SPEAKING TRUTH TO POWER: CHALLENGING "THE POWER OF PARENTS TO CONTROL THE EDUCATION OF THEIR OWN"

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INTRODUCTION

Civil rights activists have long believed that progress toward full human rights is built on "speaking truth to power."[1] Speaking truth to power takes both courage and insight. After all, the authority of power seems so self-evident and power is, inherently, self-perpetuating. Yet periodically we have been called upon by marginalized groups — women, people of color, people with disabilities — to re-examine long-held beliefs and measure them against what we hope is a progressively more enlightened standard of human rights. Children are one such group, and the new frameworks for thinking about the rights of children have pushed us to re-think some of our most cherished beliefs and most hallowed traditions.

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[1] *See, e.g.*, F. Michael Higginbotham, *Speaking Truth to Power: A Tribute to A. Leon Higginbotham, Jr.*, 20 YALE L. & POL'Y REV. 341 (2002); David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 121 (2002); Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763 (1995).

One such hallowed tradition is the "power of parents to control the education of their own,"[2] a common-law power that was constitutionalized in a pair of cases dating to the first decades of the twentieth century. In my past work, I explored the role of *Meyer v. Nebraska*[3] and *Pierce v. Society of Sisters*[4] in shaping the development of our laws on child custody, adoption, and child protection.[5] I offered a "revisionist history" that examines the cases not purely as education cases but within a broader social and economic context to explain how an archconservative and openly bigoted man like Justice James McReynolds came to author two such liberal icons. In this symposium keynote, I will look at these cases as they are more commonly understood — as education cases. I will argue that the jurisprudence that developed from these cases allowed the rights of parents to trump the interests and rights of children as well as the interests of the state. I will argue that the constitutionalization of a parental right to control children's education perpetuated a view of the child as parental property and of education of the child as a private good rather than as a fundamental right of the child or a fundamental responsibility of the community.

Almost eighty years have passed since the U.S. Supreme Court handed down its landmark 1923 decision in *Meyer v. Nebraska*.[6] In *Meyer* and its companion case *Bartels v. Iowa*,[7] the Court struck down laws in several states prohibiting teaching classes in foreign languages to elementary-grade children. Assimilationists and other supporters of these laws pointed to communities whose members only spoke German or Polish and argued that English-only laws were necessary to ensure that all American citizens would speak a common language. The Court, with Justice McReynolds writing for the majority, disagreed. Over a terse dissent by Justice Oliver Wendell Holmes, Jr., joined by Justice Sutherland, the Court held that the rights of parents to control the education of their own superseded the interests of the state in Americanizing its youth.[8]

Two years later, the Court decided *Pierce v. Society of Sisters*.[9] Its decision in *Pierce* nipped in the bud a populist movement emerging in Oregon that would have required all elementary-grade children to attend public schools. While the Oregon law's supporters included nativists,

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2 262 U.S. 390, 401 (1923).

3 *Id.*

4 268 U.S. 510 (1925).

5 Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

6 262 U.S. 404, 412 (1923).

7 *Id.*

8 *See id.* (Holmes, J., dissenting, joined by Sutherland, J.).

9 268 U.S. 510 (1925).

anti-Communists and anti-Catholics, as well as the Ku Klux Klan, many Oregon voters simply saw the law as a means to promote solidarity and equality.[10] The official ballot declared, "Our children must not under any pretext, be it based upon money, creed or social status, be divided into antagonistic groups, there to absorb the narrow views of life, as they are taught."[11] In their briefs and oral arguments, the law's opponents did not focus on religious freedom. Instead they defended the rights of private schools to operate and the right of parents to utilize them to educate the child according to his "station in life."[12] They warned the Court that if private elementary school could be abolished, then "Harvard, Yale, Columbia, Princeton . . . [a]ll could be swept away, and with them would depart an influence and an inspiration that this country can ill afford to lose."[13] This defense of private education resonated deeply with the justices. Once again, this time unanimously, the Supreme Court struck down a popular initiative, finding that the state's attempt to create solidarity by standardizing the education of all children violated the rights of parents to educate their children as they saw fit.[14]

Few cases have enjoyed such a long and complex run or left so unlikely a legacy. These cases were decided in the heyday of economic due process, when the "Four Horsemen" on the Supreme Court (McReynolds among them) mobilized the language of the Fourteenth Amendment, protecting citizens' liberty and property, to defeat state and federal regulation of private enterprise.[15] These two cases miraculously survived the death of substantive due process and the "switch in time that saved nine."[16] They began a new life of their own, hailed by modern scholars as standing for a commitment to pluralism and the proposition that individuals must be free to "heed the music of different drummers."[17] We came to view them as "the good personal liberty gold of substantive due process left when the evil dross of economic due process was purged."[18] As utilized by the Court in cases like *Griswold v. Con-*

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10 Woodhouse, *supra* note 5, at 1019.

11 *Id.* at 1018 (quoting the Official Ballot of Oregon argument over school law).

12 *Id.* at 1102. The language concerning the parents' right to educate the child in accord with his "station in life" is taken from *Meyer*, 262 U.S. at 400.

13 *Id.* at 1105 (quoting the Kavanaugh Brief for Apellee).

14 *Pierce*, 268 U.S. 510.

15 *See* THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969: THEIR LIVES AND MAJOR OPINIONS 2029–30 (Leon Friedman & Fred L. Israel eds., 1969).

16 This phrase was coined to describe the change of heart in the ranks of the justices when threatened by Franklin D. Roosevelt's "court-packing" plan. *See* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 206–10 (2d ed. 1985).

17 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-6, at 1319 (2d ed. 1988).

18 Woodhouse, *supra* note 5, at 997.

necticut[19] and *Roe v. Wade*,[20] *Meyer* and *Pierce* underwent a strange metamorphosis, giving rise to a principle their archconservative author would have found quite alien — that a zone of privacy and autonomy precludes state regulation of intimate sexual relations. It is no exaggeration to say that *Meyer* and *Pierce* provided the foundation for the Court's modern substantive due process jurisprudence. Every crucial case on family privacy, from A to Z, or from *Akron v. Akron Center for Reproductive Health*[21] to *Zablocki v. Redhail*,[22] cites to these precedents in holding that rights of parenthood enjoy special constitutional protection. In education law, *Meyer* and *Pierce* give constitutional imprimatur, in the words of their author Justice McReynolds, to "the power of parents to control the education of their own."[23]

These cases have fascinated me for many years. My skepticism dates to my experiences as a student in the Columbia Law School Child Advocacy Clinic almost twenty years ago. Too often, as I worked through the case law and statutes trying to get my young clients what they wanted and needed, it seemed that these cases precluded the courts from even considering the best interest of the child. My research into the context and history of these cases resulted in my 1992 article, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*.[24] In that article, I offered an intentionally revisionist history of these two liberal icons. Studying these cases in the context of their time, I sought to expose their roots in economic due process theories about the sanctity of private property and in the common-law tradition of patriarchal ownership of children. In that article, and in subsequent works,[25] I offered a critique of this dark side of parental rights as it played out in cases on family law, custody, adoption and child protection.

My critique of these cases focused on their role in elevating the common law powers of parents to the status of constitutional rights.[26] I argued that, given the rhetorical clout of rights talk, the common-law

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19 381 U.S. 479 (1965).

20 410 U.S. 113 (1973).

21 462 U.S. 416 (1983).

22 434 U.S. 374 (1978).

23 *Meyer*, 262 U.S. at 401 (1923).

24 Woodhouse, *supra* note 5.

25 Symposium, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247 (1999); Symposium, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1 (1999); Colloquy, *Child Abuse, the Constitution and the Legacy of* Pierce v. Society of Sisters, 78 U. DET. MERCY L. REV. 479 (2001).

26 Given the history of patriarchal control within the family, the common law provides a highly problematic foundation for the construction of modern-day constitutional rights. *See* Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) (discussing the husband's right to use physical force to exact obedience from his wife).

powers of parents (transmuted into inalienable rights) often seem capable of trumping the interests of the state in educating and protecting children and the interests of the children in being nurtured, educated and protected. I claimed that *Meyer* and *Pierce* stand as a barrier to the development of an American jurisprudence of children's rights.[27] In America, we are so accustomed to the notion that parents have "rights" while children have mere "interests" that we hardly notice the yawning hole in our jurisprudence of rights. I contended that, in education, as in other areas touching the lives of children, an overemphasis on the rights of parents kept American law from moving into the twenty-first century and embracing children's rights as human rights.[28]

In my writings, I used the stories of children and youths in slavery to make real and vivid the difference between the quasi-property theory of parental rights reflected in *Meyer* and *Pierce* and a theory grounded in human rights principles that respects the child as a human being. I borrowed this approach from Professor Peggy Cooper Davis. Davis seeks to rebut the argument made by many conservative jurists, including Justice Scalia, that the Constitution has nothing to say about families and family life.[29] In her book *Neglected Stories: The Constitution and Family Values*, Professor Davis argues that the words of the Fourteenth Amendment must be understood in the context of slavery and the abolition of slavery.[30] She draws upon the stories of families in slavery that motivated the drafters in order to give substance to the notion of "liberty" at the heart of the Fourteenth Amendment.[31] I believe that children and youths, who shared in the suffering of slavery and involuntary servitude, also may claim a share in the promise of the Fourteenth Amendment. I used the story of Frederick Douglass, the famous abolitionist, to show how maltreatment of children figured in the new understanding of "liberty" reflected in the Civil War Amendments. Frederick Douglass' story also illustrates the pivotal role of education in children's resistance to and emancipation from slavery.

In his autobiography, Frederick Douglass describes his childhood as a slave boy named Fred Bailey. He relates how his master, Hugh Auld, erupted in fury when he discovered that his wife was teaching nine-year-old Fred how to read. Auld's words made a profound impression on Fred as a child:

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27 *See The Constitutionalization of Children's Rights*, *supra* note 25.

28 Symposium, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393 (1996).

29 *See* Troxel v. Granville, 530 U.S. 57 (2000) (Scalia, J., dissenting).

30 PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 214–26 (1997).

31 *Id.*

> "A nigger should know nothing but to obey his master — to do as he is told to do. Learning would spoil the best nigger in the world. Now," said he, "if you teach that nigger (speaking of myself) how to read, there would be no keeping him. It would forever unfit him to be a slave."[32]

Here, in a highly dramatic context, we confront the lifelong enslavement that can follow when adults are empowered to deprive children of education. Fortunately, Fred defied his master, teaching himself to read from castaway newspapers. From these newspapers, he learned about the movement to abolish slavery and began as a pre-adolescent to plot his escape to freedom.

Over a century later, Justice William O. Douglas, writing in the case of *Wisconsin v. Yoder*,[33] highlighted the tension between children's intellectual liberty and adults' control over their education.[34] The Yoders, along with other Amish families, sought an exemption from mandatory schooling laws that set sixteen as the minimum age for leaving school.[35] The Amish, who followed a simple life of farming and rejected modern technology, viewed compulsory public education as infringing upon their rights to raise their children in the Amish religious tradition. The Court agreed, holding that the First and Fourteenth Amendments protected the Amish parents' choice to educate their children at home in the simple ways of their faith.

Chief Justice Burger's opinion is almost elegiac — he paints a picture of Amish youth working side by side with their parents in fields and kitchens — a picture that is even more American than Mom and apple pie. But Douglas' separate opinion breaks the bucolic mood by protesting that the trial court never asked some of the Amish young folks involved in the case how they felt about their parents' choices. Shifting attention from the parents' liberty to the children's liberty, Douglas argued that children's lives might be forever limited by their parents' choices:

> On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to

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32 Frederick Douglass, *Narrative of the Life of Frederick Douglass, an American Slave* (1825), *reprinted in* THE CLASSIC SLAVE NARRATIVES 225, 274 (Henry Louis Gates, Jr., ed., 1987).

33 406 U.S. 205 (1972).

34 *Id.* at 213–15.

35 *Id.*

> be a pianist or an astronaut or an oceanographer. To do so he will have to break from the Amish tradition. It is the future of the student, not the future of the parents, that is imperiled by today's decision . . . If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed.[36]

Douglas' words, though often cited and admired by scholars and advocates for children, never fully persuaded the court or realized their potential in framing children's educational rights. The Court has generally treated the parents' right of control as severely limiting if not precluding examination of the child's views. Much depends on the alignment of parties in the child-parent-state triad. In a nutshell, when parent and child are allied together against the state, as in cases like *Tinker v. Des Moines*[37] or *Goss v. Lopez*,[38] they seem to have a fair chance at resisting state coercion. But one searches the casebooks in vain for cases where the Court has allowed the child's educational choices to trump those of a parent. When state and parent are allied against the child, as in *Parham v. J.R.*,[39] the presence of the parent in the equation seems to diminish, rather than enhance, the child's procedural due process rights. When the child and parent disagree and there is no state action to provide a hook for arguing that the child's constitutional rights are violated, the parent's authority appears virtually absolute. Some scholars, intent on challenging the public-private distinction, have argued that the framework of laws enforcing parental custody and control constitutes state action and makes the state complicit in the parent's assertion of power.[40] But the Court has never accepted the invitation to go down this path, and its education cases continue to support the prerogative of the parent to make decisions without regard to the child's wishes.

Couched in the dry terminology of law, the principle that a parent speaks for the child in matters of education seems rather benign. After all, education is hardly a life-or-death matter like medical care or child abuse. And what do children know about education, compared with their more sophisticated and sensible elders? Empowering parents to control

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[36] *Id.* at 244–46 (Douglas, J., dissenting in part).

[37] 393 U.S. 503 (1969) (holding that the First Amendment protects students' rights to protest war by wearing armbands in school).

[38] 419 U.S. 565 (1975) (holding unconstitutional the administration of corporal punishment by schools absent procedural protections).

[39] 442 U.S. 584 (1979) (holding that despite parents' broad control over their children, juveniles committed to state institutions have procedural due process rights).

[40] *See, e.g.*, Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359 (1992); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985).

children's education, so the argument goes, merely recognizes that children lack the capacity to educate themselves. This traditional liberal description, however, fails to give adequate weight to the interests of the community in education of children or to the interests of the child in acquiring an education that fits his needs and aspirations.[41]

Using narratives drawn from the lives of real children, I hope to illustrate why I believe that children need robust education rights of their own. The stories that follow are drawn from cases I have encountered either in my practice or in my research.[42] In each of these cases, children have suffered because the law gave too much deference to the rights of parents to control the education of their own and insufficient attention to the rights of the child to a voice in his or her own education. In each of these cases, children paid the price for parental autonomy. In each of these cases, school held a meaning for children that was vastly different from its meaning to their parents and guardians.

I. HOME SCHOOLING: THE POWER TO IMPOSE SOCIAL ISOLATION

In 1999, an attorney representing two Arkansas brothers, Neal and Jesse Eldridge, approached the Center for Children's Policy Practice and Research (CCPPR), of which I was a co-director and co-founder, and asked us to assist with their criminal defense case. At the ages of fourteen and fifteen, these boys had ambushed their father and shot him dead.[43] According to the boys and their neighbors and teachers, their father had repeatedly abused them, physically and emotionally. He terrorized them with beatings, shot their pets to punish them for insubordination, and when they and their mother finally ran away, he threatened to burn the house with their grandparents in it to the ground if they did not return. The family lived on an isolated farm far from any other dwelling. One day, when their father again threatened to kill the boys as soon as he returned from town, they decided to shoot him first.

What does this case have to do with a child's right to education? As is so often the case with abused children, school provided these young boys their only respite from their father's violence.[44] Both boys were polite and well-liked by their teachers, who did their best to protect them. Despite fearing the father because he tried to intimidate them, the teach-

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41 *See generally* JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS (1998).

42 Names and nonessential facts have been changed to protect the children's interests in privacy and confidentiality.

43 *See* James Jefferson, *Teens Say They Shot Father to End His Abuse*, COMMERCIAL APPEAL (Memphis, Tenn.), Dec. 23, 1999, at A14; *Teens Plead Guilty to Killing Abusive Dad*, COMMERCIAL APPEAL (Memphis, Tenn.), May 25, 2000, at A16.

44 *See, e.g.*, DAVID J. PELZER, A CHILD CALLED "IT": ONE CHILD'S COURAGE TO SURVIVE 8, 36, 47 (1995).

ers reported the boys' bruises to child protection authorities. However, the social worker who visited their home to investigate the allegations, against all best practices in domestic violence investigation, failed to interview the children privately. In fear of their father, the mother denied any abuse and the boys felt compelled to recant.

At this juncture, the boys' father angrily forbade them to attend school, invoking his right to home school his sons. Researchers studying domestic violence know that social isolation of the victim and the abuser from the larger community is one of the key characteristics of abusive behavior:[45]

> This social isolation cuts them off from any possible source of help to deal with the stresses of intimate living or economic adversity. These parents are not only more vulnerable to stress, their lack of social involvement also means that they are less likely to abandon their violent behavior and conform to community values and standards.[46]

Yet the school authorities felt they had no choice but to capitulate. Apparently, no one asked the boys if they wanted to be schooled at home. The question, however, would have been futile because under Arkansas law, their wishes were legally irrelevant, since minors generally lack the legal capacity to trump the education choices of their parents.[47]

Ironically, only a few months later, the state of Arkansas considered them old enough to be tried as adults. Arkansas charged the boys with first-degree murder and scheduled them to stand trial in Pope County criminal court. My team at CCPPR believed they had an excellent case for self-defense under a recently enacted Arkansas statute on domestic violence, and we submitted a report detailing the psychological and legal basis for acquittal. Yet, on the eve of trial, both boys agreed to plead guilty to manslaughter because they could not face the trauma of reliving their story in open court. In Justice Douglas' words, these boys' lives were truly "stunted and deformed,"[48] at least in part because those in a position of trust who could have saved them bowed to the authority of the father "to control the education of his own."

The home schooling movement has many supporters, and I myself believe in a wide array of choices for children. While speakers at this symposium suggest that home schooling should be limited or abolished, I would not go that far. But in the case of these boys, an exaggerated

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45 RICHARD J. GELLES & MURRAY A. STRAUSS, INTIMATE VIOLENCE: THE CAUSES AND CONSEQUENCES OF ABUSE IN THE AMERICAN FAMILY 87–88 (1988).

46 *Id.*

47 ARK. CODE ANN. § 6-18-201 (Michie 2001).

48 Wisconsin v. Yoder, 406 U.S. 205, 246 (1972).

deference to the right of the father to home school his children allowed him to remove them entirely and completely from a community that might have helped and protected them. A violent man misused the parents' right to control the education of their own to guarantee himself the privacy he needed to brutalize two children, leaving them no other option but to kill or be killed.

School can play a significant stabilizing role in children's lives — especially when they are under stress. Research indicates that a major factor in the adjustment of children who grow up in violent environments is the school.[49] For children who are exposed to chronic violence, schools provide an opportunity "to develop strong relationships with adult role models in a nurturing setting that combines warmth and caring with a clearly defined structure . . . and explicit limits that are consistently enforced."[50] School can also offer respite and resources for overstressed parents. One wonders what role home schooling played in the tragedy of Andrea Yates, a devoted but mentally ill mother who drowned her five children.[51] Did the family's social isolation contribute to the seriousness of her depression and explain the community's failure to see the risk to her children of spending day after day alone at home with such a troubled caretaker?

Home schooling is currently regulated to the extent of requiring that basic educational standards be met. I would urge that children have some voice in deciding whether they should be home schooled. As in child custody cases, a private interview with the child to hear his or her perspective and to listen for any evidence of abuse should become a routine part of the permission process.

II. OPPOSITION TO SEX EDUCATION: THE POWER TO PREVENT ACCESS TO LIFE-SAVING INFORMATION

Deference to parental control of a child's education can be life-threatening in another way. Consider the lethal risks to young people who are forbidden access to education about Human Immunodeficiency Virus (HIV) and other sexually transmitted diseases. It is commonplace for schools to ask permission of the parent before exposing the child to information on the risks of contracting sexually transmitted diseases (STDs) during sex and how to reduce these risks through the use of con-

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49 *See* JAMES GARBARINO ET AL., CHILDREN IN DANGER: COPING WITH THE CONSEQUENCES OF COMMUNITY VIOLENCE 121, 151 (1992) (citing studies by Hetherington, Cox, Wallerstein, and others).

50 *Id.*

51 *See* Terri Langford, *For Yates, Life Behind Bars: Jury Takes 35 Minutes to Decide That Mother Doesn't Deserve Death Penalty*, DALLAS MORNING NEWS, Mar. 16, 2002, at 1A; Lee Hancock, *Grieving Father Blames Wife's Illness for Tragedy: Mother Details How Children Were Drowned*, DALLAS MORNING NEWS, June 22, 2001, at 1A.

doms. At least one state court has held that parents have a constitutional right to prevent school authorities from distributing condoms to teens who ask for them. In *Alfonso v. Fernandez*,[52] a New York court considered the constitutionality of a sex education program that included both a classroom component and a program establishing a school health resource room where condoms (and instruction on how to use them) would be available to students who asked for them. The program included an "opt out" for the sex education classes but allowed students who sought out assistance from the health resource room to do so without parental permission. The court held that "the condom availability component of the . . . program violated the [parents'] constitutional due process right to direct the upbringing of their children."[53] While other courts have held that the schools are not obligated to prevent the children of objecting parents from obtaining condoms or information about safe sex,[54] I have yet to find a case upholding the child's affirmative right to access to sex education and holding that the school has a duty to make sex education or condoms accessible to all students, despite the parents' objections.[55]

Here, again, the notion that parents speak for their children is betrayed by the data. Young people who contract these diseases are clearly not persuaded by their parents' advice to "Just Say No." If you believe this is a small problem, consider the statistics on heterosexual transmission of HIV among American youth. Nearly half of the Americans infected each year with HIV are younger than twenty-five.[56] HIV infection rates among some young people rival those of Auto Immunodeficiency Syndrome (AIDS)-ravaged countries of Africa. African Americans, who make up only 15% of the teen population, account for 49% of reported AIDS cases.[57] Young people represent the group now most susceptible to AIDS, according to the Centers for Disease Control's National Center for HIV, STD and TB Prevention.[58] While infection rates among gays have slowed, AIDS incidence among heterosexuals between the ages of three and twenty-five rose by 130% between 1990 and 1995.[59]

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52 606 N.Y.S.2d 259 (App. Div. 1993).

53 *Id.* at 267.

54 *See, e.g.*, Parents United for Better Schs. v. Sch. Dist. of Phila., 148 F.3d 260 (3d Cir. 1998) (upholding a program that included an opt-out provision but not a parental consent requirement); Curtis v. Sch. Comm. of Falmouth, 652 N.E.2d 580 (Mass. 1995).

55 The district court in the *Parents United* case believed that the students' privacy rights warranted freedom from parental consent, but the Third Circuit upheld the lower court on different grounds. *See Parents United*, 978 F. Supp. 197, 209 (E.D. Pa. 1997).

56 *Baltimore Teens Alert Community About Dangers of HIV/AIDS in Preparation for National "Get Tested" Week*, ASCRIBE NEWSWIRE, Nov. 3, 2000 (citing White House Office of National AIDS Policy, *Youth and HIV/AIDS 2000* (Oct. 2000)).

57 *Baltimore Teens Alert Community*, *supra* note 56.

58 Jesse Sendejas, *Spreading the Word: Westbury High Group Teaches "Safer Choices"*, HOUSTON CHRON., Mar. 21, 2002, at THIS WEEK, p.1.

59 *Id.*

In the face of such an epidemic, one would think that education and health policy would make safe sex education a top priority. Yet only eighteen states mandate sex education classes, and in thirty states, educators are required to teach abstinence as a part of the program if they teach sex education at all.[60] It is not kids who object to young people learning about HIV and AIDS — it is parents, and a minority of parents at that. Offered access to accurate information, students are eager to learn how they can protect themselves and avoid contagion. This sort of life-saving information, however, is in short supply. Studies show that teens are woefully ignorant of which practices are safe and which are risky.[61]

One group of students in St. Louis was determined to take the initiative. School administrators banned a condom-use demonstration in an AIDS awareness program. The principal reported that the school board made its decision reluctantly "after a handful of parents argued that they, not educators, should decide whether their children should have exposure to condoms when talking about safe sex."[62] Angry at the school's refusal to take the heat, the students organized their own rock concert to talk about HIV/AIDS and started an email education campaign about STDs. Thank goodness for the Web! It is to modern youth what the castaway newspapers were to Frederick Douglass — a gateway to forbidden but essential, life-saving knowledge.

III. BEHAVIOR MODIFICATION SCHOOLS: THE POWER TO CONFINE AND BREAK "DEFIANT" YOUTH

Another case history from my work is a story echoed in many news reports. One night, I received a midnight call from a woman seeking emergency advice about the legal rights of a teen I will call Toby. Toby, age sixteen, was her son's best friend. Toby had just called from the airport to say he was being taken away in handcuffs. Toby was not in police custody; rather his parents had arranged his midnight "arrest" by a retired police officer. He was en route to a behavior modification school in Utah. "Why such a radical measure?" I asked. According to my informant, his parents did not like his taste in music or his talking back, they were alarmed that he had dyed his hair blue, and they suspected (but had no proof) that he was smoking marijuana.

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60 Anjetta McQueen, *Survey: Sex Education Falling Short in Eyes of Parents and Teachers*, CHI. TRIB., Sept. 26, 2000, at C2 (citing a Kaiser Family Foundation report).

61 Richard Cohen, *Keeping Teens Ignorant (and Pregnant)*, MERCURY NEWS (San Jose, Cal.), May 28, 2002, *available at* http://www.bayarea.com/mld/mercurynews/news/opinion/3350446.html

62 Nancy Cambria, *Kirkwood High Students Plan Concert to Talk About HIV, AIDS*, ST. LOUIS POST DISPATCH, May 11, 2000, at WEST POST, p.1.

The woman who called me was distraught — Toby was a good kid, just a little bit different. Didn't he have some rights in this situation? My answer surprised and disappointed her. The parents' authority to send the child to a private school program of their choice, even in handcuffs, would be difficult if not impossible to override. I gave her the name of a firebrand advocate for children who might take a case like this one but warned that they would face an uphill battle in convincing a judge to intervene.[63] She decided to let things be, and Toby continued on his way to Utah. How effective was the boot camp experience? When I recently inquired about him, eight years after this "intervention," I learned that he is hanging out aimlessly at home, unable at age twenty-four to take control of his life. His parents are still distraught. But at least his hair is no longer blue.

In preparation for this speech, I decided to cruise the Web as if I were a parent seeking advice about my troubled teen. I found numerous Web pages dedicated to helping parents find the right boot camp or special school. The facilities had reassuring names like "Tranquility Bay," "Casa by the Sea," and "Paradise Cove." Many were located offshore, in Jamaica or Mexico, and some as far away as the Czech Republic and Samoa. Interestingly, many of the Web sites, with domain names like "toughloveparenting.com" and "2helpteens.com," used the same graphics and touted the same half-dozen schools. My request for more information brought me a professionally produced video and a stack of glossy brochures. Being a lawyer, I noted the tiny print on the back cover stating "not all photos [of beautiful beaches, crystal streams and smiling youths] taken at facilities."[64] Members of the World Wide Association of Specialty Programs (WWASP) all provide a "warranty," giving several months of tuition-free follow-up should your teen slip back into old ways. With monthly tuitions ranging from a high of $4,500 to a low of $2,400 for offshore schools (not including psychological testing, therapy,

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[63] In cases in which the child has been able to seek outside help, through a relative or neighbor's intervention, a few advocates have managed to overcome the child's lack of standing by framing such cases as abuse and neglect or "child in need of supervision" (CHINS) cases. However, the issues of proof where a child has been removed from the jurisdiction and is held incommunicado are formidable. *See* Trial Transcript, *In re Jonathan Tyler Mitchell*, Va. Cir. Ct. of Tazewell County (Hearing Aug. 1, 2002) (on file with author). The child's grandmother apparently initiated *Mitchell* as a custody proceeding. *Id.* at 5 (opening statement of attorney for grandmother). A court-appointed guardian ad litem (GAL) in this proceeding was able to speak with the child by telephone, and subsequently filed a petition to have him declared a child in need of supervision, meaning a child whose "condition presents . . . a serious threat to the well-being and physical safety of the child." *Id.* at 10 (opening statement of GAL). *See also* Marianne Costantinou, *Unwilling Teen's Stay in Jamaica Debated: Court to Decide if Parents Have Right to Send Son Away for Behavior Modification*, S.F. EXAMINER, Jan. 8, 1998.

[64] Resource Catalogue: Schools/Programs for Troubled Teens Recommended by Teens in Crisis (on file with author).

or medical and dental care), not surprisingly the schools provide links to tuition loan companies and give advice about using health insurance to defray the costs.[65]

At Mount Carmel Youth Ranch in Wyoming (a program that did not claim to be a member of WWASP), the Web site included a frequently asked questions or "FAQ" section. The questions and answers reveal much more about the nature of the enterprise than the Web site's wholesome pictures and glowing testimonials:

> Question: "How long does it take to process an application?"
>
> Answer: "Three days to a week."
>
> Question: "What if my son does not want to come to Mt. Carmel Youth Ranch?"
>
> Answer: "It might be necessary to place him in a lock down facility, before placement here. Many of our boys have been brought here by their parents or escort services with mild resistance and have no history of running away."
>
> Question: "Do all the young people on the ranch attend school?"
>
> Answer: "Yes, school attendance is mandatory."
>
> Question: What school curriculum do you use?"
>
> Answer: "We use a nationally accepted correspondence, Christian education program; [sic] which offers complete teacher services, texts, lesson plans, workbooks, tests, grading and diplomas etc."[66]

Mount Carmel claims to be licensed — by Montana's Department of Family Service — as a group home facility. Monthly tuition is $3,250, and Mount Carmel recommends commitments for a minimum of eighteen months.

The notion of behavior modification schools and boot camps is not without its critics. I also found Web sites offering words of caution, including one site hosted by a more traditional school for emotionally disturbed children warning parents that these boot camps lacked ade-

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[65] *See, e.g.*, New Horizons Youth Ministries, *Enrollment Information*, *at* http://www.nhym.org-contact.html (last visited May 10, 2002). *See also* Potter, *Turn-About Ranch*, *at* http://www.potterministry.com/programs_coed.html (last visited May 10, 2002); Christopher Smith, *Tough Love Proves Too Tough: The Short Life and Hard Death of a Teenager*, 28 HIGH COUNTRY NEWS (Colo.), June 10, 1996, *available at* http://www.nospank.net/bacon.html (last visited May 10, 2002).

[66] Mount Carmel Youth Ranch, *Frequently Asked Questions*, (n.d.), *at* http://www.mtcarmelyouthranch.com/faq.html (last visited Oct. 4, 2002).

quate mental health care and had recidivism rates of 94%.[67] This Web site provided a link to the U.S. Department of State Fact Sheet on Behavioral Modification Facilities. The State Department Fact Sheet advises parents to be extremely suspicious of offshore facilities for treatment of minors with drug-or-alcohol and discipline problems. It explains:

> U.S. citizen parents who place their children in these facilities typically sign a contract for their child's treatment that authorizes the staff to act as agents for the parents. These contracts often give the staff blanket authorization to take all action necessary, in their judgment, for the health, welfare and progress within the program of the children. The facilities isolate the children in relatively remote sites, restrict contact with the outside world and employ a system of graduated levels of earned privileges and punishments to stimulate behavior change.[68]

The schools are not accredited under American standards.[69]

The State Department Fact Sheet closes with a word of legal advice that speaks volumes about the absence of rights for children under eighteen. "Parents should be aware that U.S. citizens eighteen years of age and older have a right to apply for a passport and to request repatriation assistance from the U.S. Government, both without parental consent."[70] On another Web site hosted by advocates for boot camps, parents will find a way to circumvent even this limitation. If you place your child prior to his eighteenth birthday, the Web site maintains, many states' laws will require him to finish out the placement despite his reaching the age of majority.[71] This Web site (called "potterministry" based on a biblical saying that parents mold their children like a vessel) reassures parents that if a facility was not a "lock down" facility, it would be located in an isolated setting "where there really is no place to run to."[72]

Defiance is a risky diagnosis. While defiant behavior can be pathological, justified defiance is an essential component of the creation and maintenance of a free society. Some of our greatest heroes were defiant youths reacting to very real injustices. Benjamin Franklin (under coercion by his father who had the legal power to bind him regardless of his

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67 Boot Camp Information, *What Are They?*, *at* http://www.boot-camps-info.com/boot camps.html (last visited Oct. 4, 2002).

68 DEP'T OF STATE, *Fact Sheet: Behavior Modification Facilities* (May 1999), *available at* http://travel.state.gov/behavior_modification.html (last visited Oct. 4, 2002).

69 *Id.*

70 *Id.*

71 Potter, *Questions About Residential Treatment Programs*, *at* http://www.potterministry.com/finding_help_rtp.html (last visited May 8, 2002).

72 *Id.*

wishes) signed an indenture agreement that bound him at age twelve to obey and serve his master for nine long years.[73] At age seventeen, Ben ran away because he found the conditions of his apprenticeship, including physical and mental abuse, an intolerable burden.[74] In defiance of law and of his family, not to mention the terms of the indenture, he lied his way onto a ship in Boston harbor.[75] He went on to find work as a printer in Philadelphia, and the rest is history. Countless children throughout American history, girls as well as boys, have run away from home rather than face mistreatment by parents or authorities.[76]

But runaway children, like runaway slaves, pose a grave threat to adult authority.[77] Modern boot camps "with no place to run," such as those I found on the Web, bear a chilling resemblance to the plantation where the teenage Frederick Douglass spent a terrible year of his youth. He was sent there for what we would now call "behavior modification" when he began to challenge his master's dominance.[78] Worried that Fred was learning bad habits (like reading) from his peers in Baltimore, was becoming increasingly defiant, and was at great risk of running away, his master sent him back to the isolated Eastern Shore of Maryland and leased him to a man with a reputation as a "nigger breaker."[79] Some of the most poignant moments in the autobiography describe Fred's determination to resist, despite his physical exhaustion and mental anguish, the crude attempt to transform him from a thinking, articulate individual into a submissive field hand. The experiment proved a failure because Fred refused to be broken. Defiance saved this boy long enough to become the famous abolitionist orator who continued to speak truth to power and refused to accept the legality of racialized slavery.

What do the minors who graduated or escaped from these programs think of them? I am sure each child reacts as an individual, and each story depends on the age of the child and the nature of his "problem" behavior. Apparently, some boot camps accept children at very early ages. Perhaps most disturbing to me, as a parent of grown children and a former teacher of young children, was one Web site I found that included facsimiles of very young children's letters home. These letters, intended to show parents that their children would benefit from the camp experi-

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73 H.W. BRANDS, THE FIRST AMERICAN: THE LIFE AND TIMES OF BENJAMIN FRANKLIN 21 (2000).

74 *Id.* at 31–34.

75 *Id.* at 34.

76 *See Dred Scott's Daughters:* Symposium, *Dred Scott's Daughters: Nineteenth Century Urban Girls and the Intersection of Race and Patriarchy*, 48 BUFF. L. REV. 669, 672 (2000).

77 *See* Gregory A. Loken, *"Thrownaway" Children and Throwaway Parenthood*, 68 TEMPLE L. REV. 1715 (1995).

78 *See Dred Scott's Daughters*, *supra* note 76, at 677.

79 *Id.*

ence, overflowed with children's expressions of self-hate, guilt, and loneliness. One child, apparently yearning to go home, wrote in wobbly block letters, "I know I am very bad but I think in another week I will be better."[80]

The Web sites of the schools and their promotional videos include testimonials from kids who say the boot camps and behavior modification saved their lives. And this may well be true, for these youngsters. But at teenliberty.org I found the other side of the story, from survivors of what one critic has called the "American Gulag."[81] On this Web site[82] and in sworn courtroom testimony, survivors of boot camps and behavior modification schools told of physical and emotional abuse and crude methods of coercing obedience that left them scarred and battered.[83] These complaints are characterized by at least one school as lies told by kids in an attempt to manipulate their parents into releasing them.[84]

For some children, according to news reports, the experience of behavior modification proves fatal. The *Rocky Mountain News*, for example, reported that seventeen-year-old Valerie Ann Heron:

> plunged to her death shortly after arriving at a compound for troubled teens in Jamaica. [She] had been taken from her bed at four a.m. the previous day by a "transport team" working with an organization commonly known as Teen Help. Her family had arranged for her surprise removal to the isolated Tranquility Bay compound. The next day Valerie bolted from a room in the compound, jumped from a thirty-five-foot-high balcony and died.[85]

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80 When I looked again for the Web page in preparing this speech for publication, it was gone. Whether the camp was shut down or simply went out of business, I do not know.

81 ALEXIA PARKS, AN AMERICAN GULAG: HOW THE WRONG SPECIALTY SCHOOL CAN DESTROY YOUR CHILD! (2000), *available at* http://www.teenliberty.org/An_American_GULAG.html (last visited Oct. 4, 2002).

82 *Id.*

83 In a court hearing in Virginia, former students at Tranquility Bay testified to being forced to lie face down on the floor all day for days on end and described a common form of punishment called "restraint" that consisted of several staff members kneeling on the victim's back and feet and twisting the victim's arms backwards so as to inflict intense pain. *See* Trial Transcript, *supra* note 63, at 37, 84–85. Based on their testimony, the trial court held that a thirteen-year-old boy placed in the facility at age twelve was at serious risk of harm. *Id.* at 403–04. The judge granted the GAL's CHINS petition and ordered the parent to have the child sent home. *Id.* at 402–03.

84 *See id.* at 87, 124, 147, 165, 345 (children and parents' testimony that the school explained away children's complaints as "manipulation").

85 Lou Kilzer, *Teen-ager Leaps to Her Death at Compound in Jamaica*, ROCKY MTN. NEWS (Denver, Colo.), Aug. 18, 2001, at 19A.

Fatalities are not confined to offshore facilities. According to the journal *Corrections Professional*, at least thirty-one teenagers in eleven states had died at private boot camps as of August 2001.[86]

The public responded with calls for state regulation of these camps, and such regulation is long overdue. But the operative principle that makes these schools possible has gone largely unchallenged — that parents have the "right" to control the education of their own, even when it means confining their children in private detention facilities, without any showing of need or efficacy. When the state (as opposed to the parent) incarcerates a juvenile, or the parent seeks the child's admission to a restrictive public facility such as a mental hospital, the child has a right to be heard. The state must show that the child has engaged in some activity that, if not a crime, at least poses a risk of danger to self or others.[87] Advice of doctors is sought, and evaluations are examined to avoid an abuse of power. When a parent sends a child to one of these private "schools-programs," signing over to strangers the authority to use whatever force and intimidation they deem necessary, the child is afforded no due process protections whatsoever. This is one problematic legacy of *Meyer* and *Pierce*.

I do not doubt that cases arise in which a lockdown or socially isolated facility may be the only answer. But such facilities must be professionally staffed and accredited. When a child is being "arrested" by an escort team and whisked out of state or out of the country in handcuffs, there should be some legal avenue for the child to seek judicial review of the parents' decision.[88] A professional evaluation or other evidence that less draconian interventions failed should be a pre-requisite to shipping a teen against his or her will to a behavior modification facility.

IV. RECOGNIZING CHILDREN'S EDUCATION RIGHTS AS BASIC HUMAN RIGHTS

Meyer and *Pierce* and their progeny, by constitutionalizing the common law powers of parents, has kept us tethered to the Nineteenth century while the rest of the world passes us by. In the United States, children's rights remain trivialized, a favorite topic for stand-up comics and cartoonists who joke about children "divorcing their parents." Meanwhile, the rest of the world has experienced a children's rights

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86 *Corrections Experts: Violence Locks Door to Success at Boot Camps*, CORRECTIONS PROFESSIONAL 6 (Aug. 10, 2001).

87 *See, e.g.*, M.W. v. Davis, 756 So. 2d 90 (Fla. 2000); Parham v. J.R., 442 U.S. 584 (1977); *In re* Gault, 387 U.S. 1 (1967).

88 In *Mitchell*, a twelve-year-old was whisked away in handcuffs and confined indefinitely in an off-shore behavior modification institution because of his step-mother's suspicion that he might be using marijuana. *See* Trial Transcript, *supra* note 63, at 375, 402.

revolution that has major implications for education law. While we slept on our superiority in the field of "rights," every other nation in the United Nations community except Somalia, which until recently lacked a functioning government, has ratified the United Nations Convention on the Rights of the Child (CRC).[89] The CRC recognizes a wide range of children's human rights from the right to be provided with a free public education to freedom of thought and to other essentials of intellectual and spiritual freedom. The CRC also recognizes the authority of parents, and the crucial role they play in securing and asserting children's rights to education. But it conceptualizes the parent's role as that of a trustee. The rights articulated in the CRC belong to the child. The parent acts as guardian of those rights when the child is young, and the parent guides the child in exercising her rights as she becomes increasingly mature.

Opponents of the CRC argue that recognition of children's rights would undercut traditional family values and imperil the authority of parents to control and discipline their young.[90] I must respectfully disagree.[91] It is clearly true that the child's best friend and strongest permanent advocate in any school system, private or public, is a powerful and effective and caring parent. Laws on "special education" of children recognize this fact and require that a child who lacks a parent, such as a child in foster care, be appointed a parent surrogate to advocate for his or her needs.[92] But a theory of parental rights to control the child, untempered by any matching theory of children's educational rights, fails to strike a proper balance between the claims of parents to autonomy and the needs of children on the road to autonomy. Especially as children mature, serious tensions may develop between parents' rights of control and children's liberty interests in receiving an education that fits their needs and aspirations.

Despite victories that require equal access to education, such as *Brown v. Board of Education*, American children still enjoy no federal

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89 UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES (Feb. 8, 2002), *available at* http://www.unhchr.ch/pdf/report.pdf; Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167 U.N. Doc. A/44/49 (1989). Even Somalia has begun the process of ratification. It signed the convention on May 9, 2002.

90 Barbara Bennett Woodhouse, *The UN Convention on the Rights of the Child: Cultural and Political Barriers to Ratification by the USA*, *in* CONTEMPORARY INTERNATIONAL LAW ISSUES: NEW FORMS, NEW APPLICATION 421, 422–23 (1997).

91 Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 GEO. J. ON POVERTY L. & POL'Y 313 (1998); Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393 (1996).

92 *E.g.*, 20 U.S.C.A. § 1415 (2002).

constitutional right to education.[93] They must rely on state constitutions for protection of this essential right. While a state may not abolish private schools, as we see in *Pierce v. Society of Sisters*, in theory at least, the fifty states are free to limit or even abolish public education — leaving parents to purchase whatever education they liked and could afford on the open market.

CONCLUSION

Looking ahead, I fear that the role of the state in educating children for responsible citizenship will be increasingly marginalized. Education of the young has been re-conceptualized politically and legally. We seem to be moving toward a vision of education as a private good rather than a public commitment or a child's basic right. The old vision of a free public education as each child's stepping stone to equality has been replaced by a new privatized vision based on parents' rights of control.

Recently, the U. S. Supreme Court rejected a challenge to a voucher plan that uses public money to fund private religious schooling.[94] The Cleveland plan upheld in *Zelman v. Simmons-Harris*, provides funds to parents who may use it to pay for tuition at private secular or religious schools or at public schools outside their district. In concluding that the plan did not constitute an impermissible endorsement of religion, the Court pointed to the fact that parents, and not the state, controlled the choice of schools. It did not matter that the effect of the program was to shift tax dollars from public to private religious education — as long as the parents, not the State, made this choice. Perhaps *Meyer* and *Pierce* have come full circle, in policies that empower parents not only to select the private education of their choice but also to pay for it with public dollars. After all, what can be wrong with empowering parents to make choices for their children? As one amicus brief put it, "Private choice programs are not, as opponents claim, 'attacks' on the public school system or 'schemes' to funnel money to religious institutions. They are, rather, a reaffirmation of *Pierce*: parents are trusted to know what is best for their children."[95] This invocation of *Pierce* seems to me to obscure the complex rights and interests at stake in public education policies.

Our constitutional jurisprudence has generally balanced the state's interest in educating children for citizenship against the right of the parent to control the education of his own. Missing from the equation has

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93 Barbara Bennett Woodhouse, *The Status of Children: A Story of Emerging Rights*, *in* CROSS CURRENTS 423, 427 (Sanford N. Katz et al. eds., 2000) (discussing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

94 Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002).

95 Brief Amicus Curiae of Wisconsin in Support of Petitioners at 4, Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002).

been a conviction that children themselves have rights — not only rights to equality but also substantive rights to an education that provides them with the tools to survive and thrive and procedural rights that respect their emerging capacities by honoring their reasonable educational choices. These are not mere interests to be protected by the state, nor should they be subsumed in the rights of parents to control the child free of state interference. A sturdy theory of children's rights would not cure all of society's ills. But without such a theory we are unlikely to strike a fair and responsible balance of the fundamental rights and interests at stake in education law and policy.

I believe that the stories I have told here — of children isolated from peers and community in the name of parental rights, deprived of the information necessary to preserve their own life and health, and confined against their will in abusive institutions — should cause Americans to question the extent of deference we give to parents' educational choices. I hope that we Americans will also begin to question our stubborn resistance to recognizing children as full-fledged members of the community of human rights. Children are the "new kids on the human rights block."[96] It is up to us, as adult advocates and respected scholars, to listen to their experiences and be ready to speak their "truth" to the arbitrary use and abuse of power.

[96] Barbara Bennett Woodhouse, *Recognizing Children's Rights: Lessons from South Africa*, A.B.A. J. HUM. RTS. 15 (Spring 1999).