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Bruce C. Hafen

The American civil rights movement of the 1950s and 1960s did not view the nation's children as a discrete minority group. Since the early 1900s, the policy assumptions and the institutions of the "child-saver" era had regarded children as legally privileged rather than disadvantaged. Massively funded public education, a juvenile court system based on children's special needs, and a strong state commitment to protecting children against harm from parental neglect or from their own delinquency indicated that "children's rights" of many kinds had long been recognized. Children thus seemed to have little need for protection against discrimination, because they were seen as the beneficiaries of a special legal status.

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Civil rights workers soon began to see, however, that the effects of racial discrimination and poverty were especially harsh when visited on the children of disadvantaged families—not because of actual discrimination against children, but because children's natural dependency was aggravated by the economic and political impotence of their families Lack of public services for children in minority groups thus became a focal point for the reform of laws and institutions providing child care and juvenile justice

Other sources of concern about children also provided motivation for reform For example, a heightened awareness of the needs of other dependent persons increased the public's concern for the inherent vulnerability of children A growing skepticism regarding discretionary institutional power also raised doubts about the use of paternalistic authority in public schools and juvenile courts to determine the best interests of children And the egalitarian trends of the day suggested to some observers that the very concept of minority legal status might, like distinctions based on race or sex, be a source of discrimination rather than advantage

American governmental and legal institutions responded to these developments in several ways Large-scale responses such as the war on poverty gave new attention to the need of all children for the threshold necessities of physical care and protection from parental abuse Various forms of protection from institutional abuse were also initiated, often through new litigation techniques that challenged the authority and the methods of state agencies Public schools and juvenile courts adopted new procedural standards, which clarified when and how state agencies should regulate the behavior of young people or intervene in family life During this same period, a constitutional amendment lowered the voting age to eighteen, and courts began to describe in constitutional terms the legal rights of children in cases ranging from abortion to free speech, which encouraged the perception that children were entitled to greater personal autonomy.

The nation is currently examining itself to see how, and even whether, these and related reforms produced net gains for children and families [2] The Mnookin studies are part of that self-examination

One general theme of the post-"child-saver" era reforms since 1960 has been a loss of faith in paternalism, reflected in attempts to reduce all forms of discretionary authority The due-process model has become popular in part because it appears to contribute to reducing discretion. Especially when children are involved, however, a reduction in the discretionary judgment that authority figures may exercise creates a vacuum that deprives children of an affirmative source of support and guidance Indeed, as *Bellotti v Baird* illustrates, an overriding commitment to due process can abandon children to their procedural rights [3]

The reality underlying the concept of minority status is that children lack the capacity to formulate reasoned judgments Their inherent dependency thus creates an obvious need—indeed, a "right"—to affirmative nurturing and special forms of protection. John Locke believed parents were obliged by "Nature" to "nourish and educate" their children until their "understanding be fit to take the government of [their] will "[4] In this way, he argued, the young are prepared to meet the demands and partake of the opportunities of adult life as mature and rational beings [5] Thus, Locke concluded, "we see how natural freedom and subjection to parents may consist together, and are both founded on the same principle "[6]

This basic children's need was described by Henry Foster and Doris Freed in their proposed "Bill of Rights for Children" as the "moral" as well as "legal right [to] receive parental love and affection, discipline and guidance, and to grow to maturity in a home environment which enables [the child] to develop into a mature and responsible adult "[7] Empirical studies establish "the need of every child for unbroken continuity" in parental relationships Such stability is "essential for a child's normal development "[8] A conviction that this sense of belonging is critical for a child's normal development underlies the generally accepted policies discouraging state intervention in ongoing family relationships A commitment of mutual trust is also an essential element in transmitting to children moral norms, cultural values, and judgmental as well as intellectual skills

A child's right to be protected from his or her own immaturity is concomitant with this right to belong Of course, each child needs gradually increasing freedom to make important choices, even at the risk of harm from some bad judgments The capacity to weigh risks in making personal choices is only developed as children live with, and learn from, the unpleasant consequences of their decisions Thus, adolescence should be seen as the learning years, a time in which children are given low-risk levels of autonomy as a way of learning how to assume greater responsibility [9] Still, in a paradoxical but important sense, a child has a basic right to be protected against complete freedom

With our loss of confidence in paternalism, however, a subtle but important shift has occurred in the public mind away from a commitment to the right of children to belong and to be nurtured We seem increasingly unsure, for example, whether kinship and marriage are valuable ties that bind, or sheer bondage Laurence Tribe contends that future legal developments will lead to a "liberation by the State" of "the child—and the adult— from the shackles of such intermediate groups as the family "[10] In this vision, no person would "belong" to any other person through kinship or formal marriage, because such belonging is thought to undercut personal autonomy Professor Tribe maintains, however, that being "liberated from domination by those closest to them" raises an "urgent need" for legal recognition of "alternative" relationships that "meet the human need for closeness, trust and love" in the midst of "cultural disintegration and social transformation "[11] Professor Tribe has not yet explained how alternative relationships can both meet a child's need for nurturing and belonging and yet protect her from the "shackles" of long-term commitments

Similarly, some commentators have argued that

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children must be "liberated" from minority status or from other age-related legal limitations,[12] sometimes drawing parallels between the inferior statuses of slaves, women, and children [13] The reform movement for children's rights, especially in its approach to group litigation and its reliance on constitutional theories, has borrowed extensively from the legal experience of the civil rights movement, risking some uncritical transfers of egalitarian concepts that ignore children's lack of capacity and their need to be protected from their own immature development

The findings of Robert Mnookin and his colleagues suggest that, for the most part, child advocacy litigation cannot by itself be held responsible for recent changes in either adult attitudes toward children or in institutional environments affecting children Legal developments are intertwined with larger social changes.[14] In addition, the Supreme Court's attitude toward liberationist arguments in children's cases has become more cautious in recent years [15] Yet our developing vision of children's legal rights is malnourished, because it fails to support both the social and parental assumption of affirmative child-rearing duties The law's reluctance (or inability) to enforce affirmative duties in intimate relationships forces us to rely on voluntary fulfillment of responsibilities But, ironically, the increased visibility of our reliance on procedural enforcement powers may also create the illusion that adults owe children only what the legal system demands of them.

Our present collective tendency to neglect children's right to developmental protections and opportunities has been documented in recent nonlegal literature For instance, Marie Winn's *Children Without Childhood* describes "a profound alteration in society's attitude toward children,"[16] tracing the connections between a general erosion of institutional authority, the instability of marriage, the sexual revolution, and the emerging tendency to treat children as if they had the capacity for unrestricted adult experience.

Neil Postman reached a similar conclusion, finding that contemporary television's attempts to appeal to mass audiences erases the traditional dividing line between adults and children, thereby undermining the normal psychic maturation of children.[17] Educational researcher Gerald Grant also found in his field studies that public school students and teachers "no longer have any agreement" on what "morality ought to be," or they "feel that any attempt to provide it is a form of indoctrination," because we are "declaring—even insisting—that children are adults capable of choosing their own morality as long as they do not commit crimes "[18]

Adults face conflicts of interest in thinking about legal rights for children When we set our children free, we also set ourselves free from certain responsibilities we have traditionally assumed in the interest of children Child rearing has always made heavy demands on the time, energy, and financial resources of both parents and communities To escape those demands by giving "rights" to our children is a beguiling invitation. The notion that we should respect their autonomy enough to leave them alone provides easy justification for adults whose personal convenience is also best served by remaining aloof Thus, some school personnel may find it not worth the patience required and the frustration involved to provide meaningful discipline Marriage partners may think it unimportant that they cooperate with each other in the interest of their children Unmarried fathers may not feel an obligation to marry or to provide support Parents may be unconcerned about employment or leisure-time interests that conflict with a child's needs These noncommittal attitudes may also be encouraged as more parents live in unmarried relationships they regard as impermanent, in which they are less likely to invest themselves in long-term reciprocal patterns that maximize the quality of child development

The preference of many adults for a casual sexual environment may also encourage adolescent sexuality in ways that illustrate the conflict between adult interests and the needs of children For example, a team of distinguished researchers in adolescent pregnancy concluded a large study of increasing pregnancy rates with the observation that "For ourselves, we prefer to cope with the consequences of early sex as an aspect of an emancipated society, rather than pay the social costs its elimination would exact "[19] Unfortunately, most of the benefits of that emancipated society are for adults only, because premature emancipation for children is so often harmful to them

The excessive paternalism of the child-saving movement may have been misguided because of the extent to which it allowed state agents to assume the discretion associated with a parental role But our children need more than the vacuum created by reduced discretion They also need protection from the uncritical transfer of skepticism about institutional authority in general to the institution of the family

The preamble to the Constitution expresses the vision of "securing the blessings of Liberty" not only "to ourselves," but also to "our Posterity " This statement captures the connection between the sacrifices we make in defining our own liberty and the blessings we secure for our posterity As part of our public policies for children, adults should be encouraged to undertake the unenforceable responsibilities of nurturing, disciplining, and teaching children toward responsible maturity We owe them as much, not because they belong to us, but because we belong to them

ENDNOTES

1 Albert Solnit is credited with the phrase "Abandoning Children to Their Rights." A Solnit, panel discussion remarks at Child Advocacy Conference, Madison, Wisconsin (Sept 26, 1975)

2. *E.g* , C Murray, *Losing Ground American Social Policy, 1950–80* (1984), D Ravitch, *The Troubled Crusade· American Education, 1945–1980* (1983)

3. 443 U S. 622 (1979) The Supreme Court directed lower courts to provide hearings, if requested, to determine (1) whether a pregnant minor is "mature," in which case she should make her own abortion decision, and (2) if she is not mature, whether an abortion is in her best interests Field research two years after the decision showed that all of the 1,300 pregnant minors who sought judicial approval for an abortion without parental consent eventually obtained an abortion (Mnookin, p 239)

4 J Locke, *The Second Treatise of Government* § 59 (1952)

5 *See id*

6 *Id* § 61

7 Foster & Freed, "A Bill of Rights for Children," 6 Fam L Q 343, 347 (1972).

8 J Goldstein, A Freud, & A Solnit, *Beyond the Best Interests of the Child* 6, 31–32 (2nd ed 1979)

9 *See* F Zimring, *The Changing Legal World of Adolescence* (1982)

10 American Constitutional Law 988 (1978)

11 *Id* at 988–89 (1978).

12 For example, the chair of the ABA section on Individual Rights and Responsibilities proposed "that we consider the logical and ultimate step—that all legal distinctions between children and adults be abolished " Manahan, "Editorial: Children's Lib," 3 *A B A. Sec on Indiv Rts & Resps* (Spring 1976)

13 *See* sources cited in Hafen, "Children's Liberation and the New Egalitarianism Some Reservations About Abandoning Youth to Their 'Rights,' " 1976 *B Y U L Rev*. 605, 651

14 This point is best developed in the chapters on *Goss v. Lopez* (Mnookin, p 449–508)

15 *See* Hafen, "The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests," 81 *Mich L Rev* 463, 511–17 (1983)

16 M Winn, *Children Without Childhood* 5 (1983)

17 *See* N Postman, *The Disappearance of Childhood* (1982)

18 Grant, "The Character of Education and the Education of Character," 18 *American Education* 135, 146 (1982)

19 M Zelnik, J Kantner, & K Ford, *Sex and Pregnancy in Adolescence* 182 (1979)