

CHILDREN'S RIGHTS: AN AMERICAN EXPERIMENT

Kay S. Hymowitz, senior fellow, The Manhattan Institute, New York, NY

THE IDEA OF CHILDREN'S RIGHTS has had a long and varied history in the United States. Some of it, particularly in its earliest phases, has been a humane effort that should make Americans proud. Alas, that has not been the case in more recent attempts to expand the nation's concern for children. Over the past thirty years, advocates for children's rights have taken a misguided turn, one replete with what students of policy in the United States call "unintended consequences," some of which I will try to describe for you.

Children's Rights in America: Phase One

First, a little history is in order, for reasons that should become apparent shortly. Most Americans would be surprised to hear that their tradition of concern for the welfare of children goes far, far back to the Puritans, the earliest settlers in the United States. Usually we think of the Puritans for their harsh view of infant damnation and their intolerance of play, rather than for their gentle treatment of their young. Yet surprisingly, the Puritans were the first people in history to offer children a provision for complaint—"free libertie to complain to the Authorities for redresse"—in the event that adults subjected them to "unnatural severitie." At this very early stage of American history, then, the nation wrote into law its dedication to the welfare of children. Children did not merely owe adults blind obedience, this law said. Parents also were obliged to avoid the temptation to treat their children as property that so many throughout history seemed to have succumbed to. They owed children humane treatment.

In the early nineteenth century, the ministers and intellectuals who were the cultural arbiters of the time went quite a bit further than this, specifically warning parents and teachers against corporal punishment of any kind. In several cases around the time of the Civil War, the government actually came to the rescue of children subjected to conditions that one 1869 decision called outside "the bounds of reason and humanity." And later in the century, in 1875, Americans introduced the first voluntary society for the protection of children against cruelty, when the howls from ten-year-old Mary Ellen Wilson as she was whipped at the hand of her stepmother led to the founding of the first Society for the Prevention of Cruelty towards Children (SPCC). Up until then, there were societies to protect animals from cruelty, but not children. By the turn of the century, the U.S. was truly the republic of child protection, with 250 societies, all told.

But the most important achievements in protecting children during this period of American history, commonly

known as the progressive era, came when reformers instituted two major reforms for the benefit of children: first, they founded the juvenile court, a judiciary system designed to protect children from harsh adult sentences and, indeed, from being sent to adult jails. The second reform was expanded compulsory schooling until sixteen-years-old. Compulsory schooling held two benefits for children. It would make it impossible for the young to be subjected to long hours in factories and sweatshops, as they so often were at the time. It would also expand their opportunities. The juvenile court and compulsory schooling did not merely set out to protect children from cruelty, or what the Puritans called "unwanted severitie." In both instances, reformers were insisting that society recognize children as different from adults. Children were unfinished, unshaped human beings, in need of adult guidance and support.

Children's Rights in America: Phase Two

Yet by the 1960s and 70s, this old fashioned notion of children's rights—that of protecting children against cruelty and neglect, of recognizing their vulnerability and need for adult guidance—gave way to a new one. In this new version of children's rights, advocates focused on advancing children's independence from what they viewed as the arbitrary control of adults. Lawyers, judges, and child advocates have taken Americans over the past several generations on what Harvard law professor Martha Minow has called a "legal march away from the conception of the child as a dependent person." This new version of children's rights has had some beneficial results. It has gone some way towards protecting kids from some destructive decisions of authorities like judges, police, and to a lesser extent, principals, teachers, and parents. And doubtless, they were guided by an admirable Western legal tradition, one that defines the individual as a solitary agent whose autonomy must be respected. But this tradition when applied more fully to minors has had the unintended consequence of abandoning American children to their worst impulses and depriving them of meaningful adult direction.

Example 1: The Juvenile Court

During the decades in question, many social critics, most famously Hillary Rodham, now Hillary Clinton, had argued for the need for more liberation for children. But it was only in 1967 that this impulse was written into law, when the United States Supreme Court decided a case entitled *In re*

Gault. The case began in 1964, when a fifteen-year-old Arizona boy named Gerald Gault was hauled in front of a juvenile judge for making a dirty phone call. Gerald was sentenced to six years in a reform school, an absurd overreaction, doubtless, but one which given the structure of the juvenile court, could not be reviewed. Gerald's parents sued the state of Arizona, and eventually the case wound its way to the Supreme Court. There, the justices of the Court noted the unfairness of confining a fifteen-year-old for six years for a crime which, if he were three years older, might provoke nothing more than a fifty dollar fine. However, they did so in dramatic and path-breaking terms that began to erase much of the traditional legal distinction between adults and children. "Neither the fourteenth amendment nor the bill of rights is for adults alone," they proclaimed, in words that would ring repeatedly in future lower judicial decisions. Like adults, minors had the right to due process, to "principle and procedure," including the right to counsel, the right to remain silent, and the right to confront witnesses.¹

On the surface, it seemed a humane and sound decision; few Americans would support the idea of a six-year incarceration for a dirty phone call. But by casting its decision in these broad terms, the Supreme Court inevitably undermined the spirit of the juvenile court. The juvenile court, which I mentioned was founded at the beginning of the century, had been designed less as a criminal court whose purpose was simply to punish children, than a socializing institution designed to shape and guide them. Up until that point, kids who committed minor crimes like pilfering coal from the train tracks went to adult jails, where they would find themselves sharing quarters with horse thieves and murderers, or even worse, rapists. Recognizing the dangers latent in this treatment, and believing that those under seventeen should be handled differently than adults, progressives recast the judge from an impersonal agent of the law meting out retributive justice to something closer to "a wise parent . . . deal[ing] with a wayward child," in the words of Julian Mack, one of the first Chicago court judges.² In street clothes rather than a robe, at a desk rather than a bench, the judge put aside the stern demands of justice and set about pondering the "best interests of the child." The absence of procedure, though it came to seem to its later critics merely an invitation for judiciary mischief, was actually intended to allow adolescents to avoid the full brunt of the law. It gave the wise-parent-judge flexibility: Had the youth gotten into trouble before and why? What were things like at home? Did he need to be removed from a brutal home or did he just need additional supervision from a parole officer?

Unfortunately, when the Supreme Court announced in *Gault* that the constitution applied to children as well as adults, it ensured that this flexibility would no longer be possible. It also ensured that adults would abandon children to

their worst instincts. For one thing, after *Gault* it became much harder for authorities to punish the sorts of mischief that troubled children almost always engage in on their way to more serious crime. Most children start off as what law enforcement people sometimes call "minnows," small time troublemakers, who, as opposed to the more dangerous "sharks," grab a purse or shoplift some records or CDs. With the changes in the court, it has become expensive and impractical for prosecutors to conduct a full-scale investigation and prosecution of each bicycle thief and schoolyard bully. Consider the recent example of a young Michigan boy named Nathaniel Abraham. Nathaniel was brought into the police twenty-two times for a wide variety of misdeeds, including robbery and assault. However, he was never arrested and brought to court, for the likely reason that there were not enough witnesses to ensure a good case against the boy, although he was widely known as a troublemaker. Even his mother had begged for help from the authorities for a child she felt was out of her control. She was told there was not much they could do until Nathaniel was charged with a crime. Unfortunately, Nathaniel obliged them. In 1997, when he was eleven, Nathaniel shot and killed a young man walking out of a convenience store while he was "playing" with a rifle.

Nathaniel's case clarifies another irony of over-extending children's rights. Nathaniel was given many of the due process rights held by adults and avoided charges that couldn't be proved by the letter of the law. Good enough. He was also to be judged as an adult. In fact, Nathaniel's case made headlines when he became the youngest child ever to be charged for a crime as an adult. The undoing of the juvenile court begun in 1967 with the *Gault* decision then ended with an eleven-year-old charged as an adult with murder.

Anyone who has spent time around children knows rule number one: kids need to know there are clear and speedy consequences for their misbehavior. For all its good intentions, *Gault* made this almost impossible. Adults may understand the slow and cautious workings of the law, the need for witnesses, the reasons for delay, but all Nathaniel Abraham knew was that when he robbed someone, adults stood around and did nothing. Many other kids have gotten a similar message from the post-*Gault* court. Edward Humes, in his account of the Los Angeles juvenile court *No Matter How Loud I Shout*, recounts how one mother called the police repeatedly about her son, who was joining street gangs, skipping school, and staying out all night. She was told, "There's nothing anyone can do unless he commits a crime."³

Even when juveniles are brought to trial, elaborate due process procedures ensure that adults cannot act in their traditional role as teachers and guides. Kids often figure out that by failing to show up, they can add to the likelihood that exasperated witnesses won't come back again and that their case will be dropped. Lawyers sometimes encourage them to find

ways to delay, an especially disturbing effort given children's need for clear and swift responses from adults.⁴ Yet delays are rampant in the new procedural, juvenile justice system.

In fact, the post-*Gault* court has often been an excuse for adult negligence. Instead of helping to civilize the troubled youngster, it sometimes seems to encourage him to remain in his amoral, unfinished state. A New York case illustrates the point. In 1992 Juan C., a fifteen-year-old student at New York City's Taft High School, one of the tougher schools in the Bronx, was stopped by a security guard who noticed a bulge in his jacket. Though Juan tried to run away, the guard was able to reach into his pocket and find a loaded semi-automatic pistol, leading to the boy's suspension and arrest. However, the judge in Juan's case ruled the search illegal because it violated the fourth amendment requirements for reasonable search and seizure. There is a peculiarly absurd American quality to the fact that a potentially dangerous fifteen-year-old went free because he was able to demonstrate for a judge just how well he had hidden his gun.⁵ The message for this teen—and the legions of others going free on this kind of technicality—is that the adults around him respect their rights, they are indifferent towards their adolescent deceptions, bravado, and in all too many cases, cruelty.

The post-*Gault* court tells kids—worse, it tells kids in trouble—that they are free, isolated, adult actors, and that their elders' only responsibility towards them is to ensure that complex rules they can't understand are being meticulously followed. "I'm a technician," says a legal-aid lawyer in another study. "I help these people by getting them their freedom."⁶ Yet most of the adolescents who find their way into juvenile court these days have been neglected by families, by teachers, by just about every adult they've ever encountered. Now they come to juvenile court and what do they get? Lawyers who are technicians aiding them in their natural desire to avoid confronting their misdeeds.

Children's rights often come at the expense of parental rights. *Gault* is no exception. In the United States, there is no parent-child immunity; a parent can be forced to testify against a child. Fearing they might be subpoenaed by the prosecution, lawyers often tell their clients not to talk to their parents even about decisions that could drastically alter their future.⁷ Further, when their child is in trouble with the law, most parents, one researcher has found, want them to take responsibility if they have in fact done something wrong. "He should tell the truth," they say, or, "if he's guilty, he should own up."⁸ This is what a society needs its parents to believe. Studies have shown what most parents have seen firsthand in less serious circumstances—guilty kids are prone to blame their victim or a peer.⁹ The resistance to admitting guilt for a misdeed runs deep in human nature; owning up comes only with careful teaching and even then, it's precarious. Yet the right to be silent subverts the required

repeated lesson of moral responsibility. It gives the sullen adolescent the opportunity—no, the *right*—to act out his worst instincts. It forces him into an adversarial stance with those who should be supervising him.

In sum, by expanding children's rights, the Supreme Court introduced the image of the child as a young citizen who needed protection *from* the state and erased the image of the child who needed the protection *of* the state. The decision transformed the boy entrusted to the care of a father substitute into a man benefitting from the services of a professional lawyer. The child who has won his rights stands proud, an independent—and sometimes unsupported—citizen.

Example 2: Reproductive Rights

In the Supreme Court's decisions concerning a minor's right to an abortion, similar and even more misguided assumptions about children's rights are at work, with the same neglectful consequences.

In its landmark 1973 decision *Roe v. Wade*, the Supreme Court explicitly avoided consideration of whether the constitutional right to abortion was shared by minors. It was an understandable evasion. Historically, the court had been loath to allow the state to interfere with the parent-child relationship, and if any subject seemed designed to roil up family life, it was teen sex. Even though *Gault* and several other subsequent decisions had pronounced minors citizens with constitutional rights, in each of these cases—if not in cases that have ensued—the interests of the child and his parents had been identical. In fact, parents had initiated these suits on behalf of their children. When the issue of abortion rights for minors finally came before the court in 1976, it was a very different matter. This time it was doctors and interest group advocates who came forward in *Bellotti, Attorney General of Massachusetts, et. al. v. Baird et al.* and *Planned Parenthood of Missouri v. Danforth* to plead on behalf of children's constitutional right to obtain an abortion without involving their parents.¹⁰

To be fair, the justices were trying to take into account the importance of parental involvement in decisions regarding abortion. On the one hand, they reiterated the terms of *Gault*, proclaiming that "minors, as well as adults, are protected by the Constitution and possess constitutional rights,"¹¹ on the other, they allowed states to require girls to involve their parents when they were seeking an abortion. However—and here's where the justices tipped the balance—they allowed states to do this *only* if those girls who could not or would not go to their parents were allowed instead to receive permission from a judge, a practice known as judicial bypass to "make their own decision."

Doubtless, many Americans would believe an escape hatch like judicial bypass may be necessary in certain extreme instances, such as a girl who finds herself a victim of incest or abuse or if one is being coerced by her parents into

bearing a child or having an abortion. But it's important to understand that the Supreme Court insisted on judicial bypass not only when a law required a girl to get consent for an abortion from her parents, but even when a state law required a girl merely to *inform* her parents of her intention to get an abortion. For the first time ever, the law made an explicit provision for minors to subvert the wishes or even the knowledge of their parents; it thereby proclaimed the unmarried pregnant girl to be the most sovereign and independent of the new generation of minor rights bearers. In other words, following the logic of children's rights they had initiated in *Gault*, the justices, whether intentionally or not, gave unprecedented freedom and autonomy to the country's most troubled children.

Why would the justices do such a thing? In all fairness, they were laboring under the influence of activists who had fed them many gruesome scenarios about the honors that would greet the pregnant teen if forced to inform her parents about a pregnancy. There was much talk at the time that girls who became pregnant would suffer horrific beatings and maybe even be exiled from their homes. Activists also hinted that many girls had become pregnant by their fathers. Such girls, activists concluded, must be free of their dangerous and brutal homes. Girls with good relationships with their parents, they assured us, would naturally speak to them if they were in trouble.

But the history of judicial bypass—that is, seeking permission to make one's own decision about an abortion from a judge and avoiding telling one's parents—proves how deeply both activists and the justices who followed their advice were misguided. Studies have shown that the most common reason for girls to avoid going to their parents when they are pregnant is not that they believe they will be subject to violence, but simply that they are afraid of disappointing them.¹² Around 40 percent of all girls who are seeking an abortion seek judicial bypass in states that have such laws because it is easier to tell a stranger about their pregnancy than their parents. One study found that girls informed their parents at the same rates in Minnesota, where there is a statute for notification, and in Wisconsin, where there is none.¹³ Similarly a 1992 study by the Alan Guttmacher Institute reported that about 40 percent of girls do not notify their parents at all, regardless of law.¹⁴ This goes to prove a truth which had somehow escaped both the Supreme Court justices and the advocates who argued for these causes: give kids in trouble a way to avoid telling their parents, and many will seize it.

The justices' failure to heed what adolescents are really like has led to unhappy consequences that echo those in the post-*Gault* court. Kids in trouble are abandoned to an anonymous, procedural void. In Massachusetts, from the moment the state's judicial bypass was passed, judges were inundat-

ed with requests from pregnant and frightened minors. They granted interviews rarely lasting more than fifteen minutes, during which they would attempt to determine, as the law stipulated, whether the girl was mature enough to decide to have an abortion without help from her parents. Inevitably, their tools were crude. "How old are you?" they would ask, "How long have you been pregnant? Do you understand the nature of an abortion procedure?" Some judges would ask more personal questions about why a girl did not want to go to her parents, but many would not. Between 1981 and 1991, of the thousands of girls who requested judicial approval only thirteen were denied it, and, of those, eleven quickly got an okay from another judge. Though Massachusetts lawmakers had imagined the judge's chambers as a somber retreat for careful consideration of an individual girl's predicament, they had instead created an office for bureaucratic rubber-stamping.¹⁵

In more conservative jurisdictions, girls suffer a somewhat different encounter with adult negligence in the form of impersonal arbitrariness. Some girls are told by authorities that they are not competent to decide whether to have an abortion and yet that they *are* old enough to bear a child. In some states, like Indiana, judges wouldn't confirm the request of anyone. In Ohio, a judge denied permission to a seventeen-and-a-half-year-old straight A student who stated she was neither financially nor emotionally prepared for motherhood. In some of these places, pregnant girls merely crossed state lines to more generous courtrooms, a practice that probably did more to increase their disaffection from adults than their maturity. In Massachusetts, judges who had avidly opposed abortion rights realized that there was no way a girl could be too immature to make a decision yet mature enough to have a baby, and they began okaying petitions.¹⁶

Example 3: The Schools

We can see a very similar set of unintended consequences when the schools expanded children's rights beginning two years after *Gault*, in 1969, with the Supreme Court's decision in the case of *Tinker v. Des Moines Independent Community School District*. In 1965, a group of adults and students from Des Moines donned black armbands in protest against the Vietnam War. The issue for the adults involved was moot, of course, but not for the children. The principal of the local school demanded that the students remove their armbands or else faces suspension. One of them, a fifteen-year-old boy named John F. Tinker, sued, and the Supreme Court took his side. "It can hardly be argued," wrote Justice Abe Fortas for the majority, "that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. . . . Students in school as well as out of school are 'persons' under our Constitution."¹⁷

Six years later, the Supreme Court followed up with another decision in this vein after riots in several Columbus, Ohio,

schools resulted in the suspension of several students, at least one of whom claimed to be innocent of any involvement in the mayhem. *Goss v. Lopez* granted kids the right to due process in hearings which threatened a suspension over ten days.¹⁸

Gerald Grant's *The World We Created at Hamilton High*, a study of a city high school in the decade and a half after these decisions, gives us a look at what was at stake in these two decisions. Like many such schools, Hamilton High suffered through riots and shutdowns in the late 60s as it became more integrated and was forced to confront its own racist past. As the smoke cleared over the next decade, however, it became clear that the new order, though more egalitarian, had created a seriously demoralized, just-get-through-the-day institution. Simply put, teachers had come to fear their students. "Assemblies often degenerated into catcalls and semiobscene behavior while teachers watched silently," Grant writes. "Trash littered the hallway outside the cafeteria, but it was a rare teacher who suggested a student pick up a milk carton he or she had thrown on the floor." Cheating was widespread, but "few adults seemed to care."¹⁹

What Grant is really describing here is what we saw in the case of the juvenile court: expanding children's rights inevitably makes the relationship between child and adult, in this case the teacher, more adversarial. Adults no longer have the clear social role of socializing children. According to Grant, teachers who accused kids of cheating found themselves feeling as if they were the ones who had done something wrong; they were required to produce documentation and witnesses to counter the "other side of the story." One teacher who had failed a boy for plagiarizing a paper had to defend herself repeatedly before a supervisor after being harassed by daily phone calls from the student's parents and the lawyer they had hired on their son's behalf. Another teacher, asked why she didn't report several students who were making sexually degrading remarks about her in the hallway, shrugged, "Well, it wouldn't have done any good. . . . I didn't have any witnesses." The phrase, "You can't suspend me," became the taunt of many a disruptive student.

Of course, not all, nor even most, high schools in the United States have degenerated into quite this kind of chaos. The most recent statistics indicate that about 37 percent of high school principals in the United States report serious discipline problems, an impressive number, though not an overwhelming one.²⁰ But the absence of disciplinary problems does not mean that a school has not suffered from the deconstruction of teacher authority. Teachers fearful of lawsuits resort to other measures to keep the peace among restless and hostile students. One of the things they sometimes do is change the curriculum so that it won't create tensions with their students. Phillip Cusick's study of three high schools—two urban and biracial and one suburban and white—con-

ducted at around the time of Grant's Hamilton High School analysis, describes how in each institution a fear of new adolescent power drove administrators and teachers to keep classes amiable and nonthreatening, or, in other words, unchallenging. Teachers accepted talking, laughing, spitballs, even card-playing, as long as they didn't get out of hand, for "the principal obligation of the teachers . . . was to 'get along with the kids.'"²¹ Fearful of inspiring conflicts, all but a handful of charismatic teachers studiously avoided low grades, demanding homework, and challenging tests.

The 1986 Supreme Court case, *Bethel School District vs. Fraser*, was a fine illustration not only of where adolescents given the right to free speech would be likely to go with it, but also the loss of adult will that had set in after *Tinker* in the culture at large.²² Matthew Fraser, a high school senior, was suspended for a speech he gave during an assembly that was filled with sexual innuendo and greeted by his grateful classmates with hoots and obscene gestures. When Matthew's father sued over his punishment, the lower courts not only supported his son's free speech rights as defined by *Tinker*; but in a radical reversal of the assumptions of lower courts in the earlier case, they went so far as to question the Bethel district's efforts at "cementing white, middle class standards for determining what is acceptable and proper speech and behavior in the public schools."²³ Mr. Fraser was awarded damages from the school and Matthew, whose violation of "white, middle class standards" had (predictably) turned him into a local hero in the eyes of his peers, was voted valedictorian in a write-in campaign. Appalled at the results of their own handiwork, the Supreme Court justices reversed the decisions of the lower courts. *Tinker* had not meant to hold, Chief Justice Warren Burger wrote quoting Justice Black's dissent in that case, "that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students."²⁴

There is every reason to believe that the expansion of children's rights that came after the Supreme Court decided *Tinker* and *Goss* continues to leave educators uncertain about their adult role. Regardless of their outcome, lawsuits that leave teachers unsure of the distinction between instructing kids in the norms of civil language and violating their rights to free speech are bound to paralyze. In 1997, a New York State school district was permitted to suspend a senior for distributing articles urging students to urinate in hallways, scrawl graffiti on the walls, and riot when the police arrived, only after two years of time and enormous amounts of money finally brought the case to the attention of the state's highest court.²⁵ In his dissent in *Tinker*, Justice Black had written that the majority's decision condemns "all the public schools in the country to the whims and caprices of their loudest mouthed, but maybe not their brightest students."²⁶

He was exaggerating, but not by much.

Other examples confirm the picture. When a San Francisco student gave a speech alluding to the size of his genitals, the principal, who attempted to admonish him, was duly informed by the rest of the student body that the boy had a right to free speech.²⁷ Patricia Hersch in *A Tribe Apart*, a study of teenagers in suburban Virginia, found that many times when educators tried to cut short the inevitable adolescent tangents on sexual topics in order to direct the discussion to the subject at hand, kids would raise the flag of free speech. They “demand their rights. . . . They refer to the First Amendment, hint at discrimination.”²⁸ Once teenagers think of being a loudmouth, or talking about whatever they feel like talking about, as a personal right, the entitlement itself becomes the chief good, while the higher goals of free speech in seeking some sort of truth—surely something we want to impress upon the young—fade into insignificance. Rights talk, in Mary Ann Glendon’s phrase, ultimately has the effect of bestowing high moral purpose on adolescent obsessions and making the already difficult task of training their judgment and refining their sensibilities seem quaintly irrelevant.²⁹

Unfortunately, many parents too seem to have implicitly accepted the idea that the right to self-expression should preempt all concern over intellectual or moral seriousness. As long as kids are speaking up, it must be a good thing, no matter how much it undermines genuine education. In 1994, eighth graders in Hershey, Pennsylvania, engaged in a disruptive protest when they learned they had to go to school for several extra days in June to make up for snow days. Parents supported their children rather than the school, because they were “good kids [who]. . . just wanted to make a statement.” As Laurence Steinberg, who relates this incident in his *Beyond the Classroom*, remarks, this kind of support for the kids over the school was unheard of in other times and still is in other countries.³⁰ Yet this situation is minor compared to a case in Half Moon Bay, California. There, a fifteen-year-old student, who wrote several English compositions—one about torching the school library and beating up the school principal, and another called “Goin’ Postal,” about taking a gun to school and putting seven bullets into the principal’s body—was suspended. His parents sued the principal and the school district for damages and to have the boy’s suspension expunged from his record. They found support among many of their fellow parents, who believed the school had overreacted.³¹ Children in Half Moon Bay never did get the message that the adults around them took speech seriously. A settlement reached this year between the district and the boy’s parents reduced the suspension to two days and the grounds were changed from “terroristic threats” to “habitual use of profanity in school assignments.”³² In effect, a boy who threatened to shoot his principal was turned into a hero

among his peers.

Examples like this one begin to suggest how much is at stake when leaving the young prematurely to what Fortas recognized as “hazardous freedom.” Speech can be dangerous; it can wound, it can provoke; precisely the point I was trying to impress upon my daughter when she said “I hate you.” A democratic society must be able to rely on its citizens’ comprehension of the dangers as well as the more constructive uses of the weapon they are wielding. But when will the next generation have the opportunity to learn this lesson? Only when words have turned to sticks and stones. In a Colorado high school in the early nineties, a principal, forced to respect the law as determined in *Tinker*, could not stop a student from wearing Ku Klux Klan insignia to school. That is, until a black student punched the student. Only then, when the Klansman’s “speech” could clearly be construed as threatening school order, could the principal call the insignia a danger and so, forbid it.³³ In Springfield, Oregon, fifteen-year-old Kip Kinkel reported on how to build a bomb in science class and he read from his journal about his dreams of killing in his literature class. No one made particular note of what in another era would have been clear red-flag behavior. “He was a typical fifteen-year-old,” the Springfield superintendent of schools said—until the boy shot and killed his parents and two classmates in a rampage.³⁴ Dylan Klebold and Eric Harris in Littleton, Colorado, were also exercising their free speech rights as they and their teachers understood them when they produced a video showing a school massacre in a video production class and poems about murdering classmates in a creative writing class. In other words, given free rein to say whatever they want, kids talk casually of murder, bombs, and suicide, and adults support their right to do so until someone gets hurt.

Thus it is that the effort to expand children’s rights apparent in decisions like *Gault* and *Tinker*, far from advancing freedom, threaten its foundations. A free society rests on a contract between intentional, responsible selves who support a state which, in turn, respects their competent autonomy. When we lose a shared understanding of when or how that self is achieved, or to put it another way, of when or how the child becomes an adult, we undermine the terms of the contract. Today’s children and adolescents may be guaranteed rights to free speech, but not for a responsible, democratic future. For while it is doubtless true that free speech among adult citizens is a cornerstone to democracy, it is simply not true that depriving a fifteen-year-old the right to describe the length of his penis, his parents’ divorce, or even his opposition to the Vietnam war is a genuine threat to the Constitution. In its adoption of children’s rights in the sense of children’s intellectual and moral autonomy, the Supreme Court forgot that all societies recognize the deficiencies of

youth. Even free societies deny children all sorts of things—drivers' licenses, the chance to purchase liquor or cigarettes, the opportunity to vote—because they recognize that freedom is less threatened by denying kids certain rights temporarily than it is by handing them over prematurely. This is no threat to our principles. Childhood is temporary; even children know that.

NOTES

1. 387 U.S. 13, 18.
2. Julian W. Mack, "The Chancery Procedure in the Juvenile Court" in *The Child, the Clinic, and the Court* (New Republic Inc., 1925, reprinted by Johnson Reprint Corporation, 1970), p. 310.
3. Humes, p. 26.
4. Humes, pp. 52, 93.
5. Ian Fisher, "Gun Decision Raises Furor in the Schools," *New York Times*, pp. B1, B7, 19 September 1996.
6. Quoted in Peter Prescott, *The Child Savers: Juvenile Justice Observed*, p. 169, (New York: Knopf, 1981).
7. Edward Humes, *No Matter How Loud I Shout* (New York: Simon and Schuster, 1996) which describes a year in the life of the Los Angeles juvenile court, points out the irony of lawyers for what is supposed to be a family court sometimes telling kids not to talk to their parents even about things that "will profoundly affect a child's future." p. 211.
8. Grisso, pp. 150–180.
9. Eloise L. Snyder, "Impact of Court Hearing on the Child," *Crime and Delinquency*, pp. 182–3, April 1971.
10. Strictly speaking, *Eisenstadt v. Baird*, decided in 1972, which allowed physicians to give minors contraception without parental approval, was the first step in this direction. See Joan Jacobs Brumberg, *The Body Project* (New York: Random House, 1997) pp. 171. For the best discussion of the Court's challenge to the traditional assumption that parents are best able to consider their children's interests and the dramatic transfer of supervision over the minor from parents to doctors and experts, see Margaret O'Brien Steinfeld, "Ethical and Legal Issues in Teenage Pregnancy," in *Teenage Pregnancy in a Family Context* ed. Theodora Ooms (Philadelphia: Temple University Press, 1981) and "Children's Rights, Parental Rights, Family Privacy, and Family Autonomy," in *Who Speaks for the Child? The Problem of Proxy Consent* ed. Willard Gaylin and Ruth Macklin (New York: Plenum Press, 1982).
11. 428 U.S. 74.
12. Concern for parents' feelings and fear of disappointing them are the most frequently cited reason in several studies: Freddie Clary, "Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area," *American Journal of Public Health*, 1982 pp. [TK], Stanley K. Henshaw and Kathryn Kost, "Parental Involvement in Minors' Abortion Decisions," *Family Planning Perspectives*, September/October, 1992, pp. 200, 203, found girls who avoided notifying their parents were more likely to be white and from intact families. Ianni, pp. 80–82, in a study comparing inner-city, suburban, and rural communities found that suburban girls found it much more difficult to go to their parents if they were pregnant than inner-city girls, simply because their condition was so out of keeping with their families' and communities' expectations.
13. Robert W. Blum, Michael D. Resnick, and Tricia A. Stark, "The Impact of a Parental Notification Law on Adolescent Decision-Making," *American Journal of Public Health*, May 1987, pp. 619–620. Incidentally, though it was widely claimed that the Minnesota parental notice law increased the birth rate among minors, it appears that this rise was attributable to a growing racial minority more prone to teen motherhood in Minneapolis. See James L. Rogers and Amy M. Miller, "Inner-City Birth Rates Following Enactment of the Minnesota Parental Notification Law," *Law and Human Behavior Vol 17*, pp. 27–42, 1993.
14. Henshaw and Kost, pp.196–213
15. Robert H. Mnookin, "Bellotti v. Baird: A Hard Case," in *In the Interest of Children: Advocacy, Law Reform, and Public Policy* ed. Robert H. Mnookin (New York: W.H. Freeman, 1985). Tamar Lewin, "Parental Consent to Abortion: How Enforcement Can Vary," *New York Times*, 28 May 1992, p. A1 cites the figure between 1981 and 1991. A five year study in Minnesota cited in Linnet Myers, "Pregnant Teens Face Parents—Emotions Strong over Requiring Notice Before Abortion," *Chicago Tribune* 5 July 1990, p. 1, found a similar rubber-stamping of petitions. Incidentally, Mnookin's article is a highly informative study of the politics behind *Belotti v. Baird*. One notable fact is that in the original case, while experts and the minor on behalf of whom the case was brought were allowed to testify, the girls' parents were not, though their daughter had claimed that her father would kill her boyfriend if she told him about her pregnancy. Virginia G. Cartoof and Lorraine V. Kierman, "Parental Consent for Abortion: Impact of the Massachusetts Law," *American Journal of Public Health*, 1986, pp. 397–400, also found that as many as one in three pregnant minors crossed state lines in order to avoid parental notification requirements. Their conclusion—that since such laws are failing to promote family unity and parent-child communication, they should be overturned—neglects the broader context of a society that so frequently tells parents they have nothing to offer their children.
16. See Lewin, p. A1.
17. 393 U.S. 506, 511.
18. 419 U.S. 565.
19. Gerald Grant, *The World We Created at Hamilton High* (Cambridge: Harvard University Press, 1988), pp. 106–107. See also Grant, "Children's Rights and Adult Confusions," *Public Interest*, Fall, pp. 87–98, 1982.
20. National Center for Education Statistics, *Violence and Disciplinary Problems in U.S. Public Schools, 1996–1997* NCES 98–030 Washington D.C., U.S. Department of Education, March, 1998.
21. Philip A. Cusick, *The Egalitarian Ideal and the American High School* (New York: Longman, 1983), p. 60 and Grant, pp. 67–70.
22. 478 U.S. 675
23. 478 U.S. 680.
24. 478 U.S. 676. Justice Stevens' dissent to this decision is a fine example of adult uncertainty in the face of child empowerment. Matthew Fraser, he wrote, is obviously respected by his peers and is better at determining what might be offensive to them "than is a group of judges who are at least two generations and 3,000 miles away from the scene of the crime. 478 U.S. 692.
25. James Dao, "School Rightly Curbed Student Speech, States Highest Court Rules," *New York Times*, p. B5, 3 December 1997.
26. 393 U.S. 525
27. Cited in Elaine Yaffe, "Expensive, Illegal, and Wrong: Sexual Harassment in Our Schools," *Phi Delta Kappan*, p. K8, November 1995.
28. Patricia Hersch, *A Tribe Apart: A Journey Into the Heart of American Adolescence* (New York: Fawcett Columbine, 1998) p. 65.
- 29.
30. Laurence Steinberg, *Beyond the Classroom: Why School Reform Has Failed and What Parents Need to Do* (New York: Simon and Schuster, 1996) pp. 11–12.
31. Frank Bruni, "Student's Violent Prose Pits Free Speech Against Safety" *New York Times*, 8 May 1998 p. A10. In another 1997 case, a fifteen-year-old student from Statesboro, Georgia, who had a web site where he proposed shooting the school principal and kidnapping his seven-year-old daughter, and included how-tos for making bombs and killing yourself, was arrested and charged with making terroristic threats against the principal of his high school. One of

the student's lawyers argued the students "were just expressing the kind of dislike of authority that every generation feels." Whether or not "every generation" dislikes authority, beginning with *Gault*, the law has encouraged this generation to do so. See Tamar Lewin. "Schools Challenge Students' Internet Talk," *New York Times*, p. A16, 3 March 1998.

32. See Kay S. Hymowitz, "How the Courts Undermined School Discipline," *Wall Street Journal*, 4 May 1999.

33. Yaffe, K8.

34. Don Terry and Frank Bruni, "Lethal Fantasies of a Fifteen-Year-Old Became a Reality," *New York Times*, p. A14, 24 May 1998.