MAXIMIZING STRATEGIES FOR PRESSURING ADULTS TO DO RIGHT BY CHILDREN

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I. INTRODUCTION

It is essential that law and legal policy makers gain a better understanding of the needs of children so that law and policy can better address them. For this reason, this conference, and the inter-disciplinary perspectives it brought together, represents precisely the kind of efforts needed to improve the law as it impacts children.

The more we know about what children need, the further along we will be in doing right by children. But, of course, in our complicated world, knowledge of children's needs, however vital to our work, is not enough. We need to translate our knowledge into real policy and law. For this reason, it is important for children's rights advocates to consider strategies for advancing children's rights. This Article addresses one of those strategies.

For the vast majority of American history, there was no subject of "children's rights." It was only in the 1960s that the Children's Rights Movement became prominent, when an important literature developed extolling children's rights[1] and the Supreme Court decided several prominent cases involving children.[2]

This does not mean, however, that children's legal interests had never before been the subject of judicial decisions. Quite the contrary is true. Children's interests have long figured in many important cases decided by the Supreme Court, including cases that have proven to be among the most important in locating and

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1. *See, e.g.*, PAUL GOODMAN, GROWING UP ABSURD (1960); EDGAR Z. FRIEDENBERG, THE DIGNITY OF YOUTH AND OTHER ATAVISMS (1965). *See also* RICHARD FARSON, BIRTHRIGHTS (1974); JOHN HOLT, ESCAPE FROM CHILDHOOD (1974).

2. *See, e.g.*, *In re* Gault, 387 U.S. 1 (1967); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

securing constitutional protection of the family from government intrusion.[3] But those cases were not framed in terms of children's rights. The first case explicitly to say that children are protected by the commands of the Constitution was decided in 1967.[4]

Before looking at the cases decided during and after the Children's Rights Movement, it is instructive to review some of the important constitutional cases affecting children's interests that were decided before the Children's Rights Movement came into being. Part II will consider two important Supreme Court decisions that advanced the rights of children before the Children's Rights Movement existed. It will analyze the language and reasoning that achieved success for children before the rhetoric of children's rights was used. Part III will look at two Supreme Court decisions decided after the Children's Rights Movement began. This section will compare and contrast the language and reasoning of the Court with the decisions from the earlier era. Part IV will discuss the significance of the differences between the two sets of cases and the current implications for children's advocates. Finally, Part V will suggest alternative ways of framing claims on children's behalf that do not depend on a rhetoric of children's "rights."

II. A BRIEF HISTORY OF CHILDREN'S RIGHTS BEFORE THE CHILDREN'S RIGHTS MOVEMENT

In 1943, the Supreme Court decided *West Virginia Board of Education v. Barnette*.[5] In 1954, it decided *Brown v. Board of Education*.[6] Neither case mentions children's rights, yet both rank as landmark constitutional law cases with results that are universally praised by advocates for children. How could this be?

The specific issue in *Barnette* was whether school officials could compel students to salute the flag and say the pledge of allegiance each day at school as part of the curriculum.[7] Three years earlier, in *Minersville School District v. Gobitis*,[8] the Supreme Court assumed without deciding "that power exists in the State to impose the flag salute discipline upon school children in general."[9] That case "rejected a claim based on religious beliefs of immunity from an unquestioned general rule."[10] After the *Gobitis* decision, many state legislatures, including West Virginia's, enacted new legislation requiring all schools "to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State for the purpose of teaching, fostering and

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3. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Prince v. Massachusetts, 321 U.S. 158 (1944).

4. *Gault*, 387 U.S. at 13. "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *Id.*

5. 319 U.S. 624 (1943).

6. 347 U.S. 483 (1954).

7. *Barnette*, 319 U.S. at 629–30.

8. 310 U.S. 586 (1940).

9. *Barnette*, 319 U.S. at 635.

10. *Id.*

perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government."[11]

The school board directed that each school day all teachers and students be required to participate in a salute to the American flag and that refusal to salute "be regarded as an Act of insubordination."[12] Anyone who refused to salute the flag would be expelled.[13] During the time the student was absent, he or she was subject to charges of delinquency based on truancy and his or her parents were liable for prosecution for violation of compulsory education laws.[14] The justification for the mandatory flag salute, set forth in the footnote below, is particularly instructive at this moment in American history when patriotism after September 11, 2001, seems to have reached a modern peak.[15]

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11. *Id.* at 625 (internal quotations omitted). There may be important lessons for today's Americans to observe the degree to which school boards may feel obliged to demonstrate their patriotism by enacting rules requiring schools to do what the law allows but does not require.

12. *Id.* at 626.

13. *Id.* at 629.

14. *Id.*

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> WHEREAS, The West Virginia State Board of Education holds that national unity is the basis of national security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitution; that the Flag is the symbol of the Nation's power; that emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression, and
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> WHEREAS, The West Virginia State Board of Education maintains that the public schools, established by the legislature of the State of West Virginia under the authority of the Constitution of the State of West Virginia and supported by taxes imposed by legally constituted measures, are dealing with the formative period in the development in citizenship that the Flag is an allowable portion of the program of schools thus publicly supported.
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> Therefore, be it RESOLVED, That the West Virginia Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States—the right hand is placed upon the breast and the following pledge repeated in unison: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all'—now becomes a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly.

Barnette, 319 U.S. at 626 n.2.

The law was challenged by Jehovah's Witnesses, who consider the flag to be an "image" which their literal reading of the Bible precludes them from saluting.[16] They sought an exemption from the application of the mandatory flag salute requirement on the basis of the First Amendment's Free Exercise Clause.[17] Without reaching that claim, the Court held that government lacks the power in the first place to compel any of its citizens, including school children, to publicly demonstrate their agreement with ideas or views that the government deems correct.[18]

The Court declared the mandatory flag salute provision unconstitutional because it compelled "a form of utterance,"[19] which "requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks."[20] In addition, the Court observed that the combination of requiring a flag salute with utterance of the pledge of allegiance "requires affirmation of a belief and an attitude of mind."[21]

The Court held that under the First Amendment it does not matter whether the thing government demands people say or believe is something the Justices of the Court would regard as "good, bad or merely innocuous."[22] In the Court's words:

> [V]alidity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.[23]

The opinion emphasized the potential ultimate cost to society, adults and children included, if state officials were permitted to force any citizens, but particularly children, to express a particular view.

> There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any

16. *Id.* at 629. "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them." *Id.* (quoting *Exodus* 20:4).

17. *Barnette*, 319 U.S. at 630.

18. *Id.* at 641. "We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." *Id.*

19. *Id.* at 632.

20. *Id.* at 633.

21. *Id.* "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *Id.* at 634.

22. *Id.* at 634.

23. *Id.*

> legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.[24]

The Court's opinion was written by Justice Jackson. In his hands, the case was told as a story about government, its role in educating youth, and its limitations. Rather remarkably, nowhere in the Court's opinion do we ever learn whether the persons challenging the rule are children or their parents. We learn only that "[a]ppellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others similarly situated asking its injunction to restrain enforcement of these laws and regulations against Jehovah's Witnesses."[25]

In Justice Jackson's hands, the case pitted a "conflict . . . between authority and rights of the individual."[26] Neither the Court's holding nor Justice Jackson's reasoning depended on an understanding that children possessed rights that the Constitution protected. Instead, the case stands for the closely related, but materially different point that "individuals," whether they happen to be children, adherents of a particular religion, or whomever, were protected against improperly exercised state power.

Even when Justice Jackson discussed the impact of the challenged law on children, he did not indulge a "children's rights" perspective. Instead, his emphasis was on the cost to society over time that a rule requiring children to believe a particular thing would exact. "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[27]

He ended his opinion with words that continue to ring as among the most eloquent expressed by the Court on the importance of freedom of expression:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[28]

In *Brown v. Board of Education*,[29] one of the best known cases decided by the Supreme Court in the twentieth century, the Court heard a challenge to the maintenance of racially segregated schools. *Brown* changed American law and the American way of life by overruling *Plessy v. Ferguson*,[30] the 1896 Supreme Court case which declared that "separate but equal" was constitutional.[31] *Brown* further

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24. *Id.* at 641.
25. *Id.* at 629.
26. *Id.* at 630.
27. *Id.* at 637.
28. *Id.* at 642.
29. 347 U.S. 483 (1954).
30. 163 U.S. 537 (1896).
31. *Id.* at 552 (Harlan, J., dissenting).

ignited the civil rights movement in the 1950s (even as it was a reflection of the movement). It led directly to the civil rights legislation of Congress in 1964, which outlawed the last remnants of publicly sponsored segregation outside the public schools.[32] But *Brown* began these changes with a compelling declaration that official segregation in the public schools violated the 14th Amendment to the Constitution.[33]

In *Brown* and its companion cases,[34] the Court was asked to decide whether primary and secondary schools in Kansas, South Carolina, Virginia and Delaware were operating in conformity with *Plessy's* "separate but equal" requirement. The plaintiffs made a variety of claims in the lower courts to advance their ultimate claim that the maintenance of a race-based dual school system violated the "separate but equal" requirement. Out of the various cases, the plaintiffs challenging the Kansas school system made the most explicit focus on the children.[35] The trial court found "that segregation in public education has a detrimental effect upon Negro children," but denied relief nonetheless because "the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers."[36] As a result, the Court chose to consider "the effect of segregation itself on public education,"[37] in all its incarnations, both tangible and intangible.

Unlike *Barnette*, in *Brown* the Court made clear who the plaintiffs were. In the Court's words, the plaintiffs were "minors of the Negro race, through their

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32. 42 U.S.C. §§ 2000(a)-(e) (2001).

33. *Brown*, 347 U.S. at 495.

34. The three companion cases were *Briggs v. Elliott*, *Davis v. County School Board*, and *Gebhart v. Belton*. *Id.* at 486 n.1.

35. The other cases focused more on the facilities and the strength of the education, including the teachers and the instruction. *See id.* at n.1.

36. *Id.* In one companion case from South Carolina, *Briggs v. Elliott*, the district court "found that the Negro schools were inferior to the white schools and ordered the defendants to begin immediately to equalize the facilities. But the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program." *Id.* In the Virginia case, *Davis v. County School Board*, the district "court found the Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants forthwith to provide substantially equal curricula and transportation and to proceed with all reasonable diligence and dispatch to remove the inequality in physical plant. But, as in the South Carolina case, the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program." *Id.* (internal quotations omitted).

It is fascinating to compare these different results. In the Kansas case, the trial court, though agreeing with the claim that the dual school systems adversely affected black children, denied relief to the plaintiffs because the facilities were nonetheless "equal." *Id.* In the case from South Carolina, the trial court ruled against the plaintiffs, even though it found the facilities were unequal, because the separate schools did not necessarily result in an inferior education. The only remedy the court gave the plaintiffs was to order the school districts to work harder to make the separate facilities more equal. *Id.* In the Virginia case, without regard to the impact on black children, and even though the facilities were unequal, the trial court refused to prohibit the continued use of segregated schools, instead ordering officials to make the schools satisfactorily equal. *Id.*

37. *Brown*, 347 U.S. at 492.

legal representatives."[38] Nonetheless, as in *Barnette*, the Court's focus was not on the rights of children. Even when it stressed the importance of education in order to make clear why the question the Court had to decide was so important, the Court chose to emphasize the importance of education to society as a whole, rather than to the children receiving it. In the Court's words, "education [wa]s perhaps the most important function of state and local governments."[39] But, for the Court, the importance of education lay not because of the potential value to children to lead a happy and fulfilled life. Rather, its importance was to be found in its impact on "our democratic society."[40] A good education is needed, the Court told us, to assist "in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship."[41]

The *Brown* opinion became a story about the commitment American society made to equality. Even if a version of equality developed by the Court in 1896 seemed sufficient to some, the Court in *Brown* explained why separation ensured inequality. The precise holding is that "children of the minority group" are deprived of equal protection of the law by the maintenance of segregated education "even though the physical facilities and other 'tangible' factors may be equal," because segregation "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[42]

III. THE ARRIVAL OF THE CHILDREN'S RIGHTS MOVEMENT

Let us now jump to the 1960's when the Supreme Court decided two cases in particular that were influenced by, and prominently helped to advance, the incipient children's rights cause: *In re Gault*[43] and *Tinker v. Des Moines Independent School District*.[44] In both cases, decided in the midst of the Civil Rights Movement, the Court used a very different imagery than it used in earlier

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38. *Id.* at 487.

39. *Id.* at 493.

40. *Id.*

41. *Id.* It is true that the Court also added, "[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Id.* But, in context, this reads like an afterthought. The clear emphasis the Court placed on the importance of education was on society as a whole and how it would benefit from children being educated well. This additional thought, expressed as it was after emphasizing the benefit to society, simply acknowledges that it is also true that children may themselves benefit from a good education. However, it is plain that the Court stressed the public, not the individual, benefits of education.

This may well have been strategic on the Court's part. It is one thing to declare segregated education to be unconstitutional because black children *as individuals* would gain by its elimination. It is another thing entirely to prohibit segregated education because its continued maintenance disserves the broader interests of the United States. Ultimately, my major point in this Article is these kinds of strategic choices really do matter and they should matter to today's children's rights advocates.

42. *Id.* at 493–94. This finding was based upon the work of Dr. Kenneth B. Clark, among others. Dr. Clark's work is cited by the Court. *Id.* at 494 n.11.

43. 387 U.S. 1 (1967).

44. 393 U.S. 503 (1969).

cases. Specifically, the Court shifted its focus from limitations or duties imposed on government officials to children and their rights as the subjects of the legal disputes.[45] These cases inspired a generation of advocates trained in the law to devote their attention to this new-found category in the law: the constitutional rights of children.[46] Within a decade, special offices focusing exclusively on the legal rights of children opened throughout the United States.[47] Once this new category in law was spawned, law schools made their contribution to the movement by teaching specialized courses on children and the law and offering clinics in which students represented children in legal proceedings.[48] By the mid 1970's, aided by Congressional law requiring that children be represented in child protection proceedings,[49] hundreds of recent law graduates were entering the field of children's rights.

Perhaps the best-known children's rights case, and the one widely regarded as igniting the subject, is *In re Gault*,[50] decided in 1967. *Gault* was a constitutional challenge to a lack of basic due process procedures in juvenile court. At the time, children who were accused of committing criminal acts in juvenile delinquency proceedings were not entitled to such basic rights as the right to counsel or even notice of the charges against them. Broadly declaring that children are protected by the Constitution even when state officials mean to serve their best interests, *Gault* "domesticated" juvenile court and required that the fundamentals of due process must be applied in all juvenile court proceedings.[51]

In *Gault*, the Court was given its first opportunity to determine what, if any, procedural constraints the Constitution placed on state officials in juvenile delinquency proceedings. *Gault* was a tale of two stories. One was about the

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45. *Gault*, 387 U.S. at 13; *Tinker*, 393 U.S. at 511.

46. I am among the hordes of law students influenced by this mini revolution. I began law school in 1968 and, after graduating in 1971, went to work at the Legal Aid Society's Juvenile Rights Division in New York City, the largest law office in the country devoted to representing children in court proceedings.

47. Among the offices that opened within a decade after the Gault decision, which had a national impact on advancing the legal interests of children and the law, were the American Civil Liberties Union, Juvenile Rights Project (New York City), the Juvenile Law Center (Philadelphia), the National Center for Youth Law (St. Louis), the New York Civil Liberties Union, Children's Rights Project (New York City), and the Youth Law Center (San Francisco).

48. Again, my own career mirrors these efforts. I began teaching at New York University School of Law in 1973 by starting its first clinic focused on children, the Juvenile Rights Clinic. Shortly thereafter, I began teaching a constitutional seminar entitled Child, Parent & State which I continue to teach today. A similar story can be told at more than 100 law schools in the United States.

49. In 1974, Congress enacted the Child Abuse and Prevention Treatment Act of 1974, which created the first nationwide incentive for appointing representatives for children in all child protective proceedings. *See* 42 U.S.C. §§ 5101-5107 (2000).

50. 387 U.S. 1 (1967). Many years earlier, the Court had held that when persons under eighteen are prosecuted in the adult criminal justice system, the Constitution requires that the procedures used for adults apply in those proceedings. *See, e.g.*, Gallegos v. Colorado, 370 U.S. 49 (1962); Haley v. Ohio, 332 U.S. 596 (1948).

51. Monroe G. Paulsen, *The Constitutional Domestication of the Juvenile Court*, 1967 SUP. CT. REV. 233.

failure of juvenile court as a social institution,[52] but the other was about children and their rights.[53] This was the first time in Supreme Court history that the Court announced, "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."[54] This was clearly Justice Fortas's flourish. Writing for the Court, he decreed that juvenile delinquency proceedings had to comport with the Due Process Clause's guarantee of "fundamental fairness."[55] In particular, the Court held that delinquency proceedings had to provide fair notice of the charges, and that an accused delinquent was entitled to the right to counsel as well as the privilege against self-incrimination and the right to confront and cross-examine adverse witnesses.[56]

Two years later, Justice Fortas was provided with another opportunity (and what proved to be his last) to make his mark on the Children's Rights Movement. There he even more vividly employed the rhetoric of advancing children's rights by focusing the case on the children. In *Tinker v. Des Moines Independent Community School District*,[57] the Court was asked to determine whether the suspension of students from school because they wore black armbands in protest of the Vietnam War offended the Constitution. The school officials justified their decision to suspend the students because of the concern that the protest would interfere with classes and disrupt the educational mission of the school.[58]

There was evidence in the record to suggest that the school officials disagreed with the particular message the suspended students wished to deliver, that the school commonly allowed students to wear a wide range of symbols, and that no actual disruption resulted from the protest.[59] Based on these claims, all of which Justice Fortas accepted,[60] *Tinker* could have been written in terms very close to the language in *Barnette*. The *Barnette*-like opinion would have emphasized the duties of state officials not to prefer one political view over another and not to discriminate against a speaker merely because of a disagreement with the content of the suppressed speech. The point of such an opinion would have been that state officials must respect the First Amendment even when it is applied to students (just as in *Barnette*), not because children have constitutional rights, but because the Constitution constrains the government in particular ways.

But Justice Fortas pursued the children's rights agenda. His opinion for the Court became a story about the children in the case and their rights. The

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52. *Gault*, 387 U.S. at 16–29.
53. *Id.* at 30–59.
54. *Id.* at 13.
55. *Id.* at 30–31 n.48.
56. *See Id.* at 31–34 (notice), 34–41 (counsel), 49–51, 55 (self-incrimination), and 56–57 (confrontation and cross-examination).
57. 393 U.S. 503 (1969).
58. *Id.* at 508.
59. *Id.* at 509–11.
60. *Id.*

opinion began by telling the reader the names and ages of the petitioners.[61] This contrasts sharply with *Barnette*, which never informed the reader who the complainants were, and with *Brown* which described the plaintiffs only as "minors of the Negro race."[62] Justice Fortas, instead, made the sixteen, fifteen and thirteen-year-old suspended students the protagonists in his story. Famously declaring that "[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[63] Justice Fortas proclaimed, for the first time in Supreme Court history, that "[s]tudents in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."[64]

For Justice Fortas, the point was that, because students have constitutional rights, school officials may not punish students who express themselves in a non-disruptive way. This may seem reasonably close to the reasoning of the Court in the 1940's and '50's, but on close inspection, it turns out to be radically different. For Justice Jackson in *Barnette* and the entire Court in *Brown*, it is because the Constitution constrains state officials in their official duties that students are protected from certain challenged state action.

Does any of this really matter? I believe it is important to appreciate the difference in approaches this analysis has highlighted. The wise strategist wants to identify a set of arguments that maximizes the chance that their arguments will prevail. As the next section discusses, an emphasis on children's rights can appear provocative to some. Such an emphasis may also give those disinclined to believe in children's rights an additional reason not to rule in the children's favor.

IV. COSTS ASSOCIATED WITH USING A RIGHTS-BASED RHETORIC

It is not my purpose here to argue that children should not be regarded as "rights-holders." Many believe intensely in the children's rights movement and in the importance of thinking about children as people with rights.[65] There plainly are important reasons to want to advance the claim that children are rights-holders. In the words of one prominent advocate for children's rights:

> Rights are important—few would now deny this.... [T]hey enable us to stand with dignity, if necessary to demand what is our due without having to grovel, plead or beg. If we have rights we are

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61. *Id.* at 504. "Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school." *Id.*

62. Brown v. Bd. of Ed., 347 U.S. 483, 487 (1954).

63. *Tinker*, 393 U.S. at 506.

64. *Id.* at 511.

65. *See, e.g.*, HOLT, *supra* note 1; THE CHILDREN'S RIGHTS MOVEMENT: OVERCOMING THE OPPRESSION OF YOUNG PEOPLE (Beatrice Gross & Ronald Gross eds., 1977); Barbara Bennett Woodhouse, *Out of Children's Needs, Children's Rights: The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 328–29 (1994).

> entitled to respect and dignity: no amount of benevolence or compassion can be an adequate substitute.[66]

Instead, my purpose is more limited. I believe it is desirable for children's advocates to appreciate that there may be certain costs associated with framing claims on children's behalf in terms of their "rights," [67] and that, where there are alternative ways to advance these claims, advocates carefully choose from among the full range of options.

As important as the language and concept of children's rights may be, we should also appreciate that rights discourse also can mask some realities. Implicit in the claim that one has a right to something is that another has a duty that flows from the right. Wesley Hohfeld's classic taxonomy on rights,[68] which is virtually universally accepted today by scholars,[69] is that rights are definitionally relational. My right corresponds to someone else's duty. Unless someone has a duty imposed

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66. Michael D. A. Freeman, *The Limits of Children's Rights*, *in* THE IDEOLOGIES OF CHILDREN'S RIGHTS 29 (Michael Freeman & Philip Veerman eds., 1992) (internal quotations omitted).

67. A characteristic frequently associated with "rights" is "responsibility." Because of this, it is worth considering whether children have been disserved by emphasizing their rights. Today's popular conception is that children enjoy more rights than ever in our history.

Before *Gault*, juveniles were subject to loss of liberty without being provided with the rudiments of due process of law. Few would happily return to that era. Putting aside the gains juveniles made in procedural due process, however, no juvenile rights proponent can be happy with the severity with which the rules concerning the incarceration of juveniles have changed. Since the end of the 1970s, virtually every state revised its transfer laws to facilitate the prosecution of more juveniles in adult criminal court. *See, e.g.*, Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965 (1995). Compared to twenty years ago, it is now vastly easier to prosecute a juvenile in adult criminal court and to expose the young person to massively greater penalties. This change has resulted from changes in the law of waiver, permitting juvenile court judges to transfer delinquency cases filed in juvenile court to adult court, amendments to juvenile court statutes that eliminated very serious felonies from being filed in juvenile court, and other changes in state statutes that authorize prosecutors to choose which court in which to bring criminal charges against young people. *See generally* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT (Jeffrey Fagan & Franklin E. Zimring eds., 2000). Is it far fetched to wonder whether an emphasis on children's rights helped free adults to impose more responsibilities on young people for their misbehavior which previous generations would have considered unthinkable? It seems we are living in a time when adult policy-makers no longer appreciate that young people lack the maturity and experience of adults. Not very long ago, these differences served as the justification for treating children with understanding and lenity when they engaged in misconduct. In short, if we could return to a time before adults commonly spoke in terms of children's rights, it would be difficult to imagine the draconian penalties that are now routinely inflicted on children.

68. Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

69. BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 118–19 (2d ed. 1999).

on him or her as a result of my possessing a particular right, I cannot be said to have such a right.[70]

In the course of advancing children's rights, then, there is an implicit claim that their rights are something which must be recognized. But children's advocates should remember that children and their legal fate are always in the hands of adults. Whatever rules are made for or about children are made by adults.[71] However we go about the business of identifying, defending, and vindicating the rights of children, we are unavoidably in the business of adults determining what constitutional rights children have. Moreover, adults are free to make whatever rules they choose. They are also free to characterize the rules they choose to invoke as rights of children or as something else entirely.

Since advocates for children must press their claims to adults, an argument that sounds perilously close to saying, "you must do thus and thus because children have a right" may not be received very well by an adult who insists on his or her freedom to make rules for and about children. To avoid becoming too theoretical about this, consider the reaction of two Supreme Court Justices—Hugo Black, Jr. and Lewis A. Powell, Jr.—to the rhetoric of children's rights as promoted by Justice Fortas.

In *Tinker*, Justice Fortas cited *Barnette* for the proposition that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years."[72] Justice Black, of course, was a member of the Court when *Barnette* was decided and fully joined Justice Jackson's opinion. Nonetheless, Justice Black made very clear that *he*, at least, could argue with Justice Fortas about the "unmistakable holdings" of the Court. As he wrote, "I deny, therefore, that it has been the 'unmistakable holding of this Court for almost 50 years' that 'students' and 'teachers' take with them into the 'schoolhouse gate' constitutional rights to 'freedom of speech or expression.'"[73] It is possible that Justice Black's views changed since 1943, but there is little to believe that they had. Rather, it is far more likely that he did not regard *Barnette* as a children's rights case in 1969 any more than he regarded it as one in 1943.

Justice Black dissented from the Court's holding in *Tinker* that government officials may not punish individuals for "symbolic speech."[74] By itself, the fact that Justice Black dissented is not remarkable because it would have been difficult to get him to agree that "symbolic speech" was protected under the First Amendment.[75] But this would hardly justify or explain the extraordinarily

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70. *Id.* at 117.

71. As Michael Freeman reminds us, and this is a central point about the entire subject of children's rights, "The question 'What is a child?' is one answered by adults." M.D.A. FREEMAN, THE RIGHTS AND WRONGS OF CHILDREN 7 (1983).

72. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

73. *Id.* at 521 (Black, J., dissenting).

74. *Id.* at 516 (Black, J., dissenting).

75. Justice Black drew a sharp distinction between utterances (which he fiercely protected) and actions (including the wearing of symbols, which he did not count as

angry tone of Justice Black's dissent.[76] Instead, it is much more reasonable to attribute his reaction to Justice Fortas's rhetoric. By shifting the focus of attention from constraints on government officials, including teachers, to students as newly identified rights-bearers, Justice Fortas awakened in Justice Black a fear that obviously disturbed him.

Thus, it is quite reasonable to believe that Justice Fortas's rhetoric baited Justice Black to say:

> Nor are public school students sent to the schools at public expense to broadcast political or any other views to educate and inform the public. The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. It may be that the Nation has outworn the old-fashioned slogan that 'children are to be seen not heard,' but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach.
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> . . . [I]t is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils.[77]

Justice Black was distressed by the prospect that children became empowered to disregard the commands of their teachers. He complained that *Tinker* was accelerating "the time . . . when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, [which] is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary."[78]

Justice Black may have disagreed with the *Tinker* majority that wearing an armband was protectable speech.[79] He may also have disagreed with the Court's conclusion that the students were suspended for legitimate reasons not related to viewpoint discrimination. But surely Justice Black would have accepted the logic that state officials (including teachers) may not, consistent with the Constitution, punish students for their speech because the officials disagreed with the students' message. Had Justice Fortas written an opinion that sounded more *Barnette*-like, Justice Black almost certainly would not have felt the need to write that *Tinker* would usher in "an entirely new era in which the power to control pupils by the elected officials of state supported public schools . . . is in ultimate effect

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protectable speech). *See* Street v. New York, 394 U.S. 576, 609 (1969) (Black, J., dissenting).

76. *See infra* note 77 and accompanying text.

77. *Tinker*, 393 U.S. at 522, 525 (Black, J., dissenting).

78. *Id.* at 518 (Black, J., dissenting).

79. *See supra* note 74 and accompanying text.

transferred to the Supreme Court"[80] or that "[s]chool discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens."[81]

It is equally reasonable to conclude that Justice Fortas's rhetoric bothered Justice Powell. Although Justice Powell was not yet a member of the Court when *Tinker* was decided, he used the first case to come after *Tinker* that addressed children's rights in public schools, *Goss v. Lopez*,[82] to express what troubled him about *Tinker*. *Goss* held that, before students are suspended from school as a result of alleged violations of school rules, due process required some kind of hearing for the student.[83] In his dissenting opinion, Justice Powell observed that, until *Tinker*, "the educational rights of children and teenagers in the elementary and secondary schools have not been analogized to the rights of adults or to those accorded college students."[84] What troubled Justice Powell about *Tinker* was that Justice Fortas *analogized* that students should have adult-like rights. We can now see that *Barnette* and *Brown* recognized rights which children have, even though adults have identical rights, but the Court reached those results without making an analogy with rights possessed by adults.

Advocates for children would be wise to consider whether the language they use to advance children's causes are necessary to achieve the results they desire. There are at least potential costs resulting from emphasizing rights instead of something else, which might achieve the same outcome. First, children's advocates may not prevail when trying to persuade decision-makers disinclined to advance children's rights, even though the same decision-maker might have ruled in the children's favor on different grounds. Second, even if the advocates win, the victories that stressed children's rights (such as *Tinker*) may prove less valuable in the long run than they might otherwise have been had they been based on less provocative grounds. The next section addresses how children's advocates might refocus their arguments in the hope of increasing their victories.

V. DO CHILDREN NEED "RIGHTS"? LESSONS FOR THE FUTURE

The question remains—what is the most effective way to argue to adults that certain rules regarding children should be changed? I suggest that the strongest arguments are not grounded in claims that the change is required to vindicate the rights of children. Instead, whenever possible, these arguments should be framed in terms of vindicating long-cherished principles of society, even when applied to children.

In the two cases decided before the 1960's discussed in this Article in Part II, the Court refused to speak in terms of children's rights. Instead, the Court emphasized limitations on government actors. In *Barnette*, school officials, as state employees, violated the First Amendment by attempting to compel citizens to

80. *Tinker*, 393 U.S. at 515 (Black, J., dissenting).
81. *Id.* at 524 (Black, J., dissenting) (internal quotations omitted).
82. 419 U.S. 565 (1975).
83. *Id.* at 582–83.
84. *Id.* at 591 (Powell, J., dissenting).

speak.[85] The decision emphasized the need to constrain government officials to conduct themselves in accordance with constitutional principles, and it focused on the profound reasons for denying officials the authority to compel citizens to speak.[86] *Barnette* did not stress a student's right not to be coerced into speaking (the corollary of the principle upon which *Barnette* was based).

In *Barnette*, that the state sought to compel children to believe certain ideas made the threat to democracy all the more compelling. If the state could standardize the next generation in its beliefs, the state could control its people and by stealth transform American democracy into blind adherence to state-identified values. Instead, American principles of democracy demand the maximizing of ideas. Through pluralism and a maximally diverse set of ideas, the American people would reach the best choices for self-rule. At least so the thinking goes.[87]

What is key, however, is that *Barnette* was not decided to advance the rights of children, even though the clear import of the decision did precisely that. *Barnette* is perhaps the strongest case to cite for the proposition that Justice Fortas saw fit to underscore thirty-six years later: students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[88] But, except in terms of result, *Barnette* did not advance a child's constitutional rights nor did it matter that the challenged state action could be said to have trampled a child's rights. The challenged state action was declared unconstitutional in order to prevent state officials from engaging in prohibited conduct.

Brown did the same thing, although, admittedly to a greater extent than in *Barnette*, the Court talked about the children affected by the case. *Brown* declared that America's version of freedom denied state officials the power to discriminate against people on the basis of race. That children were the initial direct beneficiaries of this principle underscores the importance to the adults of the eradication of the prior discriminatory power. If state officials were permitted to discriminate against children on the basis of race, the legacy of slavery would inevitably continue into succeeding generations. This was the import of the testimony of Dr. Kenneth Clark in the trial phase of the *Brown* litigation.[89] Clark helped white judges understand that separate-but-equal had an extremely negative impact on the psyche of black children, felt throughout their lives. This impact, in turn, affects society as a whole. Thus, stopping this discrimination at the earliest possible time serves important purposes for society as a whole.

Brown plainly ranks as one of the most important decisions issued by the Court in the twentieth century. That it had a dramatic impact on the lives of children there can be no doubt. Nor can there be doubt that the decision enlarged the rights of children (among others in society). But it is also true that the decision could have been articulated in terms of advancing the rights of children. It would

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85. *See supra* note 18 and accompanying text.

86. *See* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

87. My purpose here is not to justify this reasoning. It is to make clear that *Barnette* is an example of adults limiting the conduct of state officials because of the kind of society in which the adults wish to live.

88. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969).

89. *See supra* note 42 and accompanying text.

not be very difficult to imagine Justice Fortas writing both *Barnette* and *Brown* in very different language than the Court used in those cases, with very different emphasis placed on what was at stake and why the cases had to be resolved as they were.

Even if one does not regard the difference as important, the crucial point is that both sets of reasoning—one illustrated by *Barnette* and *Brown*, the other represented by *Gault* and *Tinker*—get to the same place.[90] But the latter one requires that the decision-maker agree that children, *qua* children, have rights (which, in turn, requires an agreement that children as children *ought* to have rights). It stresses that the case should be decided because children are rights-holders and, consequently, government officials must be constrained.[91] The alternative argument requires only that the decision-maker agree that the Constitution constrains government officials from doing certain things. Once the decision-maker agrees that state officials ordinarily are constrained from doing what is currently being challenged, the remaining question is whether there is some exception to the ordinary rule when it comes to applying the principle to children. Thus, to rule for the children, the decision-maker need not conclude that children ought to have rights. She need only conclude that there are sound reasons to constrain the government actor. In such circumstances, children end up with the right not to be discriminated against, not to be compelled to speak by the government, or not to lose liberty without due process of law. But they possess these rights correlatively, not directly. Instead of being children's rights, they are rights possessed by citizens whatever their age. The latter are much easier claims to make to judges (who are themselves adults) than are the former.

If the reader does nothing more than agree that *some* decision-makers (like Justices Black and Powell) are likely to react negatively when advocates press children's rights claims in the strong sense, logic suggests the argument be revised unless (a) some decision-makers are more likely to rule for the children because the argument is advanced, (b) the outcomes of cases are more likely to favor children nonetheless, or (c) the results will be more lasting. I believe none of these claims is sustainable and, therefore, I recommend that advocates for children's rights forsake the strong claim for such rights.

Though I cannot prove that any case would have been decided differently by shifting the advocate's focus from the strong sense of children's rights to the

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90. To some, this is a distinction without difference. I believe that this is an important distinction which deserves its own extended treatment. I do not attempt here to prove the importance of the distinction or even to insist there is importance to it. From a strategist's perspective, these things should not matter at all.

91. *Brown* has been identified by some commentators as the case that began the Children's Rights Movement. *See* Theresa Glennon & Robert G. Schwartz, *Foreword: Looking Back, Looking Ahead: The Evolution of Children's Rights*, 68 TEMP. L. REV. 1557, 1559 (1995) (identifying *Brown* and *Gault* as laying the "foundation" for the "modern children's rights movement."). *See also* Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 11–14 (1986). I suggest we in the children's rights movement would do better rethinking this. After all, it was because the plaintiffs were *black* children that they were before the Court; not because they were *children*.

indirect focus stressed here, I believe there is a real possibility that this is so. Justice Powell's strongly held views that children should not be regarded as constitutional rights-holders ought to give strategists pause. His vote might have been lost in a close case because he focused more on the notion that a different outcome would have advanced a child's right than that it would have advanced a societal interest even though the interest will be applied to children.

By 1976, when the Court decided *Ingraham v. Wright*,[92] *Tinker's* legacy was already gone. *Tinker* is among those cases from the Warren Court Era[93] that, although never overruled, holds virtually no influence on the Court any longer. *Tinker* was the last victory for school students in the Supreme Court when the First Amendment was invoked on the students' behalf. In 1986, the Court decided *Bethel School District No. 403 v. Fraser*,[94] which began a restriction on the free speech rights of students by giving greater control to teachers over what students are permitted to say on school property. This restriction was extended in 1988 in *Hazelwood School District v. Kuhlmeier*.[95] Students' Fourth Amendment rights in schools have fared no better.[96] The rhetoric of *Tinker* may not be the culprit for this turnabout; but it certainly did not prove to be of very much value. If there is no real legacy for Justice Fortas's version of children's rights, what, precisely, is gained from continuing to employ it?

VI. CONCLUSION

For the first sixty-five years of the twentieth century, rules about children were conceived exclusively in terms of their interests. There was an unarticulated but sometimes expressed understanding that children were subordinate to adults and the legal rules concerning their lives could simply be expressed solely in terms of addressing their interests. But the rights discourse of the past thirty-five years masks the reality that children will never be given things by adults that adults do not want them to have.

I believe the children's rights advocates would do well to turn back the clock and refocus their rhetoric and attention on children's interests. The virtue of focusing on interests over rights is it eliminates the suggestion implicit in rights talk that adults are obliged to give rights to children. Of course, no such thing is ever true. Children are given rights by adults only when adults are persuaded, for whatever reason, to do so. Making the implicit explicit may be just what the children's rights advocates should want. By returning to an interests focus, we force adults to ask: what should be the rule in the particular instance? Focusing on interests avoids the collateral costs associated with using a rights-based rhetoric.

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92. 430 U.S. 651 (1977).

93. Although *Tinker* was decided in Chief Justice Burger's first term, it plainly is a decision thoroughly affected by the Warren Era.

94. 478 U.S. 675 (1986).

95. 484 U.S. 260 (1988).

96. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325 (1985); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995); Bd. of Ed. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822 (2002).

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