no one will differ with us who thinks as we do of the negro's capacity, and we might argue till dooms-day in vain, with those who have a high opinion of the negro's moral and intellectual capacity The negro slaves of the South are the happiest, and, in some sense, the freest people in the world. The children and the aged and infirm work not at all, and yet have all the comforts and necessaries of life provided for them,” LESLIE H. FISHEL, JR. & BENJAMIN QUARLES, THE BLACK AMERICAN, A DOCUMENTARY HISTORY, (3rd ed. 1976), available at <http://www.pbs.org/wgbh/aia/part4/4h3141t.html>.

²² For example, Blackstone writes “THE husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehavior, the law thought it reasonable to entrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children; for whom the master or parent is also liable in some cases to answer THESE are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favorite is the female sex of the laws of England.” WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, ch. 15 (1769) available at <http://www.lonang.com/exlibris/blackstone/bla-115.htm>.

²³ See PAUL SPICKER, LIBERTY, EQUALITY, FRATERNITY 76 (2006).

²⁴ See HOWARD COHEN, EQUAL RIGHTS FOR CHILDREN viii, 11, 12 (1980).

²⁵ See *id.*, at 15-16, 44-45.

against children, and the denial of equal rights to children is similarly arbitrary and unjust.

This position will strike many as leading to deeply counter-intuitive conclusions that are inconsistent with many people's moral impulses about how children ought to behave and how they should be treated.²⁶ I would invite readers to engage in what Peter Singer called the "chief task of philosophy," to "question the basic assumptions of the age."²⁷ In the first part of this paper, I will argue that our intuitions are not however formed in a vacuum, nor do they necessarily provide any deep insight into justice or fairness.²⁸ Instead our intuitions are shaped and informed by our social conditioning, including the prevailing societal hierarchies and the ideology that sustains them. In the mid 18th century, many people's intuition would have been that women and non-white people should similarly be subject to the control of other private individuals (husbands and slave owners, respectively) for their own benefit, and at the time many would have likely found it counter-intuitive to call for their emancipation and equal rights under the law. To do so would have flown in the face of everything many people at the time *thought* they knew about women and non-white people. The initial impulse to dismiss calls for children's liberation as counter-intuitive should therefore not be accepted uncritically. Those with relative social power and status are historically not reliable judges of the interests, capabilities or needs of socially marginalized and oppressed people when it comes to altering the social hierarchy.²⁹

In the second part of this paper, I will attempt to show how a demand for children's equal rights could be made credible by combining two approaches advocated by Howard Cohen and Eileen McDonagh. Cohen offers an explanation of how children can enjoy adult rights without adult capabilities by "borrowing capacities" and employing "child agents."³⁰ Eileen McDonagh offers an explanation of how we can reframe rights discourse from discussion of "decisional autonomy," or of freedom of choice without state interference, into a discussion of "bodily integrity," or basic rights against other private parties.³¹ In doing so, this

²⁶ I credit Prof. Judith Lichtenberg for raising the objection that the conclusion of this paper is counter-intuitive.

²⁷ Peter Singer, *All Animals are Equal*, in ANIMAL RIGHTS AND HUMAN OBLIGATIONS, 148, 156 (Tom Regan & Peter Singer eds., 1976).

²⁸ For some general arguments for and against the evidentiary value of intuitions in philosophy, see Alan Goldman, *Philosophical intuitions: Their target, their source, and their epistemic status*. 74 GRAZER PHILOSOPHISCHE STUDIEN 1 (2007).

²⁹ See Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV., 563, 588-89 (1982) (describing how upper class males historically believed the hierarchy they imposed was in the interests of subordinate people).

³⁰ See HOWARD COHEN, EQUAL RIGHTS FOR CHILDREN 74-91 (1980).

³¹ See EILEEN L. MCDONAGH, BREAKING THE ABORTION DEADLOCK 4 (1996).

section will lay out philosophical foundations that lends credibility to the legal analysis advanced in the third part of this paper, by undermining the presumption that age-based classifications are socially necessary.

In the third part, building off of and extending a position originally made by Hillary Rodham,³² this paper will argue that age-based laws should not be treated as presumptively rational; instead children should be given the status of a suspect class. Expanding from this position, I will argue that while many age-based statutes and common law rules have some rational basis in legitimate state interests, they are neither necessary to accomplish those legitimate interests, nor are they narrowly tailored to meet them. Where there are specific, identifiable relevant differences between most adults and most children that impact their ability to competently exercise rights, the law ought to discriminate, if at all, on the basis of those identifiable relevant differences, rather than employing age as a proxy for those differences. To this end, I will argue that competence and ability based criteria should be used in place of age for making legal distinctions between people when those distinctions are in fact necessary. Where those competences and abilities that supposedly distinguish adults from children for the purposes of holding rights are impossible to articulate or evaluate, then the distinction currently drawn is unlikely to serve any legitimate public interests, and is likely purely discriminatory.

For example, driving under a certain age (normally sixteen) is illegal, because age is taken to be a proxy for driving ability. This proxy however is necessarily over and under inclusive as many people under the age limit will drive more competently than those over the age limit. It is also unnecessary, because driving tests can be precisely tailored to assess driving ability, thereby eliminating incompetent drivers both under and over the any current age limits. In this way, children and adults could be made equal before the law, while the legitimate purpose of the current legal distinction, to insure a minimum standard for safe driving, is preserved. In contrast, that so called "corporal punishment" is legally permissible against children but illegal against adults, cannot be justified according to any meaningful differences between adults and children—it advances no compelling public interest and only serves to oppress children.

I. THE IMPACT OF THE ADULT/CHILD SOCIAL HIERARCHY

In the first part of this paper, I will address the assumptions implicit in one of the central objections to children's equal rights, namely, that children are incapable of possessing or exercising them. It is said that if we were to allow children equal rights, they would harm themselves

³² See Hillary Rodham, *Children Under the Law* 43 HARV. EDUC. REV. 487 (1973).

and³³ they would be incapable of acting responsibly.³⁴ But with the exception of very, very young children who cannot communicate their desires specifically and effectively, children are in a literal sense able to consent and make choices: they express refusal or assent.³⁵ The claim then is not really that children are incapable of making choices, but that their parents or the state ought to be able to prevent them from making bad choices—bad choices that would likewise be bad choices for adults, but which would be permissible for adults to make.³⁶ In other words, our paternalist impulse to protect someone from themselves for what we take to be their *true* best interests trumps our desire to respect that person’s ability³⁷ to make choices for themselves for children in circumstances where it would not for other adults. The following sections will consider why this might be the case and if this position is defensible.

A. Denying Children Rights Finds Historical Parallels in the Resistance to Earlier Liberation Movements

In this section, I will attempt to draw parallels between the contemporary assumptions against favoring equal rights and liberty for children, and the way those in previous generations have argued against equal rights and liberty for women and black people. This section will first outline the similarities between the ideological basis for the historical subordination of women and black people, and the current

³³ See COHEN, *supra* note 14 at 65.

³⁴ See *id.*

³⁵ Informed consent will of course depend on the specifics and what one defines as sufficiently “informed” – but then adults often make decisions with less than optimal information and “informed consent” will always be a threshold degree of information since perfect information is impossible. It also of course depends on what one takes to be relevant information to any given choice. Given this what satisfies an “informed consent” criteria will always depend on the subjective value judgments of the person or tribunal making the determination. It is therefore not an especially compelling argument to defeat the evident fact that children can and do express consent that they fail to express hypothetical informed consent, since a similar objection could be raised against any adult’s expression of consent. Without a clear defined criteria for informed consent (possible only in the context of specific situations) it is, at least on an analytic level rather than a visceral reaction, arbitrary to simply pronounce children incapable of informed consent and adults potentially capable of it. When considering specific scenarios where consent may be sought, and then defining a criteria of information and comprehension sufficient for informed consent – it is almost impossible to imagine a case where all legal children would be incapable of giving informed consent but sizable numbers of non-expert adults would be able to do so. This imprecision in age as a proxy for ability will become crucial to the arguments advanced later in this paper.

³⁶ Of course there is also the possibility that children can make bad choices that are legally *impermissible* for adults as well as for children – but these cases are not of concern to an advocate of equal rights for children since they are options that adults likewise do not have a right to choose.

³⁷ If someone is only allowed to “choose” the “right” choice and disallowed from “choosing” the wrong choice, then there is no choice present at all.

subordination of children. This section will then turn to the contemporary critique of race and gender characteristics and stereotypes as social constructs, and racial and gender hierarchies as results of material conditions rather than biological necessity. This exercise will invite the reader to engage in greater skepticism about how much of the characteristics attributed to children may be socially constructed by and contingent on the prevailing social hierarchy.

The legal, political, scientific and media discourse prevalent in previous generations promoted the idea that race and gender are biologically determinate categories with biologically determined attributes, characteristics, and social roles.³⁸ Historically, many anthropologists and psychologists believed they had found physical evidence that non-white people had an inferior capacity for reason and rationality.³⁹ These supposed differences fit into an imperialist ideology of a 'white man's burden' that justified the systematic oppression of indigenous peoples through-out the world.⁴⁰ Black people were said to be intellectually and morally inferior to white people and as a result, unable to take care of themselves without the supervision of their white slave owners.⁴¹ The myth of a biological basis for male domination over women has persisted for even longer.⁴² Both those who defended the historical relegation of women to second class citizen status under the law and the contemporary anti-feminist backlash have relied on a belief (often backed by superficially scientific-looking evidence of the inferior female mental capacities) that men are more capable, at least on average, of fulfilling a variety of important social rules than are women.⁴³ Anti-Suffragette propaganda held that women's minds were not suitable for politics or public life.⁴⁴ These supposed mental differences were said to

³⁸ See MICHAEL KIMMEL, *THE GENDERED SOCIETY* 21-22 (4th ed., 2011).

³⁹ For a famous example of relatively recent scientific racism, see generally RICHARD HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1996).

⁴⁰ For recent discussion of this, see generally Gretchen Murphy, *Shadowing the White man's Burden: U.S. Imperialism and the Problem of the Color Line* (2010).

⁴¹ See FISHEL, Jr. *supra* note 21.

⁴² See MICHAEL KIMMEL, *THE GENDERED SOCIETY* 21-22 (4th ed., 2011); JANET SAYERS, *BIOLOGICAL POLITICS: FEMINIST AND ANTI-FEMINIST PERSPECTIVES* 1-4 (1982).

⁴³ For example, in the late 19th century, a "distinguished nerve and brain specialist" Dr. William A. Hammond wrote "A Woman's brain evolves emotion rather than intellect and whilst this feature fits her admirably as a creature burdened with the preservation and happiness of the human species, it painfully disqualifies her for politics;" Illinois Association Opposed to the Extension of Suffrage to Women, *Address to the Voters of the Middle West*, 15 (1900) as cited in Nicole Herz, *Opposition to Female Suffrage in the United States*, 4, *THE CONCORD REV.* 74 (1992). As Herz puts it "In this widespread view, women's 'mental inferiority' was not only social perception, it was science! The anti-suffragist argument therefore identified femininity with inherent irrationality, a trait fully inconsistent with the proper exercise of suffrage," *id.* at 79.

⁴⁴ See *id.*

causally explain why women were excluded from politics.⁴⁵ This reasoning was also used to normatively justify female exclusion from politics as a necessary consequence of having to protect women in general and from the burdens of public responsibility in particular.⁴⁶

In addition to the paternalistic justifications for white dominance over black people and male dominance over women—arguments that fit the pattern of “group A must have legal power over group B for the best interests and protection of group B”—the white chauvinist and male chauvinist ideologies also employed a somewhat different normative justification: an appeal to the good of society, where the subordination of black people and women was said to be necessary for society to function. Defenders of slavery for instance claimed that the institution of slavery was necessary for a functioning society and economy.⁴⁷ Similarly, the subordination of women to their husbands was widely held to be necessary for the stability and wellbeing of the family, and hence, society at large.⁴⁸ In both instances, the biological differences between subordinate and dominant demographic groups was said to both causally explain the social relations of domination and subordination, while also providing a normative justification for why those social relations were good, natural, and desirable.

Today, the subordination of children to adults in general and their parents in particular is similarly seen as being both caused and justified by children’s inferior mental faculties. Both the paternalism argument (children must be subordinate for their own good⁴⁹) and the social necessity argument (children must be subordinate for the good of

⁴⁵ *See id.*

⁴⁶ For example *see* HELEN KENDRICK JOHNSON, WOMEN AND THE REPUBLIC 32 (Echo Library, 2009) (1897) (for a late 19th century example of this reasoning).

⁴⁷ James Henry Hammond in a speech to the U.S. Senate said: “In all social systems there must be a class to do the menial duties, to perform the drudgery of life. That is, a class requiring but a low order of intellect and but little skill. Its requisites are vigor, docility, fidelity. Such a class you must have, or you would not have that other class which leads progress, civilization, and refinement. It constitutes the very mud-sill of society and of political government; and you might as well attempt to build a house in the air, as to build either the one or the other, except on this mud-sill. Fortunately for the South, she found a race adapted to that purpose to her hand. A race inferior to her own, but eminently qualified in temper, in vigor, in docility, in capacity to stand the climate, to answer all her purposes. We use them for our purpose, and call them slaves.” James Henry Hammond, Speech to the U.S. Senate, March 4, 1858, *available at*: <http://www.pbs.org/wgbh/aia/part4/4h3439t.html>.

⁴⁸ *See* Lisa Cochran Higgins, *Adulterous Individualism, Socialism, and Free Love in Nineteenth-Century Anti-Suffrage Writing* 21 LEGACY: A J. OF AMERICAN WOMEN WRITERS 193, (2004) (explaining that anti-suffragette writers believed women’s suffrage would destroy the family and cause division between spouses). Unfortunately, these attitudes still have currency on the radical right. *See generally* LAURA DOYLE, THE SURRENDERED WIFE (2001) (for a contemporary rightwing extremist argument in favor of male dominance for family good and social necessity).

⁴⁹ *See* The State v. Rachel Pendergrass, 19 N.C. 365 (1837).

society⁵⁰) are advanced to support the legal disabilities of children. The parallels with “scientific racism” and sexist neurological theories should be obvious: we are frequently told that children and adolescents are mentally inferior due to their underdeveloped brains, and this inferiority renders them incapable of behaving rationally or responsibly;⁵¹ in the past, precisely the same claims were advanced against women and black people.

Many people will instinctively reply that the racists and male chauvinists of nineteenth century were wrong about black people and women, whereas our scientifically superior contemporary society is right about children and adolescents. There are good reasons however not to leap to this conclusion.

A chief way the black civil rights movement and women's rights movement responded to racist and sexist stereotypes was *not* to deny that there are discernable differences between races and genders that might (mistakenly) be called upon to justify social hierarchies, but that social hierarchies themselves produced these differences. In *The Mismeasure of Man*, Stephen J. Gould argues that measurable “intelligence”⁵² does not casually explain the inferior social status of racial minority groups, rather the inferior social status of racial minority groups contributes to their relatively worse average performance on “intelligence” tests;⁵³ the characteristics that racists appealed to in order to causally explain the conditions of white dominance could themselves be causally explained by the fact of living under white dominance.⁵⁴ In *Guns, Germs, and Steel: The Fates of Human Societies*, Jared Diamond argued that Eurasians have been politically dominant over the rest of the world's

⁵⁰ See *id.*

⁵¹ See Daniel Weinberger, Brita Elvevag, & Jay Giedd, *The Adolescent Brain: A Work In Progress*, THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY (Jun. 2005) <http://www.thenationalcampaign.org/resources/pdf/BRAIN.pdf>; Sarah Spinks, *Adolescent Brains are Works in Progress, Here's Why* FRONTLINE <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/adolescent.html>; *Secrets of the Teen Brain* 163 Time 56 (May 2004). There is a highly persistent myth that myelination is only “complete” in young adulthood, therefore fundamentally distinguishing the immature adolescent brain from the completed adult brain—this model is in reality completely untrue. In reality myelin and cholesterol levels continue to increase until they “peak” in the “fourth decade of life”—after which they decline; George Bartzokis, *Age-related myelin breakdown: a developmental model of cognitive decline and Alzheimer's disease* 25 NEUROBIOLOGY OF AGING 5, 9 (2004). It is therefore simply inaccurate to say that the brain “reaches maturity” at a certain point in the early to mid twenties as it is often alleged – in reality human brains continue to develop and change until death. See *id.*

⁵² Gould also disputes the claim that there is such a thing as “general intelligence” or that it is what IQ tests measure. See generally STEPHEN J. GOULD, *THE MISMEASURE OF MAN* (1996).

⁵³ *Id.*; see also JARED M. DIAMOND, *GUNS GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES* 20 (1999).

⁵⁴ See *id.*

population not because of some biological, cultural, intellectual or moral superiority, but because of their geographic advantages; resources like horses, metals, and sufficiently large populations to develop disease resistance structurally advantaged them against populations who lacked those resources.⁵⁵

Similar explanations have also been advanced for gender differences and hierarchies. The cultural materialist anthropologist Marvin Harris argued that patriarchal, male dominant family arrangements arose when agricultural societies developed livestock driven iron plows: men were better equipped for this type of more efficient farming that became economically dominant, and so their social dominance followed from their control of the most efficient means of production.⁵⁶ In *The Dialectic of Sex* (1970), Shulamith Firestone offers a different explanation where she argues that while the physical differences between male and female roles in reproduction explain how male dominance developed⁵⁷—the feminine character traits cited as reasons why male dominance should persist are themselves products of female oppression.⁵⁸

The purpose of these arguments is not to show that it is impossible to explain the status of subordinated demographic groups in reference to their biological differences.⁵⁹ Rather, it is to demonstrate that there are social structural or material explanations that can also account for the social hierarchy and the perceived differences between demographic groups. Given two possible explanations—one sociological, the other biological—where the variables are impossible to control for (we cannot take a child and put him or her in some other experimental social arrangement, nor can we put an adult in a social position identical to a child in our society)—there is no way for us to determine how much of

⁵⁵ See generally, JARED M. DIAMOND, GUNS GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES 25-26 (1999).

⁵⁶ See generally, MARVIN HARRIS, CULTURE, PEOPLE, NATURE: AN INTRODUCTION TO GENERAL ANTHROPOLOGY (1997).

⁵⁷ See SHULAMITH FIRESTONE, THE DIALECTIC OF SEX 8-9 (1970).

⁵⁸ *Id.* at 10.

⁵⁹ Some might object that there is really no comparison between race and childhood/adulthood because race is not biological, it is wholly a social construct. The comparison is actually very appropriate. Although *discrete races* do not exist in nature as neat and naturally organized categories, the traits that people use to recognize and attribute the social status of “race” do relate to genetic clines – of course it is only social discourse that gives these clines racial and therefore social significance. See generally Loring Brace et. al., *Clines and Clusters versus “race:” a test in ancient Egypt and the case of a death on the Nile*, 36 AM. J. PHYSICAL ANTHROPOLOGY 1 (2005). A more controversial argument along these lines has also been advanced with regard to sex and gender, see generally JUDITH BUTLER, GENDER TROUBLE (1990). Similarly, people change over time as they grow older (and different individuals change in different rates and in different ways and there is tremendous variability and overlap) but the discreet demarcations of ‘child’ and ‘adult’ are similarly socially imposed – there is nothing natural about 18 or 21 as a dividing line between two fundamentally different types of people; See JOHN HOLT, ESCAPE FROM CHILDHOOD, 25 (1974).

children's *childishness* is the result of their innate attributes and how much is the result of their social position.

What does it really mean when we say that a child's brain is "still developing"? This is often construed to suggest that the changes that go on in a child's brain over time are teleological in nature—they begin at a low level of development and lead to the end point of a superior adult level of development, so we only give people adult rights and responsibilities once they have fully reached that superior level. This narrative however has minimal scientific support. The reality is that there is no fixed adult level of brain development where brains plateau—rather brains continue to change over the course of someone's lifetime.⁶⁰ Myelin levels in the brain, often cited as 'proof' that the teenage brain is still developing, not only continue to increase through teenage years, but well into middle age, at which point they decline.⁶¹

Psychologist Robert Epstein surveyed the literature on adolescent neurology studies and concluded that they were misrepresented in the popular press in several ways: the changes observed continue to take place through our lives,⁶² and research has thus far only shown correlations between behavior and neurology, but has not demonstrated causality, and it is well known that experience can alter brain anatomy,⁶³ and studies are often simply misrepresented and overstated.⁶⁴ Epstein notes that while all of our behavior, thoughts and feelings are in some way reflected physically in our brains, it does not follow that something particular about our brains is the cause of those actions or emotional states.⁶⁵ According to Epstein, environments, studying, diet, exercise, stress, and many other activities alter the brain—so if adolescents have problems, pointing to brain differences does not show that their brains caused the problems as the problems could cause the brain differences.⁶⁶ There are also numerous differences between child and adult mental capacities where children actually have superior mental abilities. Visual acuity peaks at the onset of puberty, and incidental memory abilities peak near twelve years old before declining,⁶⁷ so young people actually have

⁶⁰ See George Bartzokis, *Age-related myelin breakdown: a developmental model of cognitive decline and Alzheimer's disease* 25 *NEUROBIOLOGY OF AGING* 5, 9 (2004).

⁶¹ *See id.*

⁶² See Robert Epstein, *The Myth of the Teen Brain*, *SCI. AM. MIND*, Apr. 2007, at 60.

⁶³ *See id.* at 60-61. It is well known that many structural differences in the brain detectable with neural-imaging arise from social influences. *See, id.* at 60. For example, talk therapy has been shown to observably change the brains of patients in therapy, just as drugs can, *see* Richard A. Friedman, *Behavior; Like Drugs, Talk Therapy Can Change Brain Chemistry* *N.Y. TIMES*, (Aug. 27, 2002), available at <http://www.nytimes.com/2002/08/27/health/behavior-like-drugs-talk-therapy-can-change-brain-chemistry.html?pagewanted=1>.

⁶⁴ See Robert Epstein, *The Myth of the Teen Brain*, *SCI. AM. MIND*, Apr. 2007, at 62.

⁶⁵ *See id.* at 60.

⁶⁶ *Id.* at 61.

⁶⁷ *Id.* at 63.

an organic advantage in learning new things.⁶⁸ Intelligence researchers J.C. Raven and David Wechsler using different intelligence tests found that “raw intelligence” scores peak between age thirteen and fifteen and decline through life.⁶⁹ Needless to say these differences between child and adult mental capacities have not been prominent in political and media discourse about children’s capacities and rights.

The focus on the difference between adults and children ignores what is at stake from a social justice perspective in according children equal rights. Even to the extent that there are significant natural differences in capacity between most adults and most children, these differences do not necessarily justify all or most of the social structures that privilege adults against children. Just as biological differences between men and women do not determine the specific socio-economic (and, historically, legal) advantages of men over women (such as coverture), the biological differences between adults and children do not determine the form that children’s legal status takes with regard to adults.⁷⁰ Even if we were to grant for the sake of argument that, implausibly, *all* people under the age of eighteen have inferior mental capabilities to *all* those over eighteen, this is hardly an argument for assigning civil rights only to those with superior mental capabilities over eighteen. Reasonable people rightly recognize that those allegedly (or even demonstrably) more rational and intelligent should not enjoy greater rights than those with lesser capacities for rationality and intelligence—we do not see legal caste hierarchies arranged by IQ points or brain size as legitimate or just ways of organizing a society.

Despite the considerable variability in the roles children have occupied in society, people continue the mistake of thinking children’s status is something inherent to children, rather than a condition imposed on them by the state and society. For instance, in *Schall v. Martin*,⁷¹ the Supreme Court permitted pretrial detention of children for longer periods than permitted for adults,⁷² under the theory that such detention was not punitive, but merely regulatory,⁷³ in part because children have fewer liberty interests than adults⁷⁴—they are always in some sort of custody.⁷⁵

Do children *really* have fewer liberty interests as an *inherent* result of their childhood, or has the state already deprived them of their liberty under its ‘regulations?’ It would seem that the *Schall* Court did not find any pre-trial punishment of children because children are generally

⁶⁸ *See id.*

⁶⁹ *Id.*

⁷⁰ *See generally*, SHULAMITH FIRESTONE, DIALECTIC OF SEX 86 (1970).

⁷¹ *Schall v. Martin*, 467 U.S. 253. (1984).

⁷² *Id.* at 266.

⁷³ *Id.* at 270.

⁷⁴ *Id.* at 265.

⁷⁵ *Id.*

treated in a way that would be recognized as punitive if applied to an adult. In this case, the status of a child's liberty is the result of a child's legal status, not a child's biology.

It is dangerous from the viewpoint of someone concerned with wrongly depriving others of liberty to assume that children's apparent capacities necessarily exclude them from possessing rights, when their effective capabilities are constrained by the way they are treated in society. If a child were capable of exercising equal rights competently, how would we be able to recognize it in a society that deprives them of any opportunity to do so? If we cannot tell whether or not children are capable of exercising rights in a society that enables them to do so, because we are only familiar with children in the context of a society, which prevents them from exercising equal rights, then the assumption that children are naturally incapable of having rights is unjustified.

B. Prevailing Attitudes Towards Children

There are additional reasons to be suspicious of the common impulse to accept research that seems to confirm adult assumptions about children. Dismissing out of hand the possibility that children could exercise greater control over their lives is attractive, easy, and convenient. It is convenient because it is easier *for adults* to deal with children if children have few state-enforceable rights that can be mobilized against adults when adults attempt to control their lives against their wishes. Many adults also tend to just really *like* the idea that children are child-like and profoundly unadult-like: that they are cute, innocent, irresponsible, and dependent without the possibility of autonomy. Educator and child rights' advocate John Holt writes:

When one person sees and deals with another not as a unique person but as an example of a type, whether Celebrity, Black, Sex Symbol, Great Genius, Artist, Saint, or whatever, he diminishes that person and makes it hard for any natural relationship to grow between them. This is what we do to children when we see them as Cute, Adorable, Innocent. For the real child before us we substitute some idea of Childhood that we have in our minds and deal with that. Often, when we label someone in this way, we invest him with magical properties, sometimes bad, sometimes good Men often do this to women they consider beautiful Having turned the child into an ideal abstraction, many parents and teachers tend to look at him much as Rocket Control in Houston looks at a moon shot. They have a trajectory (life) all mapped out for this child, and they are constantly monitoring him to see whether he is on the path or whether he needs a little boost from this rocket (psychologist) here or a sideways push from that rocket (learning specialist) there They have their own

precise notions of what a child should be. They tend to slip very easily into condescending sentimentality as I have described.⁷⁶

Holt's observation reveals what we in some ways already know, that adults judge children according to what plans and expectations the powerful adults in their lives, their parents and teachers, have for them. If children are not under parental control, following a parent-defined path rather than their own desires, adults judge them to be out of control. If it is often thought that if children are left to their own devices they will make a mess of their lives, this is in part because parents, teachers and other adults presume to define what is valuable in their children's lives and what would constitute making a mess of them. The widespread liberal belief that the state should remain neutral between differing conceptions of the good⁷⁷ is inconsistently dropped when it comes to dealings with children—most adults imagine instead that there is either an objectively appropriate way for children to behave, learn, and grow up, or that each parent's subjective and arbitrary preferences for their children's conduct should be given force despite also thinking that even a democratically elected state should not impose its beliefs of how to live one's life on its citizenry.

When children deviate from adult expectations, from the idealized abstracted version of what a child is, it can cause cognitive dissonance: the problem is felt to be with the child and not with the idea of what a child should be and how children should act. To find an example of this we need look no further than the way adults react with horror to children's use of foul language when the same language used by an adult would leave them unfazed.⁷⁸ Just as children's apparent capabilities and

⁷⁶ HOLT, *supra* note 59 at 123-24. In comments on an earlier draft of this paper, Prof. Lichtenberg raised the question of whether we can and should avoid "viewing people as instantiating properties of any kind,"—posing the possible objection that there may not be anything wrong with viewing people in part this way in order to sensibly organize the world. In response, one might say that while it may be difficult to avoid attributing any stereotypes to people, we have an obligation to avoid allowing stereotypes to prejudice our views of individuals. With traditionally suspect classes like race, the need to reject stereotypes in order to ensure fair treatment of individuals is well established—as I will argue later on in this paper, this should be extended to children as well. In any case, we should be *aware* of our tendency to categorize people by type, in part so we can prevent it from prejudicing us in our judgments of individuals – and part of the point of including Holt's comments is to bring this tendency to the reader's attention.

⁷⁷ See Will Kymlicka, *Liberal Individualism and Liberal Neutrality*, 99 ETHICS 883, 883 (1989).

⁷⁸ An example of this in the popular media has been the 'controversy' around the character "Hit Girl" played by an 11-year old actress in the film *Kick-Ass* [sic]. "Hit Girl" uses obscenities and graphic (if unrealistic) violence and most commentators and "family groups" have reacted in horror, not at the obscenities or violence in and of itself, but the fact that a young girl is the one committing the violent acts and saying the obscenities. For more detailed discussion, see Melissa Silverstein, *The Politics of Hit Girl*, WOMEN

behaviors are limited by societal constraints, societal views of children and the impressions they make on adults are similarly informed by the social conventions that affect how adults think about children. This is all the more reason to be skeptical of our own intuitions about what children are capable of. Recent research strongly suggests that older adults actually prefer reading articles that seem to confirm inferior traits in young people.⁷⁹ One way this could be explained is that people in a position of privilege find it affirming and convenient when they receive information that seems to confirm that their privilege is natural and not arbitrary.⁸⁰ One could hypothesize that there might be a similar tendency to screen out less convenient information when forming opinions (not to mention a media that screens out information it's viewers and readers do not want to see).

C. The Social Construction of Childhood

As described earlier, many speak as if the distinction between childhood and adulthood is some eternal, fundamental distinction that arose from nature. One may even accept that the precise demarcating line, whether 21, 18, or 16, is essentially a political choice, while still assuming that there is a basic need for *some* line to be drawn to distinguish adults from children.⁸¹ Childhood however, like race, is not a characteristic or classification that can be pinpointed in biology, rather it is a socially contingent category. Age, similar to skin color and other genetic clines used to attribute 'race' to people, is a feature that requires a social context to take on significance for making legal, moral, and political distinctions. The concept of childhood is then, like the concept of race, a social invention that refers to biological traits but is not itself a fact inherent in biology.

AND HOLLYWOOD FROM A FEMINIST PERSPECTIVE Apr. 12, 2010 *available at* <http://womenandhollywood.com/2010/04/12/the-politics-of-hit-girl/>. Shulamith Firestone explains in *Dialectic of Sex* "as for the double standard about cursing: A man is allowed to blaspheme the world because it belongs to him to dam—but the same curse out of the mouth of a woman or a minor, i.e., an incomplete 'man' to whom the world does not yet belong, is considered presumptuous, and thus an impropriety or worse," SHULAMITH FIRESTONE, *DIALECTIC OF SEX* 99-100 (1970).

⁷⁹ See Silvia Knobloch-Westerwick & Matthias R. Hastall, *Please Your Self: Social Identity Effects on Selective Exposure to News About In- and Out-Groups*, 60 J. OF COMMUNICATION 515, 528-539 (2010).

⁸⁰ Since most people also oppose *arbitrary* privilege and like to keep their views internally consistent.

⁸¹ Justice Kennedy wrote "drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn." *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

Childhood and adulthood as categories for people are not eternal classifications but rather concepts with a relatively recently history that have evolved over time.⁸² Firestone and Aires describe how the very concept of childhood did not exist in the Middle Ages⁸³—people were literally “not conscious of children as distinct from adults.”⁸⁴ Medieval iconography depicted children as tiny adults⁸⁵ and the lack of conceptual distinction was such that there was not even a specialized vocabulary to describe children as children.⁸⁶ Children were distinct only in their economic dependence and were otherwise just another servant class, one that most children would remain in as adults.⁸⁷ From the age of seven to fourteen, it was common for children to begin apprenticeships,⁸⁸ taking on responsibilities undistinguished from those of adults; yet today, most people would not consider children capable of performing such tasks.⁸⁹ Prior to compulsory education, children were not segregated into their own schools and activities but were part of the larger adult world⁹⁰—in part, because segregating children was thought to delay their development of a mature perspective.⁹¹ Of course children were profoundly oppressed and exploited, but they were exploited and oppressed in the same ways that adults of their class were.⁹²

Only after the fourteenth century with the development of the bourgeois family did the concept of childhood and a vocabulary to describe children develop.⁹³ By the seventeenth century, the concept of childhood had more fully developed and the idea that children are innocent beings who require constant supervision to protect them from adult vices set in.⁹⁴ The shift in attitude from assuming that children tend to be fine when left to their own devices, to believing that children can never be left alone and must be supervised at all times, could of course have a profound effect on popular beliefs about children’s capabilities.

⁸² See PHILIPPE ARIES, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE 10 (Robert Baldick trans., Vintage unstated ed. 1965); see generally LLOYD DEMAUSE, THE HISTORY OF CHILDHOOD (1995) (for another historian who adopts this view).

⁸³ SHULAMITH FIRESTONE, DIALECTIC OF SEX 86 (1980). See also Aries *supra* note 82.

⁸⁴ See *id.* See also FIRESTONE *supra* note 83.

⁸⁵ See *id.*

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ See *id.* at 87.

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See generally *id.*

⁹³ See *id.* at 88.

⁹⁴ See *id.* at 89.

This is one of the factors that could contribute to the tendency of adults to underestimate the capacities of children.⁹⁵

A complete natural history of childhood is of course beyond the scope of this paper, but Firestone's explanation is useful when considering the extent to which common presuppositions about children are justified. Historian Peter Stearns notes that treatment and attitudes towards children vary tremendously over time and between cultures;⁹⁶ some societies think it normal for children to work hard, others see child labor as abhorrent, some idealize innocent child happiness while others find this idea strange, and many cultures believe that full adulthood begins at the onset of puberty.⁹⁷ This tremendous variation in attitudes and treatments invariably also affects the behavior of children. Even if contemporary children seem not to be capable of functioning with equal rights, this might be at least in part because of the way they are treated. Were children treated more like adults, they might be more apt to grow into more adult-like competencies.⁹⁸ While we cannot do a controlled experiment to tease out how much of children's behavior, attitudes and capabilities are determined by artificial social limits, we do know from many "natural experiments" that when people in power find it socially necessary to put children in positions reserved for adults, such as child soldiers and laborers, they are capable of taking on these functions.⁹⁹ While it is right that people in the West should be aghast that children (or anyone else) are exploited as soldiers or workers, this reflects relatively recent standards that still differ significantly between societies.¹⁰⁰

II. WHAT WOULD EQUAL RIGHTS FOR CHILDREN MEAN?

Rights are often thought of in the context of what choices people are entitled to make. Many assume that children will make bad choices; they are said to lack the experience, knowledge and ability to make rationally self-interested choices.¹⁰¹ This might not be the most appropriate or useful way of framing the issue of rights for children. Here I would argue that the way we think of children's rights should be reframed along the lines of Eileen McDonagh's distinction between a right to "decisional

⁹⁵ See *id.* at 95.

⁹⁶ See PETER N. STERNS, *CHILDHOOD IN WORLD HISTORY* 1-2 (Routledge 2006)

⁹⁷ See *id.*

⁹⁸ This position is advanced in various places by John Holt (*JOHN HOLT, ESCAPE FROM CHILDHOOD*, (1974)), Howard Cohen (*HOWARD COHEN, EQUAL RIGHTS FOR CHILDREN* (1980)) and Robert Epstein (*ROBERT EPSTEIN, THE CASE AGAINST ADOLESCENCE* (2007))

⁹⁹ See PETER N. STERNS, *CHILDHOOD IN WORLD HISTORY* 132 (2006).

¹⁰⁰ See *id.*

¹⁰¹ See Samantha Brennan, *Children's Choices or Children's Interests: Which do their Rights Protect*, in *THE MORAL AND POLITICAL STATUS OF CHILDREN* 60-62 (David Archard & Colin Murray Macleod eds., 2002).

autonomy” and a right to “bodily integrity.”¹⁰² This is not an attempt to redefine rights, but rather an attempt to re-center rights discourse in a way that might alter the judgments people are likely to make about children’s rights.

Using McDonagh’s terminology, thinking of questions of rights in terms of the choices a person has available to them is to think of rights in terms of “decisional autonomy.”¹⁰³ Framing rights questions in terms of “decisional autonomy” burdens children’s rights advocates with the need to overcome concerns about children’s competence to make sound decisions and navigate the world autonomously. Children are profoundly dependent on adults, and while some (or even most or all) of that dependency may be a consequence of how society is arranged,¹⁰⁴ some young children are *very* dependent. While it is easy to imagine a sixteen year old making all the choices that adults do¹⁰⁵ it is hard to think that a three year old could ever do so under any social situations.

Recognizing rights does not necessarily require autonomous decisional competency. McDonagh introduces another way to think of personal rights: rights as “bodily integrity.”¹⁰⁶ A bodily integrity notion of rights concerns not what decisions a person is able to make, but to what extent other private actors can coercively intrude on a person’s physical body and liberty.¹⁰⁷

This reframes what is at stake in rights not in terms of what a person is able to do, but what other people are able to do to them. In many instances the same right can be articulated either in terms of decisional autonomy or bodily integrity: for instance, the right to leave a building can be described either as the ability to choose to remove oneself from that building or the duty of others to refrain from physically blocking the doors. The key distinction for children’s rights discussed here however, is that the existence of a bodily integrity right is not predicated on the child’s ability to exercise any particular discretion or choice—rather it imposes a duty of non-violation on others. The importance of ‘capabilities’ as a prerequisite to holding rights is therefore diminished in this model: a child’s rights in this sense would not depend so centrally on

¹⁰² EILEEN L. McDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT 6 (1996).

¹⁰³ *Id.* at 4.

¹⁰⁴ In a society where food, shelter, clothing, and so on are all property of others, the state enforces dependence by enforcing property rights. See Robert Hale *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470-79 (1923).

¹⁰⁵ Sixteen is the age of majority in a number of countries, see The Electoral Commission, *Age of Electoral Majority, Report and Recommendations 15* (2004), available at http://www.electoralcommission.org.uk/_data/assets/pdf_file/0011/63749/Age-of-electoral-majority.pdf.

¹⁰⁶ See EILEEN L. McDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT 4 (1996).

¹⁰⁷ *See id.*

his or her ability to make autonomous choices as it would on the respect conferred by others for the child's physical integrity. The following sections will first explain how this notion of rights would still satisfy a demand for equal rights with adults, but would not entail the type of irresponsible, uncontrollable and dangerous behavior from children that children's rights skeptics may fear. I will then go on to explain how children could exercise equal bodily integrity rights and enjoy equal liberty even without the full capabilities for decisional autonomy that adults are presumed to have, by enhancing McDonagh's notion of rights as bodily integrity with Cohen's concept of borrowed capacities.

A. Equal Rights Does Not Entail Unlimited Freedom

For children to possess equal legal rights with adults would not mean that children could dictate, without regard for other people, everything that happened in their lives. Adults of course do not have such freedom. To have equal rights would only entail having the same entitlements that adults have: the right to bodily integrity and security of person, including freedom of movement in public spaces, the right to the same reasonable expectations of privacy, to equal protection under the law, and the right to participate in society as citizens. This would be a hugely transformative and liberating change in the relations between adults and children, but it would in no way invite children to be 'out of control' or even deprive parents of their principle means for guiding their child's behavior.¹⁰⁸

Under a regime of equal rights with children, parents would not, for example, need to stand idly by while their child played in highway traffic. They could intervene to protect them from imminent danger, since adults are likewise not legally entitled to harm themselves.¹⁰⁹

¹⁰⁸ Of course one might take an even more radical line and question the validity of parental guidance in general—but as described earlier, this paper's principle aim is to demonstrate that children's oppressed status is not justifiable within or consistent with conventional liberal political thinking. *Legal* equality from this perspective does not necessitate complete *social* equality. Whether complete social equality is desirable or possible is an important question, but while children have so far to go in order to reach mere formal legal equality anywhere—the issue of complete social equality does not seem ripe, so it is not my focus. My point here however is in part that parents would continue to have a guiding role over children even if children were given formal legal equality.

¹⁰⁹ Civil commitment statutes, for instance, presuppose there is no legally protected right to harm oneself. It is a reasonable question of whether, hypothetically, physically preventing someone from committing suicide could expose someone to civil liability for assault—but it is also reasonable to think that a jury would never convict—and so for all intents and purposes people have a legal privilege to prevent others from harming themselves. This privilege would of course be strongest where the person being prevented from harming themselves was doing so unintentionally, as in the case of a child in traffic.

Similarly, all of the material things that parents typically give their children for entertainment are not things that anyone is legally entitled to; access to toys and desserts purchased by others are privileges, not rights, among adults, and so would they remain mere privileges if children had rights commensurate with adults.¹¹⁰ Parents would therefore remain free to try to modify their children's behavior by rewarding them or withholding privileges—and obviously, parents would remain free to praise their children when they do what they want and criticize them when they do not.¹¹¹ There is every reason to think that parents would remain centrally important in guiding a child's development in a legal regime of equal rights.¹¹²

In such a regime however, so called “corporal punishment” of children would be necessarily regarded the same way “corporal punishment” of another adult would be: as assault and battery and/or domestic violence. Parents could also not confine their children against their will. They could mandate a curfew as a condition of the privilege of living in their home, but the child would be free to seek out an alternative living arrangement with other adults if they felt their home life was intolerable—a pressure valve against truly dysfunctional living situations

¹¹⁰ HOWARD COHEN, EQUAL RIGHTS FOR CHILDREN viii (1980). This would however fundamentally change the relationship between children and parents with regard to personal property. Currently, most of a child's personal items are generally considered the property of their parents, similar to the way wives personal affects were property of their husbands under coverture, *see* JOHN HOLT, ESCAPE FROM CHILDHOOD 191 (1974). Equal rights for children would necessarily entail equal rights to own and control property, *see id.* at 190. Because parents would have no legal right to take their children's property away, an action that would constitute theft if attempted with an adult, they would have less leverage here too—but it is ultimately unnecessary leverage in that simply by way of having less time to establish themselves in the world and little or no way to earn money, children would likely remain economically dependent for some time. Allowing children property also does not necessarily mean that anything their parents give them to use is their property—furnishings in their room, clothing they are expected to grow out of, and so on, especially in poor families, may be lent rather than given out right to children and still ultimately controlled by their parents. *See, id.* at 192-193 for John Holts description of property arrangements for children. In any case, the entire point of liberating children is to free them from parental and state control, to allow them to be emancipated as individuals, so loss of parental leverage is a necessary part of any such project. However freeing children from ultimate parental control does not, as discussed in this section, mean an end to significant parental influence.

¹¹¹ These are of course also things that someone could legally do with another adult though the social expectation is not there for it as it is for parents and their children.

¹¹² A more radical question is whether or not this is *desirable* or just, or whether the socio-economic power imbalance that would certainly remain, even if only because parents would continue to have access to resources and knowledge and skills that children would lack—is one that should be corrected in order to achieve *social equality* rather than mere equality under the law. However because equality under the law is a prerequisite for true social equality, and in current social arrangements even equality under the law for children is a radical idea, the desirability of full social equality for children is an issue that may be best to differ unless and until equal legal rights for children becomes a matter of serious political debate.

not found in current family law. Rather than permitting any treatment of children no matter how degrading and harmful short of legally recognized abuse and neglect, if children were able to choose whom they wished to live with,¹¹³ it would change the baseline bargaining position of parents and children so that parents would be incentivized to offer children better conditions—otherwise they would end up choosing to live with more accommodating adoptive parents. A social side-benefit of this incentive structure would be that caring for a child would have more to do with merit than with reproductive (mis)fortune. Parents' current privileges to assault, batter, and detain their children will be discussed in greater detail in the third section of this paper.

Parents do not currently have an unlimited privilege to physically "punish" their children or treat them poorly. The state will intervene with child abuse charges or by instructing child services to remove children and place them in foster care.¹¹⁴ Were the state to recognize children's bodily integrity and liberty rights however, it would empower children to set the limits of how they could be treated by other people rather than deciding for them an almost necessarily lower standard of treatment. While equal rights for children would change a parent's bargaining power insofar as a parent could no longer threaten (explicitly or implicitly) to use force against a child (either striking or confining), it would not affect parents' fundamental personal rights: their own rights to bodily integrity and liberty. The only rights a parent would lose would be their pseudo-property right over children to treat them as if chattel.

B. Equal Rights Does Not Mean Exercising Rights in the Same Way as Adults

The "liberal" or "equal rights" feminists were criticized by the "radical" feminists¹¹⁵ for demanding merely identical treatment of men and women by the state and employers, when men and women often have different needs, pressures and outside responsibilities.¹¹⁶ Similarly, for children to possess equal rights and equal entitlements would not necessarily require identical treatment: children with equal rights may exercise those rights in ways that differ from adults. A legal regime where children were meaningfully equal to adults would need to be sensitive to children's status specific needs—needs which may not even

¹¹³ Presumably, children would choose to live with some adults, since adults would be likely to offer them better conditions than living on their own or exclusively with other children.

¹¹⁴ See ALI-FAMDISS § 2.01.

¹¹⁵ For a summary, see generally Maxine Eichner, *On Postmodern Feminist Legal Theory*, 36 HARV. C. R.-C. L.L. REV. 1(2001); for a different formulation, c.f. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV 1 (1988).

¹¹⁶ See Eichner, *supra* note 115.

be fully apparent in a legal structure that represses children. In male dominated societies, apparently gender-neutral policies often effectively entail that both men and women are treated according to the social, economic and political positions typically occupied by men, which serves typically male social needs at the expense of women while remaining superficially neutral. A similar critique has been raised of liberal “color-blind” policies on race: taking a “neutral” position with regard to race for college or university admissions amounts to effectively unequal treatment because it treats people of color as if they had the same social advantages enjoyed by white people.

With children too, the most meaningful regimes of equal rights for children would need to take into account children’s particular needs, experiences, and social position. In the next section, I will describe one approach for enabling children to make use of their rights.

C. How Would Children Make Use of their Rights?

Howard Cohen argued that while many children may not be capable of living autonomously and making decisions independently, their rights need not be contingent on their capacity to exercise them responsibly on their own. Instead, they could “*borrow capacities*” from adults, who would act as their “agents.”¹¹⁷ Adults “borrow capacities” from other adults who act as their agents all the time when they employ doctors, lawyers, and accountants to handle the medical, legal and financial decisions that they cannot make on their own.¹¹⁸ While adults rely on doctors, lawyers, accountants and other experts to make decisions for them in their respective areas of expertise, adults continue to hold the ultimate rights over their legal, medical and financial affairs. Adults do not need to be capable of replacing their own hips, defending themselves in court, or filing their own complicated business taxes in order to be eligible to do these things with the assistance of expert agents. At the same time, adults retain the right to dismiss their expert agents and replace them with new doctors, lawyers and accountants, to refuse medical treatment or to decide which way to plead in court: the fact that the expert agent is capable of handling areas of the client’s life where the client has no capacity does not mean that expert agents are allowed to do anything to their clients without their clients’ consent. Decisional autonomy can be seen to be functionally unnecessary for the enjoyment of bodily integrity rights for adults, likewise full decisional autonomy is no prerequisite for granting bodily integrity rights to children.

The fact that a child may rely on an adult in order to survive and prosper in society does not mean that that adult must be able to override

¹¹⁷ See HOWARD COHEN, EQUAL RIGHTS FOR CHILDREN 56-70 (1980).

¹¹⁸ See *id.*

children's decisions concerning their own actions, when they do not take an adult's advice. However in this model, children would also have no right to *compel* an adult agent to perform any task on their behalf if it is against the adult agent's judgment, anymore than a client or patient can *compel* that a lawyer adopt a certain legal strategy or a physician prescribe a certain medication. In this way, children could retain a right to refuse adults' demands without being able to abuse the adults they rely on.

Here again, framing the issue of rights in terms of bodily integrity (i.e., the necessity of consent to legitimate an agents' actions) rather than decisional autonomy (i.e., the ability to make choices for oneself without interference) illustrates how it is possible to retain rights over areas of one's life even when unable to perform the necessary tasks oneself. Cohen proposes that just as adults make use of expert agents, children might make use of adults as "agents" for tasks that they are unable to perform on their own, and to inform them of what their reasonable courses of action are in situations where children would have insufficient experience to decide by themselves.¹¹⁹ This shift in paradigm from 'guardian' with coercive authority over a child, to "agent" lacking the coercive authority but retaining the guiding and typical decision making role, could enable children to enjoy equal rights absent equal experience based capabilities.

Some might wonder if children require adults to act as their agents, and parents already, allegedly, act in their child's best interests, why not use this line of thinking to just confirm that adults should have dominion over their children if adults are better able to make decisions? Doctors and lawyers and accountants are better able, on average, to make decisions relating to their clients medical, legal and financial wellbeing than their clients, but this is no justification for changing the relationship so that the client is the legal inferior of the professional expert. It makes far less sense for parents or other adults to be able to override the will of their "client" child on account of their "expertise," than it does for a lawyer or doctor or accountant to be permitted to override their clients. While accountants, lawyers and doctors have professional standards and a set of tested and agreed upon knowledge and practices—there are no professional standards for parents and many are not especially competent; they require no training or certification or examination before being given extraordinarily dominion over their children, and there is no consensus as to how children should manage their affairs (or have them managed). Moreover, while doctors can measure success by patients saved, lawyers by cases won, and accountants by successfully arranged finances, there are no clear standards to judge and evaluate parental success (except through the fallacy of attributing all or many of a child's

¹¹⁹ See *id.* at 75.

accomplishments and shortcomings as adults to their parents) and so no way to meaningfully and objectively evaluate the different competing opinions about proper parenting.

The fact that parental beliefs about what the correct way to “raise” children, and how one ought to live their lives, varies tremendously and is heavily contested, is a good reason to argue that no alleged “expertise” should grant them special rights over their children, except those that their children may voluntarily delegate to them. Parents cannot after all, all be said to make consistently superior decisions for their children when the decisions of different parents for their respective children are often wildly contradictory both in practice and in reasoning.

In this model, it is necessary to distinguish between 1. Those older children and adolescents who, if given legal rights, could make reasonable decisions and carry out the everyday tasks of life unassisted; 2. Children who could make use of a “child agent” to make decisions and assist their lives, and; 3. Infants and toddlers who are insufficiently capable of expressing themselves, articulating their desires and understanding a “child agent’s” advice to make use of a “child agent.” The first group poses no problem for children’s rights advocates since they could exercise rights as adults do were the legal impediments removed.

The third group of very young children who are both unable to exercise their rights independently or to make use of an agent differ from the other groups and adults in ways relevant to rights. In this case, extending rights to such children might make no difference at all if they are literally unable to express consent or lack of consent or choice, even with assistance. However, having a legally protected right does not require actually exercising that right. Citizens who have reached the age of majority have a right to vote, but many do not exercise that right—some because they affirmatively chose not to—but some because of functional incapacity. Again considering rights from the standpoint of bodily integrity and liberty rather than decisional autonomy—someone who fails to or is incapable of exercising rights they are entitled to have is not having those rights violated because others are not imposing themselves coercively against their wishes: a coma patient unable to vote is not having her right to vote violated since no one is actually stopping her from voting. Similarly, if caretakers manage the lives of children in the third group, they would not be violating those children’s rights, because when such children are so young that they are unable to clearly communicate, to express their choices between actually available options, then they are literally unable to express consent or refusal to consent. In these instances, as with an unconscious patient in an emergency room, caretakers have no option but to do what they believe the child (or patient) would most prefer were they to be able to express their wishes.

This is, however, not the case with the second group (including most children), who are capable of expressing refusal or agreement; to override such children's wishes would be as coercive as it would be to override an adult's even though the second group of children are not capable of being fully self-sufficient.¹²⁰ The second group's rights can be protected provided that they are given the accommodations, such as use of "child's agents" necessary to meet their particular needs. This would be no different from allowing blind people to have their guide dogs where dogs are normally not allowed, or providing foreign language speaking litigants interpreters in court: while these children have unique barriers to exercising their rights the way that adults normally do, these barriers are in no way insurmountable and the response should be not to deny children's rights but to accommodate their needs. Many elderly people are totally dependent on others to assist them and are unable to live on their own, but this is not a justification for depriving them of their legal rights.¹²¹ Because even lack of capabilities and ability to make decisions autonomously do not pose absolute barriers to granting legal rights, the denial of legal rights to children cannot be presumed to be rational.

III. THE LEGAL STATUS OF CHILDREN

The third part of this paper considers the two main ways that children are legally disadvantaged in society, and presents arguments for undoing these legal disadvantages. First, children as citizens enjoy fewer rights in relation to the state, both in their diminished capacity to participate through voting and running for election and in diminished protections from state coercive force: they are both subjected to regulation similar to the regulation of suspects and convicts, and have fewer due process rights with which to defend themselves. Second, children as human beings are subject to expansive, arbitrary whims of other private citizens, primarily their parents.

A. Interests and Rights

There are fundamental logical inconsistencies in the justifications for both sets of legal disadvantages. It is said that parents and/or the state must have the prerogative to override a child's wishes because this

¹²⁰ Of course the extent to which adults are truly self sufficient in a contemporary society is debatable.

¹²¹ Though of course it does make them extremely vulnerable to violations of their rights, a problem that would remain with children. Of course, that someone's rights are at risk of being violated is a reason to more rigorously defend their rights, not to discount them.

arrangement is in the child's best interests.¹²² Another way of stating this same position is that, were children to be permitted do what they want, they would harm themselves, or at least have relatively less welfare than if they were compelled against their will to do what their parents and/or the state wants.¹²³ Putting aside the whole range of decisions that adults are not legally permitted to make, which include criminal offenses, torts, and legally unenforceable demands, there remains *a category of decisions* that adults are permitted to make and children are not. An opponent of children's equal rights can interject with the (entirely plausible) justification that an adult will be more likely to make choices according to his or her own interests than a child would, and a child's parents and/or the state is more likely to choose according to the child's best interests—thus it is in the adult's interests to be permitted to make this set of choices, but it would be against a child's interests to make this set of choices. Therefore, if we are guided by the principle of maximizing individual's best interests rather than maximizing individual's ability to choose, we can rationally allot more decisions to adults than we do to children.

So far, the position against children's rights is internally consistent, but it immediately hits a snag. What happens when a child attempts to decide something that is categorized as legally permissible for adults, but that goes against his or her interests? A "best interest of the child"¹²⁴ standard is applied and the child's "best interests" trump the child's will—the decision the child would have made is forcibly overridden by guardians or the state.¹²⁵ Now consider what happens when an adult attempts to make a decision within the same category, that similarly goes against his or her objective interests and causes harm? In these cases, the adult is held to *a different standard*: the adult's will trumps the adult's "best interests" and the choice is legally permitted despite it being "a bad choice." Now, the claim that it is in an adult's interest to have rights and a child's interests to lack rights no longer explains the distinction because it is also in the adult's "best interest" to have his or her will overridden, and yet the adult's will is nonetheless respected.

A clear example of this dilemma is found in the right to refuse medical treatment: assuming treatment is medically necessary, an adult exercising such a right will by definition harm themselves by "objective

¹²² See LAURA M. PURDY, IN THEIR BEST INTEREST? THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN 144-145 (1992).

¹²³ See *id.* (arguing that it is in children's interests for parents to be able to apply 'levers' against them).

¹²⁴ For a critique of the legal best interest of the child standard, see Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 512 (1973).

¹²⁵ See LAURA M. PURDY, IN THEIR BEST INTEREST? THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN 144-145 (1992) (advocating this position).

standards.”¹²⁶ Refusal of medical treatment is not a case where adults are simply best positioned to determine what is in their own best interests, whereas parents and the state could determine a child's interests better than the child could. It is instead a case where adults have a legally protected right to go against what experts and society in general hold to be in their best interests. The “best interest” standard then is being applied inconsistently: a sufficiently reliable outside determination of the best interests of a child is valued more highly than the child's will, but an equally or more reliable outside determination of the best interests of an adult is valued less than the adult's will. In this way, adults' choices are not given more deference and value because they are *more* prudent or reasonable than children's choices, but rather in instances where adults make verifiably *equally imprudent* and unreasonable choices, they are still valued more highly than children's. Adult's rights to decide for themselves are then not predicated on their propensity to make decisions in their own best interests—even though children's supposed lack of this propensity is said to be the reason they may not make similar decisions. In other words, that adults make “better choices” cannot explain why an adult's demonstrably bad choice is respected but a child's bad choice is overruled. The distinction here is arbitrary: the argument by way of a persons' interest is applied in an inconsistent fashion. The idea that children are generally irrational and adults are generally rational does nothing to counter this argument because it applies precisely in cases where adults are known to be acting irrationally by external standards.

If two patients, one child, one adult, with the same life-threatening illness and identical prognoses both refuse the same treatment for the same reason, it makes no sense to say that that parent or the state should override the refusal of the child patient but *not* override the refusal of the adult patient, on the basis of the individual's interests, when both have the same interests at stake. Such logic would only make sense if one believed the child's will was *worth less* relative to his or her interests than the adult's will. This difference in the value assigned to children and adults as persons, *with minds and wills of their own* rather than merely valuable objects whose value is appraised by *others* and not themselves, betrays an objectification and devaluation of children. When we value the minds, the subjective values, preferences, and will of those like us (other adults) more than that of those less like us (children) it demonstrates the limits of our empathy: while people insist they want what is best for children, they also wish to subject them to treatment they would never wish on themselves or those they think are like them.

There is, of course, a further problem with this distinction between adults and children in that it presumes that there is such a thing as an objective self-interest that can apparently be ascertained by third parties

¹²⁶ Or, at least the standards of the local medical community.

(parents and the state) but not by a person themselves. Value judgments like “best” interests are subjective evaluations rather than objective measurements.¹²⁷ One answer frequently given with respect to adults, for the question of whose value judgments should prevail, is that the person or people whose interests are most directly implicated by a given choice should have the right to make it when it does not conflict with the interests of others. Whether it is better for a particular person to take piano lessons or join a soccer team is not a judgment call that can be made objectively, so when a decision has to be made given necessarily subjective preferences, that particular person’s subjective valuation is privileged, if he or she is an adult (again excepting crimes and torts). For a child however, the same person’s subjective valuation may be discarded in favor of the equally subjective valuation of their parents or the state. Because there is no objective measure against which subjective valuations may be judged, this amounts to nothing more than a case of “might makes right.” We cannot presume that “best interests” are definable independent from individual and collective assessments of what someone’s “best interests” are. Whenever someone overrules another’s expressed wishes in favor of the other individual’s “best interests”—they have then also exercised the power to *define* the other’s “best interests.” To do so is clearly incompatible with the liberal belief that the state should attempt to assume a neutral posture between different conceptions of the good.¹²⁸

The slightly different argument frequently advanced, that adults should have rights that children lack because adults are *rational* (or, typically rational) and children are *irrational*¹²⁹ is equally problematic for the same reasons: it relies on a double standard approach to adults and children, and judges them in relation to an indeterminate characteristic (rationality). Rationality, like “best interests” can be alleged, but it cannot be proven: there is no objective standard of rationality from which to determine who is rational and who is not. The most rational children are at least as rational as the least rational adults, so an appeal to rationality as the basis for legal distinction is then both under and over inclusive. It is also that rationality is not something that can be defined and measured in any definitive, uncontroversial way: though we can each judge certain actions, attitudes, and people to be rational or irrational with a great deal of confidence, our judgments are again merely subjective judgments. As with the case of arguments from “best

¹²⁷ See Ronald V. Ludlow, *Walking the Mine Field: The Moral Issues of International Adoption*, 9 J. L. & FAM. STUD. 401, 405 (2007).

¹²⁸ See Will Kymlicka, *Liberal Individualism and Liberal Neutrality*, 99 ETHICS 883, 883 (1989). Many have convincingly argued that such a neutral posture is in fact impossible.

¹²⁹ See LAURA M. PURDY, IN THEIR BEST INTERESTS, THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN 211 (1992).

interests,” arguments from “rationality” are ultimately just adding a layer of weasel words to justify imposing one’s subjective views against another. Moreover, just as adults have a recognized right to act against their best interests, adults’ rights are not necessarily contingent on their exercise of rationality.¹³⁰

The conclusion of course, is *not* that one has an obligation to respect any choices made by either adults or children. If violating a person’s right to decide something for themselves prevents a much greater harm—then a necessity defense would be available. Legal formalism aside, in reality, no judge or jury is likely to hold someone criminally liable for battery for restraining someone who is about to jump off a cliff. This argument leads instead to a conclusion that the double standard for intervention is unjustifiable. Rather than a presumption of competence for adults and a presumption of incompetence for children, the burden should be shifted to proving the incompetence of a child (or adult) in any given situation.

B. Equal Protection Under the Law

The U.S. Constitution’s Fourteenth Amendment’s Equal Protection Clause guarantees that “no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹³¹ All persons must be treated alike under the law, when they are in like circumstances, both in terms of the liabilities imposed by the law and the privileges and rights granted by law.¹³² Equal protection does not, however, require that dissimilarly situated people are treated equally,¹³³ and courts grant the states wide latitude in articulating relevant differences among people for legislation.¹³⁴ Classification of people in legislation is typically permissible if the class is non-arbitrary and rationally related to a legitimate government interest.¹³⁵ The U.S. Supreme Court’s Equal Protection jurisprudence requires “strict scrutiny” to be applied to legislative classifications when the classifications disadvantage a “suspect class” or they interfere with a “fundamental right.”¹³⁶ Rather than merely having to rationally relate the classification to a legitimate purpose, the state must meet a high and exacting standard.¹³⁷ The state must first show that it has a compelling governmental interest, not

¹³⁰ For just one example, It is easy to make the case that gambling for instance is irrational, since it statistically results in a net loss.

¹³¹ U.S. CONST. amend. XIV, § 1.

¹³² See 16B C.J.S. *Constitutional Law* § 1098.

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ See 16B AM. JUR. 2D *Const. L.* § 873.

¹³⁶ 16B C.J.S. *Const. L.* § 1116.

¹³⁷ See *id.*

merely an important or legitimate one.¹³⁸ Second, it must show that the classification is *necessary* to achieve the compelling state interest.¹³⁹ Third, the state must also demonstrate that there are no less onerous alternatives to the method it has chosen,¹⁴⁰ and finally that the law and its classification are “narrowly tailored” to serve that compelling governmental interest.¹⁴¹ In practice, given the extreme burden on the state, strict scrutiny review will almost always lead to the law in question being struck down.¹⁴²

Race, religious affiliation, alienage, and national origin have long been recognized as suspect classes.¹⁴³ Age has never been recognized as a suspect class.¹⁴⁴ In *Kimel v. Florida Board of Regents*,¹⁴⁵ the Court held that:

Age is not a suspect classification under the Equal Protection Clause States therefore may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest. The rationality commanded by the Equal Protection Clause does not require States to match age distinctions and the legitimate interests they serve with razor like precision. Rather, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. That age proves to be an inaccurate proxy in any individual case is irrelevant.¹⁴⁶

Because age is not considered suspect class, regardless of the fact that some children may have sufficient ability to handle rights afforded to adults, under current equal protection jurisprudence they may be legally denied those rights because age may be used as a proxy for those abilities. Moreover, merely legitimate, rather than compelling, state interests are sufficient to justify age-based classifications. Establishing age as a suspect classification, a possibility that was first proposed by Hillary Rodham in her article *Children Under the Law*,¹⁴⁷ could dramatically curtail the range of legal disadvantages imposed on children. Rather than being able to presume children incompetent, were

¹³⁸ *See id.*

¹³⁹ *See id.*

¹⁴⁰ *See id.*

¹⁴¹ *See id.*

¹⁴² *See Massachusetts Bd. Of Retirement v. Murgia*, 427 U.S. 307, 319 (1976).

¹⁴³ *See* 16B C.J.S. *Const. L.* § 1117.

¹⁴⁴ *See id.*; “age is not a suspect classification under the Equal Protection Clause,” *Gregory v. Ashcroft* 501 U.S. 452, 453 (1991).

¹⁴⁵ *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000).

¹⁴⁶ *Id.* at 63-64.

¹⁴⁷ *See* Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 511 (1973).

children a suspect class, the state would have to presume them competent until it demonstrated otherwise.

Although given political realities and overwhelming social prejudice towards children, it would be difficult to persuade any court in practice to recognize children as a suspect class, were equal protection jurisprudence applied justly and evenly, children would qualify as a suspect class. The most famous standard for what makes a suspect class is found in footnote four of *United States v. Carolene Products Co.*, stating that “prejudice against discrete and insular minorities . . . may call for a correspondingly more searching judicial inquiry,”¹⁴⁸ and it has been argued that “an age qualification is not state action aimed at any discrete and insular minority.”¹⁴⁹ Rodham argues however that age classifications should be subject to scrutiny for some of the same reasons that the legally recognized suspect classifications are.¹⁵⁰ Rodham first argues that the presumption of rationality for age classifications is inconsistent with the fact that children have various abilities at different developmental stages before the age of majority.¹⁵¹ Rodham goes on to argue that some children would constitute a “discrete and insular minority” if they possess the rationality to participate in the political system but are forbidden to do so by their age.¹⁵² Alternatively Rodham argues, that if some or all children are not sufficiently rational to play an active role in politics, then they should still be regarded as a suspect class because they have no power to effect the political process.¹⁵³ Thus, whether one thinks children are competent to participate but prevented from doing so, or incompetent to participate, courts should not assume rationality of laws based on age and the state should carry the burden of demonstrating a compelling governmental interest.¹⁵⁴

In order to make Rodham's position persuasive, it must be made more capable of rebutting some of the arguments advanced in more recent age discrimination cases. Though Rodham argues that children could actually be viewed as a discrete and insular minority, this is not at all necessary to reach the conclusion that children must be regarded as a suspect class. The entire relevance of the “discrete and insular minority” test in *Carolene Products* was due to the potential for discreteness and insularity to “curtail the operation of those political processes ordinarily relied upon to protect minorities.”¹⁵⁵ In *San Antonio Independent School*

¹⁴⁸ *United States v. Carolene Products Co.* 304 U.S. 144, 152, n. 4 (1938).

¹⁴⁹ From Justice Stewart's dissent in *Oregon v. Mitchell*, 400 U.S. 112 (1970), referenced in Rodham *supra* note 147 at 512.

¹⁵⁰ See Rodham *supra* note 147 at 512.

¹⁵¹ See *id.*

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ See *id.*

¹⁵⁵ *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n 4 (1938).

Dist. v. Rodriguez, the Supreme Court writes that the “indicia of suspectness [sic]” is not necessarily discreteness and insularity but for a class to be “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”¹⁵⁶ Clearly, because children are prohibited from voting or standing for office, they are in such a position of political powerlessness. As already described in Parts One and Two, children have been subject to a history of purposeful unequal treatment. Under a fair application of the *Rodriguez* indicia, children should be a suspect class.

In a subsequent case applying *Rodriguez* to age, the Supreme Court has still found age not to constitute a suspect classification. In *Massachusetts Bd. Of Retirement v. Murgia* the Court found that mandatory retirement ages did not warrant strict scrutiny, only rational basis review, because elderly people have not been historically subject to purposeful discrimination based on stereotypes not consistent with their true abilities, and they are not in need of protection from the majoritarian political process because old age “marks a stage that each of us will reach if we live out our normal span.”¹⁵⁷ The issue of age as a suspect classification has come before the Supreme Court in several more recent cases, in *Kimel*¹⁵⁸ and *Gregory*¹⁵⁹ and *Vance v. Bradley*,¹⁶⁰ each citing to *Murgia*, either directly or indirectly, and each dealing with old age rather than young age as the alleged suspect class.

While childhood similarly marks a stage of life that each of us will pass through, it is unlike old age, excluded from consideration in the majoritarian process. While all adult voters were once children, they will not become children again at some point in the future so they need not worry about the legal disadvantages of children being applied to them, whereas adults anticipate becoming elderly and therefore have a self-preservation motive to prevent discrimination against the elderly. Another obvious difference is simply that the elderly, unlike children, can vote, and in practice they vote disproportionately. Children are also often de facto denied the right to assemble: their ability to travel to demonstrations or to political meetings can be restricted by their parents and truancy laws, with the state ready to use its police power to enforce parental authority if necessary. Access to the media is further curtailed, not only because children lack the financial means to popularize their

¹⁵⁶ *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

¹⁵⁷ *Massachusetts Bd. Of Retirement v. Murgia*, 427 U.S. 307, 313-314(1976).

¹⁵⁸ *Kimel v. Florida Board of Regents*, 528 U.S. 62, 83 (2000), citing to *Gregory*, *Vance*, and *Murgia*.

¹⁵⁹ *Gregory v. Ashcroft*, 501 U.S. 452, 453 (1991), citing *Vance*, citing *Murgia*.

¹⁶⁰ *Vance v. Bradley*, 440 U.S. 93, 97(1979), citing *Murgia*.

views but because they lack the legal rights to have the opportunity to acquire those means.

An additional set of standards for suspect class status is found in *Lyng v. Castillo*.¹⁶¹ In *Lyng*, the Court considered suspect classes those that were historically “subjected to discrimination” or “politica[l] powerlessness” as is consistent with *Rodriguez* and *Murgia*, but also introduced an additional possible consideration: if a class “exhibit[s] obvious, immutable, or distinguishing characteristics.”¹⁶² Children exhibit obvious distinguishing characteristics: people can confidently determine that someone is a child visually. In borderline cases one might not be sure if someone is, legally speaking, a child or an adult, but this is equally true of race and national background. Additionally, while people grow older, the date on which someone was born is an immutable characteristic—people cannot choose to be older. While a case can clearly be made that children also fit the additional criteria for a suspect class introduced in *Lyng*, meeting *all* of the criteria is of course also unnecessary; for instance, religious affiliation rarely produces obvious distinguishing characteristics, nor is it immutable.

The other way courts get to apply strict scrutiny is by determining that a law interferes with a fundamental right. Classifications that interfere with voting,¹⁶³ privacy,¹⁶⁴ freedom of association,¹⁶⁵ travel,¹⁶⁶ and other first amendment rights¹⁶⁷ have been subject to strict scrutiny. Many of the legal disabilities imposed on children implicate fundamental rights such as voting and travel as will be discussed further in this section.

¹⁶¹ *Lyng v. Castillo*, 477 U.S. 635 (1976).

¹⁶² *Id.* at 638.

¹⁶³ See 16B C.J.S. *Const. L.* § 1118; note that one major exception is among felon’s voting, where, unlike many other state voting rights cases, the Supreme Court found that there was not a fundamental right to vote among felons. See generally *Richardson v. Ramirez*, 418 U.S. 24 (1974). However, *Richardson* relies on Section 2 of the equal protection clause, which the Court viewed as specifically allowing felon disenfranchisement. This section clearly would not apply to children, and moreover, the provision that the *Richardson* Court relied on, that states would retain equal allocations of votes even when they disenfranchised felons, is arguably no longer in force, nor has it ever been enforced. See generally Gabriel Chin, *Disenfranchisement and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?* 92 GEO. L. J. 259 (2004).

¹⁶⁴ See 16B C.J.S. *Const. L.* § 1118.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

*C. Classifications Based on Directly Relevant Abilities and
Characteristics as an Alternative to Discrimination*

Once the presumption of the rationality of age-based classifications is defeated, and strict scrutiny is recognized as the correct standard of review for laws that *prima facie* disadvantage children, states may no longer employ age as a proxy for abilities or characteristics relevant to their legitimate interests. The alternative for advancing a state's legitimate interests is in legislating according to the abilities or characteristics relevant to those interests directly. In this way, legitimate state interests can be preserved without arbitrary discrimination. Not all legal disabilities imposed on children can be replaced with relevant capability or characteristic-based classifications, such as those where the alleged capability or characteristic is impossible to quantify or measure. However, even when those characteristics or qualities are difficult to quantify, when there is in fact a legitimate public interest there are almost invariably better measurements than age.

To use an example, the state has a legitimate interest in allowing only people who can drive safely the privilege to drive. The state pursues this in two ways. First, it offers a capability-based driver's license to people who, through written examination and a road test, have demonstrated themselves to be safe and competent drivers. The state further may withdraw driver's licenses to people who prove unsafe or reckless. In other words, the characteristic (in this case, driving ability), relevant to the legitimate state interests (in this case, road safety), serves as the direct basis for legal classification.

On top of this, however, the state has a second condition: one must be sixteen or older to drive. In this case, being sixteen or older serves as a proxy for the ability to drive safely. This condition is, as has been discussed, both over and under inclusive—plenty of people younger than sixteen may be competent to drive, whereas many older than sixteen are not competent. Where there is a means of evaluating the relevant ability, in this case driving ability, there is no reason to use the proxy of age at all, unless we have reason to think that requisite road tests and written evaluations are insufficient to classify people for driver's licenses. If this is the case, then it is an argument to more precisely classify people according to relevant abilities, whether by better driving tests or more road time experience, or otherwise. Relying on a less precise proxy is not justified. Although almost any test or evaluation for any relevant characteristic is likely to *also* be over and under inclusive, the degree to which a well-designed test over includes and under includes is almost certain to be less than the degree to which an arbitrary age cut off would be.

There is no reason why capability-based licenses should be limited to driving when the same logic could apply elsewhere. To the extent that

there are rational reasons why the state might want to prevent children from voting, drinking alcohol, working, joining the military, etc., on the assumption that children typically lack the capacity to do these things competently or safely, the state should instead devise means of relevantly evaluating competence if relevant skills and competences in fact exist.

An obvious objection is to this is that such a requirement would create administrative nightmares. Even where abilities and capacities relevant to legitimate state interests could be articulated and hypothetically evaluated for the purposes of legal classification, to demand as much would be to impose a severe burden on the state. For example, to simply say that no one under 21 should be permitted to drink alcohol¹⁶⁸ is less administratively demanding than devising a method for relevantly classifying who should and who should not be allowed to drink alcohol.

Several counter-arguments are possible in response to this objection. First, it is simply a lack of motive and imagination that would, for example, prevent a licensing system for alcohol consumption. There could be privately operated and funded alcohol responsibility classes, drinking under supervision, written exams testing knowledge of the amount of alcohol needed to raise a blood alcohol level to intoxicating or dangerous points, and relevant physical criteria such as a weight minimum (comparable perhaps, to eye tests for prospective drivers). There is no obvious reason why such a system would be impossible to operate. Such a system of alcohol competency would likely result in a much more relevant means of classifying people with regard to legal alcohol consumption, one much more able to advance the relevant state interest in public safety than allowing *anyone* to drink merely because they have reached a certain age.

Similarly, many activities that are restricted both by an age requirement *and* accordingly relevant classifications, might still be de facto foreclosed to children. For example, height, weight, physical fitness and educational requirements of relevance to military competency and the need to have uniform and interchangeable equipment, would prevent most adolescents and children from joining the military,¹⁶⁹ even without

¹⁶⁸ An age limit which is of course, three years above most of the rest of the world.

¹⁶⁹ Joining the military may be a special case. Many have argued that women should be excluded from combat roles, and gay people from the military entirely, because the presence of women and openly gay people would supposedly reduce so called "unit cohesiveness" and "combat effectiveness." Although many militaries operate effectively with gay people and women—the argument is at least plausible (if unpersuasive) that the homophobic and sexist attitudes of the military's institutional culture are such that they would be unable to fight alongside women and openly gay people. (See Stuart Koehl, *Don't Repeal "Don't Ask Don't Tell"*, THE WKLY STANDARD, Jun. 10, 2010, available at: <http://www.weeklystandard.com/blogs/dont-repeal-dont-askdont-tell>, for example) While this may not be sufficiently persuasive to justify a homophobic and/or sexist policy in military employment, a complicated question that is beyond the scope of this paper, it

a formal age requirement. Because there is no reason to treat these classifications, unlike age, as suspect, and they are relevant to the state's legitimate interests in an effective military, these classifications would be permissible within this analysis.¹⁷⁰ Since evaluation of these relevant criteria already takes place, removing the age requirements would add minimum burdens except in perhaps slightly increasing the number of unqualified applicants (though there is no reason to think that unqualified children would apply to licenses and jobs requiring evaluations at any greater rate than unqualified adults).

A second and more significant counter argument is to accept that requiring that any classifications be based on relevant characteristics and not age as a proxy would increase administrative burdens, but the burden must shift to the state. The absence of relevant characteristic-based classifications is not the absence of burden, but rather the imposition of social and personal burdens on those who are classified by proxy. If children are recognized as a suspect class, then the state cannot burden them with broad, over inclusive legal disabilities even to advance legitimate state interests. If the additional administrative burden of classifying people according to characteristics directly relevant to legitimate state interests, rather than age as a proxy for those characteristics, is great enough that it is no longer worth it to the state to pursue those legitimate state interests, then it might be argued that those state interests are not significant enough to even consider classifying people by a proxy either—and certainly not when that proxy is a powerless, historically-oppressed suspect class being deprived of fundamental rights.

An alternative objection might be that age is not necessarily a proxy, but a relevant characteristic itself, because with age comes experience and maturity. Maturity however varies more within any age group than between them: there are profoundly immature adults and exceedingly mature children.¹⁷¹ Maturity, like rationality or best interests, is not a concept that can be grounded in anything meaningfully measurable, but one that relies on subjective judgments of what it is to be mature. Age may match experience only if the experience being considered is simply the experience of existing: for any *relevant* type of experience, the level of experience will vary tremendously within any given age groups.

seems much more likely that children in the military would undermine unit cohesiveness and combat effectiveness and morale. This might constitute a compelling reason to exclude children, and one where no less onerous set of restrictions could be envisioned.

¹⁷⁰ Of course, such classifications would have a “disparate impact” on children.

This poses a completely different issue from overt discrimination analyzed under Equal Protection Clause jurisprudence. Children are not covered under Title VII of the Civil Rights Act of 1964, and in any case, the classifications could be seen as job related and necessary, so even if a disparate impact theory were permissible, it would still be inapplicable. See 14A C.J.S. *Civil Rights* § 239.

¹⁷¹ See HOWARD COHEN, EQUAL RIGHTS FOR CHILDREN 51 (1980).

While a standard objection to rights for children is that they simply “lack experience,” this wrongly reifies the concept of experience as if this was a single concrete thing that accumulates generally over time. In reality, people have *experiences*, some of which are relevant to a particular skill set or competence, most of which are not. There are many instances where applicable experience in a particular area is a relevant classification (for example, employment decisions), and children under a certain age would not have the opportunity to acquire that experience. Even in these circumstances however the advantage of requiring regulation according to relevant and quantifiable characteristics is clear. By requiring that the state regulate according to directly relevant characteristics rather than relying on age as a proxy, the state would have to justify its choice of classification as relevant whereas presently relevance is presumed. If young people lack a certain relevant experience it should be the burden of those who would deprive them of rights or opportunity to demonstrate what that experience is, that particular youth in fact lack it, and why it is relevant.

One source of resistance to using capability based licenses may come from moralizing, traditionalism, and simple (though not malicious) prejudice. “Common sense” thinking along the lines of “*You want children to be able to drive as long as they can pass a sufficiently stringent drivers test—that just sounds so unreasonable*”—is typical, but must be interrogated. If someone is able to *demonstrate* in a practical examination that they are a competent driver, why should age be an obstacle to them? There may be other reasons why, despite being a safe and capable driver, someone may not wish to permit a 13 year old to drive: for instance, driving allows them greater autonomy and personal freedom, which might be used irresponsibly (where “irresponsibly” can of course only be defined subjectively in terms of how a parent or other adult defines “responsibly”). This attitude of not trusting children with themselves, while common, would not be a constitutionally legitimate motive let alone a compelling interest if applied to any other group of people—while there is a legitimate public interest in safety, it is unclear that this attitude is rationally related to that interest, and even if one were to grant that, it is hard to imagine that it would be a sufficiently compelling interest to survive strict scrutiny. To assume that this or other similar motives for discriminating against *children qua children*, (as opposed to children *qua* incapable of a given purpose), is legitimate, would rely on a presumption of rationality for age-based classifications which, as has been discussed, there is good reason to reject. When the question of “why should children be denied these rights?” is answered simply with an insistence, “because they are *children*”—that answer is not sufficient when children are presumed competent rather than presumed incompetent.

Given how pervasive age-based classifications are, there are far too many cases of children being denied rights on account of their age to list, analyze, and offer alternatives to each. Instead, the following two sections will consider some of the most vital rights denied to children that fall under two large categories: rights as citizens against the state, and rights as humans against their parents (and schools acting *in loco parentis*).

D. Rights against Parents and Parents Rights: “Corporal Punishment,” “Runaways,” and Custody

When signaling his commitment to child welfare, Richard Nixon declared his respect for “the sacred right of parents to rear their children according to their own values and own understandings.”¹⁷² Where does this “sacred right” come from and what does it entail?¹⁷³ Families are popularly assumed to be natural, pre-political formations that exist in a private sphere distinct from the public sphere of state intervention.¹⁷⁴ The idea of a pre-political private family is as much as myth as the idea of a pre-political private market;¹⁷⁵ the family can be seen to be as much of a socio-political construct as any social institution, and like the market, it relies on state enforcement. The state creates the “parental rights” of “custody,” including a privilege to dictate where a child lives, where they travel, how they behave. The state further allocates power to parents through laws against “runaways,”¹⁷⁶ laws against disobeying parents (termed “incurability” or “juvenile in need of supervision”),¹⁷⁷ and a privilege to use “corporal punishment” to impose a parent’s will on their child.

To even accept the phrase “corporal punishment” is to enter into a discursive formation that normalizes violence against children that would

¹⁷² As quoted in Martha Minow, *What Ever Happened to Children’s Rights?* 80 MINN. L. REV. 267, 273 (1995), citing Gilbert Steiner, *The Children’s Cause* 10-11 (1976).

¹⁷³ Shulamith Firestone claimed that parents tend to believe that their children ‘belong’ to them in a possessive sense for cultural and biological reasons but there is no a priori reason for them to think this. See Shulamith Firestone, *Dialectics of Sex* 263 (1974).

¹⁷⁴ See Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J. L. REFORM 835, 839 (1985).

¹⁷⁵ See *id.*, at 842. Private property, for instance, requires the state to intervene to enforce a duty of non-interference on those who do not “own” a given piece of property. There can thus be no market without state intervention. For a more in depth discussion of this, see generally, Robert Hale *Coercion and Distribution in a Supposedly Non-Coercive State* 38 POL. SCI. Q. 470, 470-79 (1923); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927).

¹⁷⁶ See Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J. L. REFORM 835, 849 (1985).

¹⁷⁷ See *id.*

not be tolerated were it directed against adults. Referring to violence against children as “punishment” implies that the violent act is committed as a potentially legitimately deserved sanction for the child’s behavior. The phrase itself is an expression that implies victim blaming; it presumes the potential or actual lawfulness of the perpetrator. To speak of violence against children as “corporal punishment” begs the question of whether such violence is legitimate by presuming that some private violence is legitimate punishment. Therefore in an effort to question and undermine this formation, I will describe this violence as a “state privileged battery,” where a parent or teacher has committed a battery, but is immune from criminal charges or civil liability due to the status of their victim.¹⁷⁸

In the United States, parents have a limited privilege to commit acts that would ordinarily be liable for civil and criminal sanctions as assault and battery under a “corporal punishment” theory in all fifty states,¹⁷⁹ and teachers share this privilege in twenty-nine states.¹⁸⁰ In most cases, no statutes exist that explicitly authorize “corporal punishment”—rather the courts infer a common law affirmative defense against assault and battery of permissible “discipline” in violence against children where no such affirmative defense would exist were the victim an adult.¹⁸¹ Though less disturbing to most, parents also have a defense against false imprisonment; in fact, courts refuse to recognize any general liberty interest for children against their parents.¹⁸²

Why should one private individual have such power over another, arbitrarily, simply by accident of birth? The failure to enforce assault and battery laws against parents who hit their children is a clear failure to extend equal protection of the law to children. While many court cases have affirmed the privilege of parents and in certain states, teachers, to assault and batter children, most offer surprisingly little in the way of coherent justification—instead most cite to older cases, that cite to older cases, and so on. One of the oldest and most frequently cited (both directly and indirectly) cases that actually offers elaborate justification

¹⁷⁸ Obviously there are other defenses against battery which do not rely on the classification of the victim, such as self-defense.

¹⁷⁹ See Thomas Jacobs, *Corporal punishment—Eighth Amendment, 2 in CHILDREN & THE LAW: RIGHTS AND OBLIGATIONS* § 9:21 (2010).

¹⁸⁰ *Id.* However, in twenty-three countries all forms of “corporal punishment” are illegal and regarded as assault and battery. See NSPCC Policy Summary, Equal Protection for Children Under the Law on Assault—Hitting Children is Wrong and the Law Should say so, available at http://www.nspcc.org.uk/Inform/policyandpublicaffairs/policysummaries/EqualProtection_wdf57478.pdf.

¹⁸¹ See *id.*; see also Janice Holben, J.D., Alan J. Jacobs, J.D., Jack K. Levin, J.D., and Jeffrey J. Shampo, J.D., *Corporal Punishment*, 67B AM. JUR. 2D *Schools* § 318.

¹⁸² For example, in *Schall v. Martin*, the Court held that “[A child’s liberty] interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody... They are assumed to be subject to the control of their parents.” *Schall v. Martin*, 467 U.S. 253, 266 (1984).

for corporal punishment is a 1837 North Carolina Supreme Court case, *State v. Rachel Pendergrass*¹⁸³ where a school teacher was indicted for assault and battery for hitting a student, and claimed an *in loco parentis* right to punish as a defense. In *Pendergrass*, the Court found:

It is not easy to state with precision, the power which the law grants to schoolmasters and teachers, with respect to the correction of their pupils. It is analogous to that which belongs to parents, and the authority of the teacher is regarded as a delegation of parental authority. One of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits; and to enable him to exercise this salutary sway, he is armed with the power to administer moderate correction, when he shall believe it to be just and necessary.¹⁸⁴

While *Pendergrass* occurred before the Fourteenth Amendment was enacted and considers the possibility of a common law defense against assault and battery, rather than upholding a statute, it is still possible to consider how inconsistent this reasoning would be with equal protection were children to be afforded strict scrutiny.¹⁸⁵ While the state may have a legitimate interest in having useful and virtuous members of society, privileging parents and teachers to commit assault and battery against children is quite obviously neither necessary nor narrowly tailored to achieve that end. Clearly, were this a statutory defense it would not pass strict scrutiny, and thus any common law defense described in *Pendergrass* should be considered superseded by the Fourteenth Amendment.

One of the most famous “corporal punishment” cases, *Ingraham v. Wright*¹⁸⁶ was considered under the Eighth Amendment. Justice Powell, writing for the Court, recognized that “corporal punishment” in schools was indeed an action of “the State itself”¹⁸⁷ but rather surreally asserted that the Eighth Amendment was only “designed to protect those convicted of crimes.”¹⁸⁸ Justice White in dissent appropriately notes that the prohibition on cruel and unusual punishment is nowhere “limited or modified”: the word “criminal” does not appear in the Eighth

¹⁸³ *The State v. Rachel Pendergrass*, 19 N.C. 365 (1837).

¹⁸⁴ *Id.*

¹⁸⁵ Though having said that, it's not obvious that there would even be a rational connection between allowing corporal punishment and developing virtuous citizens.

¹⁸⁶ *Ingraham v. Wright*, 430 U.S. 651 (1976).

¹⁸⁷ *See id.* at 662.

¹⁸⁸ *Id.* at 664. This is a particularly surreal view given that Eighth Amendment not only makes no mention of criminal conviction and discusses excessive bail, which presumably occurs before trial let alone conviction.

Amendment and thus there is good reason to think the Amendment was meant to prohibit all cruel and unusual punishments without regard to the offenses for which they were imposed.¹⁸⁹ Justice White argues,

If there are some punishments that are so barbaric that they may not be imposed for the commission of crimes, designated by our social system as the most thoroughly reprehensible acts an individual can commit, then, *a fortiori*, similar punishments may not be imposed on persons for less culpable acts, such as breaches of school discipline. . . . The relevant inquiry is not whether the offense for which a punishment is inflicted has been labeled as criminal, but whether the purpose of the deprivation is among those ordinarily associated with punishment, such as retribution, rehabilitation, or deterrence.¹⁹⁰

Justice White's Eighth Amendment analysis is sufficient itself to suggest that *Ingraham v. Wright* was wrongly decided and "corporal punishment," by parents as well as teachers, should be illegal. There is also a more substantial Equal Protection Clause argument to be made. The state has classified children (both in and out of school) as subject to punishments which could not be imposed were they adults, thereby providing them lesser and unequal protection under the law. Though the Court's majority opinion recognizes that the case implicates the children's liberty interests,¹⁹¹ there is no effort to show a compelling state interest in this classification, only an allusion to an unsubstantiated claim that "corporal punishment" somehow serves the educational needs of children.¹⁹² Even if privileging teachers to hit students did advance educational needs, the state interest in those needs is not likely compelling compared to a student's interests in not being hit. The same is likewise true for the state's interest in children's development that privileging parents to batter supposedly serves. In any case, the widespread existence of schools and parents who do not hit their children and yet educate them and see to their development as useful members of society, demonstrates that a privilege to batter is not necessary for education and child development, and so it would fail a strict scrutiny review on those grounds as well.

The same logic applies equally to a parental privilege to confine children against their will to their rooms, houses, or other locations—acts that could result in criminal charges and civil liabilities including kidnapping and false imprisonment, depending on the circumstances. By failing to enforce kidnapping and false imprisonment laws when these acts are committed by parents against their own children, children are not

¹⁸⁹ *Id.* at 685.

¹⁹⁰ *Id.* at 685, 686-687.

¹⁹¹ *Id.* at 692.

¹⁹² *Id.* at 662.

granted the full and equal protection of the law. Because there is no obvious compelling state interest in this non-enforcement, the state has not demonstrated that it is necessary to further a compelling interest and the least onerous way of doing so, these privileges would also be unconstitutional if children are regarded as a suspect class. Even if one rejects the notion that children are a suspect class, the right to travel and move freely has been widely considered a fundamental right warranting strict scrutiny,¹⁹³ so strict scrutiny would remain the appropriate standard of judicial review.

There is no reason why the end of state enforced parental privileges to batter and imprison children would lead to the “dissolution of the family,” anymore than the end of husbands’ legal privileges to beat and imprison their wives lead to the end of marriage. In fact, such legal reforms toward formal equality would not even be sufficient to achieve anything approaching true equality within families because a mere end to legal disabilities would do little to overcome the huge economic inequalities which would surely continue to work as overt or subtle levers within families (as they unfortunately do in many marriages). As alluded to earlier in this paper, without a state privilege to batter and imprison, the incentive structure and balance of power would shift in a positive direction that would help to eliminate the most severe abuses against children. If a child feels their living circumstances are so desperate that they *have* to “run away,” that alone is a good reason why they should not be forced to stay with their parents. Even for those who reject the children’s rights argument advanced here, such a family is unlikely to be in the child’s “best interests” however measured. Similarly, parents who can only tolerate their children’s presence if they are allowed to hit them are not the optimal people to take care of them. As Cohen points out and was mentioned earlier in Part Two, while physical punishment and confinement would be unavailable in a system with equal rights for children, parents could still exert control over children by offering conditional rewards—rewards that a child desires but is not legally entitled to.¹⁹⁴

However the state decides to allocate rights, privileges and duties, it will entail a policy decision that affects the relative balance of power within a family: as previously discussed, there is no neutral option to allow the family to exist as a private institution.¹⁹⁵ When children have no options because the state prevents them from leaving home in favor of a better living arrangement, there is less legal incentive for parents to

¹⁹³ 16B C.J.S. *Const. L.* § 1118.

¹⁹⁴ See HOWARD COHEN, EQUAL RIGHTS FOR CHILDREN 92 (1980).

¹⁹⁵ For a longer discussion of this position, see Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J. L. REFORM 835, 836-837 (1985).

treat children well enough that they want to stay.¹⁹⁶ If children were free to choose to live in other arrangements, if they could for example, seek and select adoptive parents, then healthy functional families would be relatively unaffected since children would not want to leave, but an escape valve would limit the degree to which parents could mistreat their children or disregard their wishes. When the law extends to parents not only the ability to withhold money and approval, but the privilege to physically harm and threaten, there is similarly a lesser incentive to reason and persuade children in ways that respect their dignity. Without such a privilege, parents who were able to deal with their children reasonably would be unaffected, but parents who resort to violence would be addressed the same way as other domestic violence offenders.

Such a change would also shift the parameters for what a healthy family is. Instead of relying on state social services to intervene in cases of overt, currently recognized abuse and neglect, children could “vote with their feet” to establish family norms that worked for them. In the current legal framework adults have all the power to dictate the terms of their relationships with children, so where adult and child interests diverge, adults’ interests are the ones that will be protected. Where children are given normal protections against battery and false imprisonment, they could also decide how much they are willing to tolerate. Extending basic rights to wives resulted in marriages that, though imperfectly equal, were more likely to achieve some balance of interests and desires. Similarly, extending basic rights to children would have an analogous effect.¹⁹⁷

E. Rights as Citizens: Voting Rights and, Due Process

In the famous voting rights case *Yick Wo v. Hopkins*, the Supreme Court concluded that voting is regarded as a fundamental right because it

¹⁹⁶ Obviously most parents do their best to make their children happy, but they do not legally have to, and many do not.

¹⁹⁷ Cf. “Until recent years, state protection for battered wives was also considered state intervention in the family – again perhaps justified intervention, but intervention nonetheless. The protective intervention argument characterizes such state protection as a beneficial and necessary form of intervention into a family that has problems. Few people today would openly oppose state enforcement of rape and battery laws against spouses. If providing shelter houses and legal aid to battered wives constitutes state intervention, many argue that such intervention is fully justified to protect individual wives from being oppressed by their husbands. In the exceptional cases in which families malfunction,[sic] the state should step in to protect the powerless.” Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J. L. REFORM 835, 839-840 (1985) (note that Olsen rejects the intervention/non-intervention distinction and is describing what she takes to be the conventional view of family-state interactions – still the parallels with proposed “interventions” against assault and battery of children here should be obvious, and one should conclude that these interventions on behalf of children are likewise no threat to a well functioning family).

is “preservative of all rights,”¹⁹⁸ and in *Reynolds v. Sims* the Court found that “any restrictions on [the right to vote] strike at the heart of representative government.”¹⁹⁹ Without political enfranchisement, politicians have little political incentive to act in accordance with children’s political interests, and children cannot exert political pressure to ensure that their interests are taken into consideration. This is one of the most crucial elements in children’s political and social subordination. Parents and other concerned adults cannot simply vote *on behalf* of children because there is little reason to think that any adults’ interests are identical to those of children, nor is there any reason to believe that parents or other adults are perfect judges of children’s interests.²⁰⁰

Where conflicts of interest between children and adults *might* exist, if children are not allowed to express their own interests independently in a way that others must pay attention to such as by voting, those conflicts will be ignored and dismissed. Moreover when the adults who are engaged in a conflict of interest are also the ones relied upon to act in the interests of children, it is clearly in their interest to deny that the conflict exists.²⁰¹ Given this potential dilemma, no substitute for direct political enfranchisement is sufficient to protect children’s interests. Additionally, even if parents actually had interests identical to children, their votes would still be insufficient simply because there are not enough of them: without the addition of children to the voting roles any adults advocating their interests would not represent the full number of people with those interests since children themselves would not be counted.²⁰²

In *Oregon v. Mitchell*,²⁰³ a case testing whether Congress could “enforce” the equal protection clause by lowering both the federal and state voting age from twenty one to eighteen,²⁰⁴ Justice Douglas argued in dissent that “voting is ‘a fundamental matter in a free and democratic society,’ where ‘fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.’”²⁰⁵ Justice Brennan, with whom Justice White and Justice Marshall joined, wrote, “We believe there is serious question whether a statute granting the

¹⁹⁸ *Yick Wo v. Hopkins*, 118, U.S. 356, 371 (1886).

¹⁹⁹ *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

²⁰⁰ See HOWARD COHEN, EQUAL RIGHTS FOR CHILDREN 11 (1980).

²⁰¹ *See id.*

²⁰² The fear that enfranchising children would give their parents additional voting power is thus unwarranted: absent children’s voting rights a household with children is under counted.

²⁰³ *Oregon v. Mitchell*, 400 U.S. 112 (1970).

²⁰⁴ “Congress was of the view that this prohibition, embodied in s 302 of the Amendments, was necessary among other reasons in order to enforce the Equal Protection Clause of the Fourteenth Amendment.” *Id* at 240.

²⁰⁵ *Id.* (internal citations omitted).

franchise to citizens 21 and over while denying it to those between the ages of 18 and 21 could, in any event, withstand present scrutiny under the Equal Protection Clause.”²⁰⁶

If a statute granting franchise to citizens twenty-one and older, but not eighteen and older, could not withstand strict scrutiny as Brennan, White, and Marshall believe, would granting the vote to citizens eighteen and older satisfy strict scrutiny? Justice Douglas himself asks, “why draw the line at 18? Why not 17?”²⁰⁷ Because the right to vote is a fundamental right,²⁰⁸ restrictions placed on it should be evaluated on the compelling interest standard demanded by strict scrutiny. Noting that his colleagues acknowledged voting rights as fundamental rights Justice Stewart wrote in dissent that:

Yet to test the power to establish an age qualification by the ‘compelling interest’ standard is really to deny a State any choice at all, because no State could demonstrate a ‘compelling interest’ in drawing the line with respect to age at one point rather than another If the Government is correct in its submission that a particular age requirement must meet the ‘compelling interest’ standard, then, of course, a substantial question would exist whether a 21-year-old voter qualification is constitutional even in the absence of congressional action, as my Brothers point out.²⁰⁹

Stewart’s conclusion was that, contrary to the Government and his colleagues, he could not endorse a compelling interest standard for voting restrictions because “[yet] it is inconceivable to me that this Court would ever hold that the denial of the vote to those between the ages of 18 and 21 constitutes such an invidious discrimination as to be a denial of the equal protection of the laws.”²¹⁰ This amounts to nothing more than hand waiving by Stewart to make a compelling interest standard go away when it leads to a result he dislikes, despite the Court’s continued insistence through many cases that a compelling interest standard is demanded where restrictions effect fundamental rights including voting rights. The more logically consistent conclusion is that, as Stewart himself admits, the compelling interest standard would render the twenty one year-old voting qualification unconstitutional, the Court should have overturned statutes barring eighteen to twenty one year olds from voting even without Congressional action, let alone a constitutional amendment. Taking Stewart’s reasoning one step further, “because no State could demonstrate a ‘compelling interest’ in drawing the line with respect to

²⁰⁶ *Id.* at 240.

²⁰⁷ *Id.*

²⁰⁸ *Reynolds v. Sims* 377 U.S. 533, 555 (1964).

²⁰⁹ *Oregon v. Mitchell*, 400 U.S. 112, 294-95 n.14 (1970).

²¹⁰ *Id.* at 295.

age at one point rather than another,”²¹¹ then not only was the twenty one year minimum voting age unconstitutional, so is any eighteen year minimum voting age. In fact, *any* voting age is unconstitutional by Stewart’s logic, provided one applies the compelling interest standard, the standard that most of the remainder of the Court was happy to apply, and which is applied in other voting rights cases. While the Twenty Sixth Amendment eventually expanded the franchise to include eighteen to twenty year olds, the correct application of Stewart’s reasoning combined with the compelling interest standard would have made it unnecessary if the Courts’ equal protection analysis was applied consistently.²¹²

In an earlier case, *Kramer v. Union Free School District*, the Court found that in elections of general interest, restrictions apart from age, residency and citizenship requirements must be justified according to a compelling state interest to pass constitutional muster.²¹³ All three classifications were thought to be presumptively rational—but as discussed at length throughout this paper, age classifications should not be treated with presumptive rationality but as suspect. Residency and citizenship, unlike age, indicate a diminished personal interest in political enfranchisement: someone who is not a resident of a locality where an election is to take place is not under the jurisdiction of its laws and therefore has a lesser interest; likewise, someone who is not a citizen has diminished interest because their residence cannot be presumed to be permanent.²¹⁴

A common objection is that children are not sufficiently informed to vote.²¹⁵ There are a number of basic flaws in this objection. Being educated and/or politically informed is not a constitutionally permissible basis for limiting the enfranchisement. *Oregon v. Mitchell* held that literacy tests were not permissible under the Fourteenth Amendment and

²¹¹ *Id* at 294.

²¹² As an aside, Justice Stewart also argued that “so long as a State does not [set] the voting age higher than 21, the reasonableness of its choice is confirmed by the very Fourteenth Amendment upon which the Government relies. Section 2 of that Amendment provides for sanctions when the right to vote ‘is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States.’” *Id.* at 295. But Section Two of the Fourteenth amendment should be considered moot, *see* Gabriel Chin, *Disenfranchisement and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?* 92 GEO. L. J. 259 (2004), is any case unenforced, could not be seen as undermining conclusions drawn from Section 1 of the Fourteenth Amendment, and in any case refers to a long abandoned standard of reasonableness for voting since the Fifteenth and Nineteenth amendments already altered the explicit minimum requirement for voting to include non-white people and women.

²¹³ *See* *Kramer v. Union Free School District*, 395 U.S. 621 (1969).

²¹⁴ Though this logic does not apply to permanent resident visa holders—an argument might be made that they too ought to be able to vote, or otherwise be granted citizenship so they can vote—but this is a topic for another paper.

²¹⁵ *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970).

upheld Congress's enforcement of the Fourteenth Amendment against the states with regard to literacy tests.²¹⁶ While literacy tests were used to discriminate on the basis of color,²¹⁷ this still implies that literacy tests did not promote other compelling state interests such as having an educated electorate. Moreover, if there was a legitimate state interest in literacy tests, Congress could have chosen to enforce the Equal Protection Clause by requiring instead only that they be administered equally rather than in a racially discriminatory fashion (as they were). Secondly, as Brennan points out in *Oregon v. Mitchell*, any supposed intelligence standard restricting voting may serve as an epithet to exclude voters based on how they might vote, and this would be unconstitutional.²¹⁸ It is also profoundly undemocratic in the most obvious way: voting is meaningless if the government restricts who can vote based on how they might vote.

The objection that children are not intelligent or educated enough to vote also seems to imply that adults are able to vote because they are intelligent and educated. It may be true that children are less educated, and depending on one's definition of intelligence, less "intelligent" on average than adults. However, if children are a suspect classification as earlier argued, discriminating against children because age is a proxy for education would be impermissible, just as discriminating against statistically less educated racial or religious demographics would also be impermissible. If being able to cast well informed votes that achieve their desired results were a criterion for voting, it is unclear who if anyone would be permitted to vote. Nearly all surveys of general political knowledge and current events have exposed American voters as generally uninformed.²¹⁹ Moreover, even those few relatively well informed people lack the truly *relevant* knowledge when voting in an election: what impact their votes will have in achieving their desired policy outcomes. To have such knowledge would mean knowing which candidates would keep their campaign promises, how unforeseen events would affect their interests and how different elected officials would respond, and how all of the many different variables in the complex world we live in interact with each other to effect governmental decisions in practice. Voting is not some sort of crowd-sourcing²²⁰ exercise where the superior knowledge of the public at large ensures

²¹⁶ *Id.* at 117.

²¹⁷ *See id.*

²¹⁸ *See id.* at 242.

²¹⁹ *See generally* Michael Schudson, *America's Ignorant Voters*, 24 THE WILSON Q. 16, (2000).

²²⁰ Where professionals "outsource" to the public, decisions they would normally make on their own, on the belief that collective knowledge, wisdom, abilities, and research power produces superior results. *See generally* Jeff Howe, *The Rise of Crowdsourcing*, 14.06 WIRED (2006).

good government—it is instead a way of insuring that those who govern can be held accountable to those they represent.

One fear that is raised against granting children a vote is that children will simply vote however their parents tell them to vote. The result would be that a parent would in effect, have greater voting power than a non-parent. It might be pointed out that this fear parallels a historic objection to women's suffrage that wives would vote the way their husbands told them to.²²¹ There are numerous problems with this objection. Firstly, the counterfactual case is one where parents and children are *undercounted*. A family of three should collectively have three votes to have the same proportional representation as a group of three adult strangers because there are three people in both groups. So, it makes more sense to think of the current situation as being one where families with children are underrepresented, than one where parents might be overrepresented if children had the vote. Given the secret ballot system, once inside a voting booth, children could vote without their parents knowing who they voted for, thus removing the real potential for parents to sanction or reward their children for their voting choices (children could always tell their parents they voted one way while voting another). Finally, the fear that parents could influence their children's voting choices may be entirely misplaced: a fundamental part of constitutionally protected political speech is attempting to persuade others to vote the way you want them to. To suggest that parents could not exercise their First Amendment rights to convince their children to vote the way they would like them to is somewhat ridiculous—attempting to influence others' votes is not something to be guarded against, but rather, an essential part of a democratic system.

Another objection follows that one must “draw the line somewhere.” While it should be easy to imagine young teenagers voting, to think that toddlers and infants could vote is inconceivable. As earlier mentioned, having the *right* to vote does not require actually *exercising* that vote—plenty of adults choose not to vote. Infants and toddlers without the wherewithal to vote simply would not vote even if they had the right to vote. Possessing a legal right to vote simply means that the state and third parties cannot actively prevent the right holder from voting and cannot jail or fine them should they attempt to do so.

An additional objection is based on children's economic dependence and their lack of economic contributions to society. However, economically dependent adults, including very young adults who have yet to contribute anything to the economy and remain just as financially dependent as children, are permitted to vote. Property qualifications for

²²¹ See HELEN KENDRICK JOHNSON, WOMEN AND THE REPUBLIC 139 (Echo Library, 2009) (1897); Gloria Steinem, *Women Voters Can't Be Trusted*, 1 MS. MAGAZINE, 47 (1972).

voting are generally constitutionally impermissible absent a compelling state interest.²²² Arguing that children can be excluded from the political franchise based on a lack of economic participation then is to apply to them a double standard not applied to adults.

Besides being denied a right to vote, children are denied other basic civil rights like the right to a jury. In *McKeiver v. Pennsylvania*,²²³ the Supreme Court held that “juveniles” have no constitutional right to a jury trial in juvenile court.²²⁴ In a baffling opinion, the Court found that were a jury present, it would “effectively end the idealistic prospect of an intimate informal protective proceeding.”²²⁵ This “idealistic prospect” has no basis in reality: juvenile courts send people to prison cells,²²⁶ deprive people of liberty and impose social stigma just like normal criminal courts. The “intimacy” between the accusing government and a defendant whose liberty hangs in balance is one that courts have rightly recognized is inappropriate in criminal trials because accused persons need full due process to defend themselves against the power of the state. Not only are juvenile correctional facilities often physically identical to jails, even maximum security prisons,²²⁷ “juveniles” often face *longer* sentences for the *same* crimes because they will often be incarcerated till the age of majority even for offenses where adults would be liable for a shorter prison term.²²⁸ Children face an uneven standard of justice where they are punished more for the same crimes and have less due process with which to defend themselves. In *In Re Gault*, Justice Black, speaking of numerous procedural rights, took the position that “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.”²²⁹ The same

²²² See 29 C.J.S. *Elections* § 46.

²²³ 403 U.S. 528 (1971).

²²⁴ *Id.* at 528.

²²⁵ *Id.*

²²⁶ *Id.* at 542.

²²⁷ See *id.* “In 1965, over 100,000 juveniles were confined in adult institutions. Presumably most of them were there because no separate juvenile detention facilities existed. Nonetheless, it is clearly undesirable that juveniles be confined with adults.” PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, CHALLENGE OF CRIME IN A FREE SOCIETY 179 (1967). Even when juveniles are not incarcerated with adults the situation may be no better. One Pennsylvania correctional institution for juveniles is a brick building with barred windows, locked steel doors, a cyclone fence topped with barbed wire, and guard towers. A former juvenile judge described it as “a maximum security prison for adjudged delinquents.” PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, CHALLENGE OF CRIME IN A FREE SOCIETY, 179 (1967), cited in *McKeiver v. Pennsylvania*, 403 U.S. 528, 561 (1971).

²²⁸ See *In Re Gault*, 387, U.S. 1, 61 (1967). Mike Males found that minors in California serve an average 63% longer than adults for the same crimes. See MIKE MALES, THE SCAPEGOAT GENERATION: AMERICA’S WAR ON ADOLESCENTS 130 (1996).

²²⁹ See *id.*

logic clearly applies to the right to a jury trial. The juvenile justice system should be abolished as incompatible with the Equal Protection Clause.

F. Labor Laws and Contracts

Some of the “protections” applied to children, while over inclusive, do serve to protect unusually vulnerable populations. Child labor laws for example, reduce the opportunity to exploit children for their work, but they also increase children’s dependence on their parents. Presently child labor laws are absolutely necessary to protect children from exploitation because any money a child earns will be controlled by his or her parents, so any employment of children in the current legal regime is exploitive (and yet of course, there are many ways that children can and do work before the age of majority, and a few ways like acting where children work from an extremely young age). Clearly it would not be responsible to end labor laws in a society where children are systematically subordinated to adults since working would only become another means of exploiting them. What made child labor in the 19th century so terrible was that children were de facto slaves: they did not choose to work and could not refuse to.²³⁰ In a society where children were generally emancipated it would make sense to reexamine child labor.

To continue the equal protection jurisprudence earlier proposed, the state should have to show that certain employment practices are exploitive given the specific developmental needs of individual children—rather than prohibiting children from working as a whole. Children need and want money,²³¹ some work can be interesting, and many children want to feel useful, constructive, and influential.²³² In current society however, *all* children are uniquely vulnerable to exploitation as a class because *all* children are under unique legal disabilities. It is premature to guess just how vulnerable children would remain to exploitation if these disabilities were removed. However the extent to which children are capable of working without having more onerous burdens than those experienced by adults would depend on their particular development, and so classifications where necessary should be based on observable developmental characteristics rather than age. Provided these developmental characteristics could be shown to be relevant to different jobs, this would remain consistent with the equal protection jurisprudence earlier described. Moreover, removing age-based classifications might create more of an impetuous to carefully

²³⁰ JOHN HOLT, ESCAPE FROM CHILDHOOD 186 (1974).

²³¹ *See id.* at 173.

²³² *See id.*

tailor labor laws to prevent or reduce exploitation *in general* of children and adults.

Contract enforcement could also be done in such a way that took into account the vulnerabilities of individual children without imposing a blanket prohibition on children forming binding contracts. The doctrine of unconscionability, for example, is sensitive to disparities in bargaining power and sophistication between contracting parties.²³³ If courts applied the doctrine of unconscionability more often, and refused to enforce contracts between poorly educated and business savvy people where the poorly educated party received a substantially unfair deal,²³⁴ then children could be protected from unfair contracts as they are now, but gain the right to sign contracts that truly do serve their purposes. If children *were* allowed to sign contracts they would be among the people most likely to be succeed in an unconscionability defense to contract enforcement because unequal bargaining power and savvy would be easy to show convincingly. In this way, by removing discriminatory laws against children signing contracts while also permitting a more liberal use of the unconscionability defense (possibly with legislation), children would gain more rights and abilities to function in the world without exposing themselves to significantly more risks because they would remain protected from unfair contracts.

CONCLUSION

Children represent one of the final frontiers for a truly free and democratic society governed by the principle of equal rights under the law. The legal disabilities imposed on children cannot be presumed rational on the basis of children's abilities, their best interests, or practical social necessity. Just as prior liberation movements had to overcome the argument that legal oppression was for the benefit of the oppressed, similar logic is unconvincing when applied to children. A persuasive argument can be made that children represent a suspect class for equal protection purposes, and that children's fundamental rights are implicated in many of the restrictions against them. As a consequence, the basis for children's liberation exists within U.S. constitutional law, and is necessitated by a rigorously consistent application of established equal protection jurisprudence.

While it is impossible to know the full consequences of such monumental social and legal changes as advocated by this paper, it is impossible to conclude that legal moves towards the general emancipation of children would have anything like the disastrous effects that opponents predict. Such changes could never occur overnight,

²³³ 8 WILLISTON ON CONTRACTS § 18:10 (4th ed.).

²³⁴ Unconscionability must be both procedural and substantial, *see id.*

spontaneously, or in the absence of a sustained children's civil rights movement. Hopefully, however, by demonstrating that children's liberation is theoretically possible, and children's equal rights is a matter of social justice, legal and political discourse can shift towards that goal, rather than maintaining a narrow focus on child protection.