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The Children's Cause. By Gilbert Y. Steiner, with the assistance of Pauline H. Milius. Washington, D.C.: Brookings Institution, 1976. Pp. viii, 265. \$9.95 cloth; \$3.95 paper.

Reviewed by Hillary Rodham†

Reviewing a book about children for a law journal is like talking to W. C. Fields about the subject: one senses that the audience is not enthralled. By and large, the legal profession considers children—when it considers them at all—as objects of domestic relations and inheritance laws or as victims of the cycle of neglect, abuse, and delinquency. Yet the law's treatment of children is undergoing great challenge and change.¹ Presumptions about children's capacities are being rebutted; the legal rights of children are being expanded. As the structure of family life and the role of children within it evolves, the law is likely to become ever more embroiled in social and psychological disputes about the proper relationship between government and family. The task for lawmakers will be to draw the line between public and private responsibility for children.

The task will not be easy, for the rising debate over public intervention in family life has been emotionally charged. To some extent this is unavoidable. The very questions being asked invite fear and confusion, since they touch deeply held and often conflicting convictions about family autonomy and childhood needs. There are as many policy proposals as there are theories of child-rearing. Adults advance opinions about public policy that they consider validated by their own personal experience as children. Professional surrogates for children claim to want "everything good for kids."² The meandering road toward a comprehensive children's policy is paved with good intentions, most of them "as resistant to translation into legislative policy as [they are] unexceptionable."³

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1. See Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487 (1973).

2. G. STEINER, *THE CHILDREN'S CAUSE* 241 (1976), [hereinafter cited by page number only].

3. *Id.*

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The difficulties in shaping children's policy stem not only from the sentiments that attach to the issues but also from a cultural reluctance to make children's needs a public responsibility. Politicians, not wishing to appear as advocates of interference with the family, balk at turning their Boys Town rhetoric into public commitments on any but the safest of issues. Besides, for most public officials the idea of a federal policy for children is alien. In a recent address to a conference I attended on children's needs, a United States senator admitted he knew nothing about the subject and would have felt more comfortable discussing energy. Policymakers are simply not accustomed to thinking about children's needs in the same ways they think about missile development, dam construction, or even old-age assistance.

Despite the variety of obstacles it has confronted in its infancy, public policy toward children is maturing into a serious political issue. One sign of that maturity is the timely publication of *The Children's Cause*, by Gilbert Y. Steiner, Director of Governmental Studies at the Brookings Institution, with the assistance of Pauline H. Milius. Steiner brings to his inquiry into the origin, organization, and success of children's policies considerable experience in the political analysis of federal programs. If the book were merely a history of certain federal policies toward children, together with substantive information about specific programs, it would be well worth reading. But the book strives for more.

As Steiner describes it, "the book deals with social altruism and self-interest as factors in the development of federal public policy affecting children, with stability and change in intervention policy, with the goals and the techniques of groups in and out of government that are concerned with making and implementing that policy."⁴ By subjecting the last decade of children's programs, as well as their supporters and administrators, to rigorous scrutiny and by treating the subject with the professional respect due serious political issues, Steiner succeeds in stripping away much of the sentimentality, political naiveté, and excuse-making that have served as camouflage for ineffectiveness, waste, and fuzzy thinking.

The book excels as both an introduction to the policy issues surrounding children's needs and a primer for political action that draws lessons from numerous mistakes and a few successes. It is not meant to be a "catalog of federal programs relating to children,"⁵ but it does provide substantive policy information about school feeding, child

4. P. 13.

5. *Id.*

health, and preschool services, especially out-of-home child care. The histories of the Children's Bureau, the Office of Child Development (OCD), and the Senate Subcommittee on Children and Youth are told with insightful commentary on their roles in the development of federal policies. Policymaking by commission, committee, and conference is reviewed and properly criticized for vague recommendations and lack of follow-through. Three private organizations established since 1970 to work on behalf of children are evaluated, and the activities of the most successful of these, the Children's Defense Fund of the Washington Research Project (CDF), and of its director, Marian Wright Edelman, are used to illustrate effective techniques of children's advocacy.⁶

On the whole, the book's conclusions, set forth in a chapter entitled "Is a Children's Policy Feasible?," are sound and probably applicable not only to the children's movement but also to reform efforts generally. For example, Steiner urges activists to build coalitions with groups whose self-interest would be furthered by new policies for children. Steiner draws this recommendation directly from the experience of the school feeding programs, expanded in large part because of the combined pressure of school cafeteria workers and "social altruis[ts]."⁷ By analogy, he suggests that the only route to comprehensive day care services lies along a way built by the teachers' unions, which seek jobs for their members, and those day care proponents who eventually agree to let the schools assume responsibility for whatever program is undertaken.

Steiner makes a number of other informed recommendations. The proponents of programs should set appropriate agendas for action by picking realistic goals from the list of "everything good for kids." The "jurisdictional quandary" in Congress,⁸ where no committee or individual has responsibility for children's programs, needs attention and perhaps could be a subject for congressional reorganization efforts. The Executive Branch should centralize responsibility for children's programs, or at least the children's lobby should monitor the directorship and activities of OCD. These and other more specific recommendations, coinciding as they do with a new Congress, a new President, and new leadership at HEW, will likely find a receptive audience.

The Carter Administration is on record as supporting efforts to

6. Pp. 158-75.

7. P. 244. See pp. 188-97.

8. P. 250.

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strengthen the family unit. Since many of its top policymakers are reportedly inclined favorably toward children's programs, "saving the family" may become the justification for, rather than remain the nemesis of, those programs. If statistics about the declining state of the American family are believed, a widely held perception of national emergency, so helpful to any reform cause, may also be emerging. At any rate, government officials charged with the task of devising programs to reverse the tide toward family disintegration certainly will be reading *The Children's Cause*. Unfortunately, although the book is in many respects useful, it may serve to perpetuate certain views about children's policy in general and about the comprehensive approach toward children's services in particular that demand more critical scrutiny than Steiner provides.

At the outset Steiner posits that "nonintervention serves as a basic guiding principle rather than an absolute."⁹ Steiner's rejection of absolutism is welcome, but it is his cautious attitude toward governmental involvement in child-rearing that implicitly molds his analysis. At critical junctures in the book's evaluation of children's programs that have been or might have been, the noninterventionist principle silently tips the scales, leading ultimately to Steiner's conclusion that it would be unwise to embark on "a far more complex, universal program" than presently exists.¹⁰ Throughout the book Steiner seems to be saying that, on the basis of available evidence, more comprehensive, innovative proposals are politically impractical after the Nixon veto of the Comprehensive Child Development Act of 1971,¹¹ and may be ill-advised on the merits as well. Accordingly, he urges children's advocates to temper their demands, sharpen their practical political skills, and work to improve and expand existing programs for "demonstrably unlucky children whose bodies or minds are sick or whose families are unstable or in poverty."¹²

There is nothing wrong with pressing for better programs for the needy, but Steiner sets his sights too low. Steiner's own arguments do

9. P. 1.

10. P. 255.

11. The Act, § 6(a) of the Economic Opportunity Amendments of 1971, S. 2007, 92d Cong., 1st Sess., 117 CONG. REC. 31248, 31249-56 (1971), was the first attempt to make policy for children and their families on a comprehensive rather than piecemeal basis. After being modified in conference, see *id.* at 43498, 43500-04 (joint explanatory statement of conference committee), the bill was sent to the President. The Nixon veto message, which charged that the Act would "commit the vast moral authority of the National Government to the side of communal approaches to child rearing over against the family-centered approach," *id.* at 46059, was a stunning rebuff not only to the Act itself but also to the very concept of a comprehensive approach.

12. P. 255.

not require an exclusive choice between compensatory programs—those that attempt to remedy deficiencies in a particular child population—and comprehensive programs—those that provide services for the entire child population. Indeed, they suggest the need for further efforts in both areas. Regrettably, Steiner's conclusion may well become a self-fulfilling prophecy unless the flaws in his analysis are exposed.

The flaws can be pinpointed by examining two familiar corollaries of the noninterventionist principle, both of which help shape Steiner's evaluation of federal policy toward children. The first corollary is that in order to overcome the noninterventionist impulse the evidence supporting proposed or ongoing children's programs must be greater than that necessary to overcome resistance to change in other areas of public policy. Whether the greater burden borne by proponents of children's programs is appropriate is rarely questioned, though it warrants consideration. After all, no new policy is fail-safe. Legislators and executives take risks of all kinds when they decide to build a nuclear plant or introduce a deadly pesticide or advocate no-fault insurance. There is no way to predict fully the effects of a policy that is ambitious, yet untried, especially one taking shape amidst the conflicting claims of proponents who foresee extraordinary benefits and opponents who see the handwriting on the wall and the dominoes on the table.

Several federal initiatives for children have been dragged down by this special burden of proof. For his part, Steiner seems agreeable, or perhaps oblivious, to this situation; for whatever reason, he does not protest. In discussing the program of early and periodic screening, diagnosis, and treatment (EPSDT), which was mandated as one of several 1967 amendments to the Social Security Act, Steiner first notes that Congress did not fully consider the costs or scope of EPSDT; by default HEW was given considerable responsibility to define and defend the program. Steiner then describes at length "an apparent decision by HEW to flout the law"¹³ by bureaucratic procrastination: final EPSDT regulations were not issued by the Department until seven years after Congress enacted the program. Nevertheless, Steiner concludes that "[t]he obvious lesson [of EPSDT] is that providing health services to poor children is too complex, too expensive, and too consequential a matter to be legislated without a plan."¹⁴ A balanced critique of EPSDT might properly take Congress to task for laying an inadequate legislative foundation for program implementation.

13. P. 224.

14. P. 230.

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Surely, however, there have been instances where an energetic and imaginative administration has overcome poorly drafted legislation. To suggest that EPSDT was doomed by its authorizing legislation is to discount the destructive role of the program's administrators, who never gave it a chance to succeed.

Sometimes even successful children's programs cannot bear the burden imposed by the first corollary. After tracing the rise and fall of maternal and child health project grants, for example, Steiner concludes that the program "seemed to show important success in preventive health care" but it "was never considered for a multi-year extension."¹⁵ Indeed, by 1975 the Ford Administration was proposing "sharp cuts in federal financing of community health services, including the now-unified maternal and child health grants,"¹⁶ based on the unfounded belief that recipients of care and insurers would pick up the difference. Although the disorganization among grants supporters and the lack of concerted congressional action are evidence of the program's political weakness, the first corollary must be given its due in explaining why successful programs for children suffer the same fate as unproven ones.

The second corollary underlying the book's critique is that children's programs, once underway, should be judged more quickly and harshly than other programs. Perhaps because of the initial ambivalence toward the introduction of a new program, support for the program rests on a shaky consensus easily shattered if the promised goals are not speedily and smoothly achieved. That the rush to judgment has occurred in a number of instances is unquestionable. Whether it is appropriate is worthy of more discussion than the book provides.

One of the clearest examples of this second corollary in operation is Steiner's treatment of the Head Start program. Before Head Start, federal support for child care was always linked to national emergencies like the Depression or World War II. Arguments favoring the provision of child care services stressed the need to put women to work in WPA projects or armaments production or remove them from swollen welfare rolls. Before the 1960s, the potential benefits of such services to the children themselves clearly were not a primary consideration. New psychological theories challenging traditional beliefs in fixed intelligence and predetermined development coincided with the Kennedy and Johnson Administrations. In the climate of a society

15. P. 238.

16. *Id.*

discovering hunger and poverty, these theories flourished and assumed political as well as scientific significance. If a child's intelligence could be improved through extrafamilial services, could a government refrain from establishing them? The answer from the generals of the War on Poverty was predictable: they decided to offer unprecedented public services to preschool children, primarily from poor families. Congress and affected parents supported the effort, according to Steiner, largely because of the claims that substantial individual cognitive gains would result.¹⁷ Therefore, when preliminary evaluation of Head Start, especially the Westinghouse study,¹⁸ failed to corroborate those claims, disillusionment dampened the program's widespread popularity.¹⁹

Steiner recognizes that the program commands sufficient political support to resist attempted cutbacks and that it provides "intellectual respectability to out-of-home child care under public auspices."²⁰ Nevertheless, Steiner shares the disappointment of some early Head Start backers and downplays the significance of positive findings about the program's effects in areas other than cognitive development. His uncritical acceptance of the Westinghouse study findings reflects the force of the second corollary, that children's programs may properly be judged more quickly and harshly than other government programs. Head Start embodied a theory about the sources and quality of intelligence whose validity was not confirmed in the first years of the experiment. But this should have been neither surprising nor disillusioning. Analyses in other policy areas presume difficulties in program design and implementation; years may be spent testing and revising a theory. Surely a theory about children's intelligence deserves more time to be tested than either the adherents of the Westinghouse report or Steiner give it. This is especially true in the light of studies completed since Westinghouse, which call into question the Westinghouse conclusion that the full-year Head Start program is only "marginally effective in producing gains in cognitive development."²¹ Apparently we share so

17. See pp. 29-35.

18. Westinghouse Learning Corp. & Ohio University, *The Impact of Head Start: An Evaluation of the Effects of Head Start On Children's Cognitive and Affective Development 2-7* (June 1969) (executive summary). The report presents the results of a study comparing Head Start participants with children in a control group. The study concluded that the summer Head Start program had no significant impact on learning readiness or academic achievement and that, in most cases, the rather small cognitive gains achieved by the children in full-year Head Start programs faded after the children entered school.

19. For example, a planned endorsement of Head Start by President Nixon was diluted. Pp. 32-33.

20. P. 35.

21. Westinghouse Learning Corp. & Ohio University, *supra* note 18, at 7. See, e.g., A. Mann *et al.*, *A Review of Head Start Research Since 1969: Working Draft* (Social Re-

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much apprehension about potential harm to cherished, albeit fantasized, family values that programs for children must demonstrate immediate success or risk extinction, even in the face of subsequent evidence of achievement.

The book's comparison of fledgling proposals for day care services with the well-established school lunch program exemplifies the folly of judging developments in this field too hastily. Steiner calls the national school lunch program "the success story of the children's cause."²² He observes that "[w]hile comprehensive child development, child-care centers, and child welfare services have floundered, school lunch has flourished."²³ Steiner traces the school lunch program's development from a form of farm relief to a middle class subsidy with nutritional justifications to a broad-based feeding effort giving priority to needy children and providing breakfast and summer feeding services as well. Farmers, congressmen, school cafeteria workers, private lobbies, and citizens concerned about the effect of malnutrition on school achievement formed a coalition over a number of years. The coalition gradually built toward the legislative activity between 1970 and 1975 that resulted in an expanded feeding program. During these five years the number of free and reduced-price lunches and breakfasts increased despite the declining school population.²⁴ Now that most of the children who need a *free* lunch have access to one, Steiner concludes that reformers should turn their attention to the "timely and politically realistic" goal of broader access to reduced-price lunches and breakfasts.²⁵ This goal may be timely and realistic today, but it took 40 years of incremental, sometimes uncertain progress to reach this point. The feeding programs once had to overcome congressional concerns about "further federal participation in 'providing food, clothing, and the other necessities of life.'"²⁶ It is premature to suggest that current proposals for child care, which face the very same concerns, cannot likewise surmount them.

Steiner's predisposition toward nonintervention distorts not only his evaluation of past and present children's policies but also his assessment of the prospects for a comprehensive approach to children's needs in the future. The need for a comprehensive child care program was

search Group, George Washington University Dec. 1976). Remarkably, although the Westinghouse findings have been challenged repeatedly since their publication, Steiner does not mention any post-1970 studies of Head Start's impact on cognitive gains.

22. P. 176.

23. *Id.*

24. P. 198.

25. P. 205.

26. P. 183.

accepted by a majority of Congress just six years ago. The legislative purpose was to assist the American family to meet children's needs, not because Congress questioned the traditional role of the family but because it perceived unprecedented challenges to many families' abilities and resources.²⁷ Within Congress there was much disagreement about the appropriate system for delivering services, but very little about the propriety of or necessity for extending them.²⁸

Steiner attributes passage of the bill not to its merits but to its disorganized opposition, which coalesced too late to secure any action short of a presidential veto. But the lack of organized opposition and the other favorable circumstances Steiner cites to explain the bill's success do not refute the case for the bill made in weeks of investigation and testimony. Had serious and timely questions been raised, the case could have been sharpened and the flaws in the bill corrected, but the Nixon veto message was totally unexpected. When it came, according to Steiner, it proved embarrassing even to some Republicans.²⁹

If Steiner's information is correct, the veto was not really a rejection of child development policy but merely a sop to opponents of the President's new China policy.³⁰ Nevertheless, Steiner seems to regard the veto as a true measure of enduring political opposition to comprehensive children's policies. But before assuming that the veto message nailed the coffin on comprehensive children's policies, changes in the political constellation since 1971 should be surveyed. Richard Nixon is no longer President; James Buckley, the force behind the veto message, has been replaced in the Senate by Daniel Patrick Moynihan, who was, while serving in the Nixon Administration, a supporter of the comprehensive services approach. These changes will not in themselves guarantee the passage of a comprehensive child development bill or other sweeping legislation, but they are indicative of a much more favorable climate than Steiner discerns.

Even if a full-fledged comprehensive program were not immediately feasible or desirable, surrender to a piecemeal approach would be unwarranted. Given the legislative and administrative inexperience with comprehensive children's programs, it might be wise to begin on a limited, experimental scale. Proponents of different types of programs could assume responsibility for testing them under competent govern-

27. Statement of Findings and Purpose. Comprehensive Child Development Act of 1971, S. 2007, 92d Cong., 1st Sess. § 6(a), 117 CONG. REC. 31248, 31249 (1971).

28. See pp. 105-13.

29. P. 114.

30. Pp. 114-15.

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ment auspices. If Albert Shanker wants the teachers to control day care programs, let him have an experimental grant for a few years to explore how he and those with whom he works would administer the program and what benefits would accrue to children. Bettye Caldwell's landmark child development project is part of the Little Rock, Arkansas school district and might provide a model for similar efforts in other environments. The Children's Defense Fund could be given financial support to coordinate projects under various community control models, thereby affording an opportunity to evaluate the claims CDF makes for that form of public intervention. If these kinds of experiments were adequately funded and patiently observed, they would do much to generate the reliable evidence needed to make informed assessments of alternative public policies.

Refinement of established programs, such as Head Start, may provide another avenue for experimentation in child development policy. Recent evidence indicates that Head Start is achieving not only its original purpose, namely cognitive gains, but also improvements in children's social behavior, parental attitudes, community involvement, and children's health.³¹ This successful evolution suggests that the program should be strengthened and expanded within its present structure with an eye to testing the comprehensive approach.

In light of these opportunities for change, Steiner's failure to endorse a comprehensive approach to children's policies is disappointing. In advocating more of the same compensatory programs, Steiner fails to recognize that the compensatory and comprehensive approaches are complementary and should be pursued simultaneously. By the same token, incremental programs can be expanded into more comprehensive ones, and even limited comprehensive programs like Head Start may form a unified framework within which both established and emerging programs can flourish. Nevertheless, despite Steiner's unnecessarily cautious recommendations his book is a welcome addition to the all too limited body of literature in this field. It will be of significant assistance to children's lobbyists and policymakers, as well as to citizens ready to join the debate about the future of children's policy.

31. See A. Mann *et al.*, *supra* note 21, at 8, 21-29 (cognitive gains); *id.* at 9, 34-35 (children's social behavior); *id.* at 12, 38-39 (parental attitudes); *id.* at 15, 42-45 (community involvement); *id.* at 16, 45-46 (children's health).

2 Children's Rights:

A Legal Perspective

HILLARY RODHAM

SEVERAL years ago I wrote an article in which I stated that "The phrase 'children's rights' is a slogan in search of a definition."¹ Although that search is still continuing, there has been significant progress in our efforts to define and achieve children's rights. I would like to discuss several aspects of that search and to raise questions about the future of the children's rights movement.

It is important to clarify at the outset the difference between a legal right and other claims of right because we still find persons discussing children's rights without any clear notion of whether they are referring to a legal right, enforceable under our laws, or a description of needs and interests. A legal right is an enforceable claim to the possession of property or authority, or to the enjoyment of privileges or immunities. In the field of children's rights, we are not dealing primarily with existing legal rights but with children's needs and interests and attempts to transform these into enforceable rights. We are talking about everything from compulsory school attendance to driving privileges to nurturing requirements.

Children's rights refer to a series of relations. This is not unusual, for in the law we often discuss a person's legal position vis-à-vis a certain set of circumstances. One has certain legal rights as a citizen, as an employee, as an heir, as a criminal defendant, and in other roles within society. Let us

think about children's rights in relation to the situation out of which they come, or against which they must be exercised. Children's relations fall within four broad categories of relations, which suggest certain rights:

1. Children's rights in relation to the family
2. The rights of children without families
3. Children's rights in juvenile-oriented institutions
4. Children's rights in society

We cannot possibly cover all of the ramifications for children's rights or any particular individual child's rights in each of these relations within the scope of this chapter, but we can raise questions and look at the subissues that each relationship suggests.

CHILDREN'S RIGHTS AND THE FAMILY

State Intervention

The first subissue concerns the situations in which family breakdown necessitates state intervention, either in response to voluntary requests for assistance by the family or decisions by government representatives to intervene between a family and a child. Through child abuse and neglect statutes society has attempted to define the occasions when intervention in a family on behalf of a child is required. In addition to the situations governed by those statutes, intervention may occur under the authority given the state to respond to parental requests for intervention as when a parent tries to turn a child over to an institution or requests assistance in raising a child because of the child's alleged incorrigibility. The guiding principle by which decisions in this area are to be measured is the "best interests of the child." But there is extraordinary flexibility inherent in this concept and the discretion afforded to any decision maker authorized to enforce it. Although the imprecision of our understanding of human behavior and of the

tools we possess for intervening in families in trouble requires considerable flexibility, the main complaints that have arisen against the state's exercise of its intervening powers are that the authority has been abused. All too often intervention in those families that are most vulnerable to state control, such as the poor or unconventional or ethnic and racial minorities, occurs principally because of the family's powerlessness rather than because of their needs.

This and other indictments of intervention are all too true. However, they must be balanced against the fact that too often, on occasions when intervention is necessary, it does not occur because of the decision maker's extreme reluctance to interrupt family life. What is needed is a theory that adequately explains the state's appropriate role in child rearing and provides sufficient checks on the exercise of discretion to ensure that authority is exercised only in warranted cases. The law, unfortunately, is not an exact science and regardless of how careful one tries to be mistakes will still be made. That is, I submit, a risk or cost we have to accept until we develop a family policy in this country that provides stigma-free assistance to families in trouble before their problems reach the extreme point of requiring wholesale intervention.

Although it is not a good analogy, one might liken the state's intervention in conditions of extremity with the state's power to condemn. It took years to develop a public policy on private property that would permit limited state intervention in the use of that property. For example, zoning restrictions and scenic easements are relatively new features of property law. The development of such intermediary actions and remedies eliminated the necessity for the state to choose between the extreme measure of condemnation or no control measures at all.

Private property is probably second only in importance in most people's cultural framework to the family. It has taken us a considerably longer time to reach a stage where we recognize that each family at some time needs a certain amount of

assistance from the community or government to care for the needs of its members. Many families are able to pay for their needs whether they be medical care or special homemaking services, but all too many cannot. A poor family situation may be allowed to deteriorate because of the lack of available assistance; a disaster area is thus created ripe for "condemnation" by state agencies that can act lawfully only after it is too late for intermediary assistance.

Now you might ask, What does all this have to do with children's rights? I believe that when we speak about the rights of children in relation to their families under conditions of family failures, we are really talking about the needs of children to be cared for in order for their own families to function successfully. If those needs are not met, many of the rights later available to the children will be exercised ineffectively or not at all. Unless we have a family policy in this country, then whatever we do on behalf of children in relation to their families will continue to be band-aid medicine, lacking clear objectives and subject to great abuse. And, if we do not know what we expect from our families, then we are unlikely to be able to provide to children without families the kind of care under state parenting they would receive in a good family. As discussed later, this inability has created some of our greatest abuses and has called for the creation of specific rights for children without families.

Independent Decisions by Children

The second subissue is whether and to what extent children have a right to make decisions that conflict with the decisions that their parents or other guardians wish made. Disagreements between children and their parents are a common occurrence and usually do not rise to the level of a legal question. However, several such disagreements have reached the courts, and a body of case law has developed around them.

Many of the modern conflicts between parents and children arise because of the "invention" of adolescence. Children in

the Middle Ages became adults at the age of seven, at which time a boy was apprenticed to a tradesman, or otherwise sent out to find his fortune, and a girl was trained for future domestic responsibilities. The concept of childhood gradually was expanded until children became more and more dependent on their parents and parents became less and less dependent on their children for economic support and sustenance. During the nineteenth century in this country, the idea of compulsory education provided an opportunity for children to be trained, and took them out of an increasingly smaller work force, so that they would not compete with adults. Child labor laws continued this trend and so did the imposition of age requirements for school attendance. All of these developments ran parallel with the accelerated industrialization and shrinking frontiers of the twentieth century. A boy or girl of fifteen who wished to seek his or her fortune in the nineteenth century or even more recently might have run off to sea or otherwise absented himself or herself from home without becoming a status offender or causing family disagreements that could become legal problems.

Because children now remain in the family for longer periods, during which they are still dependent but becoming more and more adult, the opportunities for intrafamily disputes have increased dramatically. The fears that many people have about the formulation of a family policy or a law of children's rights arise from their concern about increasing government control over such intrafamily disputes. A letter sent out several years ago about the Child and Family Development Act urged persons to oppose the proposed bill because it would, according to the writers, allow children to take parents to court if they were ordered to take out the garbage. Family disagreements that result in legal battles are, of course, of a more serious nature. There are, for instance, a line of cases in which a child either wished or required a certain medical procedure that his or her parents refused to provide.² In some cases, the disagreement was between the child and his

or her parents and in others between the parents and medical experts.³ In both types of cases, the state often enforced a child's right to receive necessary care. The most recent example of disagreement between parent and child is found in the abortion cases recently decided by the United States Supreme Court.⁴ The Court held that a minor child might seek an abortion without her parents' consent and over her parents' objections if a court believed it to be in the child's best interests. In the second line of cases, the issue most frequently arose in the context of religious objections to medical surgery, as in the cases of Jehovah's Witnesses refusing to allow blood transfusions to their children. The courts almost unanimously have ordered that, despite parents' strong religious feelings, medical necessity required that the child be treated.

Even among persons in the children's rights movement, there is a concern that extending rights to children against their parents is too difficult to control, and in all but the most extreme cases such questions should be resolved by the families, not the courts. I prefer that intervention into an ongoing family be limited to decisions that could have long-term and possibly irreparable effects if they were not resolved. Decisions about motherhood and abortion, schooling, cosmetic surgery, treatment of venereal disease, or employment, and others where the decision or lack of one will significantly affect the child's future should not be made unilaterally by parents. Children should have a right to be permitted to decide their own future if they are competent.

RIGHTS OF CHILDREN WITHOUT FAMILIES

Hundreds of thousands of children live in foster homes, training schools, orphanages, and other substitute family environments. When a state intervenes in a family and removes a child from its parents' care or otherwise takes control over a child's life, it does so under the theory of *parens patriae* and under the promise that it will act *in loco parentis*. When it fails to fulfill these promises, the child is generally left without re-

course. The typical child has his or her family to protect him or her against outside or external threats, but who protects the child given over to the state? In the last several years a series of lawsuits have challenged the treatment of children in government-sponsored settings because of violations of their rights.³ In some cases, the rights that were violated were similar to rights adults might claim in analogous situations, such as in training schools where children were subjected to cruel and unusual punishment or in mental institutions where children were deprived of due process and protection.

It is, however, difficult to fashion a legal right to more than custodial care. If a child is not given adequate food and shelter or is physically mistreated, then the courts are willing to intervene even against the state and order that minimal necessities be met. What do we do, however, in cases where children's minimal necessities are met, but those necessities are not sufficient to meet their needs? How do we fashion those needs into legal, enforceable rights?

In response to constitutional challenges to institutionalized care, courts have tried to fashion remedies requiring specific kinds of treatment. They have ordered that a certain number of psychiatrists be available for a certain number of patients and rehabilitation programs be available to inmates. Most of these cases have been in reference to institutionalized adults, but some of them have been directly applicable to children. The difficulty in fashioning a right goes beyond the initial definitional problems into administrative and resource issues. Even if a court orders an institution to maintain a certain staff-child ratio, will a legislature fund the necessary positions? Will the staff be adequate to the task of serving as substitute parents? Who will hold the institution and staff accountable? At the present time, these are questions for the future. We are still struggling to convince courts and government agencies to look beyond minimal necessities. I was recently involved in custody litigation in which I had an expert testify about a typical child's physical and psychological development. After

the expert testified, the representatives of the State Social Services told him they found his testimony very interesting and sure wished someone had told them all that before they had decided to remove a child from the only home it had known since the age of six months. If the adults charged with the responsibility of acting as and supervising the state's substitute parents do not know even the basic facts of child development, how can we expect judges and legislators to make informed decisions? The educational job facing us is enormous.

CHILDREN'S RIGHTS IN INSTITUTIONS

Children's rights in schools and courts involve both procedural and substantive issues. Much of our interest in children's rights is traceable to a 1967 United States Supreme Court case, *In Re Gault*,⁶ in which the Court extended to juveniles certain of the rights adults charged with crimes possessed under the Constitution. Until that case, it was not even clear that children were persons under the Constitution. Since then, many children's rights advocates have focused on a child's rights within the institutions that principally affect them: juvenile courts and schools.

Although the extension of rights to children in juvenile court may have generated more controversy than any other recent extension of rights, in many ways the juvenile court was the easiest target available. It became painfully obvious that the dream behind the original juvenile court in Cook County, Illinois to treat each child individually and to provide special attention to his or her needs so as to rehabilitate or socialize him or her was falling short of realization because of inadequate resources, imprecise legal standards, poorly trained personnel, and unchecked discretion. The next step had to be either the abolition of the court itself and the return to a single system of criminal justice or the extension to children of those rights that safeguarded an individual's position in an adult court. The *Gault* case ordered that juveniles threatened with

incarceration were entitled under the due process clause to notice, the right to counsel, the privilege against self-incrimination, and the right to confront one's accusers and to cross-examine witnesses. Since then, the Court has also required that juveniles have to be proven delinquent by the same standard—beyond a reasonable doubt—as adults. However, the Court has stopped short at extending all adult procedural rights to children. For example, the Court has not extended the right to a jury trial to juveniles.⁷ In this decision, the Court reviewed the development of the juvenile court and refused to alter it by requiring jury trials until the court had had an opportunity to live up to constitutional obligations. Children have also been extended constitutional rights within schools so that they can express their own individuality, such as the length of their hair, exercise their First Amendment rights, and be freed from arbitrary and unreasonable punishment.

However, within a space of three years, the United States Supreme Court decided two apparently conflicting cases as to a child's rights within schools. On the one hand, the Court ordered that a child could not be expelled or suspended without being given an adequate chance to respond to the charges against him.⁸ On the other hand, the Court reviewed a case in which a student challenged the severe corporal punishment that had been inflicted on him and decided that, absent excessive physical harm, corporal punishment was permissible under the Eighth Amendment of the Constitution.⁹ These decisions represent the confusion and conflicting goals besetting the Court as it tries to strike a balance between a child's alleged rights and the administrative needs of the institutions against whom those rights would be exercised.

CHILDREN'S RIGHTS IN SOCIETY

The issues involved with children's rights within society are complex and hard to define. In this category fall all the various declarations of rights such as the United Nations Declaration

of Rights. That and similar efforts are attempts to translate into legal rights the environmental rights we believe children must have in order to develop successfully. The United Nations Declaration, for example, says that each child has a right to grow up in a world at peace. All of us would hope to have that right, but none of us, so far as I know, has figured out a way to enforce it. Courts and legislatures have already recognized certain claims of rights on behalf of a child as a citizen. Such rights include a child heir's claim to an inheritance, a minor's right to sue for damages resulting from an automobile collision, or even an infant's action for damages because of injuries suffered in his or her mother's womb. In addition to such rights, many of which have long been recognized by the law, there are also recommendations that a child be given certain rights as against future technological changes that might damage him or her. Even though the development of such a legal cause of action seems unlikely, children and adults might have special standing to question the proliferation of nuclear power or junk food because of the potential impact or at least unpredictable impact on their and their children's future development.¹⁰

This general discussion of four categories of children's rights raises additional considerations I want to treat briefly. The question of enforcement of these rights that exist and those that may be created is an extremely difficult one. Even after the United States Supreme Court ordered juvenile judges to ensure the presence of counsel in cases with incarceration as a possible punishment, many judges resisted the directive, continued holding court without lawyers and decided on their own what should be done with a juvenile appearing before them. Lawsuits were sometimes brought to enforce the Supreme Court's mandate. Where there was an adult willing to assume enforcement powers, children were accorded their constitutional rights; where there was not, they were not. The principal difficulty in enforcing children's rights

is that, except for a very few, they are enforceable only vicariously. Children are dependent on adults to represent them in claims to achieve their rights. Most states do not even permit a child to appear in his or her own name in court but only through a guardian ad litem or other custodian. A right without enforcement is little better than no right at all, and, until we are able to enforce even the simplest of rights, such as the presence of counsel, we are unlikely to be successful in enforcing the more-difficult-to-define rights such as the right to adequate care from substitute parents.

FASHIONING RIGHTS FOR CHILDREN

There are three basic approaches to the fashioning of rights for children. First, adult rights can be extended wholecloth to children so that a right to counsel for a child means the same thing as it does for an adult. This approach prevails in delinquency law. Second, adult rights can be tailored to fit a child's special needs. The United States Supreme Court tailored First Amendment rights when it decided children possessed such rights but not to the extent that adults did. They were not, for example, able to have access to as wide a range of materials alleged to be obscene as adults were. Every state has tailored employment laws by setting ages at which children may legally work and placing conditions on their employment. Third, special rights for children can be created. Even if a child were given every right now possessed by an adult, there are few of us who would agree mere legal rights alone met a child's needs and interests. A child has special needs and the legal question they present is whether these needs are translatable into enforceable rights. It is in this area of special rights that most of us feel the greatest challenge lies and where, thus far, we have encountered the greatest disappointment. The disappointment arises not just from an inability to articulate standards but also from the resistance within the professions to rationalize their practices. (Within the special rights approach is a subcategory that covers special children—handicapped

children or institutionalized children who are atypical and require additional safeguards to ensure their needs are met.)

Children's Rights and Responsibilities

Rights carry with them responsibilities, even when—or especially when—we are discussing their applicability to children. A curious thing occurs when a society denies legal rights to certain citizens because they are thought incapable or undeserving of the right to take care of themselves or make decisions on their own behalf and consequently need social institutions specifically designed to safeguard their position. It is presumed that under the circumstances society is doing the best for the individuals, whether they be wives, welfare recipients, or Indians on reservations. The relative powerlessness of children makes them uniquely vulnerable to this social rationale and no group except for the institutionalized, who live in a state of enforced childishness, is so totally dependent for its well-being on choices made by others. Children are in fact presumed incompetent, and incompetents do not exercise responsibilities, either because they are not extended such responsibilities or because they refuse or are unable to assume them. This presumption of incompetency has profound significance not just because children are reliant on adults to exercise their rights for them, but because a child denied the opportunity to exercise responsibilities is effectively denied the opportunity to mature into a responsible adult.

Analyses about the malfunctioning juvenile justice system appear all over the country. An article involving New York was focused on a young man with a history of violence who had never been held responsible nor placed into a position where he had to be responsible.¹¹ Despite having been caught up in the juvenile justice system for most of his life, he had walked away from it with the apparent belief he would not be held accountable for his actions. Even when he eventually killed another person, he was never adequately punished nor rehabilitated. The impression was that the entire system wished

to avoid responsibility: responsibility for the problems of juvenile crime, responsibility for running its own institutions, responsibility for dealing with the needs of the juveniles coming into it, and in general responsibility for any aspect of the social system it was established to handle. I do not doubt that the system of juvenile justice in New York is beset by extraordinarily difficult problems, but a system that refuses to accept responsibility cannot hope to instill responsibility. And without responsibility, the extension of rights to children in their various relations is a meaningless exercise because rights are extended on a premise of individual responsibility. Philosophers debate whether under any circumstances children are able to exercise responsibilities sufficient for them to assume rights. The debate usually is unsatisfactory since children will and have to exercise certain responsibilities; it should be phrased not in absolute terms but in more conditional ones. There are certain children at certain ages in certain circumstances who can and should exercise responsibilities. The task is to determine what those conditions are.

The first thing to be done is to reverse the presumption of incompetency and instead assume all individuals are competent until proven otherwise. It is not difficult to presume a newborn child is incompetent, in the sense of exercising responsibilities and caring for himself or herself. It is more difficult, however, to prove a twelve-year-old child totally incompetent and I think impossible to presume the typical sixteen-year-old incompetent. Yet the law basically treats all these children, at their dissimilar stages of life, as incompetent and ignores psychological and social realities. If we were able to fashion laws that decided on the basis of available knowledge which children were competent and which were not, we could begin assigning responsibilities as well as rights and expect both to be fulfilled and enforced.

Although there are difficulties attached to making the law more discriminating, they do not seem to be any greater than the problems lawmakers confront in many other areas. Decid-

ing what kinds of crop aid should be given for a particular year to various regions affected by different weather, pests, and prices is not easy either, but it gets done. Mistakes are made, but they are inevitable in any complex decision carried out over time under unpredictable circumstances, and which affect a great number of people. Political decisions about children's rights are not any more difficult than many politicians have to face; they are just more controversial. But there are some steps supported by common sense and legal precedent we could take now. All procedural rights should be extended to children. They are entitled to legal representation in any proceeding in which their interests are at stake. This includes not just the rights available in juvenile court, but in every judicial or administrative setting. There may still be certain procedural rights one could argue should not be extended to children, but these should be examined on a right-by-right basis and withheld or granted according to the situation in which they would be exercised and the age of the child to whom they would be accorded.

Finally, I think that if we hope to influence public policy on behalf of children so that additional rights and responsibilities will be created, we need to become better advocates. Although advice on strategy may not at first impression appear to fit within a discussion of children's legal status, it seems to me to be the critical issue underlying every aspect of child advocacy. It is especially pertinent to a lawyer's role. The lawyer who best serves the client is the one who understands the legal and political realities surrounding a problem and who perceives the various routes open to solving it. Lawsuits are only one approach to problem solving in the law; a lawyer might instead decide to pursue administrative, legislative, or political action to achieve the objective. The children's rights movement must be as flexible and as realistic.

All too often, proponents of children's programs substitute emotionalism for rationality and believe altruism is an alterna-

rive to effectiveness. A recent book, *The Children's Cause*, by Gilbert Steiner and Pauline H. Milius, subjects federal children's programs, their supporters and administrators, to rigorous scrutiny and concludes that the only programs that have been justified and administered adequately are certain categorical grants to children with obvious physical and mental needs.¹² The authors claim that a comprehensive approach to children and family policy has not been made and that the proponents of one are either too busy fighting among themselves or too fuzzy-headed or too politically naive to carry the burden of proof. That is, of course, a generalization that leaves out some of the leading spokespersons for children's rights, but my experience supports the book's conclusions.¹³

The only federal program that adopted a comprehensive approach that the authors believe succeeded is the national school lunch program. The authors argue it became politically acceptable not because of arguments about hungry children, but because of an alliance between children's advocates and the association of school cafeteria workers who seized the opportunity to increase its membership.

Since children, with or without rights, will remain dependent on adults to secure the assistance they require, they deserve competent and effective advocates. Interested adults should be alerted to the work that must be done to inform the public and decision makers about children's needs, interests, rights, and responsibilities and to secure positive action.

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