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# THE LAW AND POSTMODERN PERCEPTIONS OF CHILDREN AND YOUTH

DAVID ELKIND\*

## I. INTRODUCTION

Our laws regarding children and youth generally mirror the prevailing societal perceptions of these age groups. As societal perceptions change, so do the laws regarding children and youth. Since the 1960s, our perceptions of children and youth have been more reflective of the needs and priorities of adults than they have been of what is in the best interests of the young. To the extent that the law reflects these dysfunctional perceptions, it contributes to hardships experienced by children and youth.

Without fully realizing it, perhaps, we have experienced a momentous, tectonic shift in our society that has affected all aspects of our existence and challenged the basic premises of our established world view. This transformation has perhaps been best described as a change from modern to postmodern ways of thinking, understanding and perceiving.<sup>1</sup> This change has been occasioned by a movement away from the assumption of rationality on which modern western thought was founded, namely, Descartes' assertion that "I think, therefore I am." In contrast, postmodern thinkers argue that language, not thought, has to be the starting point for our philosophical, scientific, literary, political and economic understanding of the world.<sup>2</sup>

This tectonic shift from modernism to postmodernism has necessarily affected our family life, our perceptions of children and youth and the laws that pertain to them. Accordingly, this Article will attempt to show how family perceptions of children and youth have changed from the modern to the postmodern era and the ways in which the modern and postmodern laws reflect these changed perceptions. This Article will also attempt to demonstrate how contemporary laws that mirror the prevailing perceptions of children and youth are dysfunctional for them. A final section will suggest ways to make our laws less debilitating to children and adolescents.

This is not the place to discuss postmodernism at length, but is possible to suggest some of the major shifts that make it different from modernism.

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1. STEVEN CONNOR, *POSTMODERNIST CULTURE* (1989); DAVID HARVEY, *THE ORIGIN OF POSTMODERNITY* (1989).

2. RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PAXIS* (1983).

*From Universals to Particulars*

In philosophy, literature and the arts there has been a movement away from the belief in universals that was implicit in the Cartesian assumption of a rational universe. Freud, for example, writing within a modern perspective, assumed that the "Oedipus Complex" was a universal phenomena and even argued that monotheism was one of its products.<sup>3</sup> However, today we recognize that Freud was writing within the context of a middle-class, victorian, Viennese family. Outside this context, the Oedipus Complex may never be experienced by children growing up within single parent families or in communal settings. Modern writers assumed they could transcend time and space and speak for all humankind. Postmodern writers accept the fact that they are always working within a social historical context and cannot get outside of it.

*From Harmony to Pastiche*

Modernism was also characterized by the belief in harmony. This was expressed in the arts and architecture as well as in literature. Modernist architect, Frank Lloyd Wright, for example, designed not only the building, but the building's furnishings; including the drapes and lamps as well. All elements of a building had to combine to form a harmonious whole. Postmodern architecture—like postmodern art and literature—is characterized by pastiche; a heterogeneous mixture of styles and elements. Modern buildings tend to be stark glass and steel. Postmodern buildings combine Greek columns, with atrium and copper domes. Postmodern art, like the portraits of Picasso, reflect this "pastiche" agenda and clash with the harmonious and perspective oriented paintings of the impressionists.

## II. FROM THE MODERN TO THE POSTMODERN WORLD

Not surprisingly, the changes in the ways we view the world, along with the actual societal changes that came about as a result of the revolutions of the 1960s, have transformed the character of American family life. These changes have also transformed our perceptions of children and youth. In turn, the law has progressively sought to reflect and reinforce these new social perceptions.

The modern era perceptions of children and youth, as well as the laws growing out of these perceptions, were generally beneficial to those they affected. An example is the child labor laws. Postmodern perceptions of children and youth, and the laws that mirror them, on the other hand, are often more stressful than beneficial. Indeed these laws add to the many other inappropriate demands being made upon contemporary children and youth.

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3. SIGMUND FREUD, NEW INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS (W.J.H. Spott trans., 1933).

### III. FROM MODERN TO POSTMODERN FAMILY TIES

The modern family ties that once nourished, supported and protected us have now been replaced by postmodern family ties that often put us under stress. Family ties include not only our basic kinship ties but also our feeling ties; the sentiments, values and perceptions that unite us, as family members, one with the other. The family ties of the modern era were centripetal in the sense that they tended to draw us together. In contrast, the family ties of the postmodern family are centrifugal in that they tend to pull us apart. It is this centrifugal tendency of postmodern family ties that makes them so stressful, particularly to children and youth.

#### *Kinship Ties*

The transformation from centripetal to centrifugal family ties has taken place over the last half century. The kinship structure of the modern nuclear family was an ideal: two parents living together in harmony for their entire lives; two or three children doing well in school, getting into the right colleges and eventually marrying and providing grandchildren for the doting grandparents. This kinship structure emphasized the importance of mutual dependence, caring and subordination of one's self to the family.

In the postmodern world, there is not one, but several, acceptable family kinship structures. The postmodern family is a pastiche of different kinship structures. Two-parent working families, single parent families, blended families, adoptive families, like-sex parent families, test-tube-babies and surrogate-mothers are all acknowledged, if not accepted, kinship structures. What characterizes these kinship structures is that they often necessitate mutual independence and autonomy. In the postmodern kinship structure, each family member is constrained, in whole or part, to subordinate family to self.

#### *Feeling Ties*

In addition to these postmodern changes in family kinship structure, there has also been a change in the structure of family feeling ties. The modern family feeling ties, its sentiments, values and perceptions, were such as to provide a palisade that protected family members from the dangers and the temptations of the outside world. In the postmodern world, however, these feeling ties reflect the permeability of the postmodern family. These new sentiments serve not as a wall against, but rather as a pathway to, the larger society.

The sentiments of the modern nuclear family: romantic love, maternal love, domesticity<sup>4</sup> and the value of togetherness, formed a tight nucleus that protected family members from the harsh, cruel outside world. In this nuclear family, children were perceived as innocent and in

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4. EDWARD SHORTER, *THE MAKING OF THE MODERN FAMILY* (1977).

need of the care and protection of a mother guided by her instinct of maternal love. Adolescents were seen as immature and as going through necessary periods of storm and stress.<sup>5</sup>

In contrast, the sentiments of the postmodern, permeable family: consensual love, shared parenting and urbanity,<sup>6</sup> reflect the new openness of the family to societal influences. As marriages become less permanent, as non-parental caregivers share childrearing and as images of violence, depravity and disease invade our homes, our perceptions of children and youth have changed. Within the context of postmodern realities, children are perceived of as being competent to deal with any and all of life's vicissitudes, and teenagers are seen as sophisticated users of the media, technology and commodities.

It is important to emphasize that these postmodern perceptions of childhood competence and of adolescent sophistication did not originate in the media. Nor were these perceptions introduced to correct the wrongs or injustices that the modern conceptions of childhood innocence and of adolescent immaturity had brought down upon young people. On the contrary, the perception of childhood innocence and adolescent immaturity were, for the most part, beneficent. They generated what has come to be seen as a "golden age" of childhood and youth that lasted from the end of the last century to the middle of this one. The postmodern perceptions of children and youth are essentially accommodations to the demands upon and limited time available to parents.

#### IV. LAWS AND THE SOCIETAL PERCEPTIONS OF CHILDREN AND YOUTH

##### *The Modern Era*

In the modern era, the perceptions of children as innocent and teenagers as immature gradually led to the enactment of laws that mirrored these perceptions. In the early nineteenth century, the obligation of parents to nourish, protect and educate young people was so well accepted it was seldom thought to require enforcement by "Human Laws." In the same way, "the promptings of parental affection and wholesome public opinion' were assumed to be enough to prevent the abuse of parental authority . . . ."<sup>7</sup>

The abuses of child labor in the latter part of the nineteenth century increasingly pressured the state to pass and enforce "Human Laws" to ensure that parents did indeed, protect, nurture and educate their children. Parents who neglected their responsibilities were very much on the minds of "[A]merican reformers who advocated strenuous exercise of *parens patriae* (the duty of the state to protect children from all who

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5. See generally ERIK H. ERIKSON, CHILDHOOD AND SOCIETY (2d ed. 1963)(Erikson termed these periods of storm and stress as an "identity crisis;" the proving ground of separation from the family to an independent adult life).

6. DAVID ELKIND, TIES THAT STRESS: MALADIES OF THE POSTMODERN FAMILY AND SELF (1992)(manuscript on file with the author).

7. JAMES S. COLEMAN ET AL., YOUTH TRANSITION TO ADULTHOOD 30 (1974)(citation omitted).

would harm them) to supplant the authority of parents who neglected their obligations to offspring."<sup>8</sup>

In the latter part of the nineteenth, and the first half of the present century, the State acted to ensure that children's health, education and welfare was looked after:

Using the data of medicine, physiology, psychology and pedagogy, progressive reformers viewed childhood as a critically important period of life, during which the child required protection, care, and special treatment, not just in the interests of future citizenship, but in order to develop and realize his potential as a human being. More effective regulation of child labor by the states, creation of juvenile courts, establishment of the federal Children's Bureau, the manifold activities of that bureau, and improvements in the administration of public child welfare services at all levels of government represent the achievements of the "rights of childhood" movement.<sup>9</sup>

The overall thrust, then, of the laws for children and youth during the modern era was to protect them from themselves as well as from others. In this way, the laws recognized the developmental differences between children and adolescents on the one hand and adults on the other. In many ways, childhood, and to a lesser extent adolescence, were regarded as special periods of life that were unique and valuable. Many portrayals of fictional characters such as "Peter Pan," "Huckleberry Finn" and "Penn Schofield" reflected this idealized image of childhood that the laws sought to preserve and protect.

#### *The Postmodern Era*

With the movement into the postmodern era and the emergence of the sentiments and perceptions of the permeable family, the temper of the laws regarding children and youth have changed. The change in the laws is very much in keeping with the new perceptions of children as competent and teenagers as sophisticated. In addition, these changes also mirror the new egalitarianism engendered by the Civil Rights and the Women's Movements. The emphasis is no longer upon protecting children but rather upon protecting children's rights.

Not surprisingly, however, there are still many carryovers from the modern era. As a consequence, there is a great deal of contradiction in the contemporary laws regarding children and youth. Some postmodern laws are founded upon the modern perception of children as innocent and teenagers as immature, while others are based on the perception of children as competent and teenagers as sophisticated. Although the Supreme Court has said that children are possessed of fundamental rights that the state must respect, it is not clear what rights these are and whether, and in what situations, these rights preempt parental rights.

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8. *Id.* at 31 (footnote omitted).

9. *Id.* at 31-32 (footnote omitted).

Americans have not made up their minds on the matter of children's rights. In 1967, for example, the U.S. Supreme Court (*In re Gault*) ruled that juveniles charged with delinquency were entitled to adult rights of due process—right to counsel, right to appeal, and so on. Yet juvenile offenders are still considered special. Thus, in Arizona, upon reaching 18 a person may have his juvenile court and police records destroyed (even if the crime involved was murder). Other states also have such “wipe the slate clean” provisions.<sup>10</sup>

Likewise, children and youth are still not regarded as fully entitled to the right to protection from cruel and inhuman punishment. For example, an act amounting to assault and battery is not punishable if done by a teacher while exercising his disciplinary authority over a pupil, where the punishment inflicted by the teacher consists only of a whipping with a switch, a ruler or something in the nature of a stick.<sup>11</sup>

In other cases, the Supreme Court has ruled that children have the same rights as do adults. In *Belloti v. Baird*,<sup>12</sup> a state law requiring parental consent for a minor's abortions was successfully challenged. In *Goss v. Lopez*,<sup>13</sup> the Court ruled that schools were required to provide students with due process before subjecting them to short term suspensions. Likewise, in *Smith v. Organization of Foster Families for Equality and Reform*,<sup>14</sup> the Court ruled that New York City authorities were required to hold a hearing before a child could be transferred from one foster home to another.

### *In The Best Interests of Children and Youth*

It is certainly true, of course, that in many of these cases the children have benefited from adults defending their constitutional rights. But many postmodern adults argue on the children's behalf because they have accepted the postmodern perceptions of childhood competence and teenage sophistication, not because of their abiding commitments to the health and welfare of children. Lawyers themselves are beginning to question this overemphasis upon children's rights. For example, Bruce C. Hafen wrote:

With our loss of confidence in paternalism, however, a subtle but important shift has occurred in the public mind away from a commitment to the right of children to belong and to be nurtured. . . .

Similarly, some commentators have argued that children must be “liberated” from minority status or from other age-related legal limitation, sometimes drawing parallels between the inferior statuses of slaves, women, and children. The reform movement for children's rights, especially in its approach

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10. Philippe Aries, *The Sentimental Revolution*, WILSON Q., Autumn 1982, at 51.

11. 6 Am. Jur. 2d *Assault and Battery* § 46 (1963).

12. 428 U.S. 132 (1976).

13. 419 U.S. 565 (1975).

14. 431 U.S. 816 (1977).

to group litigation and its reliance on constitutional theories, has borrowed extensively from the legal experience of the civil rights movement, risking some uncritical transfers of egalitarian concepts that ignore children's lack of capacity and their need to be protected from their own immaturity.<sup>15</sup>

Another legal commentator, Philippe Aries, concludes that "[f]or better or worse, American children enjoy more "adult rights" today than they did 20 years ago—and often more adult responsibilities as well."<sup>16</sup>

#### V. LAW AND THE NEW (POSTMODERN) MORBIDITY

The postmodern perceptions of children as competent and teenagers as sophisticated appear to have had mostly detrimental effects. Although correlation is certainly not the same as causation, the increase of stress-related indices among children in step with the progressively more accepted postmodern perceptions of children and youth is strongly suggestive. To the extent that our laws mirror and reflect these perceptions, they contribute to the dysfunction of contemporary youth.

The data on the increase of stress-related dysfunction in children and youth has come to be called the "new morbidity."<sup>17</sup> That is to say, some fifty years ago the leading cause of death among children and youth was disease.<sup>18</sup> Fortunately, many of the diseases that once accounted for the majority of deaths among young people, such as tuberculosis and polio, have now been conquered by medical science. Today, psychological and social pressures, not physical disease, account for most of the deaths among young people.<sup>19</sup> Stress-related deaths among youth thus constitute the new, postmodern morbidity.

The facts regarding the new morbidity are all too easy to document. On every measure that we have, children and youth today are doing less well than they did hardly a quarter century ago. On tests of strength, endurance and general muscle tone, young people today perform less well than young people of comparable age even ten years ago.<sup>20</sup> Verbal Scholastic Aptitude scores have fallen almost fifty points from the late fifties and early sixties.<sup>21</sup> Alcohol related accidents are the leading cause of death for fifteen to twenty-four year old Americans, either as passengers or drivers.<sup>22</sup>

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15. Bruce C. Hafen, *Exploring Test Cases in Child Advocacy*, 100 HARV. L. REV. 435, 447 (1986)(footnotes omitted)(reviewing ROBERT H. MOONKIN, IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY (1985)).

16. Aries, *supra* note 10, at 51.

17. ROBERT J. HAGGERTY ET AL., CHILD HEALTH AND THE COMMUNITY (1975).

18. UNITED STATES DEPARTMENT OF EDUCATION, OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, YOUTH INDICATORS 95 (1988) [hereinafter YOUTH INDICATORS].

19. See THE NATIONAL COMMISSION ON THE ROLE OF THE SCHOOL AND COMMUNITY IN IMPROVING ADOLESCENT HEALTH, CODE BLUE: UNITING FOR A HEALTHIER YOUTH 3-4 (1989) [hereinafter CODE BLUE].

20. YOUTH INDICATORS, *supra* note 18, at 92.

21. *Id.* at 68.

22. *Id.* at 102.



Other statistics add to this picture. Suicide rates for teenagers have more than doubled since 1965.<sup>23</sup> Overall, ten percent of adolescent boys and eighteen percent of adolescent girls have attempted suicide.<sup>24</sup> The United States also has the highest teenage pregnancy rates of any Western country, twice that of any other industrialized country.<sup>25</sup> The incidence of sexually transmitted diseases among young people have reached epidemic proportions. The number of young people diagnosed with gonorrhea and syphilis has increased a thousandfold since 1965.<sup>26</sup> The number of teenagers between the ages of fourteen and seventeen arrested per year has increased nearly thirtyfold since 1950.<sup>27</sup> Every day 135,000 American students bring guns to school.<sup>28</sup>

#### VI. TOWARDS DEVELOPMENTALLY APPROPRIATE LAWS FOR CHILDREN AND YOUTH

The contradictory messages being given to young people by society in general, and the legal system in particular, contributes to the stresses young people experience, and thus to the "new morbidity." In many cases the contradictions in the laws regarding the children and youth derive from the fact that in some cases the law takes account of human development, whereas in others it does not. However, human development must always be taken into account when dealing with the young. This is particularly true today because we now have more than a century of research on all facets of child growth and development.

Lawmakers must come to appreciate that recognizing the limits imposed by children's developmental level is in no way limiting their rights. In fact, just the opposite is true. Only when we recognize the limits as well as the capacities of children and youth do we really accord them their full rights under the law.

This need (of children for parental love, affection, discipline and guidance) suggests a general right of children to be protected from their own immaturity. Of course each child requires gradually increasing freedom to make important choices, even at the risk of harming himself through bad judgments. The capacity to weigh risks in making personal choices is only developed as children live with, and learn from, the unpleasant consequences of their decisions. For this reason, adolescence should be seen as a time in which children are given low-risk levels of autonomy as a way of learning how to assume greater responsibility. Still, in a paradoxical but important sense, a child has a basic right to be protected against complete freedom.<sup>29</sup>

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23. *Id.*

24. CODE BLUE, *supra* note 19, at 2.

25. *See id.* at 3.

26. YOUTH INDICATORS, *supra* note 18, at 95.

27. *Id.* at 115.

28. CODE BLUE, *supra* note 19, at 4.

29. Hafen, *supra* note 15, at 446.

Within the postmodern perspective, the law, like every other human invention, is necessarily couched in the perceptions and discourse of its social and historical context. A major tenet of postmodernism is the importance of the particular and the doubtfulness of universals. In many ways, the insistence on children's rights as on a par with adult rights is an appeal to universals that is a throw-back to modernism. Paradoxically, therefore, many of the older laws, geared to protecting children, were more postmodern than many of the newer laws seeking to protect children's rights.

