MAKING SENSE OUT OF THE RIGHTS OF YOUTH*

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Of late, we hear more and more about children's rights and child advocacy. Much of the dialogue appears, at first glance, far-fetched, wildly impractical, or simply woolyheaded. Yet none of us who have lived through the past decade dares to dismiss out of hand the righteous demands of any group—black, white, Indian, Mexican-American, Italian, Polish, homosexual, mentally or physically handicapped, prisoner or patient, woman—or *child*—that perceives itself the victim of systematic, historic discrimination in our democracy. Our job—as thinkers and policy-makers in many disciplines—is to try honestly *and* realistically to assess the status of children (and youth) in our society today; how they arrived there, whether and how much that status needs revision, and why; and finally, how to accomplish critical change.

Views vary enormously as to whether America is too much child-oriented, or too little; whether we are child lovers or child haters. Uniform, consistent, intelligible national policies towards children do not exist. Food programs, welfare benefits, children's allowances, day care, maternal and child medical care, school financing fluctuate wildly from jurisdiction to jurisdiction. The world's leader in material affluence, we lag scandalously behind far less privileged

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nations in enlightened programs for our young.[1] We spend, for example, much more of our tax dollars on the aged, despite the fact that more than 40% of Americans living at the poverty level are children; only 15% are over 65.[2] At the same time, our culture is preoccupied (voyeur-like) with the glamour of youth.

The status of children in our present-day society is undergoing forced change in many specific areas; but it still owes its lineage to our Anglo-Saxon and colonial ancestors. Children have always been subject to the absolute control of their parents, except in those areas where the state superimposes its rule on the parents, *e.g.*, compulsory schooling, vaccination, child labor laws. The state also stands in readiness to remove the child from the home and become its "surrogate parent" if the real parents abuse, neglect or cannot control the child, or to decide between them when they clash over the child's custody.[3] Historically, there has been an unrelenting legal tug of war between parents and the state, often with the Supreme Court as final arbiter. That Court, for instance, has had to decide that:

—the State cannot prevent a parent from sending his child to an accredited private school;[4]

—the State cannot make a child salute the flag if it violates the family's religious convictions or prevent him from wearing a black armband to protest the war in accord with his parents' beliefs;[5]

—the State *can* prevent a parent from allowing his child to sell religious tracts on a street corner;[6]

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[1] *See Do Americans Really Like Children*, Address by Kenneth Keniston, Connecticut Council of Child Psychiatrists, June 6, 1974. In 1970, the United States ranked 15th among 42 nations in infant mortality rates; among industrial nations, we are among a very few that do not guarantee prenatal and postnatal care to mothers and children.

[2] *See* Porter, *Who Are the Poor Today?* Washington Star News, September 22, 1974, at E-13; Keniston, *supra* note 1 (16% of all children, and 40% of all black children, under 6 live below the poverty level compared with less than 12% of the total population).

[3] *See* Berger, *The Child, The Law and The State* in CHILDREN'S RIGHTS, ch. 5 (P. Adams et al., eds. 1971); Rodham, *supra* note at 489; HOLT 39; for a fascinating account of the common law origins of the state's *parens patriae* doctrine toward children *see* Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae,"* 22 So. CAR. L. REV. 147 (1970).

[4] Pierce v. Society of Sisters, 268 U.S. 510 (1925); *cf.* Meyer v. Nebraska, 262 U.S. 390 (1925).

[5] *Compare* Bd. of Education v. Barnette, 319 U.S. 624 (1943); *with* Tinker v. Des Moines School District, 393 U.S. 503 (1969).

[6] Prince v. Massachusetts, 321 U.S. 158 (1944).

—the State cannot insist an Amish parent keep a child in secondary school if the parent perceives this as an affront to his religion.[7]

In this continuing struggle, the child has always been the pawn. Neither philosophically nor legally has he been recognized as having a right to *do* anything about the vicissitudes of his life, but only to await the action of others on his behalf or in his best interests. He is in a state of powerlessness, and, for that reason, the institution of childhood has been seriously compared to the institution of slavery. It has been called the "last legal relic of feudalism."[8] In colonial Massachusetts, a 1654 law provided the death penalty for stubborn children and rebellious servants.[9]

The child's subjugated status was rooted in the same benevolent despotism that kings, husbands, and slave masters claimed as their moral right. According to Blackstone, the architect of English law, parents had a legal duty to provide maintenance, protection and education for their children in return for obedience.[10] The social philosophers of the 19th century—Hobbes, Locke, Mills —never considered children parties to the social contract; they owed absolute obedience to their sovereign parents whose duty was to educate them to the degree of competence necessary to participate as adults in the social contract or the utilitarian society. For the child, said Hobbes, "[l]ike the imbecile, the crazed and the beasts . . . there is no law."[11] Even the ultimate libertarian, John Mills, complacently announced that "[t]he existing generation is master of . . . [the] entire circumstances of the generation to come."[12] To economic determinists, on the other hand, the inferior status of children was an essential counterpoint to parental control if parents were to support and protect children—as society wished them to do—and to the value of the child's labor as a contribution to the family's economic survival.[13]

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[7] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[8] Foster and Freed, *supra* note † at 343.

[9] *See* Katz, Schroeder, & Sidman 212.

[10] 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 446-455 (T. Cooley ed. 1899).

[11] T. HOBBES, LEVIATHAN 257 (Malesworth ed., vol. 3, 1839-45); Worsfold 143-146.

[12] J. S. Mill, ON LIBERTY 48 (Peoples ed. 1903).

[13] *See Childhood and Capitalism in America*, Address by Kenneth Keniston, Instituto Mexicano Norte Americano de Relaciones Culturales, Mexico City,

Even with the advent of the "child savers,"[14] and compulsory education, child labor laws, child welfare programs, and juvenile courts in the post-Industrial Revolution's revulsion to child exploitation, there was no real challenge to the underlying premise that children had no rights to choose or do for themselves. The teacher, the doctor, the reformatory superintendent, the juvenile judge become a new kind of master, acting *in loco parentis*.[15] The courts and legislators recognized only one exception—the "emancipated" (note the term) minor; a youth who, usually with the consent of his family, has taken up an independent life, by marriage, military service, or economic survival outside the family. And generally, emancipation has not been recognized at law until the latter stages of adolescence.[16] Practically, what does this dependent status mean in a child's life? Where does the churning about children's rights start?[17] A child, of course, has no say about when or where or to whom he will be born, indeed, if he will be born at all.[18] He cannot control whether he will be a "wanted" child.[19] At birth, his parents can place him for adoption; if he is handicapped, they can institutionalize him; in severe cases, they (and the doctors) can covertly agree to let him die. If his family neglects or abuses him, he may be able to complain to another adult, but he cannot take legal action by himself or even leave home legitimately. He goes to the school his parents (or the State) pick—even if he must leave home and neighborhood. Sick or troubled, he still cannot seek medical or psychiatric treatment without parental consent. If he works, he must hand over his wages. There are severe limits on what he can buy or invest without permission; he has no credit rating. His parents can select his religion, his friends, his clothing. They can regulate when he stays in and when he goes out. If his parents abandon, abuse or neglect him, he will be delivered to foster parents or to an institutional supervisor with quasi-parental authority. In school,

March 15, 1974. ("the position, the definition, and the value of children in America has largely been defined by their expected role in the productive system").

[14] *See* PLATT, *supra* note †.

[15] *See* Berger, *supra* note 3 at 159.

[16] *See* Katz, Schroeder & Sidman 218, 228-29, 233.

[17] *See, e.g.*, Nassivera, *Get Ready for Kids' Lib*, National Observer, September 14, 1974, at 1, 17.

[18] *See* Roe v. Wade, 410 U.S. 113 (1973) (putative mother has right to abortion in first trimester).

[19] *See* GOLDSTEIN, FREUD, & SOLNIT, *supra* note † at 20-21 (the psychological importance of being a "wanted" child).

the teacher and principle become the parent figures. In the hospital or doctor's office, no one asks his consent to serious surgery, mind-altering drugs, painful medical procedures, even to becoming a subject in outright medical experimentation with long-term risks to health. He cannot control access to his room, his school locker, his school or medical records, despite their potential for foreclosing options in his later life;[20] often he has no access to those records himself. John Kennedy, in 1963, asked whether any white would truly want to be imprisoned in a black skin. We might ask whether any of us would want to be consigned to the trap of childhood.

Can we cite any legitimate justification for continuing the nonperson status of children? While there are skirmishes around the borders of minority—18-year-olds can now vote; college students can sometimes contract for educational loans, auto repairs, and insurance; adolescents in some places can seek VD and drug treatment on their own; children over 12 are sometimes consulted in custody fights;[21] youths accused of delinquency get appointed-counsel to defend them, and some (but not all) of the Constitution's criminal due process rights[22]—is it not time for a frontal assault on the subordinate status of childhood itself?

The most commonly cited argument for treating children differently from adults is that they are not sufficiently mature in intellect, emotion or experience to make rational judgments about what is in their best interests. Certainly this is true in the earliest years. But even there, it is now argued, the right of a very young child to be consulted and informed about critical decisions in his life, and his right to be represented in those decisions, can no longer be summarily dismissed. Thus, in situations where the interests of the child (no matter his age) and the parents are apt to conflict or a serious adverse impact on the child is likely to be the consequence of unilateral parental actions, it is now argued that the child's interests deserve representation by an independent advocate before a neutral decision-maker. This could mean, for example,

[20] *See, e.g.*, Shields and Churchill, *Kids in the Computer*, The Progressive, October 1974, at 37.

[21] *See* Katz, Schroeder, & Sidman 238-41.

[22] *See* In re Gault, 387 U.S. 1 (1967) (right to counsel, confrontation, due process hearing in adjudication of delinquency proceeding); In re Winship, 397 U.S. 358 (1970) (reasonable doubt standard for adjudication of delinquency); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (no right to jury trial in adjudication of delinquency proceedings).

that before a child can be institutionalized as mentally ill, retarded or physically handicapped, a court must approve the commitment after having appointed someone to speak for the child.[23] Courts have already intervened in the medical area where parents, for religious reasons, have refused to consent to life-saving blood transfusions for their children.[24] Such intervention has generally depended upon the seriousness of the threat to the child if the parents' decision turned out wrong, that is, if it might result in, for example, institutionalization, serious health impairment, or even death. But with respect to an older child, there is a growing body of human developmental data which disputes the idea that rationality and judgment vest only in the late teens or early twenties. Without attempting to synthesize or refine that material, there appears solid evidence that children attain stabilized IQs, their sense of morality is well-developed, their capacity to resist peer pressure and think for themselves is realized at a much younger age.[25] There is also evidence that today's children mature physically, and become better informed earlier, than older generations.[26] It is obvious that these talents develop at different rates for different children in different settings, but insofar as our social or legal policies must generalize, presumptions of decision-making capacity ought to conform to present knowledge, not to the ignorance or prejudices of past centuries.

Let me suggest several areas where current law and practice deserve revision:

1. Age should no longer be a bar to retaining and using one's own money, making valid purchases and contracts. This, incident-

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[23] *See* Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CAL. L. REV. 841 (1974) [hereinafter Ellis]; Bartley v. Haverford State Hospital, Civ. No. 72-2272 (E.D. Pa. filed Nov. 16, 1972); Saville v. Treadway, Civ. No. 6969 (M.D. Tenn. March 9, 1974) (hearing needed to institutionalize retarded child).

[24] *Cf.* Application of President & Directors of Georgetown Hospital, 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 337 U.S. 978 (1964).

[25] *See* Kleinfeld, *supra* note †, 5 FAMILY L.Q. at 69 n. 29 (citing Piaget and others to the effect that adult level of performance on intelligence tests is reached by age 13, resistance to group pressure by age 16; moral responsibility by age 12); Wisconsin v. Yoder, 406 U.S. 205, 243-246 and 245 n. 3 (Douglas, J. dissenting) (" . . . there is substantial agreement among child psychologists and sociologists that the moral and intellectual maturity of the 14-year-old approaches that of the adult," citing, *inter alia*, Piaget, Kohlberg, Gesell & Ilg).

[26] *See* Tanner, *Physical Growth*, in 1 P.H. MUSSEN, CARMICHAEL'S MANUAL OF CHILD PSYCHOLOGY 144-147 (1970).

ally, does not and should not mean that children are presumed to be no less vulnerable or gullible than adults, and that adults therefore have no greater obligation to them. To the contrary, those who deal with children—manufacturers, merchants, advertisers, etc.—ought to be held to a higher standard of care to prevent fraud, duress, or exploitation based on the age of their clients.

2. A youth should be able to exercise increasing control over his choice of school and work or, at the very least, participate fully in decisions affecting school and work (assuming no additional financial burdens are imposed on his parents). Dropping out of school altogether should, however, probably be subject to a requirement that parents or other authority ratify the decision on the rationale that a democratic society has a proper stake in insuring its citizens are educated enough to function economically and politically.

3. An adolescent youth ought also to be able to seek medical or psychiatric care on his own; again, professionals who deal with him should be held to a higher standard of care.[27] This option, of course, will become economically feasible only when national health insurance or alternative health insurance programs make provision for vesting rights to engage such services in youth rather than in their parents. Equally, a youth ought to be able to refuse or resist medical or psychiatric care: no more "voluntary" commitments by parents of their children to mental hospitals; no more "voluntary" sterilizations, abortions, psychosurgery or other risky surgical or experimental procedures; even tranquilizing drug regimens should be subject to review if the youth objects.[28] There plainly can be situations where the youth's needs for medical care are so great as to cast doubts on the rationality of his refusal or simply to justify overriding his refusal; there, a court may have to intervene, just as in the instance where *parents* for their own reasons have intentionally denied medical care to their children. The prob-

[27] *See, e.g.*, District of Columbia regulation, passed August 20, 1974, permitting minors of any age to consent to treatment for substance abuse, to prenatal care or abortion, and to treatment for psychological disturbance in Foster & Freed *supra* note † at 358-364; *see also* Matter of P. J., No. 72-7150 (D.C. Super. Ct., Fam. Div., February 6, 1973) (minor may obtain abortion without parental consent).

[28] *See* Ellis 855; In re Smith, 16 Md. App. 209, 295 A.2d 238 (1972) (parent can't force child to abort); Grenspan & Singer, *Hyperkinetic Children*, 43 HARV. ED. REV. 515, 543 (1973).

lem of parent notification when a child seeks such treatment is troublesome, not susceptible to any neat or facile solution. There are some instances—contraception, abortion, drugs, VD, psychiatric help—when disclosure may spell disasterous consequences for the child within his family and thus deter him from ever seeking help. Incest, a psychotic parent, or even a fanatically moralistic one, are cases in point. Yet, a parent's inherent right to know when something is seriously wrong with his child is also compelling, and acts as a safety valve on quackery or medical incompentence. A reasonable procedure would be to seek the child's consent to advise the parent; if it is not forthcoming, the doctor may have to seek review by a panel of his peers to validate nondisclosure if treatment continues beyond a finite time. That review should give preeminent weight to the predicted consequences to the child of disclosure. There should not be, however, disclosure over the child's objections except in the same emergency circumstances that would ethically justify violating an adult's confidence.

4. Similarly, a youth ought to be able to seek legal advice or help to redress his grievances against family, school or others who adversely affect him.[29] This, to me, is what child advocacy ought to be about, rather than merely to interpose another layer of adult supervision, bureaucratically deciding where the child's best interests lie. A child or youth should have access to free or paid legal services on a confidential basis to discuss his personal grievances: Is he being abused at home or in an institution? Cheated out of his due by an employer? Illegally suspended from school or discriminated against in some fashion? Experience with juvenile counsel in delinquency and PINS cases shows children and youth usually *do* act as responsible clients and that parents often cannot be counted on to protect their legal rights in tri-partite conflict situations with schools and other child service agencies.

5. Finally, there is a whole range of civil rights that youths—at least from 12 up—ought presumably to enjoy. These include, obviously, free speech, and more troublesomely, freedom of association. There is no question, however, that some of these basic civil

[29] Ellis 881-90 (minors generally hire their own counsel); *see also* Legal Services Corporation Act, Pub. L. 93-355 § 1007(b)(4) (July 25, 1974) (poverty lawyers can represent juveniles only with written consent of parents except in specified situations).

rights may have to be redefined, in some instances even curtailed, as applied to youths. The Supreme Court—rightly or wrongly—has already said that the rules against selling allegedly-obscene materials to the under-17 market can be broader and more inclusive than the standard for adults.[30] Those of us fierce civil libertarians with children under 17 find this a troubling dilemma.

Does freedom of association include keeping company which parents forbid? Going places they outlaw? Does freedom to travel mean taking unauthorized trips, playing hooky, hitting the road, or staying out after hours? Does freedom of religion allow rejection of the parents' faith?

No one envisions allowing children to run to court for an injunction whenever their parents lay down unacceptable rules of conduct. On the other hand, a parallel argument can be made that society should not, through its juvenile courts, lend its authority to enforcing arbitrary parental commands in areas normally falling within these civil rights domains. No court should randomly threaten a teenager with incarceration if he doesn't obey his parents, stay away from bad companions, go to church, or get home by 10:00. The law should, as a norm, keep hands-off the give and take of rules and rights in the home. Our PINS, incorrigibility, run-away laws attest to the failure of state intervention in the exercise by parents of their so-called natural authority over rebellious children.[31]

There may, of course, come a time when the conflict is so irreconcilable that someone *has* to intervene; if the parents on a self-help theory use force against the child, bar him from the house, attempt to frustrate his efforts to live independently. In such cases, the child himself ought to be able to use the juvenile courts' facilities for resolution or enforcement of his rights. The forthcoming draft of one model juvenile court act may contain a jurisdictional provision to allow children to go to court to enforce their rights.[32] More basically, we may need more flexible emancipation procla-

[30] Ginsberg v. New York, 390 U.S. 629 (1968).

[31] *See generally* PRESIDENT'S COMMISION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT ON JUVENILE DELINQUENCY AND YOUTH CRIME 25-27 (1967).

[32] The draft of the revised Standard Juvenile Court Act currently under consideration by the National Council on Crime and Delinquency contains such a provision.

mation procedures for teenage children to establish their lawful right to move elsewhere—temporarily or permanently—without becoming wards of the court or being labelled PINS. A child could then turn to the courts as a counterweight against arbitrary parental authority.

A final word on civil rights. Most liberation groups have concentrated on the franchise as their top priority. In the case of youth, the 26th Amendment setting 18 as the voting age is not—or should not be—the conclusion of their effort. The Amendment permits a State to establish a lower voting age,[33] and I believe there are reasonable arguments advanced for doing so— even to the radical extent of allowing youths 12 or 13 and above to vote. Watching their remarkable, sometimes awesome, political sophistication (sometimes equal cynicism), this may not be so far-out a suggestion as it seems. Many adolescents are astonishingly well-versed in politics, with a clear political identity or ideology—often at odds with their parents. Many, of course, are not, and some would delay the franchise at least until high school history and civics courses have been completed or apply substantive knowledge tests at an earlier age.[34] Still, we have little, if any, evidence to show that the political preferences of teenagers are any more irrational than those of adults. If the debates in your home track with ours, you may have quite the opposite feeling. The stake of young people in their local and national leaders and leadership is enormous; and the automatic disenfranchisement of young citizens, without empirical justification, is a blatent anomaly in our democracy.

We have been talking up to now about denial of rights to children based on the old nostrum that they are incapable of exercising them rationally or with maturity; a test, incidentally, we wouldn't dare apply to adults. There may, however, be other valid considerations that would deter us from extending certain rights to youth. The one that comes most quickly to mind is the fear that pushing children's autonomy will so undermine parents' authority and erode family cohesiveness that in the end the child who still needs the intimacy, emotional warmth, physical protection and

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[33] U.S. Const. amend. XXVI.

[34] *See* HOLT 18, 155; Kleinfeld, *supra* note †, 5 FAMILY L.Q. at 71-81; F. GREENSTEIN, CHILDREN AND POLITICS 55-72 (1965).

nurturing of the family unit will lose far more than he will gain.[35] Few people would challenge, in the abstract, the child's "right to parental love and a healthy home environment," a right which unfortunately no court or legislature can deliver, but which, in its finest expression, is irreplaceable. Will a policy of bolstering equality of all family members rather than reaffirming the autocratic authority of parents strengthen or weaken the family fabric? What effect has the onrushing tide of women's rights had on marriage and the family? Obviously, we don't *know*; we can cite evidence to support almost any viewpoint. Militant minorities are inured to warnings that if they push too hard, they will suffer a backlash of hostility from the rest of society, even their putative, radically chic supporters. In the case of children, they would certainly be especially vulnerable to any such backlash.

Yet, a fundamental reason why children's rights has emerged as a serious topic at all is the erosion in confidence in the family reliability to meet all the needs of the child. Our technological society has isolated the nuclear family and subordinated its welfare to the demands of great economic entities for mobile labor; others point to the escalation of child abuse and to the incidence of mental illness, alcoholism, and suicide among both parents and children. Intact families whose members love and respect each other would not be likely to disintegrate if there were to be a different allocation of rights and privileges within the family. I would wager that most strong family units already allow their children the freedom we are talking about. It is the borderline, shaky or unstable family structures that might split open when the lines of authority become more blurred. These are also the high risk families in which abuse and exploitation of children are most likely to occur, and where children most need an affirmation of their basic rights.[36] Subconsciously, we may worry that parents will say "why should I feed, house and educate you if you won't do what I say; if, in short,

[35] *See, e.g.*, Pound, *Industrial Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 186-187 (1916).

[36] *See, e.g.*, McGrath, *Early Sorrow: Some Children of Our Time*, 8 FAMILY L. Q. 91 (1974) (700 American children killed, 10,000 battered annually by parents); Escalana, *Intervention Programs for Children at Psychiatric Risk*, in 3 THE CHILD IN HIS FAMILY: CHILDREN AT PSYCHIATRIC RISK 33, 35-43 (E. Anthony & C. Koupernik eds. 1974); HOLT 45-53 ("there is much evidence that the modern nuclear family is . . . the source of many people's most severe problems").

I can't control you?" Indeed, potential parents who feel like that may simply avoid the confrontation by not having children. But for the present I do not think we have any evidence that the viability of the family will be jeopardized by more freedom for the children or, indeed, that the continuation of its present rigid power structure is essential to preservation at all.

One of the challenging tasks for family counsellors, social workers and other professionals who work with families would be to develop new and more equal relationships inside the family without resort to outside agencies, like the police or courts, to enforce parental authority. The rights and responsibilities of men and women in marriage are being rethought and redefined, sometimes painfully, but often constructively, outside courts right now. Why not families as well?

A third justification traditionally advanced for keeping parental and surrogate parental authority over children intact is to protect the child from his own excesses and exploitation by unconscionable adults. At first glance, this may seem merely a variation on doubts about the child's rational capability, but actually there is something more involved. A positive goal of any children's rights movement should be to contribute to the development of healthy, independent, responsible adults. Increased opportunities to learn from experience, to experiment, to succeed and fail should enhance the development of a young person's judgment-making ability.[37] Yet, even rational, enlightened adults sometimes make tragic errors of judgment whose effects they must suffer the rest of their lives. Should we not want to spare young people from making mistakes with irreversible or profoundly scarring consequences? On such grounds, society can and probably should set minimum ages for exercise of a youth's right to make certain kinds of decisions for themselves, *i.e.*, to marry, to use drugs with proven adverse effects upon health, to be sterilized, to wander the streets or highways alone at night, to run away and live without adult supervision of any kind.

There are—I should note—apostles of the absolute freedom for children of all ages to make such decisions for themselves. John Holt appears to be one. He has apparently made a basic decision that the damage to a child of being tyrannized by "professional

[37] *See* Konopka, *Formation of Values in the Developing Person*, 43 AM. J. ORTHOPSYCHIATRY 86-96 (1973).

helpers" and treated as a "mixture of expensive nuisance, slave and super-pet"[38] outweighs the conjured horrors we can so easily cite: homosexual assaults on the runaway boys in Texas, rapes and murders of hitch-hiking teenagers, sexual exploitation of girls seeking shelter—or their own identity—in strange cities.

Many of us would, however, retain some of society's power to protect children from such disasters even though we recognize its limited coercive nature. But we do need a general review of our wide-ranging so-called protective laws and customs to insure that the dangers of freedom are real and not a phantom device for imposing our own will on younger people. Often children's welfare can be protected not by forbidding them certain choices but rather by insisting that those who present them the choice observe a special level of consideration and care for their youth. Thus allowing children to work before 16 should not free employers to use them in jobs that overtax their strength or expose them to undue hazards for their age. Allowing them to enter into enforceable contracts should not preclude the application of more stringent standards of disclosure and truthfulness for children's contracts than for adults'. Protecting them from the terrors of the night and city streets does not mean shutting them up like prisoners in detention homes where they face equal dangers of corruption.[39] And so on.

In sum, contemporary concepts of fairness strongly support adoption of a general presumption that children should be allowed the same rights and freedoms as adults unless there is a significant risk of irreversible damage to them—physical, psychological, emotional—from exercising such rights or a general consensus backed by empirical data that at particular ages children do not have sufficiently developed skills to exercise those rights.

This stance seems consistent with the views of the major social philosopher, John Rawls, who posits in his *A Theory of Justice* a social contract in which everyone decides on the allocation of rights and duties under a "veil of ignorance," not knowing what

[38] *See* HOLT 18.

[39] Communities should have runaway shelters staffed with counsellors and medical and legal help for children under 16, to which they can come voluntarily or be brought by the police, if they do not want to go back home. Parents would have no right to forcibly take their children away from such homes. At the end of a designated length of time spent in the home, the child would have to return to his parent's home or go to court for a declaration that he could live alone or for the provision of a substitute home.

societal role he will occupy in the new society—man, woman or child. I believe that if anyone were in danger of being assigned to childhood, he would demand most of the rights we have been talking about.[40]

I know the job of tailoring rights to developmental stages sounds difficult and complex, and experts do not always agree on norms. Legislators will in the final analysis be left with the task of redefining ages of legal competency for many rights; they will need the experience of those who work with children, and the views of children themselves ought to be engaged in the redefinition process. The effort, however, is long overdue. Where financial or service benefits mandated by law are directed toward children, serious consideration ought to be given to having the rights of those benefits or services vest directly in the child, so that he has the economic flexibility to make his other choices real.

Perhaps this discussion seems over-concentrated on legal rights and legal mechanisms for enforcing the rights of children. It is not because I am unaware of such fundamentals as natural rights and moral rights; the right of the child to basic needs and human gratifications: love, security, guidance, adequate nutrition, shelter, recreation, education, medical care.[41] We know all too well that thwarting those needs in childhood produces distorted, unhappy and often dangerous adults.[42] Yet, so far, neither our legislatures nor our courts have seen fit to guarantee *those* rights— insofar as they have power to do so.

Just recently, the Supreme Court declared that there is no constitutional right to an education.[43] Hence, if these rights are ever to gain real substance, especially where poverty is the cause of their denial, they will have to be transplanted from the moral to the legal sphere by legislators. Where parental ignorance, apathy, or purposeful withholding of such rights is the root cause of their de-

[40] J. RAWLS, A THEORY OF JUSTICE (1972); *see* discussion of Rawls' theory as it relates to children in Worsfold 151-157.

[41] *See, e.g.*, Declaration of the Rights of the Child, G.A. Res. 1386, 14 U.N. GAOR, Annexes, Agenda Item No. 25, at 16, 17, U.N. Doc. A/4185 (1959) ("the child shall have the right to adequate nutrition, housing, recreation, and medical services").

[42] *See, e.g.*, Robins, *Antisocial Behavior Disturbances of Childhood: Prevalence, Progress and Prospects*, in 3 THE CHILD IN HIS FAMILY: CHILDREN AT PSYCHIATRIC RISK 447, 451 (E. Anthony & C. Koupernik eds. 1974).

[43] San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

nial, the most effective solutions are extra-legal, in the realm of psychology, religion and social work, with legal removal of the child from the home only a last resort. Yet, demonstration of the moral and empirical bases of these basic rights of children can be a useful device in efforts to persuade parents and surrogate parents to honor them as well as in the political efforts to codify some of them into legal obligations.

There is, however, one basic right children should have in their relationship with all adults—parents, teachers, counsellors, social workers, doctors, institutional personnel. That is the right to know, to comprehend, to challenge, and to participate meaningfully in all the decisions that vitally affect his life.[44] The implications of *this* right to participate can pervade a child's entire existence. It would apply from the age at which a child first talks, listens and begins to understand. A child should be consulted and participate in any custody decision—formal or informal, temporary or permanent—between his parents; between his parents and an institution, hospital or residential school; between a court or a social work agency and a foster home, group home, or institution. He should be consulted and participate, too, in family decisions about what school or summer camp to go to, decisions on medical treatment or psychiatric help, decisions to place him in any kind of special education situation; decisions to fail him in any subject; or to suspend or expel him from school; decisions to require him to go to church. This is a kind of moral due process that parallels what the law now requires of any state action significantly affecting a citizen's life, from cutting off welfare to sending him to prison or expelling him from public school.[45] It encompasses the right to be heard, to confront one's opposition, and ultimately to secure an impartial decision.

It is, of course, much more difficult to enforce such a right where the government is not involved and the relations are between private parties. We must do a great deal of thinking about the nature and operation of forums in which children can protest and challenge when they think they are treated arbitrarily by those to whose care they are committed. Why shouldn't schools have legiti-

[44] *See* Worsfold 155-157.

[45] Goldberg v. Kelly, 397 U.S. 254 (1970); Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972).

mate mechanisms for children to air grievances against teachers and administrators; some courts have already insisted that children's delinquency institutions have the grievance machinery for juveniles.[46] Shouldn't hospitals have similar procedures?

No doubt the complexities of applying these principles to a child's life would be enormous. There are bound to be objections that from the child's point of view it would merely confuse him, fragment his loyalties, exacerbate family tensions, provide him a tool he is incapable of handling. All of these arguments are familiar and have been used before in disputes over whether children should have juvenile court hearings before being sent to reform schools or adjudicated delinquents. Admittedly, the consequences of those decisions are more critical than what school or church a child attend, but if there is a lesson to learn from all rights-oriented operations, it is that real participation and power-sharing are fundamental and indispensable.

Let me conclude with a few specific suggestions for exploration by non-lawyers in the children's rights area. How can we make specialized information available to minors so they are able to exercise informed choices and to know and understand their rights? What must we do to erect conflict-resolution mechanisms for children in institutions such as schools, hospitals and recreation programs?[47] How can we preserve a joyous sense of participation and still enable the ability to protest fundamental deviations from fairness? Child professionals ought also to direct their attention to setting standards for dealing with young clients seeking medical, psychiatric, or legal services. When should parents be brought into the process and when not? Indeed, we must motivate the professional's willingness to listen to children at all. Finally, there ought to be more emphasis in our secondary schools on preparation for parenthood. The rights of children may find its most sympathetic audience among young adults or soon-to-be adults—not yet parents, but still young enough to remember and know what it is like to be a child.

I am sure I cannot escape without saying something about the *duties* of children and youth, as well as their rights. What legal and

[46] *See, e.g.*, Morales v. Turman, 364 F. Supp. 166 (E.D. Tex. 1973).

[47] *Cf.* Statsky, *Community Courts: Decentralizing Juvenile Jurisprudence*, 3 CAPITAL U. L. REV. 1 (1974).

moral responsibilities can they be held to? We have mentioned some already. I think they can quite legitimately be compelled to attend school up to a point where they can pass a reasonable literacy and substantive knowledge test, regardless of age; after that, they would have the option of working or continuing their education. Society and parents can demand they be equipped with minimal skills to compete in the job market. They can be obliged to obey the same laws in the community as do adults or suffer restrictions and deprivations if they refuse, although these may rightly deviate from adult sanctions—ranging from fines they pay themselves to reasonable limits on their freedom—but notably *not* including punishments that degrade or corrupt. They should be held responsible for contracts into which they enter, financial or employment, assuming that they are not exploitive or entered into out of irremediable ignorance. As long as the child lives with his parents or someone else he must be expected to obey reasonable rules of the house; if, after a minimal age, he finds such rules hopelessly arbitrary or violative of his civil rights, he can seek mediation through some outside agency; if the situation is intolerable, he can seek official aid in shifting his custody. Parents faced with an impossibly recalcitrant child should be able to seek the same kind of relief. To make such a system viable, communities will, of course, have to establish networks of non-coercive substitute homes and arrangements, temporary and permanent.[48]

I end on the realistic if somewhat depressing note that even the most radical version of children's rights on paper probably isn't going to make major changes in most children's lives. It may provide a way out for some children living in intolerable family situations without substituting a worse form of state tyranny over their lives. It should make professionals who deal with children more conscious of their responsibilities and their duties to treat children as they would adults. It can deflate some tension between the generations as power over children's lives is dispersed and more widely shared with the children. Its most convincing justification is simply that it is right.

[48] For a critical discussion of our present home substitute policies and procedures, *see* Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. ED. REV. 599 (1973).