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CHILDREN’S RIGHTS TO A LIVABLE FUTURE

Richard Delgado

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# CHILDREN'S RIGHTS TO A LIVABLE FUTURE

Richard Delgado\*

*Are persuasion and advocacy as valuable for young people asserting their rights as they are for their elders? This Article suggests that, in many cases, they are not. With disputes over global warming, for example, schoolchildren and young adults will confront futures in a world wracked by climate change for a considerably longer period than adults who are middle-aged or older. Adults thus may find it easy to compromise in search of a quick return, while young people will confront decades of living with a rapidly warming world. Young people may also experience difficulty being taken seriously for reasons that have little to do with traditional cost-benefit analysis or even such obstacles as lack of standing.*

*The Marjory Stoneman Douglas High School students' campaign for gun control, the various Juliana-type lawsuits to hold the older generation responsible for global warming, and the new genre of "kid lit" authors who write about resistance show that a new wave is rising in which the young assert advocacy rights that are new, forceful, and difficult to accommodate within the existing paradigm.*

*In the following Chronicle, part of a long-running series, my alter ego Rodrigo, himself the father of a precocious teenager, puts forward the case for the world's youth activists. As in previous encounters, "the Professor" presses him, pointing out that youth may be self-centered, lacking in judgment, and prone to fads. The two conclude by agreeing that society needs both the kind of future-oriented thinking that the young excel at and the seasoned wisdom of their seniors, with social conditions and needs determining the optimal balance of each.*

## INTRODUCTION: INTRODUCING RODRIGO

I was in my office performing a maddeningly humdrum task—checking my grading curve to make sure it didn't deviate too much from the official one the dean wanted—when a knock on my door startled me out of my torpor. "It's me, Rodrigo," the voice from outside said.<sup>1</sup> "I saw your light on and thought I'd drop in."

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\* John J. Sparkman Chair, The University of Alabama School of Law. Thanks to Jean Stefancic, David Hathcock, and Chisolm Allenlundy for incisive comments and suggestions.

1. See generally Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) [hereinafter *Chronicle*] (introducing Rodrigo). The son of an African-American serviceman and an Italian mother, Rodrigo was born in the United States but raised in Italy, where his father served at a military outpost. *Id.* at 1359; Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503, 503–04 (1994) [hereinafter *Eighth Chronicle*]. Rodrigo is the half brother of famed civil rights super lawyer Geneva Crenshaw, *Chronicle, supra*, at 1359, 1359 n.4, a figure created by Derrick Bell. See DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 18 (1987). Rodrigo graduated from the base high school, *Chronicle, supra*, at 1359, then attended an Italian university and "the oldest law school in the world," graduating near the top of his class. Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581, 1586 (1993) [hereinafter *Fifth Chronicle*]. We met when he sought me out, on his sister's recommendation, on a return trip to the States to explore LL.M. programs in preparation for a career in teaching law. See *Chronicle, supra*, at 1359. Both he and his narrator and straight man, "the Professor," are fictional characters, composites of persons I have known and not to

The door opened. "What a surprise!" I said. "What brings you around?"

"I'm shepherding Gus through an interview for a summer program for pre-high school students. Here at your very university, in fact. I didn't think you'd be back from the hospital yet, or I would have called ahead of time."

"I healed faster than the doctors expected. All I need now is a cane for long walks or rough terrain. I didn't realize Gus was that age. How old is he now?"

"Thirteen. The program is for promising ninth graders, but one of his teachers nominated him even though he's a year younger than their usual cut-off. He's really keen on it because they get to live in the dorm."

"They grow up fast, don't they?" I asked, gesturing him to take a seat on my couch. "The last time I saw him, he was just a short, stubby guy with a sharp sense of humor and a love of video games."

"They do. He's almost as tall as I am. Last night he told me he wants to go to Sweden this summer. After the program ends, that is."

"Sweden? What's the attraction?"

"He saw a young Swedish girl on TV the other day talking about global warming. Since then, he's been doing nothing but reading up on the subject. I think he wants to meet her. We may have a budding activist on our hands."

"Is she the one who is leading a national school strike?"

"The very one. Her idea is catching on, and not just over there. Giannina and I, of course, agree with what she's doing, although we aren't keen on Gus going on such a long trip by himself."

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be identified with any of them in particular. Despite their age difference, the two become good friends and discuss various topics. *See generally Chronicle, supra* (discussing affirmative action and the decline of the West); *Eighth Chronicle, supra* (discussing black crime); Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CALIF. L. REV. 61 (1996) (discussing clinical theory); *Fifth Chronicle, supra* (discussing the critique of normativity); Richard Delgado, *Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545 (1995) [hereinafter *Final Chronicle*] (discussing narrative jurisprudence); Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993) (discussing legal rules); Richard Delgado, *Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994) (discussing the rule of law); Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993) (discussing law and economics); Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1993) (discussing Enlightenment-style political theory); Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993) (discussing relations between men and women); Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995) (discussing affirmative action); Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CALIF. L. REV. 387 (1993) (discussing love); Richard Delgado, *Rodrigo's Thirteenth Chronicle: Legal Formalism and Law's Discontents*, 95 MICH. L. REV. 1105 (1997) [hereinafter *Thirteenth Chronicle*] (discussing legal formalism); Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667 (1997) [hereinafter *Twelfth Chronicle*] (discussing the problem of desperately poor border settlements); Richard Delgado & Noah Markewich, *Rodrigo's Remonstrance: Love and Despair in an Age of Indifference—Should Humans Have Standing?*, 88 GEO. L.J. 263 (2000) (book review) (discussing interracial indifference). During this period, the brash, talented Rodrigo earns his LL.M. degree and embarks on his first teaching position. *Final Chronicle, supra*, at 547 & n.4. The Professor learns that Rodrigo's father's family immigrated to America via the Caribbean. *Twelfth Chronicle, supra*, at 673. His father Lorenzo looks black and identifies as such, but he speaks perfect Spanish. *Id.* He also meets Rodrigo's friend and soul mate Giannina, a playwright and now a law student at a school near Rodrigo. *Thirteenth Chronicle, supra*, at 1108.

"I think I read about her in the *Times*," I said. "Can I offer you a cup of coffee? How much time do we have?"

Rodrigo looked at his watch. "A little over an hour. His interview is over at the Ed School. They told me to stay away until it's over."

"If it were me, I think I'd say 'No' to that trip," I said, mindful of my role as my young friend's voice of caution. "He's too young. But I'm glad to talk it over. You could start by giving me a bit of background."

"Let me do the honors," he said, gesturing toward my new espresso machine on a table in the corner of my office. "I used to have one like it back in Italy."

As he was doling out the coffee beans and filling the machine from a pitcher of fresh water, I thought how youthful he still looked. I recalled how we had met, years ago, when he dropped in on me at the recommendation of his half sister, Geneva Crenshaw, seeking advice about American LL.M. programs in hopes of launching a career as a law professor. He had told me about his family and how, after a childhood in the States, he had spent many years in Italy. I learned about his college and law school years there and his hopes to contribute to the land of his birth.

Despite our age difference, we remained good friends, meeting over the years at family gatherings, the occasional conference, and sometimes by chance, discussing affirmative action, love, the decline of the West, law and economics, and a host of other topics.<sup>2</sup>

#### I. IN WHICH RODRIGO FILLS THE PROFESSOR IN ON RECENT YOUTH MOVEMENTS

Minutes later, he set our steaming cups of cappuccino with froth on top on my office table. I indicated the condiments on a nearby shelf, and while he was stirring in his traditional three tablespoons of sugar, I said, "Back to those youth movements. I gather the Swedish girl's is just one of many."

"Her name is Greta," he said. "And there have indeed been many others. Sometimes they file lawsuits demanding that adults take action to secure a world free of pollution and global warming.<sup>3</sup> Others demonstrate on the

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2. See sources cited *supra* note 1. One of the reasons why I have written the *Rodrigo* series as I have is to provide readers an opportunity to see how intellectuals of color interact with each other.

3. See Timothy Egan, *Your Public Lands Are Killing You*, N.Y. TIMES (Mar. 29, 2019), <https://www.nytimes.com/2019/03/29/opinion/trump-climate-lawsuit-juliana.html?searchResultPosition=1>; Sarah Kaplan & Brady Dennis, 'Our Future Is What We Are Fighting For,' WASH. POST (Mar. 13, 2019), [https://www.washingtonpost.com/graphics/2019/national/climate-change-kids/?noredirect=on&wpisrc=nl\\_most&wpmmm=1](https://www.washingtonpost.com/graphics/2019/national/climate-change-kids/?noredirect=on&wpisrc=nl_most&wpmmm=1); *infra* notes 35–40, 54–60 and accompanying text.

streets for gun control.<sup>4</sup> What they have in common is that young people are making claims against the adult generation for a livable future.”<sup>5</sup>

“I’ve heard of that lawsuit you mentioned. In Oregon, wasn’t it?”

“You’re thinking of *Juliana*,<sup>6</sup> but more like it are sprouting up everywhere. Other actions take the form of street protests.”<sup>7</sup>

“As in Parkland, Florida,” I said.

“Yes, and authors of children’s and young-adult literature have begun creating books about principal characters who work for a better planet.<sup>8</sup> After seeing Greta on the tube, little Gus toted a stack of them home from the library the other day.”

“You said that incidents like these are breaking out all over, not just in Oregon and Sweden.”

“They are—Los Angeles, France, Belgium, England, Pakistan, to name just a few. We may be seeing the birth of a new type of consciousness.”<sup>9</sup>

“Movements often have long roots. Have you looked for antecedents?”

“They go back at least to the Children’s Crusade<sup>10</sup> and reformers such as Charles Dickens.<sup>11</sup> More recently, we’ve had cases such as *Hammer v. Dagenhart*<sup>12</sup>—the child-labor case—and *DeShaney v. Winnebago County*.”<sup>13</sup>

4. See *infra* note 32.

5. See Chris D’Angelo, *The Climate Kids Are All Right*, HUFFPOST (Apr. 21, 2019, 8:00 PM), [https://www.huffpost.com/entry/youth-climate-earth-day-thunberg-villasenor\\_n\\_5cb5097ae4b082aab08abaff?ncid=newstushpmgnews\\_TheMorningEmail\\_042219&gucounter=2](https://www.huffpost.com/entry/youth-climate-earth-day-thunberg-villasenor_n_5cb5097ae4b082aab08abaff?ncid=newstushpmgnews_TheMorningEmail_042219&gucounter=2) (noting that on a recent Friday “[a]n estimated 1.4 million young people in more than 100 countries went on strike from school” to protest inaction on climate change); Bill McKibben, *Notes from a Remarkable Political Moment for Climate Change*, NEW YORKER (May 1, 2019), <https://www.newyorker.com/news/daily-comment/notes-from-a-remarkable-political-moment-for-climate-change> (noting the multitude of protests that have broken out over climate change, a number of them featuring children concerned about the future of the world in which they will grow up); *infra* notes 29–65 and accompanying text.

6. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016).

7. See MICHIKO KAKUTANI, *THE DEATH OF TRUTH* 171 (2018) (describing the Parkland school shooting survivors as “inspiring”); Margaret Kramer & Jennifer Harlan, *Parkland Shooting: Where Gun Control and School Safety Stand Today*, N.Y. TIMES (Feb. 13, 2019), <https://www.nytimes.com/2019/02/13/us/parkland-shooting.html> (describing the multi-pronged, national, student-led campaign to reform gun control laws); McKibben, *supra* note 5; *infra* notes 29–53 and accompanying text (discussing the events in Florida, Oregon, Europe, and elsewhere).

8. See *infra* note 66 and accompanying text.

9. See generally Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2740 (2014) (noting how social movements often change norms and laws); Niall Ferguson & Eyck Freymann, *The Coming Generation War*, ATLANTIC (May 6, 2019), [https://www.theatlantic.com/ideas/archive/2019/05/coming-generation-war/588670/?wpmm=1&wpisrc=nl\\_todayworld](https://www.theatlantic.com/ideas/archive/2019/05/coming-generation-war/588670/?wpmm=1&wpisrc=nl_todayworld) (noting that major intellectual historians are beginning to revisit Arthur Schlesinger’s thesis about political cycles fueled by changing generational values and needs).

10. Gary Dickson, *Children’s Crusade*, ENCYCLOPEDIA BRITANNICA (Mar. 18, 2018), <https://www.britannica.com/event/Childrens-Crusade>.

11. See, e.g., CHARLES DICKENS, *OLIVER TWIST* (PENGUIN CLASSICS 2010) (1838); see also *infra* notes 21–24 and accompanying text.

12. *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918) (invalidating a federal statute prohibiting interstate shipment of goods produced by child labor), *overruled by* *United States v. Darby*, 312 U.S. 100, 116–17 (1941).

“That’s the ‘Poor Joshua’ case, isn’t it?”

“It is. And on the common law side, we have doctrines such as *in loco parentis* and ‘best interest of the child’ in which adults essentially make all major decisions on children’s behalf. But you do have a few cases like *Tinker v. Des Moines Independent School District*, upholding the right of children to protest war.”<sup>14</sup>

“But many more go the other way,” I pointed out. “Some with presidential power behind them. Consider, for example, the Trump Administration’s treatment of unaccompanied minor immigrants.<sup>15</sup> You couldn’t have a clearer example of an adults-know-best doctrine than that. But you seem to believe that the recent uprisings are a sign of something larger. Do you have a hypothesis of some sort?”

“I do,” he said, leaning forward with a serious look on his face. “I think that a structural feature of adult reasoning, especially about matters of generational survival and transcendence like global warming and environmental protection, interferes with the ability of the young to entrust decisions like these to adult minds. Adults—particularly those making decisions about energy, extraction, global warming, and guns—too readily sacrifice the interests of the young for their own in the form of short-term returns and quick profits. Compared to children, members of the adult generation like you and me will enjoy relatively short life expectancies, perhaps twenty or thirty years. Thus, the costs of pollution or global warming, for example, will weigh comparatively lightly on the adults, who will have to live with them for a few decades at most.<sup>16</sup> By contrast, children will bear them for the rest of their lives, perhaps sixty or seventy years. They will also face the prospect of their own children facing a future as blighted as theirs.”<sup>17</sup>

13. *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989).

14. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (protecting students’ right to free speech where such speech does not disturb school functions).

15. See THE NEW DEPORTATIONS DELIRIUM 19 (Daniel Kanstroom & M. Brinton Lykes eds., 2015); Kirk Semple & Miriam Jordan, *For Families Split at Border, an Anguished Wait for Children’s Return*, N.Y. TIMES (Sept. 1, 2018), <https://www.nytimes.com/2018/09/01/world/americas/immigrant-families-separation-border.html> (describing the U.S. policy of separating parents from their children at the border).

16. See Office of the High Comm’r for Human Rights, *Input from a Child Rights Perspective to the High Level Political Forum on Sustainable Development*, U.N. Doc. A/HRC/34/27, at 6–8 (July 2017), <https://sustainabledevelopment.un.org/content/documents/16641OHCHR.pdf> (describing the likely effects on children). See generally *Climate Change*, UNITED NATIONS, <https://www.un.org/en/sections/issues-depth/climate-change/index.html> (last visited Sept. 14, 2019) (explaining the dramatic impacts of climate change and emphasizing that future impacts will be costly and difficult to adapt to); Nathaniel Rich, *Losing Earth: The Decade We Almost Stopped Climate Change*, N.Y. TIMES MAG. (Aug. 1, 2018), <https://www.nytimes.com/interactive/2018/08/01/magazine/climate-change-losing-earth.html?smid=tw-nytmag&smtyp=cur> (noting the evidence for climate change and its likely costs).

17. See Eugene Robinson, *A ‘Green New Deal’ Sounds Like Pie in the Sky. But We Need It*, WASH. POST (Feb. 7, 2019), [https://www.washingtonpost.com/opinions/a-green-new-deal-sounds-like-pie-in-the-sky-but-we-need-it/2019/02/07/8cc891c4-2b1b-11e9-b011-d8500644dc98\\_story.html](https://www.washingtonpost.com/opinions/a-green-new-deal-sounds-like-pie-in-the-sky-but-we-need-it/2019/02/07/8cc891c4-2b1b-11e9-b011-d8500644dc98_story.html) (“Our grandchildren and great-grandchildren will judge us by how well we meet the challenge, and so far we are failing.”).

"I see. The benefits of activities like mining, polluting, or fracking will accrue immediately to the heads of the industries in question, while they incur few costs. The children's equation is just the reverse, yet First Amendment law, standing doctrine, traditional cost-benefit analysis, and best-interest-of-the-child decision-making give slight weight to their interests in a survivable planet and society.<sup>18</sup> A nice, simple insight with important implications. Some of which are easy to exaggerate, unfortunately. But I'll save that for later."

"Many of the commentators are on your side, Professor. I'll grant you that. They think that if the *Juliana* case reaches the Supreme Court, it will slap it down.<sup>19</sup> But that's often the fate of resistance movements, like abolition, that have often proceeded regardless of whether the law made an accommodation for them.<sup>20</sup> Eventually, we're likely to see administrative, environmental, and free speech law change to afford children and young adults a greater role in decision-making than the one they enjoy now."

I looked up. "I don't want to seem like a curmudgeon, but I must say that I have my doubts. Go ahead, though. I want to hear more."

"The shift started a few years ago," he said.<sup>21</sup> "Joe Sax's environmental trust theory,<sup>22</sup> which arrived in 1970 but with roots much earlier,<sup>23</sup> is just now catching on.<sup>24</sup> It may require us to look more closely at what the children are saying.<sup>25</sup> His work, John Rawls's difference principle,<sup>26</sup> critical race theory (es-

18. See John Lanchester, *Two New Books Dramatically Capture the Climate Change Crisis*, N.Y. TIMES (Apr. 12, 2019), <https://www.nytimes.com/2019/04/12/books/review/david-wallace-wells-uninhabitable-earth-nathaniel-rich-losing-earth.html?searchResultPosition=16> (reviewing recent writings that have posed this very problem); *infra* notes 67–72 and accompanying text. See generally AVNER DE-SHALIT, WHY POSTERITY MATTERS: ENVIRONMENTAL POLICIES AND FUTURE GENERATIONS (1995) (advancing the philosophical case for taking account of the interests of future generations in current policymaking).

19. *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016); see, e.g., David Wallace-Wells, *What If the Courts Could Save the Climate?*, N.Y. MAG. (Nov. 29, 2018), <http://nymag.com/intelligencer/2018/11/julianna-v-united-states-how-courts-could-save-the-climate.html>; Sophie Yeo, *Will the Juliana Climate Case Ever Go to Court?*, PAC. STANDARD (Nov. 27, 2018), <https://psmag.com/environment/will-the-juliana-youth-climate-case-ever-go-to-court>.

20. See Guinier & Torres, *supra* note 9, at 2744–49. See generally GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

21. One sign of how the new youth movement is beginning to break into national consciousness is the conspicuously large number of very young candidates running for political office. See Tiara Chiamonte, Madeleine Stix & Samantha Guff, *Meet the Future of American Politics*, CNN (Oct. 30, 2018, 1:08 PM), <https://www.cnn.com/2018/10/30/politics/young-candidates-midterm-elections/index.html>; Guinier & Torres, *supra* note 9, at 2749–56 (discussing "demosprudence," a new interpretive principle); Azi Paybarah, *Alexandria Ocasio-Cortez Will Push Washington. Will Washington Push Back?*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/nyregion/ocasio-cortez-congress-washington.html>.

22. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 485–89 (1970) (describing that theorists consider the earth and its resources as goods that mankind holds in trust).

23. *Id.* at 475–78 (discussing the roots of the author's theory in earlier thought).

24. See *supra* notes 22–23; *infra* notes 36, 38–39 (citing an environmental trust theory as a basis for suits to counter climate change).

25. See generally ARLIE RUSSELL HOCHSCHILD, STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT (2016) (discussing the costs of environmental damage in the South and explaining how an empathy gap separates society into two groups, conservatives and liberals); Mark



pecially interest convergence),<sup>27</sup> and narrative theory<sup>28</sup> all suggest the need to take account of global changes with unmistakable intergenerational components. That's my theory in a nutshell."

## II. EXAMPLES OF CHILDREN'S MOVEMENTS

"An obligation to posterity! Very inspiring," I said. "But I'm not sure how far you can generalize based on the handful of examples you've mentioned. And that mental kink you mentioned about adults being prone to short-term thinking may be true of some, but surely not all. It doesn't apply to gun rights in the same way as it does to global warming, since one represents a failure of foresight but the other doesn't. And children are notoriously prone to immature thought. I could name many examples. But why don't you go first?"

"I like the way you push me, Professor. Let me take up those challenges of yours, beginning with more examples."

"Nothing helps a listener get a better handle on a new thesis than lots of examples," I said. "But first, how about another cup of coffee?"

"Sure," he said, slurping the last few drops from the bottom of his cup and pouring each of us another from the carafe on the espresso machine. He then continued, "As you read in that *New York Times* article, children everywhere are beginning to assert claims to a livable future. Fifteen-year-old Greta appeared on American TV to explain her role as leader of a movement called

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Bauerlein, *Liberals, Conservatives, and the Haidt Results*, CHRON. HIGHER ED. (April 23, 2012), <https://www.chronicle.com/blogs/brainstorm/liberals-conservatives-and-the-haidt-results/46113> (reviewing recent research on differences between conservative and liberal thought, including that of prominent social psychologist Jonathan Haidt).

26. The principle holds that the costs of rules and laws should fall on those most able to bear them and never on the least fortunate. JOHN RAWLS, A THEORY OF JUSTICE 78 (1971).

27. See RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 20–24 (2001) (ebook) (describing hallmark features of critical race scholarship); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (discussing how to defend this landmark decision against the charge that it violates the rule that Supreme Court decisions should rest on the neutral principles of constitutional law).

28. See Michelle Alexander, *What If We're All Coming Back?*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/2018/10/29/opinion/climate-change-politics-john-rawls.html> ("The prospect of being reborn as a poor person in a world ravaged by climate change could lead us to very different political decisions.").

*skolstrejt*,<sup>29</sup> in which schoolchildren go on strike until adults begin remedying social wrongs such as global warming.”<sup>30</sup>

“How did her parents react?”

“Her parents objected, asking whether there was another way she could make her voice heard. But she replied ‘No, this is what I am going to do. . . . I want to be able, when I grow up, to look back and say, “I did what I could back then, and it is my moral duty to do what I can.”’<sup>31</sup>

“Despite people like me, I guess. If, for the purpose of this conversation, I’ve been assigned the curmudgeon’s part, I’ll play it to the hilt. I actually subscribe to it, by the way.”

“In that case, consider a few more examples. In Parkland, Florida, David Hogg, Emma González, and hundreds of their classmates marched to demand that their state legislature enact gun control laws.<sup>32</sup> Marjory Stoneman Douglas

29. On GPS: *The Teenager Who Stunned COP24* (CNN television broadcast Dec. 23, 2018), <https://www.cnn.com/videos/tv/2018/12/22/exp-gps-1223-greta-thunberg.cnn>; see also Somini Sengupta, *Becoming Greta: ‘Invisible Girl’ to Global Climate Activist, with Bumps Along the Way*, N.Y. TIMES (Feb. 18, 2019), <https://www.nytimes.com/2019/02/18/climate/greta-thunberg.html?action=click&module=Editors%20Picks&pgtype=Homepage>. Greta has now turned sixteen years old and is leading international strikes and protests. See Martin Belam et al., *Greta Thunberg: Teenager on a Global Mission to ‘Make a Difference’*, GUARDIAN (Sept. 26, 2019), <https://www.theguardian.com/environment/2019/sep/26/greta-thunberg-teenager-on-a-global-mission-to-make-a-difference>.

30. When the interviewer asked why she was protesting, she reported that she felt compelled to do something. See CNN, *supra* note 29. She also said that she was inspired by American high school students’ demonstrations against guns. Masha Gessen, *The Fifteen-Year-Old Climate Activist Who Is Demanding a New Kind of Politics*, NEW YORKER (Oct. 2, 2018), <https://www.newyorker.com/news/our-columnists/the-fifteen-year-old-climate-activist-who-is-demanding-a-new-kind-of-politics>.

31. CNN, *supra* note 29. Her movement has apparently caught on. At the time of writing, demonstrations were breaking out all over Europe. Milan Schreuer, Elian Peltier & Christopher F. Schuetze, *Teenagers Emerge as a Force in Climate Protests Across Europe*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/2019/01/31/world/europe/climate-change-protestsstudents.html?searchResultPosition=1>; Griff Witte, Sarah Kaplan & Brady Dennis, *School Climate Strikes Draw Thousands to the Streets in Cities Around the Globe*, WASH. POST (Mar. 15, 2019), [https://www.washingtonpost.com/world/school-climate-strikes-draw-thousands-to-the-streets-in-cities-across-the-globe/2019/03/15/ad365672-402d-11e9-85ad-779ef05fd9d8\\_story.html](https://www.washingtonpost.com/world/school-climate-strikes-draw-thousands-to-the-streets-in-cities-across-the-globe/2019/03/15/ad365672-402d-11e9-85ad-779ef05fd9d8_story.html); Ceylan Yeginsu, *Skippping School to Save the Earth*, N.Y. TIMES (Feb. 14, 2019), <https://www.nytimes.com/2019/02/14/world/europe/uk-climate-change-student-protest.html?searchResultPosition=1> (“Thousands of young people in Britain are expected to abandon their classrooms and take to the street . . . to join a growing movement to protest the lack of action on climate change. Inspired by a 16-year-old Swedish climate activist, Greta Thunberg . . . young climate campaigners are planning to walk out of British schools, colleges, and universities across 40 towns and cities on Friday.”). But in the United States, at least one group of schoolchildren got the cold shoulder. At the time this Article was written, a group of schoolchildren, calling themselves the “Sunrise Movement,” received an unfavorable reception by Senator Dianne Feinstein. See Michael Brice-Saddler, *Schoolchildren Debate Dianne Feinstein on ‘Green New Deal.’ Her Reply? ‘I Know What I’m Doing.’*, WASH. POST (Feb. 23, 2019), <https://www.washingtonpost.com/politics/2019/02/23/schoolchildren-debate-dianne-feinstein-green-new-deal-her-reply-i-know-what-im-doing/>.

32. Maggie Astor, *Let Us Have a Childhood: On the Road with the Parkland Activists*, N.Y. TIMES (Aug. 15, 2018), <https://www.nytimes.com/2018/08/15/us/politics/parkland-students-voting.html> (discussing the Parkland uprising and its leadership); see also Sofia Barrett, *A Year After the School Massacre, Parkland Survivors Vow to Keep Pushing for Gun Control*, CNN (Feb. 13, 2019), <https://www.cnn.com/2019/02/13/politics/parkland-anniversary-hogg-deutsch-cnn-tv/index.html> (interviewing David Hogg and Ryan Deutsch about their activism efforts, which have resulted in changes to gun control laws in their state, as well as in numerous other states); Kramer & Harlan, *supra* note 7.

High School was, of course, the site of a recent shooting in which many of Hogg's and González's classmates died.<sup>33</sup> Later, the two published books, went on national television, and appeared on a soundstage in Washington, D.C., demanding safer schools and fewer guns."<sup>34</sup>

"I didn't know about the books," I said. "I respect people who write books. I suppose I should keep an open mind—about the Florida kids, at least."

"There's more," he said. "In *Juliana*,<sup>35</sup> several Oregon youths sued to force the federal government to take action to counter global warming.<sup>36</sup> The case has withstood motions to dismiss in both the circuit court and U.S. Supreme Court and may be bound for trial.<sup>37</sup> Young people are bringing similar lawsuits in Norway,<sup>38</sup> Pakistan,<sup>39</sup> and New Zealand.<sup>40</sup> And the school-skipping movement has citizens up in arms in Europe and elsewhere."

"I assume Greta is behind much of it?"

33. See *List of School Shootings in the United States*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_school\\_shootings\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/List_of_school_shootings_in_the_United_States) (last visited Sept. 13, 2019) (listing hundreds of shootings going back to colonial times, including Littleton, Colorado; Aurora, Colorado; and Newtown, Connecticut).

34. See generally THE FOUNDERS OF MARCH FOR OUR LIVES, GLIMMER OF HOPE: HOW TRAGEDY SPARKED A MOVEMENT (2018). See also Emma González, *A Young Activist's Advice: Vote, Shave Your Head and Cry Whenever You Need to*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/opinion/sunday/emma-gonzalez-parkland.html?searchResultPosition=1> ("This isn't something we are ever going to forget about. This isn't something we are ever going to give up on."); Emanuella Grinberg & Nadeem Muaddi, *How the Parkland Students Pulled Off a Massive National Protest in Only 5 Weeks*, CNN (Mar. 26, 2018, 9:17 AM), <https://www.cnn.com/2018/03/26/us/march-for-our-lives/index.html> (discussing the Parkland movement and its tactics). The Florida legislature responded by forming a commission and holding hearings, and police departments in the state changed how they responded to emergencies at schools. Terry Spencer, *Parkland High School Shooting Generating Change*, TUSCALOOSA NEWS (Dec. 2, 2018, 10:00 PM), <https://www.tuscaloosanews.com/news/20181202/parkland-high-school-shooting-generating-change>. The Parkland students were not the only ones to demand action. See, e.g., Frances Coleman, *Dear Adults: Do Something About the School Shootings*, AL.COM (May 10, 2019), <https://www.al.com/opinion/2019/05/dear-adults-do-something-about-the-school-shootings.html>.

35. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016).

36. *Id.*; see also Brooke Jarvis, *Climate Change Could Destroy His Home in Peru. So He Sued an Energy Company in Germany*, N.Y. TIMES (Apr. 9, 2019), <https://www.nytimes.com/interactive/2019/04/09/magazine/climate-change-peru-law.html> (noting the legal ingenuity of the children's suit); John Schwartz, *Young People Are Suing the Trump Administration over Climate Change. She's Their Lawyer*, N.Y. TIMES (Oct. 23, 2018), <https://www.nytimes.com/2018/10/23/climate/kids-climate-lawsuit-lawyer.html?searchResultPosition=1> (noting that the suit derives from Sax's public trust doctrine, that the Children's Trust plans to file suit in almost every state, and that they regard standing as their major obstacle).

37. *Juliana*, 217 F. Supp. 3d at 1276. Many believe that even if the children are successful, the case will be overturned in the Supreme Court. See, e.g., Wallace-Wells, *supra* note 19; Yeo, *supra* note 19.

38. Tone Sutterud & Elisabeth Ulven, *Norway Sued over Arctic Oil Exploration Plans*, GUARDIAN (Nov. 14, 2017), <https://www.theguardian.com/environment/2017/nov/14/norway-sued-over-arctic-oil-exploration-plans> (discussing a lawsuit brought against Norway by Greenpeace and Youth and Nature). Other organizations interested in suits of this type include Earthjustice and the Sierra Club.

39. Beate Sjøfjell, *Doing by Suing: The International Trend of Climate Lawsuits*, CICERO CTR. FOR INT'L CLIMATE RES. (Nov. 16, 2017), <https://www.cicero.oslo.no/en/posts/klima/doing-by-suing>.

40. *Id.* (stating that, while not every lawsuit is successful, there have been victories thus far).

"She is. The word spreads rapidly, especially among the young.<sup>41</sup> Tens of thousands skipped school the other day in Belgium to demonstrate against climate change."<sup>42</sup>

"Tens of thousands, you say?"

"That's right. In Germany, France, Sweden, Switzerland, and other countries, activists—young and old—gathered without much planning except on social media, apparently.<sup>43</sup> In Brussels, crowds of protesters grew to an estimated 100,000 people.<sup>44</sup> Eighty thousand protested in France.<sup>45</sup> They called for strikes to combat global warming, scolded global leaders, and demanded that tycoons meeting in Davos take action to preserve the world's future."<sup>46</sup>

He whipped out and read from a much-thumbed newspaper article: "A seventeen-year-old protester named Axelle Kiambi, who protested in Brussels with her sisters, Pauline and Elisa, said, 'Most older people do not feel the urgency young people do about global warming. . . .'<sup>47</sup> One of her sisters said, '[W]e want to be on the right side of history. . . . It is time for the government to act.'<sup>48</sup> 'In France, . . . an online petition demanding climate action by the government has gathered more than 2.1 million signatures.'<sup>49</sup> 'In Berlin, about 10,000 climate activists . . . demonstrated in front of the Ministry of Economics and Technology, joined by the Chinese dissident artist Ai Weiwei.'<sup>50</sup> After meeting with activists, the Minister of Economics and members of the country's coal commission recommended the next day that Germany stop using coal-generated electricity by 2038."<sup>51</sup>

"Impressive," I said. "I had no idea."

"Some of the protesters wanted even more drastic action," he said, whipping out a second article. "In Brussels, an eighteen-year-old named Liam wondered whether the movement would garner more attention by being more disruptive."<sup>52</sup> He commented, 'Most adults probably think it's cute that chil-

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41. See Kayla Epstein & Juliet Eilperin, *Greta Thunberg Had One Question at the U.N. Climate Summit: 'How Dare You?'*, WASH. POST (Sept. 23, 2019, 1:18 PM), [https://www.washingtonpost.com/climate-environment/2019/09/23/greta-thunberg-vows-that-if-un-doesnt-tackle-climate-change-we-will-never-forgive-you/?wpisrc=nl\\_politics-pm&wpm=1](https://www.washingtonpost.com/climate-environment/2019/09/23/greta-thunberg-vows-that-if-un-doesnt-tackle-climate-change-we-will-never-forgive-you/?wpisrc=nl_politics-pm&wpm=1).

42. Schreuer, Peltier, & Schuetze, *supra* note 31; see also Yeginsu, *supra* note 31.

43. Schreuer, Peltier, & Schuetze, *supra* note 31.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*; see also Yeginsu, *supra* note 31 (quoting a British schoolchild saying, "The future of our planet is looking really bleak, and all the politicians are asleep at the wheel. We have to wake them up, and I think thousands of kids on the streets will do just that.").

48. Schreuer, Peltier, & Schuetze, *supra* note 31.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

dren protest. . . . But maybe we should change the timing of the protests to rush hour.”<sup>53</sup>

“Kids are certainly out on the streets,” I said. “Do you know of any more action on the legal front?”

“I do. Not long ago, a student law clerk from Alabama contributed to settling three class actions brought by poor children residing in minority neighborhoods of Los Angeles to compel the city government to cease granting automatic permits for oil drilling near the children’s homes.<sup>54</sup> The children maintained that petrochemical giants were defiling areas already heavily polluted.<sup>55</sup> Based implicitly on Rawlsian ideas, especially the difference principle<sup>56</sup> and the veil of ignorance,<sup>57</sup> the suit asked zoning authorities to take into account the inequity of treating pollution-infested areas as convenient dumping grounds for more of the same.<sup>58</sup> Note their choice of defendant, Professor, exposing as it did the city authorities’ role in inflicting routine harm on some of their most underprivileged constituents. If the children had instead sued the major petrochemical companies, they likely would have been crushed. Finding themselves very much put on the spot, the authorities agreed to evaluate pollution permits with the aid of an elaborate map and spreadsheet, which contained measures of existing pollution for each census tract in the city.<sup>59</sup> The children’s lawyers hope to persuade the legislature to adopt the same approach for the entire state.”<sup>60</sup>

“Intriguing,” I conceded. “I love maps, being from a generation before GPS technology. And their choice of defendant was, as you say, inspired. Any more U.S. cases in that vein?”

“One more that I know of, although it doesn’t concern the environment. A group of high school students in Tucson sued state authorities for canceling a program of Mexican-American studies that had been highly popular in

53. *Id.*

54. See generally *Law Student Brings Los Angeles Experience to Alabama*, U. ALA. SCH. LAW, <https://www.law.ua.edu/blog/news/law-student-brings-los-angeles-experience-to-alabama/> (last visited Sept. 15, 2019) [hereinafter *Settlement*].

55. Interview with Gonzalo Rodriguez, Law Student, Univ. of Ala. Sch. of Law, in Tuscaloosa, Ala. (Oct. 10, 2016) [hereinafter Interview]. The added pollution included benzene, greenhouse gases, noise, and vibration from oil derricks located within feet of schools and homes. *Id.*

56. See RAWLS, *supra* note 26, at 75–83; see *supra* text accompanying note 26 (describing this principle).

57. See RAWLS, *supra* note 26, at 136 (proposing that citizens only enact laws that they would agree to if they were unaware of what position in society they would occupy under a regime of such laws).

58. See generally *Settlement*, *supra* note 54.

59. Interview, *supra* note 55.

60. *Id.*; see also Gonzalo E. Rodriguez, *Resistance in the Age of Donald Trump* (2018) (unpublished manuscript) (on file with author) (noting that a “generation that for years found itself maligned by the media as a coddled, entitled, lazy, and narcissistic bunch” is rising to the stage).

the Chicano community.<sup>61</sup> A federal court ruled against them, citing case law upholding the right of educational authorities to make curricular decisions.<sup>62</sup> When counsel for the students pointed out that the state superintendent of education and his colleagues in the legislature had acted out of animus toward the children and their course of study,<sup>63</sup> the Ninth Circuit reversed and remanded the case for a new trial.<sup>64</sup> Later, the trial court found in the kids' favor.<sup>65</sup>

"I can see why you sense a trend. Not that I agree entirely with it, mind you."

"So does the *New York Times*. Spot a trend, I mean. It recently published two stories showing that the authors of children's literature ("kid lit") are beginning to choose themes of resistance and urge children and young adult readers to consider action against social wrongs as thrilling in much the same way as actions by sports or adventure heroes."<sup>66</sup>

61. See *Acosta v. Huppenthal*, No. CV 10-623-TUC-AWT, 2013 WL 871892, at \*1 (D. Ariz. Mar. 8, 2013), *aff'd in part, rev'd in part* *Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015); see also Richard Delgado, Precious Knowledge: *State Bans on Ethnic Studies, Book Traffickers (Librotraficantes), and a New Type of Race Trial*, 91 N.C. L. REV. 1513 (2013) (describing the controversy and litigation that arose out of the cancellation); Marc Lacey, *Rift in Arizona as Latino Class Is Found Illegal*, N.Y. TIMES (Jan. 7, 2011), <https://www.nytimes.com/2011/01/08/us/08ethnic.html> (discussing the furor surrounding the decision).

62. *Acosta*, 2013 WL 871892, at \*5–\*6, \*17.

63. *Arce*, 793 F.3d at 978. The superintendent viewed them as racist and ethnocentric. *Id.* at 973.

64. *Id.* at 990.

65. *Gonzalez v. Douglas*, 269 F. Supp. 3d 948 (D. Ariz. 2017) (Tashima, J.); see also Ruthann Robson, *District Judge Finds Arizona Anti-Ethnic Studies Law Violates Fourteenth and First Amendments*, LAW PROFESSOR BLOGS NETWORK: CONST. L. PROF. BLOG (Aug. 22, 2017), <https://lawprofessors.typepad.com/conlaw/2017/08/district-judge-finds-arizona-anti-ethnic-studies-law-violates-fourteenth-and-first-amendments.html>.

66. See Maria Russo, *Children's Book Authors Are Selling More Than Books. They're Taking A Stand*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/books/childrens-books-authors-activists-politics.html?searchResultPosition=8> (book review); Carvell Wallace, *Two New Audiobooks Inspire Teenagers to Make Real Change*, N.Y. TIMES (Nov. 16, 2018), <https://www.nytimes.com/2018/11/16/books/review/we-are-not-yet-equal-anderson-bolden-we-say-never-again-falkowski-garner.html?searchResultPosition=11> (book review). Authors are writing about social and political issues in the context of their impact on children with increasing frequency. See Julie Hirschfeld Davis, *Why the Government Shut Down*, N.Y. TIMES, Jan. 27, 2019, at MK3, <https://search.proquest.com/docview/2171298645?accountid=14472>; Julie Just, *Picture Book Biographies to Dazzle a Fact-Loving Child*, N.Y. TIMES (Nov. 9, 2018), <https://www.nytimes.com/2018/11/09/books/review/alexandria-giardino-ode-to-an-onion-pablo-neruda.html> (reviewing children's nonfiction books about important social and political issues) (book review); Elian Peltier, *Climate Change Won't Wait*, N.Y. TIMES, Apr. 28, 2019, ("[H]undreds of thousands of young people in more than 100 countries skipped school to demand . . . [action] against climate change. . . . 'Our future is at stake, and we are the first generation that will really see the most impact from climate change.'"). This is not to say that children's movements are completely new. The Middle Ages witnessed the Children's Crusades. See generally GARY DICKSON, *THE CHILDREN'S CRUSADE: MEDIEVAL HISTORY, MODERN MYTHISTORY* (2008) (discussing an ill-fated effort to retake the Holy Land). Later, Charles Dickens and other reformers railed against child labor. See DICKENS, *supra* note 11. Still later, Austrian women and children spearheaded a brief civil war aimed at toppling a fascist government. See MAUREEN HEALY, *VIENNA AND THE FALL OF THE HAPSBURG EMPIRE* 205 (2004).

## III. "DADDY, PLEASE STOP KILLING ME"

After a short pause, while I got a package of Italian almond cookies out of my cabinet and offered them to Rodrigo, who took two, I asked: "OK. You've convinced me that something is going on. You also sketched a reason why it's happening—something to do with differential risk–benefit calculus, right?"

"Yes. It's not only intuitively compelling; it has the advantage of parsimony.<sup>67</sup> Mmm. These are good."

"When adults—especially those in corporate suites—think about actions that have environmental consequences, they are likely to ponder a risk–benefit question framed in a comparatively short time span.<sup>68</sup> Most adults will live only a few decades; the same is true of most corporate shareholders. Grown-ups, caught up in measuring near-term profits against future costs in the form of injuries and deaths from pollution or accidents, may easily decide to incur the risk if they can foresee a prompt gain.<sup>69</sup>

"Children, however, are likely to see things differently. They may see a new smokestack, toxic dump, or law allowing free access to handguns in terms of risks and harms extending for fifty years or longer.<sup>70</sup> This structural feature of environmental thought is heavily oriented toward the adult's point of view and averse to the child's. Young people are beginning to notice this, if only implicitly, and demand that society reexamine environmental thought,

67. See Brian Duignan, *Occam's Razor*, ENCYCLOPEDIA BRITANNICA (Dec. 19, 2018), <https://www.britannica.com/topic/Occams-razor> (explaining the idea, from philosophy of science, that the simplest explanation is apt to be the best one).

68. See Alfred Rappaport, *Executive Incentives vs. Corporate Growth*, HARV. BUS. REV. (July 1978), <https://hbr.org/1978/07/executive-incentives-vs-corporate-growth> (noting the incentive pattern to favor a quick return over long-term growth); Andrew Van Dam & Jeanne Whalen, *U.S. Ranks 25th for Men and 32nd for Women When It Comes to Helping Residents Reach Their Potential*, WASH. POST (Oct. 10, 2018), <https://www.washingtonpost.com/business/2018/10/11/us-ranks-th-men-and-women-when-it-comes-helping-residents-reach-their-potential/> (noting that "government investments in human capital take generations to pay off").

69. See Rappaport, *supra* note 68; Van Dam, *supra* note 68; See generally Coral Davenport & Mark Landler, *Trump Administration Hardens Its Attack on Climate Science*, N.Y. TIMES (May 27, 2019), <https://www.nytimes.com/2019/05/27/us/politics/trump-climate-science.html> (noting that the Trump Administration "has ordered that scientific assessments . . . use only computer-generated climate models that project the impact of climate change through 2040").

70. The reason is that their life spans are apt to be considerably longer than those of the adults. See Angely Mercado, *Why Go to School When You Have No Future?: A Q&A with a 13-Year-Old Climate Striker*, NATION (Mar. 14, 2019), <https://www.thenation.com/article/interview-alexandria-villasenor-climate-striker/> (A schoolgirl from New York, who had been skipping school each Friday to protest on a bench outside the U.N. building, commented, "By the time the youth are in positions of power, it'll be too late to reverse climate change. We have to force politicians to start acting on climate change [now]. Why go to school if we won't have a future?").

free from thought-ending clichés such as best interest of the child<sup>71</sup> or *in loco parentis*.<sup>72</sup>

"That's a plausible argument," I admitted, "although I can see plenty of structural features that weigh on the other side.<sup>73</sup> Also, your detractors are apt to ask, 'What's new?' There have always been conflicts among generations. The old try to suppress the young, make them toe the line, and stop acting out of youthful high spirits. The young demand more autonomy from their elders. Sometimes this breaks out into conflict. You don't need a new consciousness or fancy political theory to understand that."

"No, but it helps," he said. "Generational conflicts can arise for a multitude of reasons. For example, in the Greek myth of Agamemnon, the king of Mycenae killed his own daughter, Iphigenia, in hopes of gaining favor with Artemis, the Olympian goddess of the hunt.<sup>74</sup> There, the motive was simple ambition. Shakespeare, too, wrote about parent-child conflict, *King Lear* being perhaps the best example.<sup>75</sup> There, the reason was simple madness. In the Bible, King Solomon imposed a seeming death sentence on an innocent child being fought over by two women, each of whom claimed to be the child's mother. Fortunately, the tale ended happily."<sup>76</sup>

"Literature is replete with such tales, too," I conceded. "And some of them do turn on future orientation or a lack thereof."

"One modern example that occurs to me is the movie, *The Long, Hot Summer*.<sup>77</sup> Have you seen it, Professor? A rich Southern codger plays two young people against each other in a way that could only lead to the demise of one."<sup>78</sup>

"Teresa and I saw it the other day. She's a big fan of Paul Newman; I liked the codger. His son, Jody, is a spoiled layabout with a beautiful wife (played by Joanne Woodward), who, like her husband, also likes to relax when

71. See generally JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1979) (critiquing this venerable test). See also *In re Gault*, 387 U.S. 1, 36 (1967) ("The child 'requires the guiding hand of counsel at every step in the proceedings against him.'"). The internationally minded reader might note how America's policy toward Puerto Rico and Washington, D.C., infantilizes them by denying them representation at a national level.

72. See Philip Lee, *Student Protests and Academic Freedom in an Age of #blacklivesmatter*, 79 OHIO ST. L.J. 223, 237 (2018) (discussing the doctrine under which colleges and universities stand in the same legal relation to students as their parents); Philip Lee, *The Curious Life of In Loco Parentis at American Universities*, 8 HIGHER EDUC. REV. 65, 66 (2011) (same).

73. See *supra* notes 16–18 and accompanying text (offering several examples of generational conflict).

74. *Agamemnon*, MYTH ENCYCLOPEDIA (2019), <http://www.mythencyclopedia.com/A-Am/Agamemnon.html>.

75. See generally WILLIAM SHAKESPEARE, *KING LEAR* (describing the mad king's mistreatment of his two daughters, especially Cordelia).

76. 1 *Kings* 3:16–28.

77. *THE LONG, HOT SUMMER* (Twentieth Century Fox 1958); see Richard Delgado, *Transcendence: Conservative Wealth and Intergenerational Succession*, 59 UCLA L. REV. DISCOURSE 44, 44 (2011) (discussing the film and its implications for current thought).

78. See *Transcendence*, *supra* note 77, at 46.



not out shopping.<sup>79</sup> One day, a young drifter played by Paul Newman arrives at the family spread seeking work.<sup>80</sup> The old-timer takes an immediate liking to Newman, whose rough character and eager ways remind the old-timer of himself in his youth.<sup>81</sup> He quickly promotes Newman to the position of assistant manager of his spread and a string of family-owned stores.<sup>82</sup> When Newman shows a keen mind for business, he moves right up the ladder, earning the jealousy of Jody.<sup>83</sup> The movie follows the twists and turns of the power struggle among the three men and the smoldering romance between Newman and Woodward.<sup>84</sup>

"As I recall," I said, "the codger favors Newman, the young upstart, because he wants his spread to fall into the best hands after he dies. So, I suppose you could say that future orientation explains some of the historical and literary examples, but certainly not all. In other words, just because there's a *potential* conflict of interest between adults and children, it doesn't follow that it takes effect very often, and not in any particular instance, such as the one of King Solomon and the two babies. So, I hope, Rodrigo, that you have more arrows in your quiver than your observation about future orientation and time span, clever as it is. If you do, I'll weigh in with my reservations after I've heard them all."

#### IV. HEARTS OF STONE? EIGHT CAUTIONARY TALES

"I do," he said. "Not all adults are so cold-hearted as to favor short-run profit over the welfare of their own children and those of their neighbors, at least consciously. Many adore children and would not intentionally shortchange their futures, especially those of their own children. But many are not so kindly disposed, particularly in business settings when money may be on the line.<sup>85</sup> In addition to the lure of profits, a number of nonpecuniary reasons increase the temptation to give short shrift to children and their futures in cases like the ones we have been considering."

"I'd like to hear some of them."

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79. See *THE LONG, HOT SUMMER*, *supra* note 77.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. See *Transcendence*, *supra* note 77, at 46 (discussing one such power struggle); HOCHSCHILD, *supra* note 25.

## A. Reason 1: Right-Wing Ideology

"A few have to do with the structure of conservative thought," he began. "Many of our friends on the other side of the aisle, according to Arlie Hochschild's recent book,<sup>86</sup> place great faith in capitalism and the free market."<sup>87</sup>

"Your friend Laz certainly does."

"Laz isn't a climate skeptic, but many conservatives are. They are dubious about the risks of pollution and believe that they are both overblown and the price of progress.<sup>88</sup> They see governmental controls as a case of 'Here comes Big Brother'<sup>89</sup> once again. The role of citizens in such cases is to tough things out, even if that amounts to accepting the presence of a toxic dump, incinerator, or nearby plant that dumps a seething effluent into a stream or river that they rely on for fishing or drinking."<sup>90</sup>

"I know about that book and plan to read it. Hochschild is one of my favorite authors."

"Red states, according to Hochschild, are often the most polluted yet the ones whose citizenry most readily accept a high amount of pollution, cases of cancer, and short life spans as the price of progress.<sup>91</sup> Many believe that it's an honor to live and work for a plant that pollutes its surroundings, even if that's where they live and their children play and go to school."<sup>92</sup>

"She describes this divide and shows how people who are otherwise very similar in background, educational level, and leisure-time pursuits may have totally different attitudes toward environmental risks and benefits.<sup>93</sup> To be sure, many residents of red states love horseback riding, hunting, and backpacking.<sup>94</sup> But their love of nature does not motivate them to vote against corporations that are wrecking their beautiful region.<sup>95</sup> The corporations provide good jobs. Besides, summoning environmental regulators would strengthen the hand of Big Government at the expense of free-market capital-

86. HOCHSCHILD, *supra* note 25, at 5–8, 82, 233 (studying the "empathy gap"); see Bauerlein, *supra* note 25 (noting the same great divide between the two camps).

87. HOCHSCHILD, *supra* note 25, at 35–61, 148–51, 176, 179, 236–37; see Bauerlein, *supra* note 25.

88. HOCHSCHILD, *supra* note 25, at 50, 138–39, 178–79.

89. *Id.* at 179, 189–90; see Thomas Byrne Edsall, *Studies: Conservatives Are from Mars, Liberals Are from Venus*, ATLANTIC (Feb. 6, 2012), <https://www.theatlantic.com/politics/archive/2012/02/studies-conservatives-are-from-mars-liberals-are-from-venus/252416/> (noting this difference, among others, in mindset between the two camps).

90. HOCHSCHILD, *supra* note 25, at 184–85, 189–91, 202–03.

91. *Id.* at 8–9, 21, 232–33.

92. *Id.* at 5, 179, 189.

93. *Id.* at 61–64, 140–43; see Bauerlein, *supra* note 25 (noting that liberals and conservatives exhibit different value systems but otherwise may have much in common).

94. HOCHSCHILD, *supra* note 25, at 9–11, 154, 171. *But see* HOCHSCHILD, *supra* note 25, at 163–67 (describing the fate of a rubberized horse, which horrified a number of Republicans in the region).

95. HOCHSCHILD, *supra* note 25, at 9–11.

ism.<sup>96</sup> Liberals, of course, see all these questions quite differently, but enough conservatives, especially in corporate suites, adhere to these beliefs that environmentalism has relatively few friends in high places, even when children's lives and futures are on the line."

*B. Reason 2: Sociobiology*

After a pause, I replied, "But politics can't be all. Only about forty percent of the citizenry consider themselves deeply conservative.<sup>97</sup> And Hochschild focused on members of the Tea Party living in dirt-poor regions of Louisiana, if I recall. They would make up an even smaller portion of America."<sup>98</sup>

"True, but a second factor weighs in where politics leaves off, namely evolutionary science. The discipline of sociobiology identifies ways in which much of human behavior is a function of genetic imperatives and the search for intergenerational survival.<sup>99</sup> Scientists working in this field seek to understand courtship patterns, dating preferences, and even dress norms by these means.<sup>100</sup> They have shown that most people tend to favor their own children, whose survival will secure their heritage.<sup>101</sup> Thus, a rich and powerful executive or member of Congress considering a bill regulating pollution may ponder, if only subliminally, whose children will suffer if the bill fails. If the main victims will be somebody else's children, particularly ones of a different social or racial group, he or she may well find it easy to give them little consideration. He may reason, 'My children only go to clean summer camps in the mountains, with pure air and water. They go to schools in idyllic villages with neat lawns and pristine surroundings. My family will benefit financially from the decision; someone else will pay the price.'"<sup>102</sup>

*C. Reason 3: Religion*

"I can see how that can color certain people's decisions," I said. "But have you thought about the role of religion?"

"I have. The Bible says that children should honor their parents.<sup>103</sup> Believers in a strict interpretation of that document may easily give scant weight

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96. *Id.* at 4, 10, 14, 67–69, 156–57, 176, 189; see Bauerlein, *supra* note 25 (noting these traits among others).

97. HOCHSCHILD, *supra* note 25, at 6.

98. *Id.* at 9.

99. See Catherine Driscoll, *Sociobiology*, STAN. ENCYCLOPEDIA PHIL. ARCHIVE (Nov. 11, 2013), <https://plato.stanford.edu/archives/spr2018/entries/sociobiology>.

100. *Id.*

101. *Id.*

102. See HOCHSCHILD, *supra* note 25, at 150, 176–77, 189 (noting that some business executives evinced this attitude).

103. *Exodus* 20:12.

to children's preferences when they conflict with those of their parents.<sup>104</sup> For them, obedience is the children's duty.<sup>105</sup>

"Moreover, for some, environmentalism is a form of animism, a blasphemy, and a practice of worshipping false gods.<sup>106</sup> For some evangelicals, God gave mankind dominion over the earth to do with as they like,<sup>107</sup> a belief that can easily justify free use. Extreme forms of evangelism even hold that the last days are imminent; rapture will arrive soon, and good people will ascend in a gravity-free rise toward a wonderful realm populated by good, God-fearing folks reaping their just rewards.<sup>108</sup> Paying excessive attention to the environment is to worship a social fad in defiance of God's will."<sup>109</sup>

"I once knew a law dean who subscribed to that notion."

"It's more common than you might think, especially among the Eastern Orthodox.<sup>110</sup> For others, prosperity is a sign of a blessing from above.<sup>111</sup> A new oil well or fracking contract, although bad for the moment, brings wealth and is thus a signal from God.<sup>112</sup> To be sure, many evangelicals love nature and outdoor pursuits just as do their liberal counterparts.<sup>113</sup> But they often care little about pollution or mining, believing that enduring hardship and insults is a virtue and our destiny in a world of trouble and pain."<sup>114</sup>

#### D. Reason 4: Media Loops and Fox News

"Some of the media outlets reinforce those beliefs, do they not?"

"Particularly Fox News and Rush Limbaugh, who reinforce them daily in front of large audiences.<sup>115</sup> In thrall to political correctness, the liberal press

104. 1 Samuel 15:22-24 (ranking obedience more highly than sacrifices).

105. Ephesians 6:1.

106. See HOCHSCHILD, *supra* note 25, at 117-26 (noting the role of religion and churchgoing in adjusting believers to their fate, including living in polluted surroundings); Bauerlein, *supra* note 25 (noting that religion plays a powerful role in the lives of many conservatives).

107. See HOCHSCHILD, *supra* note 25, 123-24; Genesis 1: 26-28 (giving man dominion over the earth and its creatures).

108. HOCHSCHILD, *supra* note 25, at 125.

109. *Id.* at 52-54, 117-19.

110. Juliet Eilperin, *Climate Change Is a Top Spiritual Priority for These Religious Leaders*, WASH. POST (June 26, 2018), [https://www.washingtonpost.com/national/health-science/climate-change-is-a-top-spiritual-priority-for-these-religious-leaders/2018/06/26/d5e06fd2-749e-11e8-9780-b1dd6a09b549\\_story.html?utm\\_term=.e9f692423f85](https://www.washingtonpost.com/national/health-science/climate-change-is-a-top-spiritual-priority-for-these-religious-leaders/2018/06/26/d5e06fd2-749e-11e8-9780-b1dd6a09b549_story.html?utm_term=.e9f692423f85).

111. HOCHSCHILD, *supra* note 25, at 119; see also Kate Bowler, *Death, the Prosperity Gospel and Me*, N.Y. TIMES (Feb. 13, 2016), <https://www.nytimes.com/2016/02/14/opinion/sunday/death-the-prosperity-gospel-and-me.html>.

112. HOCHSCHILD, *supra* note 25, at 63-64, 119.

113. *Id.* at 9-11, 154, 171.

114. *Id.* at 53, 123-26, 154-55.

115. *Id.* at 126-32; Sophie Tatum, *Obama Says Fox Viewers, New York Times Readers Live in 'Entirely Different' Realities*, CNN POLITICS (Nov. 28, 2018, 11:58 PM), <https://www.cnn.com/2018/11/28/politics/barack-obama-media-climate/index.html>.

and the EPA are job terrorists who are strangling America<sup>116</sup> and constantly nagging their audience to feel sorry for poor children.<sup>117</sup> Their fate may be unfortunate, but it is not our fault; we are virtuous people. Their parents could raise themselves by their bootstraps if they worked as hard as we did and get out of the polluted ghettos.”<sup>118</sup>

*E. Reason 5: “Grandpa, Why Are You Killing Us?”*

“I know some elderly people whose views are just as child-unfriendly as the ones you mentioned,” I interjected. “You’ll meet them, too, as you age.”

“Some of them are on my faculty. Many elderly people want to retire, sit on a rocking chair or recliner, play card games with their friends, or devote themselves to hobbies like fishing. Others, of course, may contemplate a more active retirement. Nevertheless, the elderly tend to vote against school-support measures and taxes.<sup>119</sup> Many rationalize that they have worked hard to achieve their current status. Why should they now pay for educating today’s children when they have already paid to raise their own?”<sup>120</sup>

“A comparatively short time ago,” I added, “boomer parents discovered that they could transfer the cost of college tuition to the next generation by requiring them to take out college loans.<sup>121</sup> Until then, upper- and middle-income families would typically pay the full cost of their children’s college education, or nearly so. In the short space of one generation, adults shifted the costs of college education to their own children, a transfer amounting to many billions of dollars.<sup>122</sup> This divergence between elderly, retired people, and

116. HOCHSCHILD, *supra* note 25, at 126–32.

117. *Id.* at 126–32, 190–91, 215.

118. *Id.* at 136–40, 211–16, 256–58 (discussing this belief system). See generally Richard Delgado, *Rodrigo and R resentment: “I Don’t Want It if You Are Going to Get It, Too”—Why Classical Economic and Political Theory Fails to Explain the Obamacare Vote, but Legal Realism and CLS Can*, 52 U.C.D. L. REV. 1827 (2019).

119. E.g., Lisa W. Foderaro, *School Boards Reach Out to Elderly for Support*, N.Y. TIMES (Aug. 26, 1991), <https://www.nytimes.com/1991/08/26/nyregion/school-boards-reach-out-to-elderly-for-support.html>; see also HOCHSCHILD, *supra* note 25, at 54–59; Michael Hobbes, *America’s Defining Divide Isn’t Left vs. Right. It’s Old vs. Young*, HUFFPOST (Mar. 11, 2019), [https://www.huffpost.com/entry/america-baby-boomer-old-generation\\_n\\_5c82db8de4b0ed0a00136b0c?ncid=news\\_tushp\\_mgnews\\_\\_TheMorningEmail\\_\\_031219](https://www.huffpost.com/entry/america-baby-boomer-old-generation_n_5c82db8de4b0ed0a00136b0c?ncid=news_tushp_mgnews__TheMorningEmail__031219) (noting that the elderly have much more money than the young but are reluctant to pay for social services for anyone but themselves).

120. Hobbes, *supra* note 119; see also Katie Robertson, *Why the World Needs to Rethink Retirement*, N.Y. TIMES (Dec. 4, 2018), <https://www.nytimes.com/2018/12/30/business/retirement/why-the-world-needs-to-rethink-retirement.html>.

121. See Jillian Berman & Terrence Horan, *How We Got to \$1 Trillion in Debt: An Illustrated History of Student Loans in America*, MARKETWATCH (Mar. 24, 2017, 4:38 PM), <https://www.marketwatch.com/story/how-we-got-to-1-trillion-in-debt-an-illustrated-history-of-student-loans-in-america-2017-03-21> (discussing the history of college loans); see also *Easing the Burden of Student Debt to Build a Stronger Financial Future*, CHRON. HIGHER EDUC., <https://www.chronicle.com/paid-article/easing-the-burden-of-student/152> (last visited Sept. 15, 2019).

122. Berman & Horan, *supra* note 121.

young children certainly illustrates the structural conflict of interest you mentioned."

#### F. Reason 6: Masculinity

"Right," he said. "And another is masculinity. Feminist scholarship has begun to show that many traits that we traditionally ascribe to men are not at all inevitable or desirable.<sup>123</sup> In the eyes of many, men are tough, and environmentalists are soft, particularly in honor-based societies like the South.<sup>124</sup> There, men are honorable. They take care of their families.<sup>125</sup> This may include working hard in dangerous plants full of noise, dangerous chemicals, and a fast-moving assembly line.<sup>126</sup> Unlike in other regions, environmentalism does not carry a positive connotation; honor and merit stem from working hard, leading a decent life, taking care of your family, and resisting the forces of collectivism and Big Government."<sup>127</sup>

#### G. Reason 7: Gestalt Switch

"Hochschild called this an empathy gap," he continued. "But I think something else may be at work. In a famous drawing by M.C. Escher, the viewer sees a flock of birds flying to the right, but if the viewer focuses on the same piece in a different way, he or she sees fish swimming to the left.<sup>128</sup> Both ways of seeing the drawing are equally valid. It all depends on the predisposition one brings to that particular drawing. By the same token, many adults may not be at all cruel or rent-seeking with respect to the children of their neighborhood or region, selling them out for a quick buck. Instead, they *see* the new oil rig, tank farm, or fracking field as a thing of beauty, an asset to their town or neighborhood.<sup>129</sup> Their children may see it as a monstrosity that will blight their futures, shorten their lives, give them cancer, and endow their

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123. See Maya Salam, *What is Toxic Masculinity?*, N.Y. TIMES (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/us/toxic-masculinity.html> (discussing and critiquing masculinity, especially the toxic kind).

124. Richard Delgado & Jean Stefancic, *Southern Dreams and a New Theory of First Amendment Legal Realism*, 65 EMORY L.J. 303, 338, 343, 353 (2015) [hereinafter *Southern Dreams*] (discussing the tradition of honor in the South); HOCHSCHILD, *supra* note 25, at 202–03.

125. *Southern Dreams*, *supra* note 124, at 303, 338, 343, 353; see also HOCHSCHILD, *supra* note 25, at 202.

126. HOCHSCHILD, *supra* note 25, at x, 25–31, 158–59, 189–90 (noting that some plant workers would carry out orders, such as disposing of effluent at night in a nearby waterway, that were inherently dangerous for the worker and even more so for those living in the vicinity).

127. *Id.*

128. See Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813, 823–24 (1992) (discussing Escher's work).

129. HOCHSCHILD, *supra* note 25, at ix, 4–8 (noting how individuals with different belief systems can frame environmental issues in radically different terms ("empathy walls")); see also Bauerlein, *supra* note 25 (same).

own children with multiple infirmities. The children and the adults do not see different things, they just put a different premium on them.”<sup>130</sup>

“Fascinating,” I said. “You might know about fathers in a family-owned business who opt for a quick return, while Junior prefers spending money on research and development which could pay off many times over in future years. By the same token, a business manager for a school cafeteria might consider certain foods attractive; health-minded students may deem them inedible. The children who want to regulate gun sales and greenhouse gases don’t see the world differently from their more cautious elders. They just see different consequences.<sup>131</sup> That’s not saying that I think they are always right or are looking at things from a mature—not to mention wise—point of view. But it’s easy to see how, as in a drawing by Escher, they could see future prospects differently from adults in decision-making positions.”

#### H. Reason 8: Empathy and False Empathy

“And those people need not be monsters,” he continued. “Most of us wish to be empathic and caring, especially toward children. We consider that young people are cute, appealing, and full of promise. We want to help them. As such, we are apt to believe we are completely appropriate custodians of the best interests of the child.

“But recent writings show that empathy is in shorter supply than most of us believe.<sup>132</sup> I think you mentioned this somewhere, Professor.<sup>133</sup> You gave the example of a husband who gives his wife a tool set for her birthday. She gives him two tickets to the opera.<sup>134</sup> People setting out to bestow a gift or benefit toward others can easily put themselves in their place and act in ways that they would enjoy if they were in that other person’s shoes.<sup>135</sup> Everyone knows parents who encourage their children to follow in their footsteps in the mistaken belief that a line of work that worked out well for them will prove

130. See Edsall, *supra* note 89.

131. See Editorial: *Who Wants Healthy Food in America's Schools? Ban It!*, ANNISTON STAR (Dec. 13, 2018), [https://www.annistonstar.com/opinion/editorials/editorial-who-wants-healthy-food-in-america-s-schools-ban/article\\_140dcf14-ff2a-11e8-85d4-77f5d1d6a6ba.html](https://www.annistonstar.com/opinion/editorials/editorial-who-wants-healthy-food-in-america-s-schools-ban/article_140dcf14-ff2a-11e8-85d4-77f5d1d6a6ba.html); Philip J. Landrigan & Lynn R. Goldman, *A Bad Move That Could End Up Exposing Kids to Chemicals*, N.Y. TIMES (Oct. 2, 2018), <https://www.nytimes.com/2018/10/02/opinion/chemicals-epa-children-health.html> (noting that the Environmental Protection Agency proposes to weaken protection for children’s health).

132. See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1281 (1992) [hereinafter *Images*] (discussing the “empathic fallacy”); *Eleventh Chronicle*, *supra* note 1, at 1271 (discussing false empathy).

133. See *Images*, *supra* note 132; see also *Eleventh Chronicle*, *supra* note 1, at 1271.

134. See *Images*, *supra* note 132.

135. See *id.*

equally satisfying for the kids, whose interests may lie in quite a different direction."<sup>136</sup>

"False empathy can magnify some of the structural conflicts you mentioned between adults and children," I said. "The adult may easily deceive himself that if he were a child living in that neighborhood, he or she would, of course, favor a new incinerator that will bring new jobs to that area—perhaps to a member of that child's own family. Another element is simply the power differential between the adult and the child, which can easily lead the superior party to believe himself entitled to make decisions for the weaker one."<sup>137</sup>

## V. CHILDREN'S CLAIMS TO A FUTURE AS FREEDOM OF SPEECH

"But what I can't see," I continued, "is how these matters raise questions of freedom of speech. You said they do, but they seem mainly to be questions of policy or the structure of legal thought. How does freedom of speech enter?"

"The only way the young will be able to change the way things are is through advocacy. And this in turn raises issues of voice, empowerment, and a respectful audience." I nodded, a little dubiously, so he continued.

"You see, Professor, the main advocates for children's claims to a livable future should, logically, be children.<sup>138</sup> But we barely tolerate, much less celebrate, their marching, demonstrating, or otherwise claiming our attention concerning matters having to do with their future on Earth. The First Amendment has not been kind toward children."<sup>139</sup>

"I'm familiar with the article you must have in mind. It's practically the only one—which, I guess, is more or less your point."

"Yes, the one by Yotam Barkai. So here's what I think we should do. At a minimum, we should relax rules related to standing,<sup>140</sup> capacity,<sup>141</sup> real party in

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136. See, e.g., Thomas Maier, *Winston Churchill's Brilliant but Troubled Son*, *Randolph*, PSYCHOL. TODAY (Oct. 30, 2014), <https://www.psychologytoday.com/us/blog/uncovering-great-minds/201410/winston-churchill-s-brilliant-troubled-son-randolph>.

137. The concept of the "power paradox" holds that insight and agreeableness are what enable many leaders to rise. But once they do, they find they no longer need to behave democratically and with consideration for the feelings of others; they may rule by fiat. See generally DACHER KELTNER, *THE POWER PARADOX: HOW WE GAIN AND LOSE INFLUENCE* (2016) (noting that these individuals can suffer from concrete lapses in cognitive functioning and ability to empathize—as in the famous Stanford Prison Study—and perform worse on basic tests of cognitive skills and judgment than they do in ordinary life. Paradoxically, those in power begin to act irresponsibly and selfishly, even if compassion and good interpersonal judgment were what got them to positions of power in the first place).

138. I.e., not adults, no matter how favorably disposed toward them.

139. See generally Yotam Barkai, *The Child Paradox in First Amendment Doctrine*, 87 N.Y.U. L. REV. 1414 (2012) (noting that courts routinely deny children's rights to read certain books, participate in decisions about the school curriculum, and read literature containing explicit discussions of sexuality (e.g., *Lady Chatterley's Lover* by D. H. Lawrence)).

140. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (noting that environmental standing requires an immediately traceable injury in fact); see also *supra* notes 36–37 and accompanying text (noting that stand-



interest,<sup>142</sup> and political question<sup>143</sup> so as to enable young people to file suits against adults who endanger them. So far, they have operated as serious road-blocks.<sup>144</sup> Above all, we should modify the best interests of the child rule,<sup>145</sup> realizing that we can easily fall prey to an unwitting gestalt switch in which we see our own interests as the only ones present when those of young people may be weightier.”<sup>146</sup>

“That’s only common sense,” I replied. “Not that I think the argument will go entirely in their favor. But please go on.”

“We should reanalyze case law that disadvantages children’s interests, as the courts eventually did in the Tucson school case<sup>147</sup> and might yet do for the 1980s decision, *Hazelwood School District v. Kuhlmeier*,<sup>148</sup> looking carefully for dissents, overlooked avenues, and conflicts among the decisions as opportunities to argue for reconsideration. Friends in the adult generation might contribute to research into ways to circumvent decisions that would appear to block children from coming to court to air their grievances.”<sup>149</sup>

“So we should not only check our temptation to make decisions on their behalf,” I said. “We should facilitate their advocacy. That’s why you say the First Amendment comes in.”

“Exactly. We should make it easier for children to ‘speak’ to the adults holding power over their lives. All these measures will level the playing field somewhat.”

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ing has proven a major obstacle in climate-change lawsuits). *But see* Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 452–56 (1972) (suggesting that standing be granted to natural objects, just as it is for ships, trusts, and other incorporeal entities).

141. Children are often considered to lack the capacity to act legally on their own behalf—are *non sui juris*—until they reach the age of majority. *See Non Sui Juris*, ACADEMIC: LAW DICTIONARY, [https://law.academic.ru/15743/non\\_sui\\_juris](https://law.academic.ru/15743/non_sui_juris) (last visited Sept. 14, 2019).

142. The real party in interest is the one who actually holds the right being asserted and has a legal right to enforce it. Ordinarily, failure to meet this rule requires a substituted party to come before the court, as with controversies concerning a child’s trust or inheritance rights. *See generally* Michael C. Ferguson, *The Real Party in Interest Rule Revitalized: Recognizing Defendant’s Interest in the Determination of Proper Parties Plaintiff*, 55 CALIF. L. REV. 1452 (1967).

143. The political question doctrine is a prudential one that courts use to avoid entertaining cases that can strain our constitutional system. *See, e.g.*, LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 380 (3d ed. 2000); Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1908 (2015). Courts could easily turn children’s suits aside, reasoning that they are for another political branch to decide.

144. *See supra* notes 36–37 and accompanying text (noting that standing has proven a major obstacle in climate-change lawsuits and likely will continue to be so).

145. *See supra* notes 13, 71, 131 and accompanying text (discussing the rule and its consequences).

146. *See supra* notes 127–30 and accompanying text.

147. *See Arce v. Douglas*, 793 F.3d 968, 978 (9th Cir. 2015).

148. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272–76 (1988) (upholding the power of a school principal to censor and edit stories in the school newspaper).

149. *See supra* notes 60–65 and accompanying text (discussing a striking reversal of fortune in a case brought by Latino schoolchildren in Tucson, Arizona).

"A classic First Amendment concern," I conceded.<sup>150</sup>

"But we should also make it easier for them to speak to each other and form solidarity, even across national lines," he added. "This may include encouraging them to use Snapchat, YouTube, Twitter, and other forms of social media to contact their counterparts in Sweden, Norway, Oregon, Pakistan, the American South, or elsewhere.<sup>151</sup> We should enable them when they attempt to do so. We might, for example, give them travel grants, access to computers and smart phones, and invite them to our conferences. Maybe you should let Gus go to Sweden and pay his way."<sup>152</sup>

"You've reminded me of the famous book by Gayatri Spivak. It may be that the subaltern cannot 'speak' to members of the ruling class.<sup>153</sup> But they can and should speak to each other. Maybe it will eventually dawn on the adults that the kids have something to say. I do have my reservations, mind you," I added.

"I haven't forgotten and am looking forward to hearing them, especially if I can have another cup of your excellent coffee," he said, looking over at my espresso machine. "You see, the First Amendment is not only child-averse right now, but it is also deeply conservative, undergoing a *Lochner*-style backlash across the board.<sup>154</sup> In these times, it is quite possible that courts will rule, once again, that 'children should be seen and not heard.'<sup>155</sup> This would be both misguided and likely to deprive society of views it needs to hear. Chil-

150. See David Cole, *Why We Must Still Defend Free Speech*, N.Y. REV. BOOKS (Sept. 28, 2017), <https://www.nybooks.com/articles/2017/09/28/why-we-must-still-defend-free-speech/> (arguing that it is time to retire this principle, at least in the case of minorities urging restrictions on hate speech).

151. See *supra* notes 3–9, 30–66 and accompanying text (addressing areas where children's advocacy has broken out).

152. Occasional academic conferences welcome undergraduates and even provide them with travel funding if they need it. See *LatCrit Student Scholar Program*, LATCRIT, <http://www.latcrit.org/content/ssp/> (last visited Sept. 15, 2019). Might philanthropists support this form of youth activism? See, e.g., Karen Weise, *Jeff and MacKenzie Bezos Pledge \$2 Billion for Homeless and Preschoolers*, N.Y. TIMES (Sept. 13, 2018), <https://www.nytimes.com/2018/09/13/technology/jeff-and-mackenzie-bezos-pledge-2-billion-for-homeless-and-preschoolers.html>.

153. See generally CAN THE SUBALTERN SPEAK? REFLECTIONS ON THE HISTORY OF AN IDEA (Rosalind C. Morris ed. 2010).

154. Compare Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953 (2018), with Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219 (2018).

155. See *The Meaning and Origin of the Expression: Children Should Be Seen and Not Heard*, PHRASE FINDER, <https://www.phrases.org.uk/meanings/children-should-be-seen-and-not-heard.html> (last visited Sept. 15, 2019) (attributing the phrase's origin to fifteenth-century English manners and thought). For examples of the paternalistic attitudes that this Article deplores, see, e.g., Brice-Saddler, *supra* note 31 (describing Senator Dianne Feinstein's reaction to a group of middle-school students wishing to discuss climate change with her); Caitlin Flanagan, *Dianne Feinstein Doesn't Need a Do-Over*, ATLANTIC (Feb. 24, 2019), <https://www.theatlantic.com/ideas/archive/2019/02/dianne-feinstein-video-climate-change-sunrise-movement/583501/> (siding with the senator's paternalistic attitude); *supra* notes 30–31 and accompanying text (discussing a Swedish father's reaction to his daughter's environmental activism).

dren should be seen and heard, and not merely because they want to be. Our future may ride on it.<sup>156</sup> But I gather you have some reservations.”

## VI. THE PROFESSOR RAISES OBJECTIONS

“I do,” I said. “Your view of children, I’m afraid to say, is entirely too romantic, which I find a little strange coming from a crit like you. Social life is a complex clash of class interests, with children’s being just one of several. Children may indeed, as you put it, see things in terms of the long run, at least sometimes. But that’s no reason why that perspective is sometimes, or always, the best. For one thing, we can predict—can know—the short term with greater certainty than we can what’s coming down the road 100 or 500 years from now. So sometimes emphasizing the short term makes perfectly good sense.

“Moreover, adults, having a greater body of experience than children, are more prone to weigh a wider range of factors bearing on any given decision than will a young person, who may have little experience with some of them.

“This comes under the heading of what I might urge you to bear in mind. Children—and even teenagers like your own Gus, who seems like something of a prodigy—are naturally immature. I’m sure that you wouldn’t trust Gus to drive you and Giannina on a transcontinental trip during bad weather. And you probably wouldn’t want him balancing your checkbook, even if his mind for math was lightning fast.

“It’s easy to romanticize youngsters, as Jean-Jacques Rousseau did in his epic book, *Emile*,<sup>157</sup> which laid the basis for the excesses of free education and a dozen failed experiments, all based on the idea that children are, by nature, good and, if left to themselves, will explore the world, learn, read, and turn into wonderful fellow citizens.”

Rodrigo was looking abashed. “But Giannina and I actually do think that, and most of the time it works. With Gus, at least. Sometimes he does ‘lose it,’ and Giannina has to put her foot down. And occasionally, I have to enforce homework rules if he gets lost in a video game and it’s getting close to bed time. But I gather you don’t think so?”

“Yes and no,” I said. “There’s plenty of evidence against your position. I just want you to see what it is and take it into account. The Children’s Crusades failed spectacularly. Most children, if given the chance to do homework or not, won’t. Child kings can be monsters. The British nobility often produces spoiled brats.”

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156. See Bell, *supra* note 27, at 523 (noting that judicial decisions favorable to minority interests tend to arrive when conditions render them favorable to those of the majority and rarely otherwise).

157. JEAN-JACQUES ROUSSEAU, *EMILE: OR ON EDUCATION* (Barbara Foxley trans., The Floating Press 2009) (1762).

"Surely you don't think these are reasons for giving young people—particularly ones in their late teen years—little voice in the world they are going to enter, wars they are going to fight in, air they are going to breathe?"

"Of course not. I just didn't want you to be overly sanguine. Literature is full of children who wrought great evil. The juvenile courts are full of kids who committed crimes, some of them serious."

"Literature, too?" Rodrigo asked.

"Sure. Consider, for example, William Golding's *Lord of the Flies*.<sup>158</sup> It sold millions of copies, probably because it rang true to many readers."

"Gus read it last year for his English class and wrote a book report on it. So I'm familiar with the plot. But I could use a quick synopsis."

"It's an early example of the type of dystopian literature that is now so much in vogue. In it, an airplane crashes, and the survivors, all young boys, swim to a deserted island. Without any adults around, they realize they will have to fend for themselves. Initially, they exhibit solidarity and decide things by vote. But it soon dawns on the stronger that they are in a position to dominate the weak and extract favors from them. They soon divide into two camps under the leadership of Ralph, who is a believer in fairness and civilized behavior, and Jack, who is a bully and believes in survival of the fittest. The boys realize that their only hope of rescue is to keep a fire lit, but they war over who will tend it and how. The novel and the movie show the slow descent of the boys into superstition and savagery."<sup>159</sup>

"And do you think this is a fair representation of what all young people are like?"

"By no means," I said. "For one thing, the boys were somewhat younger than the ones seeking to intervene in national politics and environmental policy in Los Angeles, Oregon, Norway, Florida, publishing houses, and elsewhere. Also, they are survivors of a British private school, which probably brutalized them with cold showers, cruel rituals, and harsh, peer-group discipline. Studies of adults placed in arduous circumstances, such as POW camps, show that some of them are able to survive with their humanity intact.<sup>160</sup> Some of the soldiers who made it through were hardly older than the teenagers in *Lord of the Flies*."

"Still, I take your point," he admitted. "In one of the movies made from the novel, the film ends when a small British rescue crew arrive on the island. They behold the tattered, downcast survivors of the boys' group with dismay: this is what has become of some of our best and brightest. The boys break in-

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158. WILLIAM GOLDING, *LORD OF THE FLIES* (Penguin Books 2003) (1954).

159. *Id.*

160. See VIKTOR E. FRANKL, *MAN'S SEARCH FOR MEANING* 141 (1992) (noting that prisoners survived, despite arduous conditions, if they were able to find meaning in their lives).

to tears of shame and self-reproach. The British soldiers turn their backs to avoid confronting the boys with their own sorry plight.”

### CONCLUSION

The phone rang. It was an excited Gus telling his father the interview was successful and that the school was offering him a place in next summer's class, conditioned on his earning good grades in the remaining semester and staying out of trouble. Gus also wanted to know if he could go to dinner with a boy he met in the program, who was there with his older brother. They would put him on the train home, and he'd make it back by early next morning. All Rodrigo and Giannina would have to do is leave a key under the doormat.

Rodrigo looked up at me with a question on his face. He mouthed the words, “What should I do?”

I shrugged and in a low voice said, “It's up to you.”

After hanging up, Rodrigo thanked me, saying that he was thinking of writing something about children's rights and that our talk had given him much food for thought. On his way out, I asked him what he was inclined to do about Gus's last-minute dinner invitation from the two strangers and a solo trip to Sweden later. He gave a quick look at his watch and said: “No to tonight—in fact, I'm heading over there now to collect him—but probably yes to Sweden later this summer. I can't really explain why. But do you mind if I send you a draft?”

I waved and said, “Sure, as always. Say hi to Gus for me.”

As he disappeared down the hall, I reviewed what we had said. We had both agreed that adults and young people have different life expectancies and, as a result, may easily assign different values to avoiding global warming and other disasters. At least eight other factors compounded the risk that adult decisionmakers could undervalue the interests of the young in a livable world. I thought Rodrigo was correct on all these contentions.

I was impressed, as well, by how young people have been increasingly forceful about demanding a say in decisions that will affect them long after the adults are gone. I agreed with Rodrigo that our legal and moral systems have had little to say about what posterity demands of us. Attention to these matters made excellent sense—it is what the difference principle suggests and what a genuine concern for freedom of speech would impel. It is what we would do if we cared how we will look in the eyes of a future generation and can help us avoid overvaluing short-term gain.

Yet, I continued to wonder about the best way to accommodate these needs and choose the right balance between them.

I was turning back to the mundane task that had occupied me before Rodrigo arrived,<sup>161</sup> when it hit me with a flash that the challenge was to arrange things so that society received the best that both groups had to offer, with an eye to the times. During periods when society is stuck, mired in old ways that are rapidly becoming unproductive and in need of change, it should seek out youthful voices.<sup>162</sup> The '50s, an age of stultifying conformity,<sup>163</sup> were such a period. Then, youthful voices protesting militarism abroad and stultifying conformity at home were what society needed and received.

At other times, society will be in turmoil. Society's main needs would then be for things to settle down. At these times, the leadership and messages it should seek out and heed will be those of mature people. Presidents Eisenhower and Reagan came to mind.

What social needs were foremost today? A little grudgingly, I conceded that Rodrigo, Greta, Gus, and their youthful companions might have a point. Our times were indeed stuck in old molds, with an Administration bent on taking us back to earlier times, resisting green technologies and building walls, both literally and figuratively, to increase isolation and hunker down behind a fortress, paying little attention to a world in transition.

I quickly sent Rodrigo an encouraging note, revised my course grading curve upward, and resolved to have my research assistants help me prepare a long memo to the dean, based on facts and the best available pedagogical and learning theories, justifying an upward departure. Why blight my students' futures unnecessarily, I thought? Even curmudgeons should show, from time to time, that they have a heart.

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161. Viz, figuring out the grading curve for my just-completed class.

162. See Julian Wylie, *Colleges Have Spent Big Money on Innovation Centers. Do They Work?*, CHRON. HIGHER EDUC. (Mar. 30, 2018), [https://www.chronicle.com/article/Colleges-Have-Spent-Big-Moneyt/242992?cid=wcontentgrid\\_hp\\_1b](https://www.chronicle.com/article/Colleges-Have-Spent-Big-Moneyt/242992?cid=wcontentgrid_hp_1b).

163. See generally SLOAN WILSON, *THE MAN IN THE GRAY FLANNEL SUIT* (1983) (describing the conformism of the time); Colin Marshall, *Levittown: The Prototypical American Suburb*, GUARDIAN (April 28, 2015), <https://www.theguardian.com/cities/2015/apr/28/levittown-america-prototypical-suburb-history-cities> (describing this mass-produced suburb as an example of bland, conformist culture).

