

COPYRIGHT NOTICE:

David L. Tubbs: Freedom's Orphans

is published by Princeton University Press and copyrighted, © 2007, by Princeton University Press. All rights reserved. No part of this book may be reproduced in any form by any electronic or mechanical means (including photocopying, recording, or information storage and retrieval) without permission in writing from the publisher, except for reading and browsing via the World Wide Web. Users are not permitted to mount this file on any network servers.

Follow links for Class Use and other Permissions. For more information send email to: permissions@pupress.princeton.edu

INTRODUCTION

CHILDREN DEPEND on adults for many things, and this dependence encompasses more than material needs. Certain intangible goods—education, for example—are just as crucial to their well-being. These observations are hardly provocative, and any sustained commentary on human society that wants to be taken seriously is unlikely to deny this dependence.

In this connection, consider the second of Ralph Waldo Emerson's two epigraphs to his essay "Self-Reliance" (1841):

Cast the bantling on the rocks,
Suckle him with the she-wolf's teat;
Wintered with the hawk and fox,
Power and speed be hands and feet.

The irony of these lines serves several purposes. It points to the limits of self-reliance, perhaps as a way of tempering the enthusiasm of those readers well disposed to the essay. At the same time, the epigraph forestalls possible criticisms. Without it, some readers might complain that Emerson has forgotten about children and family life, an otherwise startling omission in a disquisition about the individual's relationship to society.

Besides being dependent on adults, children are impressionable. By definition, a child is underdeveloped in several ways: physically, mentally, morally, and emotionally. To say that an adult is mentally, morally, or emotionally underdeveloped often implies that he or she is also impressionable. In adults, such impressionability is considered regrettable (and sometimes a grave misfortune), but with respect to children, it is deemed unexceptional or natural.

These two themes are not unrelated. For good and for bad, a child's impressionability is in some ways linked to his or her dependence on adults.

Nearly two hundred years before Emerson's "Self-Reliance," the Dutch artist Jan Steen (1626–1679) completed a semihumorous painting, *The Way You Hear It Is the Way You Sing It*. Like many Dutch works of the seventeenth century, it is rich in symbolism, though what the painting says about moral education, human appetites, and the impressionability of the young is clear.

The painting depicts a family of three generations gathered for the festival of Twelfth Night. The grandfather of the family, a rotund man who has been crowned king of the festival, sits at the head of a small table set with holiday fare. Above the grandfather, an uncaged parrot, symbolizing mimicry, rests on its perch. The grandfather's wife sits across from

him at the table and reads a nursery rhyme of the same title as the painting. Two younger women, perhaps the couple's daughters, sit between the grandfather and grandmother. The younger woman in the background has a baby in her lap. The younger woman in the foreground, only slightly less corpulent than the grandfather, holds a large goblet, being filled with the same liquid that seemingly caused her drunkenness. A beaker of this liquid stands on the windowsill.

Away from the table, on the right side of the painting, an apparently tipsy man stands near two boys and an adolescent playing the bagpipes. Thought by some scholars to be Steen, the man is showing the older of the two boys how to smoke a long and slender pipe; the younger boy awaits instruction. Behind him, the adolescent with the bagpipes plays a tune. His face appears flush, a detail whose meaning can be appreciated in light of the sexual innuendo associated with the Dutch word for "pipe."¹

Despite the passage of many years, Emerson's epigraph and Steen's painting still provide two useful points of departure for discussing the welfare of children in the modern world. Children are dependent, Emerson (indirectly) concedes, and some persons must care for them. Steen's painting reminds us that young persons, more than any others, do not on bread alone subsist.

These two points may be uncontroversial, but controversy can quickly arise when we discuss what the dependence and impressionability of children should mean for public policy. Consider the following accounts, far removed from Steen's playful wit and Emerson's delicate irony.

In the mid-1990s, three horrific crimes in England and Wales were widely believed to have been influenced by the depiction of similar crimes in American movies, then available on videocassette in Great Britain. Benedict Nightingale, chief theater critic for *The Times* (London), described the crimes and the grounds for his country's anxiety:

In Liverpool . . . two-year-old Jamie Bulger was abducted from a shopping mall . . . by two ten-year-old boys [Robert Thompson and Jon Venables], led to a railroad line, hammered to death with an iron bar, then cut in half by a train. There were suggestions that a horror film about a demonic doll, *Child's Play 3*, helped inspire the crime. No evidence was presented that either boy had seen it, but the father of one had rented it shortly before.

A gang in Manchester tortured a sixteen-year-old girl, set her afire, and left her dying. [She later died.] One of the sadists repeated the menacing *Child's Play 3* catch phrase "I'm Chucky—wanna play?"

¹ My interpretation of Steen's painting is based in part on my reading of Mariët Westermann, *The Amusements of Jan Steen* (Zwolle: Waanders, 1997), and the discussion of the painting in Michael Wood, Bruce Cole, and Adelheid Gealt, *Art of the Western World: From Ancient Greece to Post-Modernism* (New York: Touchstone, 1991), 182–183.

Four hooligans in Cardiff turned on a middle-aged man who had remonstrated with them for vandalizing a traffic barrier, and stomped him to death. As they did so, one repeatedly yelled a line, “I’ve got the juice,” from the movie *Juice*, in which a shopkeeper is murdered for trying to enforce law and order.²

Of these three crimes, the murder of Jamie Bulger was the most notorious. In the words of one journalist, Bulger’s death caused “much heart-searching,” especially on the part of the thirty-eight witnesses who saw Bulger, a large gash on his forehead, being escorted to his death at midday along busy Liverpool roads. The reflectiveness or introspection of the witnesses seems natural and appropriate, but two to three months after Bulger’s abductors were convicted of murder, the recriminations had begun:

Each boy blames the other boy. Each boy’s defense counsel blames the other boy. Each boy’s mother blames the other boy, though Robert Thompson’s mother also blames teachers and social services. Others have blamed videos, single mothers, absent fathers, original sin, and the church.³

How did public officials in Great Britain respond? Prime Minister John Major urged parents to pay closer attention to their children’s viewing habits. The Independent Television Commission, which regulates the country’s commercial networks, issued new (though apparently nonbinding) guidelines to television producers. And roughly 220 members of Parliament expressed support for a proposed law banning the sale of any video with “degrading or gratuitously violent scenes liable to cause psychological damage to a child.”⁴

Educated Americans are familiar with these matters. From one perspective, these issues raise perennial questions about individual freedom, moral responsibility, and the common good of society, including the welfare of children. From another perspective, the issues raise novel questions about the power of media, the fragility of families, and the sundry agents that now “socialize” the young.

Regardless of how the issues are framed, the actions of Prime Minister Major and the Independent Television Commission are intelligible in the context of American politics. In response to many complaints about the content of popular entertainment (movies, television, music), public figures

² Benedict Nightingale, “Yankee Cinema, Please Go Home,” *The New York Times*, 10 July 1994, sec. 2, p. 9.

³ Blake Morrison, “Children of Circumstance,” *The New Yorker* (14 February 1994): 48. Most people would say that Robert Thompson and Jon Venables grew up in desperate conditions. Both lived in poverty, neither had a father at home, and Thompson may have been sexually abused. See *ibid.*, 60.

⁴ Nightingale, “Yankee Cinema, Please Go Home.”

in this country have criticized the entertainment industry, while exploring the feasibility of different types of legislation.

One aspect of the situation in Britain, however, stands out. In the United States, Congress would not consider legislation like that proposed in Parliament without asking whether it conflicts with the Free Speech Clause of the First Amendment, as interpreted by the Supreme Court of the United States. Many Americans would quickly (and correctly) conclude that the British legislation would be unconstitutional in the United States. But because Great Britain does not have a formal charter of rights, members of Parliament may assess the free-speech interests alongside other social interests, such as the possible effects of these movies on impressionable viewers.

Given the interests at stake, which political arrangements are preferable? To pose the question in the United States is probably an invitation to ridicule. To anyone with such thoughts, let me say that the question strikes me as legitimate, it is not inspired by treachery or Anglophilia, and its answer is by no means obvious to me.

In view of the commonalities of the British and American political systems—especially the common influence of the liberal tradition—the difference here is striking. Before making policy, American legislators routinely take account of the codified or enumerated rights of individuals. By contrast, British politicians are at least theoretically freer to consider the full range of interests that conduce to the public welfare.⁵

Most citizens in the United States revere the nation's political institutions, and many would resent the idea that those institutions—specifically, the Bill of Rights and the judiciary—might hinder our responses to problems like the one described here. Whatever the risk of causing such resentment, I want to go further in this direction. Although it may be unpleasant to consider, we should ask whether the exercise of certain freedoms by adults—including some freedoms having the status of constitutionally protected rights—may adversely affect children.

The title of this book provides my answer to that question. The book documents a worrisome development: a growing indifference to what

⁵ In light of recent policy, some might say that this point needs to be modified slightly. The Human Rights Act (1998) introduced the European Convention on Human Rights into British law, making it unlawful for public authorities to act in ways that are “incompatible” with the rights listed in the Convention. But the European Convention on Human Rights functions differently in British politics than does the Bill of Rights in American politics. In enacting the legislation, Parliament presumably believed that it was advancing the public welfare, and it retains the right to modify or even jettison the Human Rights Act. Furthermore, most of the rights in the European Convention mention competing social interests and duties linked to the relevant freedoms. (See, for instance, Article 10, “Freedom of Expression.”)

were long considered important elements of the welfare of children. The analysis focuses on developments in the United States, where the indifference can be seen at the highest levels of law and academic political theory.

The indifference should be described carefully. It typically manifests itself as a tendency to regard certain freedoms of adults as indisputably more important than the competing interests of children. One sign of this tendency is the recurring failure on the part of some jurists and political theorists to consider the interests of children in even a perfunctory way.

The specific interests referred to here are more fully described in the chapters ahead. For now, let me say that these interests are hardly obscure: other jurists and political theorists have described them, and long before the current indifference took root. Large questions remain. How did so many scholars and jurists lose sight of these interests? What caused them to be so rapidly—and so radically—devalued? The full story has many elements, and it resists any quick summary. Hence my decision to write this book.

At this point, I should pause and comment on a few terms found throughout the forthcoming chapters. Let me begin with the most salient.

As used here, the word “children” generally refers to persons aged seventeen and under. In a few places, I distinguish between younger children (i.e., preteens) and adolescents. In other places, I use the term “minors.”

Some might object to the use of “children” to cover all persons seventeen and under. They might say that this group should always be divided into subgroups such as infants, very young children, preteens, and adolescents. I appreciate the point. Still, my use of “children” to refer to persons seventeen and under underscores the impressionability and dependence of all persons in this group, including teenagers approaching adulthood (even though these teenagers are generally less impressionable and dependent than both preteens and the very young).⁶

In discussing different needs of children, I often use the word “interest” (or “interests”) to refer to those needs. Notice, however, that the words “interest” and “need” are not always synonymous. Children may have an interest in something (e.g., the development of certain abilities or talents), though it would not normally be designated a need. Yet most of the interests canvassed here are sufficiently important to be designated needs. Furthermore, those interests and needs can be described as “basic” or “universal” because they apply to all children and are core elements of their well-being. (Besides having basic needs, some children have special

⁶ The usage I prefer has been accepted by others. See, for example, David Archard, “Philosophical Perspectives on Childhood,” in *Legal Concepts of Childhood*, ed. Julia Fionda (Oxford: Hart Publishing, 2001), 47.

needs—“special” because they are shared by a relatively small number of their peers—and some have unique needs.)

The developments examined here tell us something important about the evolution of the liberal political tradition. What is meant by the liberal tradition? Depending on the context, the word “liberalism” may have strongly positive or strongly negative connotations. I use the word to refer to an identifiable intellectual tradition in both Europe and North America. Prominent modern thinkers associated with this tradition (sometimes called “classical liberalism”) include John Locke, Immanuel Kant, Benjamin Constant, James Madison, Abraham Lincoln, John Stuart Mill, and T. H. Green.⁷

Identifying the central values or goods of the liberal tradition can be difficult, but Stephen Holmes provides a useful starting point:

Liberalism’s four core norms or values are *personal security* (the monopolization of legitimate violence by agents of the state who are themselves monitored and regulated by law), *impartiality* (a single system of law applied equally to all), *individual liberty* (a broad sphere of freedom from collective or governmental supervision, including freedom of conscience, the right to be different, the right to pursue ideals one’s neighbor thinks wrong, the freedom to travel and emigrate, and so forth), and *democracy* or the right to participate in law-making by means of elections and public discussion through a free press.⁸

Although this passage by Holmes does not suggest as much, these four values or norms or goods might be ordered in a rough hierarchy, and their ranking might sometimes change. To my mind, such a “re-ordering” of values has occurred within American liberalism, because liberal theorists and jurists now give personal freedom (for adults) a special or preferred status.

Yet in view of the longevity of the liberal tradition, we should hesitate before making any sweeping judgments about its record in promoting the welfare of children. Clearly, the tradition can claim some successes in advancing their welfare—think, for example, of nineteenth-century legislation in Britain and the United States leading to the abolition of child labor—but this book does not offer a comprehensive assessment.

My goals are narrower. As the reader may have surmised, I assess the status of children in *contemporary* American liberalism—meaning liberalism since the end of the Second World War. More specifically, I want to

⁷ Leading contemporary liberal theorists are identified and discussed in Chapters One, Two, and Five.

⁸ Stephen Holmes, *The Anatomy of Antiliberalism* (Cambridge, Mass.: Harvard University Press, 1993), 4. Other prominent liberal theorists have offered similar lists, and I look at some of them in Chapter Five.

know the position that children have occupied in the minds of contemporary liberal theorists and jurists. Have they taken sufficient account of the dependence and impressionability of children? If not, what explains the lack of solicitude?

As the book's title indicates, the analysis here amounts to a lengthy critique. I stand by the criticisms, despite being broadly sympathetic to classical liberalism. Because of that sympathy, one aim in writing the book has been to encourage American liberals to become more historically sensitive. Greater historical sensitivity might lead them to give more attention to the problems I describe.

Still, I expect that many liberals will be more than a bit defensive about the matters I raise. To prepare the reader, let me share an anecdote.

After reading an earlier version of the manuscript, one friendly (and liberal) critic likened the book to a "syllabus of errors." This was an allusion to an encyclical written in 1864 by Pope Pius IX, in which the pope wrote that no one should expect the leader of the Roman Catholic Church to reconcile himself with liberalism and modern civilization. (Later popes modified this view in significant ways.) Even if made in jest, the friendly critic's remark suggests that some persons might suppose that this book was inspired by religious conviction.

That would be a mistake, and despite being likened to a papal encyclical, this book contains no religious "agenda." None of the arguments here require the reader to accept the tenets of any particular faith, or even a vaguely "spiritual" outlook. In fact, the real inspiration for this book was personal experience. To explain, let me digress briefly.

At one stage in my adult life I worked in state government as a child-support investigator. This work can be both immensely satisfying and extremely frustrating. It is satisfying when a support order is established and executed, frustrating when an absent parent evades such an obligation.

The most discouraging aspect of this work is parental indifference. Such indifference is not rare; an investigator sees it every day. It occurs when an absent parent tries to prevent a support order from being established or manages to avoid complying with an existing order.

I cannot say which type of indifference is worse, but both were common enough to raise questions. How could so many adults be so indifferent to their own children? What explained it? The indifference seemed contrary to long-standing social norms and to everything most people hope to find in a parent.

Another aspect of a child-support investigator's work merits comment. Some parents—the great majority of them being fathers—display much bitterness about the duty to pay child support. They often direct this bitterness at the investigator, as if the latter's work impinged on the father's

freedom—specifically, his economic or sexual freedom, or some combination thereof.

Even after leaving this job, I reflected on these experiences, and I had occasion to think about them again a few years later in graduate school. A long-standing criticism of liberalism holds that it is insufficiently attentive to social institutions such as the family. Renowned political thinkers such as Hegel formulated elements of this criticism as early as the first half of the nineteenth century. Having encountered this criticism in a seminar on modern political theory, I tried to extend it to more recent developments in liberal thought and jurisprudence. At a certain point, I saw that contemporary liberal thinkers were minimizing or denying the importance of what were previously considered essential elements of children's welfare.

This tendency was apparent in several developments, such as the weakening of family life in the United States. Now, I scarcely wish to say that contemporary liberal theory caused or "created" the parental indifference described above. (Political and legal theories rarely have such a direct influence.) Yet contemporary liberal theory and jurisprudence have contributed to the problem. Moreover, if we take account of the main currents of liberal thought over the last fifty to sixty years, we could say that it lacks the resources to criticize—in a truly cogent way—such parental indifference. The lack of such theoretical resources would seem to be a serious problem.

These assertions may surprise some readers, so I must ask those who find them implausible to be patient. Perhaps upon finishing the book, readers will find them more intelligible—and more defensible.

I have digressed to explain the origins of this study. I now wish to comment briefly on other aspects of the book, including its relative dearth of solutions to the problems it identifies.

If I am correct in arguing that liberal theorists and jurists have been neglecting or discounting some vital interests of children, some readers might quickly propose a remedy. They might say that the best way to advance the welfare of children is to assign more rights to them. This approach may have some merit, but I cannot embrace it, and for two reasons.

First, I have many misgivings about the federal judiciary's promulgation of various new rights in recent decades. For the reasons put forth below, I regret the declaration of new rights that lack a solid basis in the Constitution. I therefore oppose this project of declaring new rights, even if it purports to help children.⁹

⁹ By "rights that lack a solid basis in the Constitution," I mean rights that cannot be fairly derived from the text, logic, or original understanding of the document. I am indebted to Robert P. George for this formulation, which he and I have used in several articles. As an

Second, if a reader accepts the main assumptions of this study—namely, that children are impressionable, dependent, and, broadly speaking, “underdeveloped”—then he or she should see that assigning certain rights to children may lead to a rash of problems. We ought to be wary of regarding children as the bearers of a large number of rights, especially “liberty rights.” Precisely because they are underdeveloped humans, children normally lack the intelligence and judgment needed to exercise many freedoms responsibly. Accordingly, every decent society criminalizes pornography involving children and prohibits sexual relations between adults and young persons.¹⁰

A critic might say that my second response is off the mark, because the best way to improve the lives of many children today is not through liberty rights, but through “welfare rights.” One scholar defines this term as allowing the holders of such rights “to claim protection or promotion of the constitutive elements of their well-being—such as health, personal security, [and] education.”¹¹ Among academic liberals, this might be the preferred approach for advancing different interests of children. So why do I avoid it?

Apart from my worries about the judiciary’s role in formulating such rights, I would suggest that this might be little more than a rhetorical exercise. Assigning a large number of rights to children is easy, and in some circles it can help to establish one’s credentials as a “progressive.” But if such rights are going to be meaningful, we must be prepared to assess their implications. This is rarely done.

Consider the putative welfare right of “personal security.” If assigned to children, could it be invoked on their behalf to restrict the freedom of adults to produce, distribute, or view violent programming? If it cannot be invoked in this manner, we are entitled to ask why. (To those who might say that the “plain words” of the First Amendment preclude such restrictions, I would note that for most of American history, such a reading

example, see Robert P. George and David L. Tubbs, “Why We Need a Marriage Amendment,” *City Journal* 14 (Autumn 2004): 48.

¹⁰ On the basis of these comments, readers ought to understand why I do not feel obliged to explore the theory of “child liberation” at length here. This theory and a corresponding social movement acquired a certain vogue in the 1970s, with proponents seeking to eliminate many (and perhaps most) of the legal boundaries separating adults from children. They would permit children to exercise a wide range of freedoms because of what they regard as the weakness of the justifications long offered to restrict certain freedoms to adults. The theory of child liberation has disturbing links to child pornography, and however appalling the notion is to others, many consumers of child pornography believe that even children as young as five years old can meaningfully consent to appear in it. See Philip Jenkins, *Beyond Tolerance: Child Pornography on the Internet* (New York and London: New York University Press, 2001).

¹¹ Archard, “Philosophical Perspectives on Childhood,” 50.

of the Free Speech and Free Press Clauses had very few defenders.) Especially in the United States, welfare rights permit theorists to tell themselves that they are attentive to children, but without asking whether interests crucial to their well-being should take precedence over the competing claims of freedom for adults.¹²

A related point should be made. Contrary to what some liberals might now suppose, much of Western political theory and American political history shows that we *can* discuss the well-being of children in a liberal democracy without using the language of rights. But such a discussion requires a willingness to talk about various *duties* adults have toward the young. Unfortunately, contemporary liberalism seems to be characterized by its unwillingness to tackle that subject.

While considering possible responses to my main arguments, I should mention another broad criticism. We live in an age where many things are said to be “socially constructed.” Unsurprisingly, since the 1960s, historians in both Europe and the United States have argued that the concept of “childhood” is more fluid or malleable than commonly supposed.¹³ Some even say that childhood has no permanent features. On that basis, others predict that childhood may vanish altogether.¹⁴ If these findings are correct, they would undermine a key premise of this book, namely, that all children share some basic needs across time.

What is my response? First, I grant that childhood is in some respects a fluid concept. Even a cursory knowledge of American or European social history bears this out. (If you grew up in the United States or United Kingdom around 1950, your childhood and adolescence had little in common with that of most persons in these countries a century before.)

I also agree with Neil Postman, who believes that the public understanding of childhood in the West changed with the rise of literacy and a “book culture” after the Protestant Reformation.¹⁵ Postman’s thesis on the historical contingency of childhood deserves attention, and it may be summarized as follows.

¹² I return to this theme at different points in the book, though I do not generally use the term “welfare rights.” Clashes between “welfare rights” for children and personal freedoms (or “liberty rights”) for adults are unsurprising, since the theory of welfare rights seems to have emerged in response to some persistent problems of national economies in the West (e.g., periodic recessions, “structural” unemployment). Extending the theory to children occurred later, and one might ask whether it ever made good sense.

¹³ The pioneering work was written by Philippe Ariès. See his *Centuries of Childhood*, trans. Robert Baldick (New York: Vintage, 1962).

¹⁴ See, for instance, James Fallows, “The Web in Your Future,” *New York Review of Books*, 14 March 2002, 4.

¹⁵ Neil Postman, *The Disappearance of Childhood* (New York: Vintage, 1994). This book was originally published in 1982.

During the Middle Ages, the percentage of literate persons in the West was small, especially outside the clergy. Some traits that help to distinguish adults from children were also less pronounced in the Middle Ages than in the modern age, owing to factors that became apparent later. With the invention of the printing press and the spread of certain ideas of the Protestant Reformation, literacy became more widespread. Literacy, however, requires years of training. Schools provide such training, and as schools became more common in Europe, the social categories of childhood and adulthood changed. An adult was understood as a person who had achieved full literacy, whereas a child was *becoming* fully literate.¹⁶

Adults were distinguishable in another way. Through the printed word, adults had access to knowledge that children generally lacked. This knowledge, especially of matters relating to life, death, and human sexuality, was only gradually revealed to children. Thus, childhood could be characterized as the lengthy period in which a person acquired literacy and the special knowledge or secrets of the adult world.

For Postman, childhood has depended crucially on the transmission of such secrets through the printed word. Before widespread literacy and a “book” culture, many persons were “grown up” by the age of seven or so. Today, in comparison, literacy rates are high, but childhood is imperiled by visual modes of communicating the special knowledge of the adult world. The growth of these modes of communication (e.g., film, television, the Internet) helps to explain why Postman believes that childhood is “disappearing.”

When knowledge of the adult world was mainly transmitted through reading, adults could share this knowledge with children by disclosing it through speech or pictures. But such disclosures were long considered shameful, and they were typically stigmatized. In some places, they were also prohibited by law. Postman concludes that “without a well developed idea of shame, childhood cannot exist.”¹⁷

Despite being persuaded by much of what Postman writes, I disagree with him about the malleability of childhood. Plainly, however, much depends on definitions. When Postman writes of the modern understanding of childhood, he refers to a period roughly between the ages of seven and seventeen.¹⁸ By contrast, my use of the term is broader, as noted above.

This difference is significant. In the end, I am sure that Postman would say that very young children (in all places, at all times) have many of the

¹⁶ See *ibid.*, ch. 2. A period of several hundred years separates the beginning of the Protestant Reformation and the start of universal schooling in Europe. Yet many persons endorsed compulsory education long before it became a reality. See Postman’s remarks on this topic in *ibid.*, chs. 2 and 3.

¹⁷ *Ibid.*, 9.

¹⁸ *Ibid.*, “Introduction,” xi.

same needs. Furthermore, he would accept that even older adolescents in the United States still depend heavily on adults for many things.

This brings us back to the central question of this study: What has led contemporary liberalism to disregard so many interests of children? What is the best explanation? In my judgment, our current predicament has multiple sources.

I noted above that in recent decades we have seen a “re-ordering” of the core values of liberalism. Today, most persons in the United States who identify themselves as liberals still want to increase personal freedom for adults and give it a special status among the basic goods of our political life. These liberals tend to be intensely concerned about adult rights, and contemporary liberal theory has affinities with the jurisprudential views of some justices on the Supreme Court of the United States, including William J. Brennan Jr., Thurgood Marshall, David Souter, and Ruth Bader Ginsburg.

If we reflect on European and U.S. history in the twentieth century, the current liberal preoccupation with rights is easy to understand. Many American liberals connect this concern to their opposition to fascism and communism and their support for the civil-rights movement. The same liberals often endorse social movements that claim to be inspired by the civil-rights movement, including feminism and the recent attempts to redefine marriage to include same-sex couples. With respect to institutions, American liberals give most of the credit for the growth of individual freedoms during and after the civil-rights era to the federal judiciary.

The loyalties of most American liberals are thus clear. But notice this: As those loyalties were being established, liberal theorists and jurists gradually lost sight of children. A preoccupation with rights for adults led prominent liberals to play down or forget the importance of competing social interests, including some that are fundamental to children’s welfare. In time, this tendency became more pronounced, and liberalism became indifferent to what were previously considered crucial elements of the welfare of children.

Today, because of the development just described, the links between adult freedoms and various interests of children may not be readily apparent. The links therefore need to be explicated, and that is an overriding goal of this book. To give the reader a sense of them now, let me summarize the main arguments of each chapter.

Chapter One looks at an important debate in Anglophone political philosophy after World War II, a debate closely associated with the publication of Isaiah Berlin’s famous essay “Two Concepts of Liberty” in 1958. The title of Berlin’s essay refers to two different ideas of freedom: the idea of freedom as unhindered choice (or “negative” freedom), and the idea of freedom as self-control or self-government (also known as “positive” free-

dom). Today, largely because of the abuse of different conceptions of freedom under totalitarianism, most American liberals accept Berlin's judgment that the idea of freedom in the negative sense is, on balance, more humane or dignified than the idea of positive freedom. But few liberals have thought about what the preferred status of negative freedom means for children. That is regrettable, because the idea of negative freedom is not—and cannot be—the only morally valid idea of freedom.

Although the point is seldom acknowledged, freedom in the negative sense has limited relevance for many matters relating to children. Furthermore, with respect to public policy, relying exclusively on this idea of freedom leads to some morally intolerable outcomes. At the same time, the idea of positive freedom is highly relevant for understanding children's welfare. Berlin was mindful of these matters. His defense of negative freedom is historically intelligible, but the defense helped to shape a moral outlook that discounts key elements of the welfare of children.

Chapter Two examines recent efforts, notably by political theorist Susan Moller Okin, to incorporate elements of feminist thought into liberalism, in an attempt to effect change in American family life and improve the life prospects of women and children. Okin criticizes contemporary liberalism for its failure to rid itself of patriarchal biases that predate the twentieth century. To Okin, such biases are still consequential for women and children, and she proposes far-reaching legislation to eliminate the biases and promote equal opportunity.

Okin's scholarly interest in families and children merits praise—and it distinguishes her from most contemporary liberals—but her work is characterized by an insufficiently critical posture toward different putative rights. Presenting herself as deeply concerned about the well-being of women *and* children, Okin fails to anticipate how certain freedoms, when exercised, will affect the latter. A further weakness in Okin's work is the absence of a cogent normative account of the family as a social institution.

Chapter Three reviews several decisions by the Supreme Court of the United States establishing the "right to privacy" in reproductive matters and considers the significance of this doctrine for the welfare of children. Before the Court's decisions in *Griswold v. Connecticut* (1965), *Eisenstadt v. Baird* (1972), and *Carey v. Population Services International* (1977), most states regulated the sale and distribution of contraceptives. Despite many views to the contrary today, those laws were meant to advance important interests of children. Specifically, they were meant to discourage sexual promiscuity and promote the traditional two-parent family as a social norm and as the family structure most conducive to the welfare of children. But when the Supreme Court invalidated the statutes and formulated the right to privacy in *Griswold* and *Eisenstadt*, it said scarcely a word about these competing social interests. The Court failed

to anticipate the possible ramifications of the new right, such as a greater sexual permissiveness in society, a corresponding rise in out-of-wedlock births, and diminished welfare for children.

Chapter Four evaluates a peculiar inconsistency in the Supreme Court's First Amendment jurisprudence. In some cases, the Court characterizes children as morally impressionable, whereas it elsewhere ascribes the moral capacities of adults to them. More specifically, when children are present at a state-sponsored religious exercise, the Court usually describes them as morally and psychologically frail and incapable of deciding whether they truly wish to participate in the exercise. Yet when children are exposed to various "adult" stimuli (such as hard-core pornography), the Court is apt to characterize them as morally sturdy and resilient beings. Besides documenting this strange inconsistency, this chapter tries to explain its origins.

The inconsistency is significant for two reasons. First, in all likelihood, it helps to explain the decisions in some cases. Second, the inconsistency further entrenches the idea that personal rights for adults associated with the idea of negative freedom should have a preferred status in constitutional jurisprudence. (The point holds even though the Supreme Court does not use the terms "negative" and "positive" freedom.)

Chapter Five assesses recent arguments by liberal legal theorist Ronald Dworkin to justify the sweeping changes in the Court's civil-liberties jurisprudence since the 1950s. Dworkin resourcefully defends the "right to privacy" and a liberal reading of the Free Speech and Free Press Clauses of the First Amendment, but his theory relies almost exclusively on the idea of freedom in the negative sense. Dworkin can also be criticized for neglecting to discuss important interests of children, since his theory requires that government treat all citizens with "equal concern and respect." That requirement should have led Dworkin to discuss the likely effects of different policies on children, who are strangely absent from his theory.

On the basis of this summary, readers should understand the tendencies of liberal thinkers described above. As they engaged different controversies, liberal political theorists and jurists may not have been thinking about children, but the resolution of those controversies implicated different interests of children. Each chapter in this book might therefore be described as a case study in liberal neglect. The neglect may have been unintentional, but its importance cannot be denied, especially since many liberal theorists and jurists do not want to revisit these matters and consider them "settled."

An unpleasant irony must therefore be noted. American liberals tend to pride themselves on being sensitive to the position of vulnerable persons, especially different minorities in society (e.g., European Jews in the 1930s, black Americans living under Jim Crow, and different groups in the con-

temporary United States). But if sensitivity to vulnerable groups is a source of pride among liberals, they should feel some humility for having so often disregarded the interests of this highly vulnerable group.

Perhaps some liberals will say that children are less vulnerable than I suppose. That is, if a child has loving and responsive parents, there may be little vulnerability in the child's life. But this reply presupposes too much. We cannot assume such favorable circumstances, in part because of cultural and legal changes favored by most liberals. Among such changes, I would cite "no-fault" divorce and the prevailing "nonjudgmental" outlook on sexuality and sexual behavior. One-third of American children grow up in single-parent families, and although such parents often deserve admiration for their efforts and achievements, the children in such families usually face diminished life prospects. We cannot pretend otherwise.

Before concluding this Introduction, I want to make a few more remarks about my goals in writing this book, to avoid some possible misunderstandings.

The first point should be underscored. The book is offered as a contribution to the academic disciplines of political theory and constitutional law; it is not a treatise on child-rearing, adolescent psychology, or family life. Throughout the book, I analyze developments in liberal political theory and jurisprudence and explain how those developments implicated different interests of children. As noted, I aim to document a long pattern of indifference. My account of the welfare of children is primarily based on older sources in political theory and American law. That is, I do not "import" a theory of children's welfare from psychology or another academic discipline. I expect that most readers will say that the account of children's welfare presented here accords with the moral convictions of many ordinary citizens. This does not mean that the account is infallible or beyond criticism, but it does attest to the strength and influence of certain ideas.

Second, although the book focuses on some interests basic to children's well-being, it obviously does not discuss *every* interest related to their welfare. As an example, I scarcely enter into the current debate about the competing claims of parental and state authority to determine the content of a child's education. This is an important debate, and it may end up affecting millions. Thus, anyone interested in the welfare of American children should pay attention. I did not enter the debate here because of considerations of time, space, and "fit."¹⁹

¹⁹ For three contributions to the debate, see Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Cambridge, Mass.: Harvard University Press, 2000); James G. Dwyer, *Religious Schools v. Children's Rights* (Ithaca, N.Y.: Cornell University Press, 1998); and Stephen G. Gilles, "On Educating Children: A Parentalist Manifesto," *University of Chicago Law Review* 63 (1996): 937. For an assessment of contemporary

Third, simply because I have written a critique of contemporary American liberalism, readers should not assume that I broadly endorse political conservatism as the solution to all of the problems identified here. On a number of issues, I see little difference between the liberalism being criticized in this book and the libertarian current in American conservatism. So if I were to endorse any form of conservatism as an alternative, it is a moral or cultural conservatism that recognizes that children's welfare can all too easily be sacrificed to the ideology of the market.²⁰

Finally, I know that some readers might disagree with my assessment of the various interests of children examined here. They might say that the interests never were valid or that they (somehow) lost their validity. Others might say that the interests remain valid but the traditional ideas about how to promote them were wrong.

Such comments would not surprise me. But it would be desirable for persons who hold any or all of these views to state them forthrightly and defend them, instead of merely assuming that every intelligent person shares them.

I say this for the following reasons. As noted, in recent decades liberal political theorists and jurists have gone about their work as though the personal freedom of adults is a political value that outweighs all competing interests, including some closely associated with the welfare of children. This viewpoint has been taken as an article of faith, or as if the correct course of action is self-evident. The result is a number of large gaps in liberal thought, raising many questions about the coherence of contemporary liberal theory and jurisprudence. Those gaps are identified throughout this book, but even someone who points them out can hope that liberals will try to fill them in, instead of maintaining this apparent attitude of indifference toward them.

theories of child-rearing (and their relevance to education), see Kay S. Hymowitz, *Ready or Not: Why Treating Children as Small Adults Endangers Their Future—and Ours* (New York: The Free Press, 1999).

The debate about primary and secondary education speaks to an important part of children's welfare. But it would be a mistake to suppose that a high level of welfare for children can be assured simply by providing them with a first-rate education. What happens before and after the school day is just as important as what occurs during the school day. Indeed, what happens to children outside a school often crucially affects what takes place inside it.

²⁰ I recognize the important role of free markets in helping societies to allocate goods and services efficiently and in responding to consumer preferences. But just as adult civil liberties must sometimes be restricted to protect certain interests of children, free markets need to be regulated. Furthermore, promoting the welfare of children is almost universally recognized as a legitimate principle for market regulation, as evidenced, for example, in prohibitions on child labor and child pornography.

Can any liberal thinker explain why the personal freedom of adults should routinely outweigh the competing interests of children? Can any liberal jurist justify this recurring presumption? If a cogent justification can be produced, I expect that many persons—and not only critics of contemporary liberalism—would like to see it.