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# What Ever Happened to Children's Rights?

Martha Minow\*

On February 10, 1995, Hillary Rodham Clinton announced that the United States Ambassador to the United Nations would sign the United Nations Convention on the Rights of the Child<sup>1</sup> (the "Convention") and seek ratification in the Senate.<sup>2</sup> Observers immediately predicted a Senate fight led by those who argue that the measure — which 176 nations have signed — could weaken parental authority.<sup>3</sup> This exchange in an abbreviated form illustrates a striking feature of discussions about children's rights: at least as a rhetorical matter they are commonplace among the international human rights community, but they remain controversial within significant sectors of this country. Another illustration appeared in the 1992 campaign attacks on Hillary Rodham Clinton for the articles she wrote during the 1970s advocating rights for children; those articles stimulated

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\* Professor of Law, Harvard University. Thanks for the superb research assistance of Liz Tobin, and additional help by Laurie Corzett, Jane Park, Justin Weiss, Terry Swanlund, and Liz Yap. An earlier version of this piece was presented as the Lockhart Lecture at the University of Minnesota Law School on March 16, 1995. A related piece will appear in *THE SIXTIES* (Stephen Macedo ed., forthcoming 1996).

1. Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 1, U.N. Doc. A/44/736 (1989). The treaty became international law in 1990; as of February 1995 it had been signed by 176 nations. See *U.S. Finally Agrees to Sign UN Accord for Children*, CHN. TRIB., Feb. 12, 1995, at 22 (discussing Hillary Clinton's announcement during a memorial service for former UNICEF director James Grant).

2. See John F. Harris, *U.S. to Sign U.N. Pact on Child Rights*, WASH. POST, Feb. 11, 1995, at A3 (stating that the administration's decision to sign the Convention set up "a possible ratification battle in the Senate with conservatives who argue that the measure might weaken the authority of parents"). The United States signed the Convention on February 16, 1995, but the Senate has not yet ratified it. See Jaya Dayal, *U.S. Children, U.N. Convention Gets U.S. Support*, INT'L. PRESS SERV., Feb. 16, 1995 (noting that the United States "remains on the list of 22 countries that have yet to ratify" the Convention).

3. Harris, *supra* note 2 (discussing critics' contentions that the Convention might allow children to sue parents).

critics and opponents to satirize the claim for children's rights as children seeking to "divorce" their parents.<sup>4</sup>

Quite apart from the recent movement for children's rights in the international human rights world, a diverse group of people urged an agenda for children's rights in this country during the 1960s and 1970s. In this Essay, I will situate that earlier movement between an even older history of advocacy for children and a subsequently troubled history of child advocacy from the 1980s to the present. The history is tangled at times. You might watch for the entrance and exit of five legal frameworks for thinking about children: child protection, child liberation, children as potential adults, children in need of traditional authority, and social resource redistribution. I will close by assessing what the historical analysis could or should mean for a political and legal agenda for children, for rights, and for all of us as we head into the next century.

## I. THE SIXTIES AND CHILDREN'S RIGHTS: CHILD LIBERATION, CHILD PROTECTION, AND CHILDREN AS POTENTIAL ADULTS

Hillary Rodham Clinton was a law student when she wrote her now famous Harvard Education Review article entitled *Children Under the Law*.<sup>5</sup> There, and in two subsequent pieces written during the 1970s,<sup>6</sup> she reviewed the emerging children's rights movement and argued that courts should stop assuming

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4. See, e.g., Thomas C. Palmer, Jr., *How Much Power Should a Child Wield, Anyway?*, BOSTON GLOBE, Aug. 16, 1992, at 57 (citing a humorist's sketch that set forth a "worst-case scenario": "Your Honor, my client, 13-year-old Sophie Roundabout, wishes to obtain a divorce from her parents and younger sister because of irreconcilable differences."); see also Eleanor Clift with Pat Wingert, *Hillary Clinton's Not-So-Hidden Agenda*, NEWSWEEK, Sept. 21, 1992, at 90, 90 (discussing Republicans' ridicule of Clinton as a radical feminist who promoted left-wing causes that undermined family values); Mimi Hall, *GOP Attacks Hillary Clinton on Children's Rights*, USA TODAY, Aug. 13, 1992, at 7A (analyzing Republicans' use of Clinton's articles on children's rights to paint her as a liberal who promoted the break-up of families).

5. Hillary Rodham, *Children Under the Law*, 43 HARV. ED. REV. 487 (1973) [hereinafter Rodham, *Children Under the Law*]. Clinton had worked as a student on a project at the Yale-New Haven Hospital; her task was to define the standards for judging child abuse. See also Garry Wills, *H.R. Clinton's Case*, 39 N.Y. REV. OF BOOKS, Mar. 5, 1992, at 3, 3 (discussing Clinton's article and her subsequent efforts as Arkansas's First Lady to promote awareness of children's issues).

6. Hillary Rodham, *Children's Rights: A Legal Perspective*, in CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES 21 (Alicia A. Vardin & Ilene M. Brody eds., 1979) [hereinafter Rodham, *Children's Rights*]; Hillary Rodham, *Children's Policies: Abandonment and Neglect*, 86 YALE L.J. 1522 (1977) (reviewing

that all children are legally incompetent until they reach the age of majority.<sup>7</sup> Instead, she argued, the question of competence should be decided on a case-by-case basis.<sup>8</sup> She also observed that children's rights seemed "a slogan in search of a definition"<sup>9</sup> and recommended careful study of both the psychological and legal issues implicated by the idea of rights for children.<sup>10</sup>

Republican campaign strategists who dug up these articles during the 1992 presidential campaign assaulted her views as radical. Some charged that Clinton "believes kids should be able to sue their parents rather than helping with the chores they were asked to do."<sup>11</sup> Other less partisan observers commented that Clinton's views were "comparatively mild versions of what

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GILBERT Y. STEINER, *THE CHILDREN'S CAUSE* (1976) [hereinafter Rodham, *Children's Policies*].

7. See Rodham, *Children Under the Law*, *supra* note 5, at 489 (stating that using an artificial dividing point of eighteen or twenty-one obscures similarities between older children and adults); Rodham, *Children's Policies*, *supra* note 6, at 1522 (noting that concepts about children's capacities were undergoing tremendous change at the time the article was written); Rodham, *Children's Rights*, *supra* note 6, at 33 (criticizing the law's treatment of a newborn, a twelve year-old and a sixteen year-old as equally incompetent).

8. Clinton suggested that general minority status be eliminated and a presumption of competency implemented instead. Rodham, *Children Under the Law*, *supra* note 5, at 507-09. She reiterated the importance of reversing the presumption of incompetency and implementing case-by-case assessments in her 1979 article. Rodham, *Children's Rights*, *supra* note 6, at 33.

9. Rodham, *Children Under the Law*, *supra* note 5, at 487.

10. *Id.* at 487; see also David A.J. Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 23-28 (1980) (arguing that chronological age only approximates maturity, and that therefore judges should make case-by-case determinations rather than use a presumption of immaturity).

11. Hall, *supra* note 4, at 7A (quoting GOP Chairman Rich Bond). Many observers linked Clinton's writings to the 1992 *Gregory K.* lawsuit, characterized by critics as a child seeking a "divorce" from his mother. See Reynolds Holding, *Children Are Losing, Not Gaining Rights*, HOUSTON CHRON., Sept. 27, 1992, at A1 (characterizing the political attacks on Clinton's legal writings as due in part to the timing of the *Gregory K.* decision). Clinton herself never advocated "divorce suits" by children against their parents. Clift, *supra* note 4, at 90. *Gregory K.* actually involved a foster child seeking to prompt the state to terminate the parental rights of his biological mother so that his foster parents could adopt him. *In Interest of Kingsley*, No. JU90-5245, 1992 WL 551484, at \*1 (Fla. Cir. Ct. Oct. 21, 1992) [hereinafter *Gregory K.*]. See generally Howard Davidson, *Making Too Much of 'Gregory K' — and Too Little*, CHILDREN'S LEGAL RTS. J., Fall 1992, at inside front cover (placing *Gregory K.* in the context of a nationwide epidemic of child maltreatment); Andrew L. Shapiro, *Children in Court: The New Crusade*, THE NATION, Sept. 27, 1993, at 301 (discussing *Gregory K.* and its mischaracterization by critics of children's rights advocates).

the children's rights movement wanted at the time."<sup>12</sup> Indeed, in books such as John Holt's *Escape from Childhood*<sup>13</sup> and Richard Farson's *Birthrights*,<sup>14</sup> some child liberationists in the early 1970s viewed children as the next group entitled, like blacks and women, to a civil rights revolution.<sup>15</sup>

Bearing the imprint of the optimistic and at times revolutionary rhetoric of the 1960s,<sup>16</sup> child liberationists like Holt and Farson drew on works by Jean-Jacques Rousseau and John Dewey<sup>17</sup> to argue that children deserve rights to participate fully in society,<sup>18</sup> that adult perceptions of children as dependent reflected their own experiences of subjugation,<sup>19</sup> and that experiments such as an open-school of the American Summerhill Society<sup>20</sup> showed children's capacities to participate in

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12. John Leo, *Who's Right on Children's Rights?*, S.F. CHRON., Sept. 6, 1992, at 5/Z1; see also Holding, *supra* note 11, at A1 (arguing that Republican critics of Clinton wrongly assumed children were gaining rights when "children are losing ground in the American legal system").

13. JOHN HOLT, *ESCAPE FROM CHILDHOOD* (1974).

14. RICHARD FARSON, *BIRTHRIGHTS* (1974).

15. See *id.* at 10-11, 216-19 (analogizing children's liberation to earlier movements by blacks and women); see also Beatrice Gross & Ronald Gross, *Introduction to THE CHILDREN'S RIGHTS' MOVEMENT: OVERCOMING THE OPPRESSION OF YOUNG PEOPLE* 1, 1 (Beatrice Gross & Ronald Gross eds., 1977) (arguing that "young people are the most oppressed of all minorities"); Leo, *supra* note 12, at 5/Z1 (characterizing the children's rights movement as a successor to other "anti-authoritarian" movements). Hillary Rodham Clinton and Peter Edelman both explicitly drew analogies comparing children with blacks and women. See Peter Edelman, *The Children's Rights Movement*, in *THE CHILDREN'S RIGHTS MOVEMENT: OVERCOMING THE OPPRESSION OF YOUNG PEOPLE*, *supra*, at 203, 203 (noting that black people, women, and children have all been considered chattel in the past); Rodham, *Children Under the Law*, *supra* note 5, at 493 (comparing childhood to marriage and slavery as institutions rationalized as caring for people who society assumed were incapable of caring for themselves).

16. "The sixties" actually represents a time period that stretched well into the next decade. It was a time of social and political activism with creative and at times conflictual challenges to the status quo treatment of civil rights, gender relations, generational politics, and sexuality. See ROSALIND EKMAN LADD, *CHILDREN'S RIGHTS RE-VISIONED: PHILOSOPHICAL READINGS* 2 (1995) (noting that the children's rights movement emerged in the 1960s, "riding the wave of concern for unfairly treated groups").

17. Farson discusses the historical roots of the child liberation movement and traces its strongly ideological commitment to freedom for children to works by Rousseau and Dewey. FARSON, *supra* note 14, at 9 (citing JEAN-JACQUES ROUSSEAU, *EMILE* (Barbara Foxley trans., Dutton 1974) (1762); JOHN DEWEY, *EXPERIENCE AND EDUCATION* (1938)).

18. FARSON, *supra* note 14, at 3; HOLT, *supra* note 13, at 18-19.

19. FARSON, *supra* note 14, at 6-8.

20. Summerhill was an English residential school based on principles of freedom and equality of children and student participation in the operation of the school. *Id.* at 52.

self-governance.<sup>21</sup> A publication of the radical caucus at Summerhill at one point quoted Huey Newton of the Black Panthers as saying "[a]n unarmed people are slaves."<sup>22</sup> The publication continued, "[w]e are asking for a 'human' standard to arm kids with, within which we as adults can deal with our own problems and uptightness while kids are free to determine their own lives."<sup>23</sup> Many liberationists argued that children's voices were wrongly absent even from public discussions of children's rights.<sup>24</sup>

John Holt, for example, urged equal legal treatment so that children would be like adults before the law.<sup>25</sup> He specifically promoted children's rights to vote, work for money, sign contracts, manage their own educations, travel, and form their own families.<sup>26</sup> Richard Farson's agenda called for the creation of alternative home environments.<sup>27</sup> He urged children's rights to information, self-education, freedom from physical punishment, sexual freedom, and economic and political participation.<sup>28</sup> He also advocated the full extension of legal protections to young

21. *Id.* at 52-53.

22. Paul Goodman, *Reflections on Children's Rights*, in THE CHILDREN'S RIGHTS MOVEMENT: OVERCOMING THE OPPRESSION OF YOUNG PEOPLE, *supra* note 15, at 140, 141-42. In this essay, Goodman reassessed his own early participation in child liberation debates in which he had argued that society, rather than young people, was to blame for the problems of "deviance." *Id.*; see also PAUL GOODMAN, *GROWING UP ABSURD* 13-14 (1960) (discussing the ways in which American society transforms bright, lively children into resigned or cynical adults).

23. Goodman, *Reflections on Children's Rights*, *supra* note 22, at 141-42.

24. See, e.g., Helen Baker, *Growing Up Unheard*, in THE CHILDREN'S RIGHTS MOVEMENT: OVERCOMING THE OPPRESSION OF YOUNG PEOPLE, *supra* note 15, at 187, 189 (citing two *Harvard Educational Review* issues on children's rights that do not contain any articles by people under the age of eighteen); Youth Liberation of Ann Arbor, *We Do Not Recognize Their Right to Control Us*, in THE CHILDREN'S RIGHTS MOVEMENT: OVERCOMING THE OPPRESSION OF YOUNG PEOPLE, *supra* note 15, at 125, 128-34 (setting forth the history of the Youth Liberation of Ann Arbor and members' struggle to make their voices heard). Even more moderate authors treated the general subject of children and the law as an issue about the distribution of power and responsibility among child, family and state. See, e.g., Robert M. Mnookin, *Foreword to Symposium on Children and the Law*, LAW & CONTEMP. PROBS., Summer 1975, at 1, 2-3 (analyzing how the family and state dominate the lives of children and how power should be allocated among the three groups).

25. Holt, *supra* note 13, at 18-19.

26. John Holt, *Why Not a Bill of Rights for Children?*, in THE CHILDREN'S RIGHTS MOVEMENT: OVERCOMING THE OPPRESSION OF YOUNG PEOPLE, *supra* note 15, at 319, 324-25.

27. Farson, *supra* note 14, at 52-62.

28. Farson devoted chapters to each of these topics in BIRTHRIGHTS. FARSON, *supra* note 14, at 83-190.

people charged with violating the law.<sup>29</sup> Other liberationists challenged schools as repressive and authoritarian<sup>30</sup> and urged schools to adopt "open classrooms," allowing students to select their own activities and pursue their own interests.<sup>31</sup>

Yet alongside those who urged children's rights to liberate young people from a constraining status worked others who also advocated for children, but sought new protections, services, or care.<sup>32</sup> The editors of a 1977 volume entitled *The Children's Rights Movement: Overcoming the Oppression of Young People*<sup>33</sup> concluded, for example, that "some children need vastly more help, protection, and concern, while others need less hovering over, channeling, and imposition of adult standards."<sup>34</sup> Advocates in this vein worked to protect children through judicial rulings, legislation, changes in existing programs, and a public rhetoric about children.<sup>35</sup> Henry H. Foster, for example, wrote an influential "Bill of Rights" for children that compared children with blacks and women as people deserving equal treatment under the law.<sup>36</sup> At the same time, Foster acknowledged justifications for age distinctions<sup>37</sup> and argued for some rights as claims upon society, such as rights to medical care.<sup>38</sup>

29. *Id.* at 200, 211-12.

30. See, e.g., CHARLES SILBERMAN, CRISIS IN THE CLASSROOM 122-24 (1970) (citing a preoccupation with order and control as schools' most important characteristic).

31. See *id.* at 266-69 (outlining how open classrooms could be implemented in the United States); see generally James Rothenberg, *The Open Classroom Reconsidered*, ELEMENTARY SCH. J., Sept. 1989, at 69 (reviewing the history of open classrooms and recommending that they be reevaluated in a more positive light).

32. See LADD, *supra* note 16, at 2 (discussing the tension between protectionists, who emphasized children's rights to assistance and care from adults, and liberationists, who favored children's rights to self-determination).

33. Gross & Gross, *supra* note 15.

34. *Id.* at 12.

35. See generally KENNETH KENNISTON, ALL OUR CHILDREN 183-211 (1977) (discussing the legal strategies of the child protectionist movement).

36. HENRY H. FOSTER, JR., A "BILL OF RIGHTS" FOR CHILDREN (1977). Foster notes in his introduction that "[t]he same arguments that were advanced for and against the abolition of slavery and the emancipation of women recur when issues arise regarding the moral and legal rights of children." *Id.* at 6.

37. Foster states that "[a]n age differential may justify legal distinctions based on chronological age if the stage of maturation has relevance to the particular problem." *Id.* at 7. He then gives the examples of consent for marriage, driver licenses, and hazardous employment. *Id.*

38. Item seven in Foster's Bill of Rights is "[t]o seek and obtain medical care and treatment and counseling"; item eight is "[t]o receive special care, consideration, and protection in the administration of law and justice so that [the child's] best interests are always a paramount factor." *Id.* at xv.

The child protectionists also included presidential leadership advocating special programs and services for children. President Lyndon Johnson sent the first congressional message devoted exclusively to children in 1967, and called for a range of medical, social service, summer employment, and compensatory education programs for children.<sup>39</sup> Perhaps even more notably, President Richard Nixon, within a month of his inauguration in 1969, called for a "national commitment to providing all American children with an opportunity for healthful and stimulating development during the first five years of life."<sup>40</sup> Nixon took pains to express along with the commitment to child welfare his respect for "the sacred right of parents to rear their children according to their own values and own understandings."<sup>41</sup>

Whether liberationists or protectionists — or something in between — growing numbers of advocates for children in the 1960s and 1970s found that the language of rights offered a way to argue for both more protection and more independence for different children, or for the same children in different circumstances.<sup>42</sup> Participants in the 1970 White House Conference on Children, continuing a tradition of similar conferences held each decade since 1909, used a rhetoric of children's rights that departed from prior discussions at earlier conferences, which instead used notions of children's needs.<sup>43</sup>

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39. GILBERT STEINER, *THE CHILDREN'S CAUSE* 10-11 (1976).

40. *Id.* at 11.

41. *Id.*

42. See Michael Grossberg, *Children's Legal Rights? A Historical Look at a Legal Paradox*, in *CHILDREN AT RISK* 111, 126-32 (Roberta Wollans ed., 1993) (discussing the development of the language used to describe children's rights). Child advocates in an early period also used the language of rights. *Id.* at 114-26. As Secretary of Commerce, Herbert Hoover presented Congress with a proposal for a Children's Bill of Rights. HERBERT HOOVER, *THE MEMOIRS OF HERBERT HOOVER: THE CABINET AND THE PRESIDENCY, 1920-1933*, at 99-100, 261-64 (1952). But the earlier uses of "rights" language either referred specifically to efforts to achieve earlier emancipation — and adult legal status — or else to legitimate paternalism and enlarged use of state power to protect children. Grossberg, *supra*, at 115-16, 121. Advocates may have tried at times to collapse needs and rights but courts resisted that tendency until the 1960s. *Id.* at 122, 126.

43. Rochelle Beck, *White House Conferences on Children: An Historical Perspective*, 43 *HARV. EDUC. REV.* 653, 662-63 (1973); see also SHEILA M. ROTHMAN, *WOMAN'S PROPER PLACE* 268-71 (1980) (discussing the 1970 White House Conference on Children); STEINER, *supra* note 39, at 122-30 (discussing the 1970 White House Conference on Children and previous White House conferences). The Reagan Administration canceled the 1981 event. Edward Zigler & Susan Muenchow, *How to Influence Social Policy Affecting Children and Families*, 39 *AM. PSYCHOLOGIST* 415, 419 (1984).



The rights-based model of legal advocacy for blacks informed the most effective national organization for children. When Marion Wright Edelman founded the Children's Defense Fund ("CDF") in 1973, she drew on her experiences as a civil rights attorney and on her involvement with Head Start<sup>44</sup> and child development programs focusing on poor and minority children.<sup>45</sup> CDF from the start advocated due process protections prior to school suspension, and a right to privacy for children regarding their school and juvenile court records. CDF also sought to pursue the same kind of sustained advocacy for children that the NAACP Legal Defense and Education Fund instigated for people of color.<sup>46</sup>

Yet Edelman's initial agenda for CDF included challenging the exclusion of children from school, the labeling and treatment of children with special needs, the use of children in medical experimentation, and the quality of day care — all comfortably within the tradition of child protection.<sup>47</sup> Edelman said explicitly in 1974, "we are not a children's liberation operation . . . . Children are not simply another oppressed minority group who could function independently if allowed to do so. . . . We don't yet have a sound enough conceptual framework to approach children's rights."<sup>48</sup> Edelman hoped for such a framework as part of a long-term strategy but also maintained that CDF should work in the meantime for specific and immediate relief.<sup>49</sup>

Nonetheless, Edelman drew on the rhetoric of rights in helping draft the Comprehensive Child Development Act of 1971.<sup>50</sup> The preamble to the Act, in Edelman's words, "put the nation on record as saying that children have certain rights: to basic nutrition, health care, education, and child developmental care in their early years," regardless of each family's ability to

44. See generally EDWARD ZIGLER & SUSAN MUENCHOW, *HEAD START* (1992) (discussing the goals, development, and implementation of Head Start, a public program assisting poor children and their families before the children reach school age).

45. *An Interview with Marian Wright Edelman*, 44 HARV. EDUC. REV. 53, 67-68 (1974) [hereinafter *Interview*]; see also JOANN J. BURCH, *MARION WRIGHT EDELMAN: CHILDREN'S CHAMPION* 5-6, 20-34 (1994) (discussing the life of Marian Wright Edelman and her involvement in children's rights issues).

46. *Interview*, *supra* note 45, at 53-54.

47. *Id.* at 54-60.

48. *Id.* at 66-67.

49. *Id.* at 67; see also STEINER, *supra* note 39, at 170-75 (discussing Marian Wright Edelman's involvement in children's advocacy and describing CDF's development and strategy).

50. H.R. 6748, 92d Cong., 1st Sess. (1971).

pay.<sup>51</sup> President Nixon accompanied his veto of the Act with a message warning that federal support for child care would lead to communal child rearing, contrary to American family values; Edelman defended the Act as one mandating parental control.<sup>52</sup> This example illustrates both the dominant association of government programs with communism and the political and practical difficulties in articulating rights for children without seeming to undermine parental authority.

This same set of difficulties marked litigation over children's rights in the 1960s and 1970s. Advocates for children used the rhetoric of rights not only to place children in the same legal position as adults<sup>53</sup> but also to seek special protections.<sup>54</sup> Courts sometimes accepted one or both of these formulations, but also often responded with concerns about governmental power or about threats to parental authority.<sup>55</sup> It is tempting to treat the late 1960s and early 1970s as the high-water mark of children's rights, but a closer look suggests the better description of an intense period of debate over children's rights.

Consider litigation in the United States Supreme Court; it is a small and selective sample, but nonetheless a body of especially influential decisions. This sample unmistakably reflects the impact of the civil rights and student rights movements of the 1960s and early 1970s. In 1967, the Supreme Court decided in *In re Gault* that the Constitution protected a child who faced commitment to a state institution.<sup>56</sup> Accordingly, the juvenile court must assure a right to counsel,<sup>57</sup> a right against self-incrimination,<sup>58</sup> a right to notice of charges,<sup>59</sup> and a right to confront and cross-examine accusers.<sup>60</sup> In 1969, the Court assured public school students some degree of First Amendment rights in a case involving students disciplined for wearing black arm

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51. *Interview, supra* note 45, at 71.

52. *Id.*; see also ROTHMAN, *supra* note 43, at 275-76 (discussing the views of Edelman and Nixon on the Child Development Act). Joseph M. Hawes cites the defeat of the Comprehensive Child Development Act in 1971 as the beginning of the downhill slope of the children's rights movement. JOSEPH M. HAWES, *THE CHILDREN'S RIGHTS MOVEMENT: A HISTORY OF ADVOCACY AND PROTECTION* 119 (1991).

53. HAWES, *supra* note 52, at 115-17.

54. *Id.* at 117-18.

55. See *infra* notes 56-72 and accompanying text (discussing children's rights cases decided in the late 1960s and early 1970s).

56. 387 U.S. 1, 4 (1967).

57. *Id.* at 41.

58. *Id.* at 55.

59. *Id.* at 33.

60. *Id.* at 56.

bands to protest the Vietnam War.<sup>61</sup> And in 1975, the Court in *Goss v. Lopez* ruled that the due process clause of the Fourteenth Amendment required notice of charges and reasons as well as an opportunity for a student to present his case prior to suspension from public school.<sup>62</sup> These cases reflected social science criticisms of the juvenile court, national turmoil over the Vietnam War and racial tensions, and widespread legal challenges to unfettered authority.<sup>63</sup> They also reflected shifting views of the legal and political status of children and young people.

Prompted in part by successful test case litigation in the lower courts, the Education for All Handicapped Children's Act was a notable legislative development that articulated rights of children with disabilities to education and related services.<sup>64</sup> Growing from medical studies of battered children, legislative initiatives also provided federal aid to stimulate improvement of state responses to child abuse, neglect, and adoption.<sup>65</sup> These

61. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 514 (1969).

62. 419 U.S. 565, 584 (1975).

63. See Franklin E. Zimring & Rayman L. Solomon, *Goss v. Lopez: The Principle of the Thing*, in *IN THE INTEREST OF CHILDREN* 459, 459-72 (Robert Mnookin ed., 1985) (discussing the racial dimensions of *Goss v. Lopez*).

64. Education for All Handicapped Children's Act, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended in scattered sections of 20 U.S.C.); see also New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715, 718 (E.D.N.Y. 1975) (mem.) (approving a judgment that inmates of a state facility have a right to a minimum quality of care or treatment even if their confinement is not voluntary); New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 768-70 (E.D.N.Y. 1973) (granting a preliminary injunction to correct deficiencies affecting physical safety and risk of physical deterioration to mentally retarded inmates); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 302-03 (E.D. Pa. 1972) (holding that mentally retarded children can no longer be excluded from a public program of education); see generally MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* 35-39, 81-83 (1990) (discussing the Education for All Handicapped Children's Act and its application).

65. Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, § 1, 94 Stat. 500 (1980) (codified as amended in scattered sections of 42 U.S.C.) (establishing a federal program providing adoption assistance, strengthening foster care assistance for needy and dependent children, and providing aid to families with dependent children); Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (current version at Pub. L. No. 100-294, tit. 1, § 101, 102 Stat. 102 (1988)) (codified as amended in scattered sections of 42 U.S.C.) (authorizing federal financial assistance for programs and projects designed to prevent, identify, and treat child abuse and neglect); see generally BARBARA NELSON, *MAKING AN ISSUE OF CHILD ABUSE* 39-44, 58-59, 76-136 (1984) (discussing medical research on child abuse and the development of laws dealing with child abuse).

developments combined conceptions of children's procedural rights restricting the discretion of public decisionmakers with notions of children's needs that the larger society should meet. Most basically, these decisions departed from the traditional view of children as properly subjected to parental and institutional authority beyond state review because such authorities no longer seemed entirely trustworthy. The Supreme Court, and thus the law of the land, began to recognize children as distinct individuals deserving a direct relationship with the state under a legal regime protecting liberties against both public and private authorities.

Halting the report of legal developments here, however, would be quite misleading. The year 1971 brought a Supreme Court decision refusing to extend the constitutional right to a jury in juvenile court proceedings.<sup>66</sup> In 1972, the Court permitted Amish parents to keep their children out of high school without calling for any consideration of the children's views on the matter.<sup>67</sup> In 1977, the Court in *Ingraham v. Wright* ruled that a teacher's use of corporal punishment — a beating with a wooden paddle — required no prior due process hearing but only the possibility of a subsequent tort action.<sup>68</sup>

The Court's decisions in these cases indicate legal ambivalence in the face of repeated efforts by advocates to extend constitutional rights to children. Ambivalence here should not be misconstrued as a kind of wishy-washy balancing act. Ambivalence is that wonderful word for our simultaneous commitments and attractions to inconsistent things. The Court's ambivalence swings between two starkly contrasting alternatives. One would extend adult rights to children; the other would treat children in important ways as subject to different authorities, institutions, and relationships than adults.<sup>69</sup>

Advocates for children's rights sometimes resolved the tension between protection and liberation through a conception of children as potential adults, deserving rights but needing care on the way to adulthood. For example, Peter Edelman, husband of Marion Wright Edelman and a longstanding child advocate himself, served as director of the New York State Division for

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

67. *Wisconsin v. Yoder*, 406 U.S. 205, 231-34 (1972).

68. 430 U.S. 651, 657, 682 (1977).

69. See Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 3-14, 19-20 (1986) (discussing conditions in the legal treatment of children).

Youth in the 1970s.<sup>70</sup> In 1977, he described a position that favored some rights for children but searched for a program responsive to children's needs. He explicitly resisted the goal of "total parity of rights for children" and instead argued that the proper goal would "extend some adult rights and improve government programs so that children will be assured protection and dignity and the chance to develop their maximum potential."<sup>71</sup> Unclear himself about which additional adult rights should be extended and which should be modified, Edelman lauded children's freedom of religion, racial equality, freedom of expression, procedural due process, and the right to privacy — adult-type rights — along with a right to education that would be unique to children.<sup>72</sup>

Where in this vision should entitlement programs — for day care, for medical services — fit? When should children be given second chances and protections against criminal punishments, civil liabilities, or other obligations placed on adults? The advocates' own uncertainty about the scope of children's rights produced no clear answers to these questions and left them largely open to political and institutional pressures.

## II. THE LEGACY OF AN EARLIER CHILD-SAVING MOVEMENT

Some ambivalence in the courts about children's rights thus may have reflected disagreements among advocates for children. Perhaps ironically, some of the most vivid issues cast as claims of rights for children arose in response to the institutions created by a prior generation of child advocates. Between 1880 and 1930, reformers around the country identified the special needs of children as an appropriate subject for public response.<sup>73</sup>

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70. Peter Edelman later became a law professor, and then counsel to Secretary of the U.S. Department of Health and Human Services.

71. Edelman, *supra* note 15, at 203-04.

72. *Id.* at 204-06.

73. See, e.g., Hamilton Cravens, *Child Saving in Modern America 1870s-1990s*, in CHILDREN AT RISK IN AMERICA 3, 3 (Roberta Wollens ed., 1993) (discussing John Dewey, a progressive who argued that the state should undertake certain social functions that had been previously undertaken by family or church); Margo Horn, *Inventing the Problem Child: "At-Risk" Children in the Child Guidance Movement of the 1920s and 1930s*, in CHILDREN AT RISK IN AMERICA, *supra*, at 141, 141-42 (describing the founding, growth, and change of child guidance clinics instigated by the desire of progressives to care for children by striking a balance between education/nurturing and treatment/cure). The child-saving movement was itself part of the larger movement for social and political change organized by the Progressive Era reformers. See CHARLES

Some of the reformers participated in the settlement house movement<sup>74</sup> to assist recent immigrants; others drew specifically on emerging social and psychological sciences to shift from moral to treatment approaches in social programs. Initiatives to address child welfare ranged from laws requiring school attendance<sup>75</sup> to those restricting child labor.<sup>76</sup> These Progressive Era reformers launched a "child-saving" movement with a focus on children's welfare, confidence in experts, and acceptance of the government as a paternal presence in children's lives.<sup>77</sup>

The juvenile court under challenge in *In re Gault*<sup>78</sup> was itself a product of Progressive Era reforms, notably fueled by Jane Addams, Florence Kelley, and other settlement house workers in the late 1890s. Imbued with the turn-of-the century belief in scientific expertise and a malleable human nature, the original design of juvenile courts counted on the benevolence of judges and the possibilities of therapeutic treatment to address misbehavior by both children and their parents.<sup>79</sup> By removing young people from adult courts and bringing them to a special institution connected with social and psychological experts, the juvenile courts rejected the use of procedural safeguards in favor of a model of therapeutic paternalism.<sup>80</sup> Yet within a decade of the establishment of the first juvenile court in 1899, critics claimed

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FORCEY, *THE CROSSROADS OF LIBERALISM* xx-xxix (1961) (exploring the background of the progressive movement and describing its social and political changes); ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920*, at 169 (1967) ("If humanitarian progressivism had a central theme, it was the child.").

74. This effort brought middle- and upper-class idealist reformers to live in urban neighborhoods and create community centers with classes, clubs, recreation, and political activities especially for poor immigrants. See, e.g., JANE ADDAMS, *TWENTY YEARS AT HULL-HOUSE* 40-55, 60-64, 89-109 (1938) (describing one of these centers); see also ELLEN RYERSON, *THE BEST-LAID PLANS* 9 (1978) (discussing settlement houses as an attempt to meet the needs of the poor).

75. New York was an example of the trend of the states passing mandatory school attendance laws. It passed a compulsory school attendance law in 1874 that required children to attend at least 14 weeks of school per year. HAWES, *supra* note 52, at 42.

76. See RYERSON, *supra* note 74, at 10 (noting that many states were passing child labor laws).

77. See Michael Grossberg, *Children's Legal Rights? A Historical Look at a Legal Paradox*, in *CHILDREN AT RISK IN AMERICA*, *supra* note 73, at 111, 119-26.

78. 383 U.S. 1 (1967). See *supra* note 56 and accompanying text (discussing *In re Gault*).

79. See RYERSON, *supra* note 74, at 28-33 (noting that the belief that children were of an innocent nature and not responsible for their acts led reformers to adopt a juvenile justice system that focused on treatment and not punishment).

80. See HAWES, *supra* note 52, at 37-38 (arguing that experts in psychology and sociology represented the interests of children through the juvenile court

this therapeutic approach proved too lenient for juvenile offenders and too intrusive for young people who had broken no laws.<sup>81</sup> Social workers, probation officers, and other experts seemed unable to deliver the promised improvement in children's behavior and lives.<sup>82</sup> Placement facilities for juvenile offenders became overcrowded. Social scientists documented abuses by juvenile court judges and in juvenile correction facilities. Law reformers used that documentation in the challenges that ultimately produced *In re Gault*.<sup>83</sup>

Similarly, restrictions on child labor and compulsory education — both products of Progressive Era reforms — occasioned critiques by liberationists in the 1960s and 1970s.<sup>84</sup> The special protections for which an earlier generation fought became the fetters that reformers from the sixties attacked. At the same time, some advocates for children in the sixties and seventies sought to continue or extend the earlier era's efforts to meet children's special needs through governmental and private programs.<sup>85</sup> Both liberationists and protectionists thus harkened back to the turn-of-the-century reformers, but with opposite motives.

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system and cared for their needs, but they did so without regard for rights or due process).

81. See *id.* at 32-34 (documenting the origins and early criticism of the juvenile court system).

82. See RYERSON, *supra* note 74, at 138, 146-47 (discussing critics who claimed and studies that indicated the juvenile justice system had failed to provide the services it promised).

83. See Martha Minow & Richard Weissbourd, *Social Movements for Children: America's Childhood*, 122 DAEDALUS 1, 7-8 (1993) (describing the overcrowded condition of juvenile facilities); RYERSON, *supra* note 74, at 150 ("The gap between the real and the ideal juvenile court seems, then, to have played some role in [*In re Gault* and two other] decisions.").

84. See, e.g., HOLT, *supra* note 13, at 172 (arguing that child labor laws deny children the right to work for money and to spend or save money); *id.* at 240 (arguing that children should have the right to control and direct their own learning). In the 1980s, the Reagan administration sought to loosen restrictions on child labor not in the name of children's rights but as part of a deregulation move. The Reagan administration also adopted regulations cutting back on the nutritional quality of federally-funded school lunches, including a rule treating catsup as a vegetable substitute. After ensuing public criticism, the administration withdrew the rule. Helen Thomas, WASH. NEWS, Sept. 25, 1991 (UPI am cycle).

85. See HAWES, *supra* note 52 at 117-21 (referring to child advocacy groups, such as the CDF, as "The Child Protectors," which have fought and continue to fight for government programs for children).

### III. REACTIONS TO CHILDREN'S RIGHTS: CHILDREN IN NEED OF TRADITIONAL AUTHORITY

Considerable opposition could be found to both versions of rights for children. Whether cast as adult rights extended to younger people or as special protections tailored for those with lesser competencies or greater vulnerabilities due to youth and inexperience, rights for children troubled judges, scholars, and traditionalists who also opposed women's liberation. Thus, Supreme Court Justices — sometimes in majority opinions, sometimes in dissents — expressed a third position responding to both the arguments for state protections for children's welfare and for extending adult-style rights to children. This third position stressed traditional authority and warned against the conflicts and disorder that rights for children could engender.<sup>86</sup>

Whether respecting and protecting the authority of parents,<sup>87</sup> teachers,<sup>88</sup> or doctors,<sup>89</sup> this third view rejects rights for children as either unnecessary or harmful given the relationships of authority and responsibility held by adults in children's lives.<sup>90</sup> For example, one critic warned in 1976 that "the most

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86. See *Bellotti v. Baird*, 443 U.S. 622, 638-39 (1979) (Powell, J., plurality opinion) (arguing that legal restrictions must sometimes be placed on minors, and that at times children's rights must yield to parental authority to facilitate the growth of the child); *Parham v. J.R.*, 442 U.S. 584, 610 (1979) (concluding that requiring a formalized, fact-finding hearing in order to admit children to a state mental hospital will "pose a significant intrusion into the parent-child relationship"); *Planned Parenthood v. Danforth*, 428 U.S. 52, 103-04 (1976) (Stevens, J., dissenting in part) (arguing that forcing minors to gain parental consent for an abortion is an appropriate method for parents to foster the welfare of their children).

87. See *Parham*, 422 U.S. at 603-04 (declaring that parents retain "plenary authority" to seek psychological care for their children and the decision to commit a child to a state mental health facility need not be subject to a formal, adversary pre-admission hearing); *Wisconsin v. Yoder*, 406 U.S. 205, 232-36 (1972) (holding that the state cannot force Amish children to attend school when such attendance conflicts with their religious beliefs and a fundamental interest of parents to guide the religious future and education of their children); see generally Robert A. Burt, *Developing Constitutional Rights of, in, and for Children*, 39 LAW & CONTEMP. PROBS. 118, 124-32 (1975) (examining the parent-child relationship and parental autonomy by examining *Wisconsin v. Yoder* in detail).

88. See *supra* note 68 and accompanying text (discussing *Ingraham v. Wright*).

89. See *Parham*, 422 U.S. at 608, 613 ("What is best for a child is an individual medical decision that must be left to the judgment of physicians in each case.").

90. Bruce Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Children to Their Rights*, 1976 B.Y.U. L. REV. 605, 656-58.



harmful of the potential consequences is that the long-range interests of children themselves may be irreparably damaged as the state and parents abandon children to their rights.<sup>91</sup> Others suggested that any public effort on behalf of families could threaten parental autonomy.<sup>92</sup> At least one academic observer similarly warned that legalized models would be inappropriate for children because courts lack wisdom superior to parents.<sup>93</sup> The introduction of and debate in Congress over the Family Protection Act indicated strong resistance to legal review of parental authority.<sup>94</sup> From a somewhat different perspective, the Director of the Children's Rights Project of the American Civil Liberties Union warned that, given children's actual dependency, expanding rights for children simply could substitute the state for parental authority.<sup>95</sup>

Concern about institutional authority infused Justice Powell's 1975 dissent in *Goss v. Lopez*.<sup>96</sup> There he argued against due process protections surrounding school suspensions as unwise and unnecessary intrusions on the schools which must maintain authority and discipline.<sup>97</sup> Two years later, Justice

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91. *Id.* at 607; see also CHRISTOPHER LASCH, HAVEN IN A HEARTLESS LAND 174-78 (1979) (discussing the erosion of paternal authority in modern society where many forms of traditional family discipline are left to social agencies and the subsequent impact on parent-child relationships); Edward A. Wynne, *What Are We Doing to Our Children?*, PUB. INTEREST, Summer 1981, at 3, 3-4 (arguing that court rulings that have granted greater children's rights, particularly in the school context, have undermined adult authority, increasing destructive tendencies in children).

92. See Jane Knitzer, *Children's Rights in the Family and in Society*, 52 AMER. J. ORTHOPSYCHIATRY 481, 493 (1982) (citing the belief of opponents of children's rights that any public effort on behalf of the family will threaten parental autonomy).

93. Burt, *supra* note 87 at 142-43; see also Knitzer, *supra* note 92, at 484-85 (citing Burt and his theory that the courts lack superior wisdom over parents to make family decisions).

94. See S. 1378, 97th Cong., 1st Sess. (1981) (providing the text of the Act, which was never enacted); Karen Flax, *Women's Rights and the Proposed Family Protection Act*, 36 U. MIAMI L. REV. 141, 141-51 (1981) (arguing that the Family Protection Act was an attempt to circumvent Supreme Court cases granting rights to minors).

95. See Knitzer, *supra* note 92, at 484 (describing the views of Rena Uviller, the director of the Children's Rights Project of the American Civil Liberties Union).

96. 419 U.S. 565, 584 (1975). See *supra* note 62 and accompanying text (discussing *Goss v. Lopez*).

97. *Goss*, 419 U.S. at 591, 595; see also Gerald Grant, *Children's Rights and Adult Confusions*, PUB. INTEREST, Fall 1982, at 83, 91-92 (arguing that school discipline procedures fail to reduce discipline problems or instill a greater sense of fairness). Grant concluded, however, that children deserve

Powell wrote the majority opinion in *Ingraham v. Wright*,<sup>98</sup> finding no constitutional problem with an act of corporal punishment by a teacher, which after all was a traditional form of discipline.<sup>99</sup>

Arguments resisting children's rights claims as inconsistent with traditional authority bear a strong resemblance to some reactions to the women's rights movement in the 1960s and 1970s. There, too, some observers worried that extending rights beyond their traditional reach would undermine the smooth operation of the traditional family, which should be trusted to fulfill its duties to children.<sup>100</sup> In addition, many opponents of women's rights argued that children would suffer if women were "liberated" from conventional roles as wives and mothers.<sup>101</sup>

These observers were not wrong to predict an impact on children if women altered traditional family roles. Leaders in the women's movement specifically and intentionally wanted to remake the way society raises children. Inspired by popular works like Betty Friedan's *The Feminine Mystique*,<sup>102</sup> many women around the country challenged the assumption that women are destined to be mothers, that wives should be subordinate to husbands, and that the care of children should fall entirely to their mothers.<sup>103</sup> Friedan and other feminists wrote about

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rights to hearings in schools but not through quasi-judicial procedures. *Id.* at 98.

98. 430 U.S. 651, 672-82 (1977) (recognizing the common law privilege permitting teachers to inflict reasonable corporal punishment on children and finding no Fourteenth Amendment need for procedural safeguards beyond civil tort actions following an event); see also *supra* note 68 and accompanying text (discussing *Ingraham*).

99. *Ingraham*, 430 U.S. at 682.

100. DEBORAH RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 70-77* (1989).

101. See HAWES, *supra* note 52, at 98 (noting that children's rights advocates and some psychoanalysts felt, in opposition to the feminist movement, that children needed and had a right to full-time mothering); SYLVIA A. HEWLETT, *A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA 183-90* (1986) (arguing that some radical feminists denounced marriage and children entirely and reviled both mothers and children); ROTHMAN, *supra* note 43, at 246-47 (discussing an overlap that existed between the growth of the children's rights movement and the women's rights movement, and the consequent concern that the women's rights movement would harm the development of children).

102. BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

103. See generally SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (1991) (discussing the ways in which society views motherhood and marriage by examining their portrayal in cinema and the media); SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST*

motherhood as enslaving women and preventing their equality with men.<sup>104</sup>

Resistance to rights for children thus stemmed from similar or identical resistance to rights for women: such rights, critics feared, would inject conflict and individualism into the sphere of the family and disturb the usual arrangements for caring for children.<sup>105</sup> Many in the women's movement deliberately sought new public policies, as well as new family relationships, to meet the needs of children once women altered their conventional family roles. But opponents of the women's movement joined others to oppose national child care legislation advanced by both women's rights and children's rights advocates.<sup>106</sup>

Is it fair to blame the women's movement for neglecting children? Many in the movement specifically attended to children's needs but argued that they should be met by fathers as well as by mothers, or by new societal arrangements such as affordable, quality child care.<sup>107</sup> Some women's movement thinkers specifically supported children's liberation,<sup>108</sup> but none argued that children should be abandoned or neglected. The failure to secure rights for children could have reflected fears of women's liberation quite independent of fears that women would no longer care for children; one way to keep women in conventional family roles is to appeal to their desires to protect children. Moreover, societal neglect of children's needs — indeed,

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REVOLUTION 250-74 (1970) (questioning the traditional roles of women in marriage and motherhood).

104. See FIRESTONE, *supra* note 103, at 82 (describing how maternal regimes and biology have kept women dependent on men) (quoting SIMONE DE BEAUVOIR, *THE SECOND SEX* (1953)); *id.* at 81 (arguing that motherhood oppresses women); FRIEDAN, *supra* note 102, at 202-05 (arguing that motherhood and marriage keeps a woman from being "her own person").

105. See Leo, *supra* note 12, at 5 ("A great many people now understand that the rights approach will exacerbate friction in the home and open the door for lawyers, judges, bureaucrats, and 'the helping professions' to make a further mess of the family."); see also LAURA M. PURDY, *IN THEIR BEST INTERESTS? THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN* 129-49 (1992) (arguing that granting children the same rights and equal standing in the family "needs to be avoided at almost any cost" because of the conflicts it will create in the parent-child relationship).

106. Zigler & Muenchow, *supra* note 43, at 416.

107. See, e.g., FIRESTONE, *supra* note 103, at 270 (proposing that child-rearing responsibilities should be shared by men, women, and other children equally); ROTHMAN, *supra* note 43, at 243 (describing how the organizers of NOW advocated the establishment of a national network of day care centers).

108. Shulamith Firestone, for example, explicitly viewed motherhood as oppressive to women but also argued for children's liberation. FIRESTONE, *supra* note 103, at 81.

the degradation and social unimportance of children — may stem from the degradation of traditional women's work.<sup>109</sup> In this light, rather than blaming the women's movement, advocates for children should have joined them in challenging the low status accorded to women and to the work of caring for children.

This failure of coalition occurred from the women's movement side as well. Some observers criticize the women's movement for failing to place a high enough priority on children's issues, although discerning the place of children in the priorities of the national women's movement is a complicated matter. The National Organization for Women ("NOW"), for example, identified as priorities in the late 1960s and 1970s child care, nonsexist education for children, and reproductive rights for teens, all of which could be viewed as concerns reflecting women's needs more than children's needs.<sup>110</sup> NOW placed child care high on its agenda in 1968 and 1969<sup>111</sup> and periodically thereafter.<sup>112</sup> Some criticized this emphasis on child care as reflecting women's claims for freedom rather than responding to children's needs, but Eleanor Smeal defended the focus on child care in 1977 as an issue of economic necessity for families and an issue of quality education for children.<sup>113</sup>

Others have contrasted the alleged failure of the feminist movement to fight harder for child care with its strong commitments to reproductive freedom and the Equal Rights Amendment.<sup>114</sup> Sylvia Ann Hewlett in particular takes the American feminists to task, comparing the American movement with women's movements in Europe that focused energy on family poli-

109. See FALUDI, *supra* note 103, at 363-99 (analyzing occupations from sales positions to the military, demonstrating the pay gap between the genders and the degradation of gendered jobs).

110. One notable discussion of children's rights in 1977 is striking in the NOW materials in part because there is nothing else like it. See Mary Grace Plaskett, *Bill of Rights for Children*, Do It NOW, Feb. 1977, at 4 (arguing that high quality child care and education free of sex role stereotyping are essential in order to eradicate sexism).

111. This discussion is based on a review of the NOW papers at the Schelsinger Library conducted by Elizabeth Tobin (on file with the author).

112. See Karen DeCrow, *Universal Child Care Is a NOW Priority*, NATIONAL NOW TIMES, Apr. 1989, at 4 ("Since NOW's founding in 1967, child care has been an issue on the front burner.")

113. *Meet the Press* (NBC television broadcast, Nov. 20, 1977) (quoted in *Smeal on Child Care*, NATIONAL NOW TIMES, Jan. 1979, at 4).

114. HEWLETT, *supra* note 101, at 190; see also STEINER, *supra* note 39, at 155-57 (arguing that feminists are persistent lobbyists but not generally on behalf of children).

cies and joined labor coalitions to support maternity leave, child care, and other family support programs.<sup>115</sup> In their defense, we should note that American feminists supported welfare rights in general without framing them as children's rights.<sup>116</sup> Moreover, perhaps American women's organizations declined to pursue a more expansive social welfare agenda, including child care, human services, family allowances, and medical care for children, because of a political climate hostile to such ideas.<sup>117</sup> Yet Betty Friedan, looking back on the women's movement she helped launch, proposed a new focus on meeting the needs of children and families.<sup>118</sup> Friedan called for a "second stage" for the women's movement, one that would advocate family-friendly policies such as child-care, flex-time for workers, and other reforms that would respond to the influx of women in the paid labor force.<sup>119</sup> These recommendations had something in common with the century-long child welfare tradition the Progressives<sup>120</sup> launched, although they show a distinctively late twentieth-century focus on women's equality.

Critics who blame the women's movement for children's unmet needs too often think that massive numbers of women, including mothers of young children, entered the paid labor force in the 1970s and 1980s as a political statement. Evidence suggests instead that most women joined the paid labor force due to economic necessity, as men's salaries failed to meet families' needs.<sup>121</sup> Rising divorce rates and growing numbers of single-parent households also necessitated women's paid labor.

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115. HEWLETT, *supra* note 101, at 138-48; see generally SHEILA B. KAMMERMAN & ALFRED J. KAHN, *STARTING RIGHT: HOW AMERICA NEGLECTS ITS YOUNGEST CHILDREN AND WHAT WE CAN DO ABOUT IT* (1995) (comparing the American gender and family policies with those of other countries and then proposing various reforms).

116. See Katha Pollitt, *Welfare Reform: Many Feminist Voices Lead to Almost As Many Messages*, CHI. TRIB., July 17, 1994, at 6 (arguing that although feminists have supported the welfare rights of women and children, they need to do more).

117. See *id.* (stating that the women's movement campaigns for such ideas "can hardly be helped along if the government officially declares that single mothers are social parasites").

118. BETTY FRIEDAN, *THE SECOND STAGE* (1981). In her own best-selling *Backlash*, Susan Faludi charged Friedan with revisionism in writing *The Second Stage* and contributing to a backlash against feminism. See FALUDI, *supra* note 103, at 318-25.

119. FRIEDAN, *supra* note 118, at 201-342.

120. See *supra* notes 73-83 and accompanying text (discussing the changes the Progressive Era reformers advocated).

121. See David Ellwood, *POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY* 47-52 (1988) (discussing women's increased participation in the labor force);

Whatever the cause, by the start of the 1980s, the movement for children's rights had failed to secure a coherent political or intellectual foundation, not to mention a viable constituency with political clout. The movement triggered defenses of traditional authority, yet it also continued to inspire a small but forceful set of advocates for children in the courts and in the legislatures. The patchwork of judicial decisions governing children's legal status placed only the barest cover over continuing ambivalence. It remained possible to argue that young people deserve the same legal treatment as adults, that young people deserve special legal protections differing from the law for adults, and that law should refrain from intruding on the ordinary practices of adults responsible for children.<sup>122</sup>

One expert reported in 1981 that Supreme Court opinions sounded like a fugue:

You can discern three distinct themes: First, that parents have primary responsibility to raise children. Second, that the state has special responsibilities to children, to intervene and protect them. And third, that children as people have rights of their own and have rights as individuals in relation to the family and in relation to the state. These themes are constantly in conflict.<sup>123</sup>

These three elements each make sense individually, but no clear lines demark which view should prevail in a given case. The absence of a clear conception of children's legal status permitted people to blame parents for failures of state responsibility, to blame the state for failures of parental responsibility, and to view children's rights as threats to both parental and state authority.<sup>124</sup> These blame-games grew into criticisms of the welfare state and even the New Deal safety-net programs, and helped to create the insecurity of children during the Reagan years and since.

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William J. Wilson & Katherine M. Neckerman, *Poverty and Family Structure: The Widening Gap Between Evidence and Public Policy Issues*, in FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN'T 232, 246-47 (Sheldon Danziger & Daniel H. Weinberg eds., 1986) (discussing the relationship between women's labor force participation and marital relations).

122. See generally Knitzer, *supra* note 92, at 481 (discussing the scope of legal activities affecting children and examining the major criticisms of such activities).

123. Glenn Collins, *Debate Over Rights of Children Is Intensifying*, N.Y. TIMES, July 21, 1981, at A1, B4 (quoting Robert Mnookin, Professor of Law at the University of California at Berkeley).

124. See *id.* (discussing different viewpoints of various advocacy groups).

#### IV. BRINGING THE STORY TO THE PRESENT: SOCIAL RESOURCE REDISTRIBUTION

The insecurity of American children in the last decades of the twentieth century became cause for some attention, but also continued to reflect how many adults use the topic "children" to serve their own political agendas.<sup>125</sup> A New York Times reporter wrote the following in 1981 while assessing the Reagan administration's plans to cut services for children: "The children's rights movement, a stepchild of the liberation struggles of the 1960's, has grown into a force affecting the battle over billions of Federal dollars, a host of Government services, and an ever-increasing number of issues involving parents and the courts."<sup>126</sup> In contrast, consider this 1977 statement by Gilbert Steiner, a leading expert on the needs of children: "We have had several opportunities in recent years to develop theories of intervention and I find the most depressing single aspect of the child-development movement in this country to be that each of these opportunities has been a failure."<sup>127</sup> No dramatic accomplishments of a children's rights movement occurred in the intervening five years; instead, observers with different perspectives made what they wanted of the rhetoric of children's rights in the service of their own political purposes.

From the perspective of advocates for children, legislative efforts to provide quality early childhood education, health care for families, and universal protections against poverty went nowhere, initiatives to protect children from abuse by their parents and guardians failed to stem rising rates of reported abuse, and children too often seemed victims of a violent world indiffer-

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125. See generally DAVID A. HAMBURG, *TODAY'S CHILDREN* (1992) (examining threats to children's physical and emotional well-being along with failures of public responses).

126. Collins, *supra* note 123, at 1. But see Leo, *supra* note 12, at 5 ("In the world of public policy, the children's rights movement is still alive, but not thriving, largely because it is essentially irrelevant to the current crisis of the family. American children are not suffering from too much parental authority, but from far too little. Rich or poor, children are much more likely to be ignored and psychically abandoned than they are to be 'oppressed' by parental fascists."); PURDY, *supra* note 105, at 214 ("[B]y severing asymmetrical legal ties that now bind parents and children together, equal rights would weaken appropriate parental authority.").

127. MILTON J.E. SENN, *SPEAKING OUT FOR AMERICA'S CHILDREN* 193 (1977) (quoting from an excerpt of the oral history of Gilbert Steiner).

ent to their needs.<sup>128</sup> Head Start,<sup>129</sup> often described as the one demonstrated success of the 1960s War on Poverty,<sup>130</sup> remained underfunded and thus unavailable for many eligible children. From the perspective of critics, even the limited legislative achievements for children — special education for children with disabilities, expanded public expenditures for protecting children from abuse and neglect, and poverty programs benefiting children and their parents — seemed to be wasteful and bureaucratic burdens on schools, parents, and states.<sup>131</sup> Underlying divisions about the proper role of the government in private life and about race, poverty, immigration, gender, and religion seem more at work in this discussion than an honest assessment of children's entitlements in this society.

One way to stand outside these debates is to compare the status of children during this period with the status of the elderly. Strikingly, the elderly moved out of poverty and benefitted from strengthened public programs meeting their financial and medical needs at the same time that more children fell into poverty and federal and state governments cut public programs for children.<sup>132</sup> Paul Peterson offered one comparison along these lines and concluded with the "immodest proposal" that children obtain voting powers to begin to duplicate the successes of the elderly.<sup>133</sup>

Perhaps because children do not vote, adults invoke the interests of children on divisive social issues. In the 1980s and 1990s, legislative and judicial battles over abortion rights spilled into the children's rights terrain as pro-choice advocates sought rights for minors and pro-life advocates lobbied for parental consent or notification procedures.<sup>134</sup> This may be one of many in-

128. See generally Douglas J. Besharov, *How Child Abuse Programs Hurt Poor Children: The Misuse of Foster Care*, 22 CLEARINGHOUSE REV. 219 (1988) (arguing that social agencies are overreacting to cases of social deprivation among poor children and causing them to suffer more harm in foster homes).

129. See generally ZIGLER & MUENCHOW, *supra* note 44 (discussing the Head Start program).

130. See LYNDON BAINES JOHNSON, *THE VANTAGE POINT: PERSPECTIVES OF THE PRESIDENCY* 69-87, 220-21 (1971) (offering President Lyndon Johnson's explanation of this effort).

131. See generally Besharov, *supra* note 128 (discussing failures of such programs and their effects on the children).

132. Paul E. Peterson, *An Immodest Proposal*, 121 DAEDALUS 151, 151-59 (1992).

133. *Id.* at 170-72.

134. See, e.g., *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 432-42 (1983) (upholding as constitutional a statute that required all minors under the age of fifteen to obtain parental consent or court order before receiv-



stances in which the topic of children's rights constitutes only a superficial frame for what more fairly is a larger national controversy with little opportunity to put children's interests into the picture. Thus, the abortion controversy involves religion, gender roles, and the place of federal courts in politics, but has little to do with the well-being of children, once born, or teens, once capable of sexual activity. In a very practical way, the national controversy over abortion fuels local disputes over the distribution of condoms in high schools, which also touches on the equally hot topics for public health and morality — HIV and other sexually transmitted diseases. One thing is clear: social ambivalence about children's rights will not offer a path through this thicket. Other agendas will prevail, just as they did when the Clinton administration recently responded to the pharmaceutical industry and abandoned plans for a national distribution of vaccinations to assure immunization of all children.<sup>135</sup>

Crime control is another agenda driving the treatment of children and producing incoherent results. Some new developments on the "child liberation front" would surprise and might dismay child liberationists from the 1960s. For example, some children now may receive adult treatment for purposes of criminal prosecution, sentencing, and corrections,<sup>136</sup> and the Supreme Court has rejected a cruel and unusual punishment challenge to the death penalty for a person who committed a

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ing an abortion), *overruled* by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Bellotti v. Baird*, 443 U.S. 622, 644-51 (1979) (upholding as constitutional a statute that requires an unmarried woman under eighteen to obtain parental consent or a court order before receiving an abortion).

135. Robert Pear, *The Health Care Debate: Immunizations*, N.Y. TIMES, Aug. 23, 1994, at A1. Immigration policy is another in which children's rights becomes a superficial topic caught in the midst of a larger debate. See, e.g., *Reno v. Flores*, 113 S. Ct. 1439, 1449 (1993) (rejecting a substantive due process challenge to an Immigration and Naturalization Service regulation requiring undocumented children be released only to the custody of certain relatives); Reena Shah Stamets, *Like It or Not, Immigration Debate Is Coming Your Way*, ROCKY MTN. NEWS, May 7, 1995, at 99A (discussing California's Proposition 187 and its effect on children).

136. Michael J. Dale, *The Burger Court and Children's Rights — A Trend Toward Retribution?*, 8 CHILDREN'S LEGAL RTS. J. 7, 8 (1987); see also Gregory J. Skibinski & Ann M. Koszuth, *Getting Tough With Juvenile Offenders: Ignoring the Best Interests of the Child*, 37 JUV. & FAM. CT. J. 43, 45-49 (1986) (discussing major Supreme Court decisions affecting juveniles). Perhaps the liberationist rhetoric of the sixties reflected a kind of romanticism about especially privileged children; if so, it is especially ironic that poor and minority children are the "beneficiaries" of policies treating minors as adults for criminal justice purposes.

crime as a minor.<sup>137</sup> Despite the calls by numerous academic commentators for the abolition of the juvenile court in order to assure children the same legal treatment accorded adults,<sup>138</sup> the juvenile justice system retains diminished protections for juvenile offenders. At the same time, the Supreme Court has ruled that public schools do not need to apply adult-style standards governing searches or freedom of speech in dealing with violations of school rules, suspected drug use, or school discipline.<sup>139</sup> What joins these decisions is a sense that the world is a dangerous place and that young people both face and pose serious risks, requiring a public response. Children's rights advocates in the 1960s and 1970s may never have imagined children with AIDS, infants exposed in utero to crack, or the massive dissemination of guns to children, but these are pressing issues in the 1990s.<sup>140</sup> Efforts to change public policies to protect these children are enmeshed in efforts to regulate and punish "bad mothers" who are so frequently perceived to be poor and black or Hispanic.<sup>141</sup>

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137. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

138. See Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1118 (1991) (arguing that separate and unequal juvenile courts should be abolished); Katherine H. Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23, 35-51 (1990) (discussing statistical and constitutional trends that support the abolition of the juvenile court); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691 (1991) (arguing that the failure to reform juvenile courts calls for their abolition). For earlier proposals, see MARTIN GUGGENHEIM, JUVENILE RIGHTS PROJECT OF THE ACLU 3 (1978) (reviewing the historical background of the juvenile justice system); Stephen Wizner & Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120, 1132-35 (1977) (proposing the abolition of the juvenile court delinquency jurisdiction). But see Irene M. Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1 WIS. L. REV. 163 (1993) (providing a contemporary defense of the juvenile court system).

139. See Dale, *supra* note 136, at 11 (stating that in *New Jersey v. T.L.O.*, 469 U.S. 724 (1985), the Supreme Court required schools to have only a reasonable suspicion under the circumstances); see also *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 680-86 (1986) (holding that, although adults may use offensive speech, public schools do not have to permit a child to use the same speech).

140. See generally Gary B. Melton, *Children, Families, and the Courts in the Twenty-First Century*, 66 S. CAL. L. REV. 1993 (1994) (discussing general changes of family and society and their relation to the family and juvenile court systems).

141. See Richard Whitmire, *Almost 1 Million Mothers Would Lose Welfare: Census*, GANNETT NEWS SERV., Mar. 2, 1995 (stating that the Census Bureau found that 25% of black mothers 15 to 44 received welfare benefits, nearly 20% of Hispanic mothers were on welfare, yet only 7% of white women received benefits).

Again, agendas unrelated to children are hard at work. Other kinds of social dilemmas and the political reactions they elicit swamp rights for children, however conceptualized.

The recent flap about Republican welfare reform proposals that could send poor children to orphanages represents one more example of a public controversy triggering talk of children's rights but reflecting a different agenda and set of issues. A bill authored by a Congressman elected in the November 1994 Republican sweep of the Congress would end welfare benefits for parents after two years and offer no aid to single mothers under age eighteen or to any mother who failed to establish the child's paternity.<sup>142</sup> The author acknowledged that the bill's policies would render many parents unable to care for their children and therefore would expand orphanages.<sup>143</sup> Following the recommendations of author Charles Murray, the bill and similar proposals seek to end births out of wedlock by ending aid to single mothers.<sup>144</sup> Apparently, President Clinton's proposed welfare plan also would result in putting some poor children in orphanages.<sup>145</sup> House Speaker Newt Gingrich quickly spoke in favor of the orphanage idea and Hillary Rodham Clinton attacked it. When Republicans attacked Clinton, Gingrich said the whole debate had become distorted and cheap.<sup>146</sup> Commentators revealed that orphanages would be far more expensive than welfare and advocates on both sides agreed that a family setting affords the best care for children.<sup>147</sup> The bill's sponsor said he later regretted the orphanage idea.<sup>148</sup> In retrospect, the whole dispute gave a new life to the word "Dickensian" and an old movie called "Boys' Town."<sup>149</sup> It did not, however, elevate the

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142. See William M. Welch, *Orphanage Talk Brings an Outcry*, USA TODAY, Dec. 6, 1994, at 4A (discussing bill introduced by Representative James Talent).

143. *Id.*

144. *Id.* Births outside of marriage have increased from 5% in 1960 to 22% in 1985, and from 22% in the African-American community in 1960 to 60% in 1985. David Popenoe, *Family Decline in America*, in REBUILDING THE NEST: A NEW COMMITMENT TO THE AMERICAN FAMILY 39, 40-43 (David Blankenhorn et al. eds., 1990).

145. William Douglas, *Welfare Plan Hit by GOP*, NEWSDAY, Jan. 11, 1995, at A19.

146. *First Lady Seeks Truce in Orphanage Debate*, CHI. TRIB., Jan. 8, 1994, at 4.

147. Welch, *supra* note 142, at 4A.

148. *Id.*

149. One writer noted:

When Newt Gingrich first uttered that dreaded word on television, the Democratic Party and the liberal press pounced with glee: "Dickensian orphanages" were the Republicans' solution to the problem of poverty. When Hillary Rodham Clinton denounced any plan to put children of

place of children's needs or rights in the debate over welfare reform.

As of May, 1995, the Congress was considering cuts in school lunches, nutrition programs for pregnant women and infants, social security assistance for children with disabilities, and special education. One cartoonist depicted congressional leaders noting, "we tried a war on poverty; we tried war on drugs; let's try a war on children."<sup>150</sup> In responses to the proposed cuts, at least some people will use mass media to focus attention during this political season on the situation of children in poverty. For example, CDF and other organizations document the increasing percentage of American children in poverty.<sup>151</sup> Those statistics reveal that by 1990, families with children under three became the single largest group living in poverty in this country; 25% of all such families lived below the poverty line.<sup>152</sup> Stated another way, one fifth of all children are poor, and children make up 40% of the poor in this country.<sup>153</sup> Again, the success in fighting poverty among the elderly during the same decades raises real questions about the equity in public policy.<sup>154</sup> The racial disparities in the circumstances of children are also striking — 50% of African-American and 40% of

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poor, unwed mothers into orphanages as "unbelievable and absurd," Gingrich suggested that she rent a video of the 1938 Mickey Rooney-Spencer Tracy film about Boys Town, whereupon he was accused of confusing reality with "Hollywood illusion."

Gertrude Himmelfarb, *Why Not Try Orphanages*, HOUS. CHRON., Jan. 22, 1995, Outlook Section at 1; see also Mary McGrory, *In Defense of "Orphanages"*, BOSTON GLOBE, Dec. 15, 1994, at 23 (discussing the debate between Clinton and Gingrich).

150. Wasserman, BOSTON GLOBE, Nov. 29, 1994, at 22.

151. James D. Weill, *Child Poverty in America*, 25 CLEARINGHOUSE REV. 336, 339-43 (1925) (adapted from CHILDREN'S DEFENSE FUND, CHILD POVERTY IN AMERICA (June 1991)); see also CARNEGIE TASK FORCE ON MEETING THE NEEDS OF YOUNG CHILDREN, CARNEGIE CORP. OF N.Y., STARTING POINTS: MEETING THE NEEDS OF OUR YOUNGEST CHILDREN 3-5 (1994) [hereinafter CARNEGIE TASK FORCE] (identifying and suggesting solutions to problems facing children during their first three years of life); Marian Wright Edelman, *Invest in Our Young — or Else*, HUMAN RTS., Summer 1989, at 19, 20 (discussing the CDF's "investment goals").

152. CARNEGIE TASK FORCE, *supra* note 151, at 17.

153. RAY MARSHALL, *THE STATE OF FAMILIES: LOSING DIRECTION* 29 (1991).

154. See CARNEGIE TASK FORCE, *supra* note 151, at 18 (noting that social policy can and does improve the economic conditions of some groups); Peterson, *supra* note 132, at 160 (linking this contradiction to the voting status of the elderly as opposed to that of children).

Latino children under the age of six live in poverty.<sup>155</sup> A focus on children in poverty may seem like yet another agenda using children; it serves as the basis for a fourth position on children's rights: social resource distribution.

Some child protectionists long have sought redistribution of resources to help children. Redistributionists throughout the past century often focused on children as an appealing group for making their case. A 1980s-style campaign for investment in children is still underway in some parts of the corporate community, but it seems to have had little effect on the congressional debate. For better or for worse, redistribution questions in this country will be legislative ones, requiring electoral coalitions.<sup>156</sup> This is precisely the method that has proved unsuccessful in varied efforts organized around children who have no ability to vote themselves.<sup>157</sup>

## V. FORECASTING THE FUTURE: A NEW FIGHT OVER HUMAN RIGHTS

I have no plan or even hope for mobilizing public support for children, especially poor children, at this point in American history. Each of the four rhetorics — child protection, children's liberation, children's rights as potential adults, and redistribution — have failed to find a strong constituency. Instead, political figures win strong support by invoking conventional authority structures, family privacy, and self-reliance, and by attacking a social welfare state. It is tempting to look at other Western industrialized countries and to wonder why state-subsidized health care, day care, child allowances, and other programs are so well-established elsewhere but so politically infeasible here. The failure of the varied rhetorics for children, however, can be only a symptom of and not an explanation for the failure of initiatives for children here.

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155. AMERICAN BAR ASSOCIATION PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES, *AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION* 10 (1993).

156. The Court has refused to view wealth as a suspect classification. See *San Antonio Sch. Dist. v. Rodriguez*, 441 U.S. 1, 23 (1973) (noting that "where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages").

157. See, e.g., STEINER, *supra* note 39, at 9-13 (tracing failed children's rights initiatives of the late 1960s in spite of golden opportunities for change); Zigler & Muenchow, *supra* note 43, at 416 (describing setbacks in child and family policy attributable to the lack of a consistent constituency on behalf of children).

What, then, might explain the failure of children's initiatives? History suggests four. First, children do not vote, and no other lobby has appeared on their behalf.<sup>158</sup> Second, we have seen cycles of reform and disillusionment, epitomized by changes in juvenile court. The reforms of one generation become the problems to be reformed by a later generation; the earlier reforms and subsequent problems then caution against further reform. Third, children's needs are connected to larger, intractable issues, such as the economy's failure to provide good jobs for many people, the presence of women in the paid labor force without reallocation of some of child care from mothers to fathers and others, negative views of poor parents, misallocated health care expenditures, failures of public education, and divisive conflicts over abortion and crime control. Finally, our culture and ideology produce great resistance to state intervention in families; a resistance articulated both by the political left and the right. Conceptions of personal responsibility and privacy, government bungling and individual freedom, and cultural diversity and mutual distrust fuel this resistance. The cultural resistance to rights for children thus reflects a fear that such public rights would disrupt private traditions and fail to meet children's needs compared with reliance on private families. As a result, we treat other people's children as beyond public concern. Perhaps because of our troubled heterogeneity, with historic racism and intergroup distrust, we do not view other people's children as *ours* in many important ways.<sup>159</sup>

Given these reasons, rhetoric alone will not alter the situation of children. Yet it is tempting to seek yet another rhetoric, such as the emerging human rights rhetoric with which I began. The human rights rhetoric has much appeal to those who believed in any prior version of rights for children. More practically, an occasion for political mobilization has arisen now that the United States has signed but not yet ratified the Convention. Because of the international framework, the United States signing could become an occasion to look beyond the parochial and idiosyncratic views that undermine children's legal protections in this country and consider the standards for treating children developed elsewhere.

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158. See Peterson, *supra* note 132, at 170-72 (proposing votes for children after comparing reductions in poverty among seniors during the same period of increased poverty among children).

159. See Minow & Weissbourd, *supra* note 83, at 1-15 (discussing these four explanations in depth).

In closing, I will explore the argument for international human rights for children, but also will consider the limitations of any existing rights framework for this group of human beings. The human rights argument seeks to treat children as candidates not for "children's rights," "child protections," or "adult rights," but instead for "human rights."<sup>160</sup> As human beings, children deserve the kind of dignity, respect, and freedom from arbitrary treatment that rights signal.<sup>161</sup> This dignity, respect, and freedom does not displace or undermine parents, but instead reminds parents and other adults of their fundamental responsibilities toward children.

Unlike children's liberation, the human rights formulation rejects the pretense that children are just like adults in all respects relevant to the law. Thus, the Convention calls for development rights — rights to education, cultural activities, play and leisure, and freedom of thought — to meet children's needs in reaching their full potential.<sup>162</sup> More comprehensive than child protection, the human rights formulation underscores that the absence of rights exposes children to risks of abuse both by their parents and by government actors such as teachers, social workers, and judges. Unlike the social resource redistribution rhetoric, this formulation focuses specifically on children and affords a point for evaluating the entire range of legal treatments

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160. This brings us back to the Convention, and the history of viewing children as eligible for human rights. See generally Cynthia Price Cohen, *The Developing Jurisprudence of the Rights of the Child*, 6 ST. THOMAS L. REV. 1 (1993) ("[The] recognition that children have unique human rights has been enshrined in the 1989 United Nations Convention on the Rights of the Child.").

I have considered but rejected the formulation of children as potential adults. See *supra* notes 70-72 and accompanying text (discussing Peter Edelman's ideas). Such a view is often associated with applications of the theories of John Rawls. See Wendy A. Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 23-25 & nn.57-64, 68 (1994) (discussing a "liberal model of constitutional personhood" heavily influenced by Rawls). It also accompanies some utilitarian views especially interested in viewing children as human capital. *Id.* at 30 & n.118. It is a tempting view especially to address resource distribution questions because one may argue that as *potential* adults, children deserve the opportunity to develop and reach that potential and thus should have claims upon others to provide basic care, safety, stimulation, and education. Fitzgerald provides a comprehensive statement criticizing this view. *Id.* at 30-34. This work makes the compelling argument that viewing children as potential adults ignores their experiences as children. *Id.* at 30-31.

161. The Convention explicitly recognizes children's individual personality rights for this reason. See Cohen, *supra* note 160, at 5 & n.21 (defining individual personality rights as distinct from rights that belong to society in general).

162. SUSAN FOUNTAIN, UNICEF, *IT'S ONLY RIGHT! A PRACTICAL GUIDE TO LEARNING ABOUT THE CONVENTION ON THE RIGHTS OF THE CHILD* 2 (1989).

of children, not only those dealing with access to resources. Thus, as human beings, children deserve economic and social benefits appropriate to their needs.<sup>163</sup>

Human rights in the international sphere depend upon the development of a community that believes in them rather than an authority — court or legislature — that will enforce them.

The vulnerability of international human rights for children to the willingness and commitments of adults at first seems like a weakness, a failure to secure something with force. This vulnerability in another sense, however, becomes a strength because it reveals how dependent and interdependent children are upon adults. Organizing to influence and shape such a community may line up means and ends in precisely the way most important for children. Without adults who believe in the importance and entitlements of children, no phrase, judicial order, or legislative statement will alter their conditions.

In a basic sense, all rights — for adults as well as for children — require a commitment by others to recognize the claims of others and to behave accordingly. Freedoms of association and religion, rights to marry and to procreate, and rights to maintain relationships with family members<sup>164</sup> all depend upon community commitments to include the rights-bearers in the group deserving respect and attention.

Rights rhetorics in the past have tended too often to imply only freedom from — freedom from state control, freedom from interference by others. Children may need some forms of such freedoms but they also need guidance, involvement, support, and even control to protect them from harms against which they cannot protect themselves. I suggest that nothing inherent in rights rhetorics prevents acknowledging these needs of children. At the same time, the rhetoric of rights is the coin of the realm in national, and increasingly in international, law and politics. Not only does invoking this language put children on the map of public concern, it also crucially “impl[ies] a respect which places

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163. Cohen, *supra* note 160, at 8 & n.31. Some describe these benefits as survival rights which include provision for an adequate living standard, shelter, nutrition, and access to medical services. FOUNTAIN, *supra* note 162, at 2.

164. This is a theme I have tried to develop elsewhere. See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 267-311 (1990) (exploring rights as fundamental features and expressions of communal relationships); Minow, *supra* note 69, at 16 (arguing that the concept of rights as protecting human relationships is at odds with that of rights as protecting individual autonomy).



one in the referential range of self and others, which elevates one's status from human body to social being."<sup>165</sup>

Many may ask whether it is practical to press for human rights on behalf of children.<sup>166</sup> A negative answer might arise given the considerable resources right-wing groups muster in opposing such rights as interference in their privacy.<sup>167</sup> The history of the children's rights movements throughout this century casts further doubt on the practicality of a human rights effort for children. By the 1980s, children's rights, as a phrase in search of a program, encompassed many contrasting and even conflicting commitments to children without a notable improvement of circumstances for many, many children. Whether styled as children's liberation or child protection, or as social welfare redistribution programs, each effort found powerful opponents poised against it. Moreover, the conventional conception of rights as implying an autonomous person who needs freedom from interference seems ill-suited to meeting the needs of most children.

Yet the past does not determine our future, but instead offers a set of lessons about the relationship between ideals and contingent realities. Powerful concepts like rights are amenable to new interpretations and applications that may in turn make good on their earlier promise and deeper meanings. So I suggest we roll up our sleeves and work on every front — our own workplaces, schools, communities, and states, our Congress, our medical care, our world — to explore what it would mean to view children as human beings entitled to human rights, or else find a better way to summon attention and resources on their behalf.

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165. PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 153 (1991).

166. Some U.S. advocates for human rights worry that placing too high a priority on children's rights may defeat other human rights efforts currently underway. Given the history of the response to the convention on genocide and the way right-wing interest groups are currently targeting the children's rights convention, this worry is legitimate. The worry really raises the political calculus and priority of purposes: Should one abandon the convention on children's rights because it is controversial or should one support it to weigh in on the controversy?

167. See, e.g., Samuel Francis, *Boutros Boutros-Ghali's Guide to Child-Rearing*, WASH. TIMES, Mar. 14, 1995, at A19 (asserting that "by signing onto the Convention, the British have opened themselves to the charge of violating an international agreement, and they've handed a stick to the child lobby with which they can be beaten, even if their children can't be").