

# Commentary on Children's Rights

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"Kids need a village."<sup>1</sup>

## I. INTRODUCTION

"Rights talk" about children derives from and implies differing images of children. Consider the following statements:

Children have a right to be cared for, protected, and taught how to live in the world.

Children have a right not to be deprived of their liberty unnecessarily or arbitrarily.

Children have a right to receive medical care, education, and other services that will help them grow into healthy, well-socialized adults. Children have a right not to be subjected unnecessarily to confinement in institutions or to be mistreated or denied opportunities for self-expression in schools they are required to attend.

Children have a right to be protected from responsibility for decision-making that is beyond their developmental competence.

Children have a right not to be denied a voice in decisions affecting their interests.

The differing images of children reflected in these statements can be seen in judicial pronouncements about the rights of children and adolescents. There is the dictum of Justice Rehnquist in *Schall v. Martin*,<sup>2</sup> upholding pretrial preventive detention of juveniles:

[J]uveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the state must play its part as *parens patriae*.<sup>3</sup>

And there is the well-known statement of Justice Fortas in *In re Gault*,<sup>4</sup> the case that constitutionalized the juvenile court, that "[u]nder

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1. Statement by Peter B. Tacy in an address to the Fourth Annual Special Education Symposium, Institute of Living, Hartford, Connecticut, January 17, 1991 [hereinafter Peter B. Tacy].

2. 467 U.S. 253 (1984).

3. *Id.* at 265 (citation omitted). For a persuasive critique of the majority opinion see Peters, *Schall v. Martin and the Transformation of Judicial Precedent*, 31 B.C.L. REV. 641 (1990).

4. 387 U.S. 1 (1967).

our Constitution, the condition of being a boy does not justify a kangaroo court.”<sup>5</sup>

There is the Court’s holding in *Ingraham v. Wright*,<sup>6</sup> permitting corporal punishment of children in public schools without affording them any constitutional safeguards on the ground that, in Justice Powell’s words, “the State itself may impose such corporal punishment as is reasonably necessary ‘for the proper education of the child and for the maintenance of group discipline.’”<sup>7</sup> On the other hand, there is Justice White’s opinion for the Court in *Goss v. Lopez*,<sup>8</sup> protecting those same children from unfair suspension from school, holding that

[t]he authority possessed by the state to prescribe and enforce standards of conduct in its schools . . . must be exercised consistently with constitutional safeguards . . . . It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.<sup>9</sup>

Similarly, there is Justice White’s conclusion in *Hazelwood School District v. Kuhlmeier*<sup>10</sup> upholding censorship of a student newspaper that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>11</sup> In contrast, there is Justice Fortas’s declaration in *Tinker v. Des Moines Independent School District*,<sup>12</sup> recognizing the right of public school students to protest the Vietnam War, that “it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>13</sup>

There is Justice Powell’s statement for the Court in *Bellotti v. Baird*:<sup>14</sup>

We have recognized three reasons justifying the conclusion that the constitutional rights of children can not be equated with those of adults; the peculiar vulnerability of children; their inability to make

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5. *Id.* at 28.

6. 430 U.S. 651 (1977).

7. *Id.* at 662 (citation omitted).

8. 419 U.S. 565 (1975).

9. *Id.* at 574-75.

10. 484 U.S. 260 (1988).

11. *Id.* at 273.

12. 393 U.S. 503 (1969).

13. *Id.* at 506.

14. 443 U.S. 622 (1979).

critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.<sup>15</sup>

And there is Justice Blackmun's opinion for the Court in *Planned Parenthood of Missouri v. Danforth*,<sup>16</sup> upholding the right of a minor to obtain an abortion: "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."<sup>17</sup>

The apparent contradictions in rights talk about children reflect differing conceptions of what it means—or should mean—to be a child. The very expression "children's rights" can be understood as redundant—to be a child is to have nothing but rights, and no obligations; or as a contradiction in terms—to have rights is to be independent and autonomous, like an adult, whereas to be a child is to be dependent and powerless, under the control and protection of adults; or as a political statement about the entitlement of children to civil rights identical or analogous to those of adults.

## II. PROTECTION OR PERSONHOOD?

The traditional view of children is that they are weak, dependent, incomplete persons, incapable of knowing or pursuing their own interests, and therefore in need of the control and protection of adults. To the extent that they have rights, they are limited to the right to receive such control and protection. A classic statement of this view is that of Jeremy Bentham:

The feebleness of infancy demands continual protection. Everything must be done for an imperfect being, which as yet does nothing for itself. The complete development of its physical powers takes many years; that of its intellectual faculties is still slower. At a certain age it has already strength and passions, without experience enough to regulate them. Too sensitive to present impulses, too negligent of the future, such a being must be kept under an authority more immediate than that of the laws . . . .<sup>18</sup>

The traditional view of children's right is given contemporary voice in the works of Goldstein, Freud and Solnit.<sup>19</sup> In *Beyond the Best Interests of the Child*<sup>20</sup> they write:

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15. *Id.* at 634.

16. 428 U.S. 52 (1976).

17. *Id.* at 74.

18. J. BENTHAM, *THE THEORY OF LEGISLATION* 209 (C.K. Ogden, ed. 1931).

19. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973); *BEFORE THE BEST INTERESTS OF THE CHILD* (1979); J. GOLDSTEIN, A. FREUD, A. SOLNIT & S. GOLDSTEIN, *IN THE BEST INTERESTS OF THE CHILD* (1986).

20. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 3 (1973).

The child is singled out by law, as by custom, for special attention. The law distinguishes between adult and child in physical, psychological, and societal terms. Adults are presumed to be responsible for themselves and capable of deciding what is in their own interests. Therefore, the law is by and large designed to safeguard their right to order their personal affairs free of government intrusion. Children, on the other hand, are presumed to be incomplete beings who are not fully competent to determine and safeguard their interests. They are seen as dependent and in need of direct, intimate, and continuous care by adults who are personally committed to assume such responsibility.<sup>21</sup>

This kind of talk emphasizes what may be termed the “protectionist” rights of children, imagining children—especially young children—to be persons in the making, unable to take care of themselves, lacking moral reasoning ability, not yet able to make rational decisions concerning their own interests. Under this view, children have a right to grow into adults in an environment where they receive care, nurturance, affection, discipline, guidance, training, and education. Until they develop into independent and responsible adults, children are entitled to protection, but not to the civil rights enjoyed by adults.

In contrast to the protectionist view of children’s rights is a view that emphasizes the right of children to be treated as persons. In its extreme form, this view advocates the “liberation” of children from “oppression” by adults, and a legal order in which children are deemed to be as fully and equally autonomous as adults. One children’s liberationist, Richard Farson, has even asserted that “[a] child should have full civil rights, the protection of the Constitution at every age, even when, especially when, the child has difficulty in exercising those rights.”<sup>22</sup> This kind of talk emphasizes the “personhood” rights of children, imagining children, and especially adolescents, to be “persons,” able to make rational decisions concerning their own interests, possessing moral reasoning skills, and entitled to substantially the same civil rights as adults.

A less extreme version of this view might argue that treating children “like children” too often results in the imposition of unnecessary and psychologically damaging restrictions on the physical liberty and intellectual and emotional expression of children. This attitude empowers adults to make decisions affecting children free of information and ideas that children can provide about their own interests

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21. *Id.*

22. Farson, *The Children’s Rights Movement*, in *THE FUTURE OF CHILDHOOD AND JUVENILE JUSTICE* 35, 55 (L. Empey ed. 1979).

and legitimate preferences, and enables adults to act in ways that make things easier for them rather than maximizing benefits for children.

The protectionist view emphasizes the right of a child to be a child; the personhood view focuses on the right of a child to be a person. The protectionist/personhood dichotomy implies that the right of a child to be a child is inconsistent with her right to be a person. It emphasizes the differences between children and adults as if there were a bright line separating or distinguishing between two discrete groups of human beings.

### III. CHILDREN AND ADULTS

How are children different from adults? It is difficult even to conceptualize the question other than in arbitrary, abstract terms. In reality, human beings are dynamic, growing, changing organisms, with much in common throughout their lifetimes, and yet differing from one another throughout their lifetimes. One need only think of persons who are newborns, infants, toddlers, preschoolers, elementary school children, pre-adolescents, adolescents, young adults, adults, middle-aged adults, senior citizens, and the frail elderly to appreciate the artificiality of differentiating between "children" and "adults."

At every stage in life an individual has many of the same needs—food, shelter, clothing, medical care, affection, stimulation, social relationships. At each stage the individual is consolidating the physical, emotional, cognitive, and social gains made in the previous stage; preparing for the next stage, or experiencing diminution of strengths or abilities possessed in a prior stage.

In addition, human beings grow at varying speeds and with varying results from a stage of helpless dependency, gradually to relative independence and self-sufficiency. Every individual, regardless of ability (or disability), possesses potential for growth. Some children are more capable of independent behavior and responsible decision-making than other children and even some adults. Some adults are less capable of independent behavior and responsible decisionmaking than other adults and than some children.

Regardless of innate ability, in order to achieve one's potential for independent living in society, every individual requires the care and nurture of others as she grows and develops, and the assistance of others in learning self-help skills, activities of daily living, social functioning, problem solving, and other physical and mental competencies.

The protectionist/personhood dichotomy, like the child/adult dichotomy on which it rests, is a misleading abstraction, since all human beings, in varying degrees, at varying times, in varying cir-

cumstances, require protection and are entitled to be respected as persons. The legal implication of this fact is that the law should take into account the varying abilities of all persons, adults as well as children, for independence and responsible decisionmaking, and should accord appropriate protection to each individual, as it recognizes that individual's personhood.

This is not to say that we are unable to talk about children's rights in ways that describe the special needs of children of varying ages and abilities. It is rather to say that rights talk tends to create an artificial conflict between the right to be a child and the right to be a person.

#### IV. CHILDREN'S RIGHTS

Typically, a child develops from a helpless and 'autistic' state to an autonomous and socialized level of functioning. The child's story is not one primarily of "rights," but of growth and socialization, and of a context of relationships that supports and promotes the child's individual and social development.<sup>23</sup>

Children do have rights, but they are primarily relational, rather than atomistic or assertional, having more to do with the obligations others owe to them than to their own opportunities for individual freedom and responsibility.

It can be helpful to think of children's relational rights in terms of their needs. Children have immediate physical and emotional needs that must be met, but they also have longer term needs that must be addressed in order to prepare them for what they will become.

Caring for and protecting children is essential. Treating them as persons who will one day be independent and socialized adults, living in relationships with other adults and children, is also, if not equally, important. What is more, children can be hurt, even damaged, by the imposition of unnecessary or excessive restrictions on their physical liberty and intellectual and emotional expression. And children often can offer useful information, insight, and intelligent preferences regarding their own needs and interests. A realistic "bill of rights" for children would take into account both their need for protection and their personhood: The respect in which they ought to be treated "like children," and their need to be treated as individuals deserving of respect.

One example in the legal literature of such a bill of rights is that proposed by Foster and Freed:

A child has a moral right and should have a legal right:

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23. See generally Minow & Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990).

1. To receive parental love and affection, discipline and guidance, and to grow to maturity in a home environment which enables him to develop into a mature and responsible adult;
2. To be supported, maintained, and educated to the best of parental ability, in return for which he has the moral duty to honor his father and mother;
3. To be regarded as a person, within the family, at school, and before the law;
4. To receive fair treatment from all in authority;
5. To be heard and listened to;
6. To earn and keep his own earnings;
7. To seek and obtain medical care and treatment and counseling;
8. To emancipation from the parent-child relationship when that relationship has broken down and the child has left home due to abuse, neglect, serious family conflict, or other sufficient cause, and his best interests would be served by the termination of parental authority;
9. To be free of legal disabilities or incapacities save where such are convincingly shown to be necessary and protective of the actual best interests of the child; and
10. To receive special care, consideration, and protection in the administration of law or justice so that his best interests always are a paramount factor.<sup>24</sup>

This proposal both guarantees children that they will be taken care of and confirms that they are persons deserving of respect. It acknowledges that adults do not always act in the best interests of children and recognizes that sometimes children deserve to be listened to when they express an idea or a preference about what is best for them. It asserts that children should be protected but not oppressed, encouraged to grow and develop, but not placed at risk; that they should not be held fully responsible for what is beyond their developmental ability to control, and not treated harshly or unfairly for conduct that fails to live up to societal expectations.

There are examples in the law of such an approach to children's rights. Take the matter of psychiatric hospitalization of children and adolescents. The Supreme Court in *Parham v. J.R.*<sup>25</sup> held that minors could be involuntarily confined in mental institutions at the request of their parents or guardians and treated as if they were voluntary patients (so long as admitting psychiatrists went along with that decision). In reaction to the *Parham* decision, several states have enacted statutes that provide procedures for minors to object to

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24. Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 347 (1972).

25. 442 U.S. 584 (1979).

unnecessary, or unnecessarily prolonged, institutionalization. For example, an Ohio statute provides:

If a minor . . . whose voluntary admission is applied for . . . [by a parent, guardian, or custodian] is admitted [to a mental hospital], the court shall determine, upon petition by the legal rights service, private or otherwise appointed counsel, a relative, or one acting as next friend whether the admission or continued hospitalization is in the best interest of the minor . . . .<sup>26</sup>

Similarly, the Connecticut child commitment law provides that any child fourteen years of age or older who has been hospitalized at the request of a parent or guardian has the right to request a hearing to challenge his or her confinement, and to have the assistance of court-appointed counsel.<sup>27</sup>

At the conclusion of the hearing, unless the court finds that there is clear and convincing evidence to conclude that the child suffers from a mental disorder and is in need of hospitalization for treatment, that such treatment is available and that there is no less restrictive available alternative, the court shall order such child's release from the hospital . . . .<sup>28</sup>

Another example of laws that incorporate both protectionist and personhood rights of children are statutes that require courts to consider the preferences of children when deciding custody and visitation disputes. Thus, the Connecticut statutes provide that "[i]n making or modifying any order with respect to custody or visitation, the court shall be guided by the best interests of the child, giving consideration to the wishes of the child if he is of sufficient age and capable of forming an intelligent preference . . . ."<sup>29</sup> The Ohio statute goes further in providing that

[t]he court may allow any child who is twelve years of age or older to choose . . . the parent with whom the child is to live, unless the court finds that the parent so selected is unfit to take charge or unless the court finds . . . that it would not be in the best interest of the child to have the choice . . . .

(c) In determining the best interests of a child . . . the court shall consider:

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26. OHIO REV. CODE ANN. § 5122.01(C) (Anderson 1989).

27. See CONN. GEN. STAT. § 17-205(g) (1988).

28. See Wizner, *Legal Considerations in the Psychiatric Hospitalizations of Children and Adolescents*, in *CHILD AND ADOLESCENT PSYCHIATRY: A COMPREHENSIVE TEXTBOOK* (M. Lewis ed. 1991).

29. CONN. GEN. STAT. § 46(b)-56(b) (1986).

(c)(2) The wishes of the child regarding their custody if he is eleven years of age or older.<sup>30</sup>

The new American Bar Association Model Rules of Professional Conduct that have been enacted in several jurisdictions<sup>31</sup> make it an ethical requirement for lawyers "as far as reasonably possible [to] maintain a normal client-lawyer relationship with [a child] client."<sup>32</sup> The official comment accompanying this Rule explains:

[A] client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of incompetence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.<sup>33</sup>

Legal measures such as these are attempts to provide protection to children, and at the same time respect their personhood. They reflect our understanding that children should not be free to take risks affecting their fundamental needs and interests, or to have the independent authority to decide what is best for them, free of adult supervision. They also represent a recognition that children should be protected from harmful actions and erroneous decisions by adults, and should have a voice in decisions that affect their important interests.

## V. CONCLUSION

In thinking about children's rights we might imagine a village, a nurturing community, where interdependent, friendly adults take an interest in and are involved with their own and each other's children. In the family and the community, at school and play, the children in the village receive attention, affection, understanding, and tolerance, from parents, relatives, friends, neighbors, teachers, and other adults. They are permitted to assume responsibility, they are encouraged to participate in or to make decisions, and they are provided assistance and guidance when they do so. In such a village, children, like adults,

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30. OHIO REV. CODE ANN. § 3109.04(A), (C) (Anderson 1989). See Wizner & Berkman, *Being a Lawyer for a Child Too Young to Be a Client*, 68 NEB. L. REV. 330, 344-45 (1989).

31. See, e.g., CONNECTICUT RULES OF PROFESSIONAL CONDUCT.

32. *Id.* R. 1.14(a).

33. *Id.* comment.

live and develop in a context of relationships that provides them support, protection and respect because they are persons.

“Kids need a village.”<sup>34</sup>

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34. Peter B. Tacy, *supra* note 1.