Student Rights and the Special Characteristics of the School Environment in American Jurisprudence

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In American jurisprudence, there can be no presumption of constitutional rights coextensive with those of adults for children in any institutional context. This includes public schools, in part because of the legal status of minors and in part because the ‘special characteristics of the school environment’ are predicated on a ‘custodial and tutelary’ relationship between teachers and pupils.

INTRODUCTION

Until the end of the Civil Rights Era, children in the United States were regarded as having custodial interests rather than liberty interests. Thus it is hardly surprising that for a number of years, the ascription of limited constitutional rights to students by the Supreme Court in Tinker v. Des Moines Independent Community School District (1969) generated inconsistencies in lower court opinions, along with some confusion amongst scholars. The Supreme Court itself wrestled with the implications of its Tinker decision until 1995, when the ‘special characteristics of the school environment’ were defined in a manner that clearly explained why the constitutional rights of K-12 pupils could not be coextensive with those of adults.

‘Jurisprudence’, writes Richard A. Posner, ‘addresses the questions about law that an intelligent layperson of speculative bent—not a lawyer—might think particularly interesting’ (1990, p. 1; cited in Garner, 1999, p. 859). Philosophers of education are intelligent persons of speculative bent, and it would appear that many do find questions about law interesting. The increased attention paid by philosophers of education in recent years to jurisprudence in general, and to legal rights in particular, represents a welcome return to issues and concerns that have defined the field since the time of Plato and Aristotle, who ‘explored related questions about justice, virtue, happiness, human development, civic friendship, political stability, the relationships between education and law, and the tools of statesmanship’ (Curren, 2010). But few philosophers of education today are jurists,
and even fewer are lawyers. Hence, some confusion persists about the juridical meaning of the terms highlighted in these introductory paragraphs. This is a problem for philosophers of education because theories based on conceptual misunderstandings cannot be sound. This is also a problem for philosophy of education because our claims should be taken seriously by the philosophers of law we cite and by members of the broader academic community to whom we tend to address our work.

I shall accordingly define these highlighted terms with care in support of my overarching argument that in American jurisprudence, there can be no presumption of constitutional rights coextensive with those of adults for children in any institutional context. This includes public schools, in part because of the legal status of minors and in part because the ‘special characteristics of the school environment’ are predicated on a ‘custodial and tutelary’ relationship between teachers and pupils. Public schools are institutions designed to serve both the present custodial interests of children (as minors) and the prospective liberty interests of children (as future adults).

To substantiate these claims, I shall rely on decisions by the US Supreme Court (the most authoritative primary source of American law) and the legal encyclopaedia American Jurisprudence, 2d. (amongst the most authoritative secondary sources of American law). As both legal scholars and philosophers of education have had much to say about ‘student rights’ and the ‘special characteristics of the school environment’ in recent years, a work of analytical philosophy of education that clarifies the jurisprudential meaning of these phrases and various underlying concepts is warranted. This article is also a work of analytical jurisprudence, ‘a method of legal study that concentrates on the logical structure of law, the meanings and uses of its concepts, and the terms and modes of its operation’ in the United States (Garner, 1999, p. 858, emphasis added). It is not a work of ethical jurisprudence, ‘the branch of legal philosophy concerned with the law from the viewpoint of its ethical significance and adequacy’ (Garner, 1999, p. 858).

‘STUDENT RIGHTS’ IN AMERICAN JURISPRUDENCE: A BRIEF HISTORY

Until 1966, constitutional rights had generally been ascribed only to adults as legally competent persons, in recognition of their presumptive dignity and liberty interests (Griffin, 2002; Waldron, 2012) and their concomitant standing to assert legal claims (Feinberg, 1970, p. 252). Accordingly, the ascription of limited constitutional rights to juveniles in custodial contexts by the US Supreme Court in Kent v. United States (1966), In re Gault (1967) and Tinker (1969) could not easily be reconciled with longstanding parens patriae principles. Under the parens patriae doctrine, the ‘State as parent’ has a sovereign duty to safeguard and promote the independent welfare and developmental interests of minors and other legally incompetent persons within its territorial jurisdiction. The State fulfils its parens
patriae duties by regulating custody. Custody is the common law mechanism by which competent persons—including parents and public school teachers—exercise legal authority to make decisions on behalf of incompetent persons.

In his brief tenure on the Supreme Court bench at the height of the Civil Rights Era, Justice Abe Fortas penned the three decisions noted above, repudiating the parens patriae doctrine and ascribing limited constitutional rights to minors in custodial contexts. In Kent v. United States (1966, p. 556), he found that juvenile courts throughout the country lacked the resources for judges to perform their parens patriae role, concluding that a minor charged with an offence ‘receives the worst of both worlds . . . [getting] neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.’ In Gault (1967, p. 28), he applied the Fourteenth Amendment to juvenile court proceedings, noting that ‘it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase “due process.”’ And in Tinker (1969, p. 506), he ascribed limited free speech rights to students in public schools: ‘First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students’ (emphasis added). In an oft-cited rhetorical flourish, he added, ‘It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’

Justice Fortas did not explicitly define the ‘special characteristics of the school environment’ in Tinker. Instead, he cited the following canonical statement by Curtis C. Shears (1962, p. 720, emphasis added) from the American Bar Association Journal: ‘The basic right of a juvenile is not to liberty but to custody. He has the right to have someone take care of him, and if his parents do not afford him this custodial privilege, the law must do so.’ It would have been reasonable for Justice Fortas to assume that most legal practitioners in 1969 would understand the ‘special characteristics of the school environment’ as a reference to the custodial relationship between public school teachers and students.

The Supreme Court began retreating from Kent, Gault, and Tinker almost immediately after Justice Fortas resigned his seat in a conflict of interest scandal in 1969. Over the next two and a half decades, both the parens patriae doctrine and the associated in loco parentis concept would regain much of their former currency as the Court identified exception after exception to Tinker (see Imber, van Geel, Blokhuis and Feldman, 2014). All the while, the Court continued to invoke the ‘special characteristics of the school environment’ as a reference to the custodial relationship between public school teachers and students.

In 1995, the situation changed. In Vernonia School District 47j v. Acton (1995, pp. 654–6), a case involving a seventh grader whose parents challenged a school policy mandating random drug testing of all interscholastic athletes, Justice Antonin Scalia explicitly characterised the school environment in terms of the relationship between teachers and pupils, describing it—twice—as ‘custodial and tutelary.’

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expectations vis-à-vis the State may depend on the individual’s legal relationship with the State’, he wrote. ‘Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.’ Citing 59 Am Jur 2d, Parent and Child §10 (1987), Justice Scalia continued:

Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, i.e., the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians.

Since Vernonia, the Supreme Court has consistently (a) invoked Tinker and (b) deployed the phrase ‘custodial and tutelary’ in cases in which constitutional or statutory rights claims have been raised by or on behalf of students in public schools, including Davis v. Monroe County Board of Education (1999), Board of Education v. Earls (2002), Morse v. Frederick (2007), and Safford Unified School District #1 v. Redding (2009).9

In order to understand the concept of ‘student rights’ in American jurisprudence, one should begin with a sound conception of legal rights. In order to understand why the constitutional rights of pupils in public schools are limited, one needs to understand what Justice Fortas meant by the ‘special characteristics of the school environment’ in 1969, and what Justice Scalia meant by characterising the relationship between teachers and students in public schools as ‘custodial and tutelary’ in 1995. Do students in public and private schools have constitutional rights? Do pupils have liberty interests? Sound responses to these sorts of questions require a review of some of the basic jurisprudential concepts on which American public schooling in general and compulsory schooling laws in particular were predicated, for these concepts define the legal relationship between school teachers and pupils that gives school environments their ‘special characteristics.’

STUDENT RIGHTS IN AMERICAN JURISPRUDENCE: SOME FOUNDATIONAL CONCEPTS

A. Students and Pupils

In American jurisprudence, all pupils are students, but not all students are pupils. Ballentine’s Law Dictionary (2010) acknowledges that while ‘pupil’ has fallen into disuse in the United States, it retains a distinct meaning for jurists. ‘One in attendance to receive instruction at a private or public school’ is a pupil, while ‘a person in attendance at a college or university’ is a student. This difference is consistent with the etymology of the former term. A person’s pupillarity refers to the period of his or her puerility or minority; hence a pupil is ‘a minor’ or ‘a ward under guardianship’ (viz. a person subject to custodial authority), while a student is not.10
The *Tinker* decision was written at a time when many believed discrimination on the basis of age might be every bit as invidious as discrimination on the basis of race or gender. Moreover, throughout the 1960s, university campuses across the United States were riven with protests by young people opposed to American involvement in Vietnam and to mandatory military service prior to enfranchisement. These protests culminated in a strike by four million university students after the Kent State massacre on 4 May 1970. In a school district in Des Moines, Iowa, officials sought to avoid this sort of ‘material and substantial disruption’ with a policy prohibiting the wearing of black armbands in their schools. In ascribing limited First Amendment rights to the appellants in *Tinker* (1969), Justice Fortas conflated pupils wearing armbands in middle and secondary schools with students agitating on university campuses. This conflation was understandable, however, because the age of majority in 1969 was twenty-one.

The Twenty-Sixth Amendment was ratified in 1971, effectively making eighteen the age of majority for voting and most other legal purposes (see Sarabyn, 2008). Most university students would no longer be minors (hence no longer pupils), and the legal relationship between universities and students would thenceforth be governed by contract (a legal relationship based on rough equality of bargaining power and voluntary compliance with institutional rules) rather than in loco parentis (a legal relationship based on the status of minors).

**B. Minority Status**

The legal rights that can be ascribed to pupils are limited not because of their age per se, but because of the immaturity associated with members of the class of persons to which they belong. Law is by necessity categorical, though equitable principles offer individualised judicial remedies when the strict application of legal rules would lead to manifest injustice in particular cases (Hohfeld, 1913). The *parens patriae* doctrine is rooted in Equity, but for obvious reasons, individualised judicial assessments of competence could not possibly be made for everyone. A statutorily-defined age of majority for particular purposes (dropping out of school, military service, criminal responsibility, consent to marriage, etc.) provides clarity as to when rebuttable legal presumptions of maturity and competence shift.

A person who has reached the age of majority for particular purposes is presumptively mature, and hence legally competent for those purposes unless an individualised judicial assessment determines otherwise. A person who has not reached the age of majority for particular legal purposes is presumptively immature, and hence legally incompetent for those purposes unless an individualised judicial assessment determines otherwise. Unless and until a minor is emancipated, whether by reaching the statutory age of majority or by means of ‘a proceeding authorized by statute in some states whereby courts are empowered to remove the disabilities of an infant on a proper application and proof of his capacity’, she remains...
subject to the authority of her custodial parents or guardians, who are in turn responsible to the State as *parens patriae*. Robert Kunzman (2012, pp. 77–78) asserts that the State may regulate only parental decisions relating to ‘schooling’, which he distinguishes from an otherwise broad domain of parental decision-making authority he calls ‘life as education’ (LaE). ‘The American legal system uses the distinction between schooling and LaE to delineate the respective authority of parents and the state when it comes to protecting children’s educational interests’, he writes. But this ‘schooling’ versus ‘life as education’ distinction is patently inconsistent with American jurisprudence:


The State has a duty of paramount importance to protect the child’s best interests and welfare. Thus, the State, as parens patriae, has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare . . .

The parents, as natural guardians, are responsible to the State for the child’s well-being. The natural rights of a parent to the custody and control of his or her infant child are subject to the power of the State and may be restricted and regulated by appropriate legislative or judicial action.

C. Liberty and Custody

At common law, competent persons are those presumptively capable of safeguarding and promoting their own interests, of intending the foreseeable consequences of their actions, and of governing themselves and their affairs in accordance with reason and reasonable laws. The concept of ordered liberty presupposes both a general willingness and ability on the part of normal adults to make choices consistent with reasonable limits prescribed by law for the common good. Thus adults, presumptively competent unless and until this presumption is rebutted in particular cases, are equally and appropriately subject to reasonable constraints prescribed by law on the exercise of their rights and liberties.16 In this sense, most adults are at *liberty*.17

Legally incompetent persons are those presumptively incapable of safeguarding and promoting their own interests, of intending the foreseeable consequences of their actions, and of governing themselves and their affairs in accordance with reason and reasonable laws. Accordingly, minors and other legally incompetent persons are subject to the substituted decision-making authority of adults in accordance with their publicly-determined ‘best interests’. Most children are *not* at liberty. They are instead subject to *custody*. As noted earlier, custody is the common law mechanism by which competent persons exercise *legal* authority to make decisions on behalf of an incompetent person, with increasing scope for the exercise of independent judgement by the incompetent person until he or she is presumptively capable of self-governance in accordance with reason and reasonable laws.
In American jurisprudence, unemancipated minors are presumed to be in the custody of their parents or legal guardians at all times, including their time in schools, where they are concurrently subject to the custodial and tutelary authority of teachers and school officials. Hence, children are not ‘at liberty’ to come and go from schools any more than they are ‘at liberty’ to come and go from shopping malls, airports, or parks as they please. At any hour of the day, and particularly during school hours or after dark, an eight-year-old girl found alone in a park would promptly be taken into custody by the police on the assumption that she had wandered away from home or school. Indeed, it would be a violation of parens patriae principles for police officers to assume the child was wandering alone in the park because she had freely chosen to exercise her inchoate liberty rights. In an exercise of parens patriae authority, they would immediately return the girl to the custody of her parents or school-teachers, who could be liable for the apparent lapse in their care and control. Most US states will issue a driver’s licence to an unemancipated minor, but even a sixteen-year-old licensed to drive cannot go anywhere without a modicum of parental oversight, if not permission. Were this not so, parents could not be held liable for damage caused by their minor children while operating a motor vehicle. In American jurisprudence, the presumption that children are always subject to custodial authority does not constitute invidious discrimination on the basis of age. Rather, it is perfectly legitimate discrimination on the basis of their legal status:

628 Am Jur 2d Constitutional Law §897 (2013):

Children are not a suspect class under the Equal Protection Clause, and a statutory classification of minor children with permanent legal disabilities due to diminished capacity is not a suspect classification. . . . The controlling principle is that the State as parens patriae of children may legislate for their protection, care, and custody.

The constitutional rights that can be ascribed to minors are limited not because of their location (at home, in a park, in a school) or their institutional ‘role’ (as students), but because of their legal status, which remains the same no matter where they are. Bryan R. Warnick (2013, pp. 5, 16, emphasis added) describes ‘explor[ing] the special characteristics of the school environment to better understand how schools can transform students’ moral and legal rights’ as ‘the goal’ of his recent monograph, adding that his ‘central thesis’ is the idea that ‘rights depend, at least to some extent, on institutional contexts’. This may be true for competent persons, to whom rights and liberties are presumptively ascribed by virtue of their legal status. Adults may voluntarily waive or limit the exercise of certain legal rights and liberties in a variety of contexts, including universities and workplaces, where codes of conduct are commonplace. Then again, universities and workplaces are environments within which relationships are governed largely by contract.
The same cannot be said of children, to whom rights and liberties are not presumptively ascribed by virtue of their legal status as minors. To suggest otherwise is inconsistent with American jurisprudence, including the Tinker decision itself. American jurisprudence provides no support for the idea that legal rights are pre-existing or freestanding entities that are ‘transformed’ by school environments, unless one takes literally the lofty rhetoric of Justice Fortas when he declared that students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate’. But of course constitutional rights are not akin to wet raincoats or muddy boots!

What constitutional rights, if any, do minors shed as they pass through the schoolhouse gate? It would be more appropriate to say they leave their parents there. As a matter of law, what takes place is a partial handover of custodial authority from parents to teachers and school officials. If it is a private school, the teachers and school officials exercise custodial authority as parental delegates. If it is a public school, the teachers and school officials exercise custodial authority as agents of the State. On that basis, the Constitution applies in limited ways to the exercise of custodial authority inside the schoolhouse gates (by public school officials acting in loco parentis), even though it does not apply to the exercise of custodial authority outside the schoolhouse gates (by parents themselves).

To be clear, minors have limited constitutional rights while subject to the custodial authority of public school teachers, juvenile court judges, and police officers because they are agents of the State. Warnick (2013, p. 36, emphasis added) claims that ‘[i]t is the role of being a student, not being a child or an adult, that matters more when it comes to rights.’ Even if this is true of moral rights, it is not for that reason alone true of legal or constitutional rights. Ethicists appropriately regard schools as ethical environments, as they are concerned with how people ought to treat one another in various capacities and contexts. Jurists appropriately regard schools as legal environments, and in American jurisprudence, legal status really does matter most when it comes to constitutional rights.

D. In Loco Parentis

While teachers in private schools continue to exercise the tutelary authority delegated to them by parents contracting for their educational services, teachers in public schools exercise both public custodial authority (as agents of the State) and private tutorial authority (as parental delegates). Following Justice Scalia’s affirmation of the custodial and tutelary nature of the teacher-student relationship in Vernonia (1995), there was a dramatic resurgence in legal scholarship on in loco parentis in public schools and other custodial contexts. Warnick (2009, p. 213 at fn. 8) claims that ‘[i]n loco parentis can only be fully attained [sic] when parents freely delegate their children to the care of the state’, and that ‘in compulsory public schools [sic], no such free decision can be assumed.’ However, as a consequence of the homeschooling movement spearheaded by the same interest groups that bankrolled the appellants in Wisconsin v. Yoder (1972),
parents throughout the United States have myriad ways in which to satisfy the requirements of compulsory schooling laws. For many, enrolling their children in public schools is now a matter of choice (Dupre, 1997, p. 72 at fn. 153). Hence, in American jurisprudence, both public and private school teachers continue to stand *in loco parentis* to the pupils in their charge.\(^{21}\)

When *pupils* in public high schools turn eighteen or reach the statutory age at which they can no longer be compelled by their parents to attend, they become *students*. Like their counterparts in universities, they may freely choose not to attend if they do not wish to be bound by institutional rules (Brighouse and McAvoy, 2010, p. 175). Widely overlooked in *Morse v. Frederick* (2007) is the fact that Joseph Frederick was *eighteen* when he unfurled his ‘BONG HiTS 4 JESUS’ banner on a city sidewalk at an event sponsored by the International Olympic Committee and Coca-Cola. Any other adult in Juneau was at liberty to hoist the same banner on the same city sidewalk, yet Principal Morse could suspend Frederick for doing so without violating the First Amendment because Frederick was cast by Chief Justice John G. Roberts as a student *promoting illegal drug use* at a *school-sponsored event*. But as an adult, Frederick was not subject to the custodial and tutelary authority of Principal Morse, either as an agent of the State or as a parental delegate.\(^{22}\) He was there by choice. Had he merely wished to avoid his suspension, a lawyer might reasonably have advised him to complete his studies elsewhere. As an adult, Frederick had standing to sue his school principal for monetary damages under 42 U.S.C. §1983, a federal statute creating a cause of action for damages in tort against state agents found to have violated ‘any rights, privileges, or immunities secured by the Constitution and laws’. And that was the course of action he took.

In *Morse*, the Supreme Court carved out another exception to *Tinker* by creating a new category of unprotected speech. Finding that speech advocating the use of illegal drugs in schools falls outside the scope of the First Amendment, the ‘material and substantial disruption’ standard enunciated in *Tinker* would not apply. Principal Morse could suppress Frederick’s speech without violating his First Amendment rights, so Frederick was not entitled to any damages under §1983. Claims under §1983 do not make *Morse* unique, for *Earls*, *Davis*, *Safford*, and even *Tinker* were §1983 cases. What distinguishes *Morse* from the others is the fact that Frederick had standing to raise rights claims; in all the other cases, parents raised rights claims on behalf of their minor children. My point is that it was somewhat anomalous for the Supreme Court to recognise Frederick as a competent adult for *juridical* purposes while at the same time treating him as if he were a *pupil* subject to the ‘custodial and tutelary’ authority of his school principal. At a minimum, then, *Morse* was probably not the most appropriate occasion for Justice Thomas to argue for the complete restoration of *in loco parentis* in public schools. Nor was it the most appropriate occasion for the Chief Justice to affirm the ‘custodial and tutelary’ relationship between public school officials and students. For in this case, the student was not a *pupil*.

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E. Parens Patriae and Compulsory Schooling Laws

Parens patriae is the common law doctrine by which the State, primarily through its legislative and judicial organs, exercises public custodial authority in the welfare and developmental interests of all minors and other incompetent persons within its territorial jurisdiction. In regulating custody, the State as parens patriae determines who shall have legal authority to make decisions on behalf of a particular child. This is public educational authority in perhaps its most compendious sense.

Parens patriae authority is perhaps most dramatically exercised in cases involving children requiring lifesaving medical treatments to which their parents have objected for religious reasons. In such cases, the custodial authority of the parents is temporarily suspended by means of a judicial order. A designated state agent then consents to the treatment on the child’s behalf. Parens patriae authority is perhaps most conspicuously exercised in cases involving abused and neglected children. In such cases, the custodial authority of parents deemed ‘unfit’ may be limited, suspended, or terminated. Parens patriae authority is perhaps most routinely exercised in custody disputes between divorcing spouses unwilling or unable to agree on who should exercise the legal decision-making authority they had previously exercised jointly. And parens patriae authority is perhaps most broadly exercised in legislation requiring all persons having care and control of a child to enrol the child in a state-approved educational programme.

An expansive conception of the parens patriae doctrine provided a primary legal basis for the establishment of juvenile justice and child welfare programs, the prohibition of child labour, and the enactment of compulsory schooling laws during the Progressive Era in most US states (see Ensign, 1921; Alexander and Jordan, 1973; Katz, 1976; Kotin and Aikman, 1980). From a parens patriae perspective, every child has an interest in learning more than what her parent(s) alone might be willing or able to teach. In American jurisprudence, both parents and the State have a legal duty to ensure that children receive an education. The State as parens patriae fulfils its duty to provide all children within its territorial jurisdiction with access to public knowledge and diverse formative influences (see Curren and Blokhuis, 2011; Kitcher, 2011) by enforcing compulsory schooling laws—legislation requiring all persons having care and control of a child to share custody of the child with state-approved teachers for specified periods of time.

When a group of Old Order Amish parents sought an exemption from compulsory schooling laws on religious grounds in the Yoder case (1972, p. 229), the State argued that it was required, as parens patriae, ‘to extend the benefit of secondary education to children regardless of the wishes of their parents’. The parents ultimately prevailed, in part because three years after Justice Fortas’s ignominious departure in 1969, the Supreme Court was not yet ready to reconcile constitutional rights claims with the doctrine he had apparently repudiated in Kent, Gault, and Tinker. Ten years after Tinker, Chief Justice Burger denounced the parens patriae doctrine as a ‘statist

The juvenile’s countervailing interest in freedom from institutional restraints . . . must be qualified by the recognition that *juveniles,* unlike *adults,* are always in some form of custody. Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae.* In this respect, the juvenile’s liberty interest may, in appropriate circumstances, be subordinated to the State’s ‘*parens patriae* interest in preserving and promoting the welfare of the child.’

The exercise of substituted decision-making authority is supposed to facilitate the prospective autonomy and legal competence of children as *future* adults and *future* rights-bearers. ‘The case against the exemption for the Amish must rest entirely on the rights of Amish *children,* which the state as *parens patriae* is sworn to protect’, wrote Joel Feinberg in response to the *Yoder* decision (2007, p. 115). ‘An education that renders a child fit for only one way of life forecloses irrevocably his other options.’ According to Warnick (2013, p. 35), this means ‘[t]he theoretical existence of the future adult who will someday exercise individual liberties . . . justifies a set of rights for the currently existing child.’ But Feinberg, arguably one of the most important figures in 20th century American jurisprudence, did not say we should ‘give’ children rights now ‘for the sake of the free adults they will someday become’ (Warnick, 2013, p. 35). It makes little sense to argue we should ‘give’ children rights now so that they can have rights later. Feinberg argued that the child’s right while still a child ‘is to have [his] future options kept open until he is a fully formed self-determining adult capable of deciding among them’ (Feinberg, 2007, p. 113). Rights are to be ‘saved’—held in trust—for children until they are capable of exercising them, much as money held in a trust account is ‘saved’ until the child reaches the age of majority, and for similar reasons. Moreover, Feinberg (2007, p. 113) explicitly acknowledged that safeguarding a child’s prospective autonomy interests ‘often requires preventing his free choice now.’

**THE INSTITUTIONAL CONTINGENCY OF LEGAL RIGHTS**

Legal rights are both *proprietary* and *institutionally contingent* (Steiner, 1994, p. 93). Most people tend not to think of rights as *proprietary,* largely because they tend to think of property in terms of tangible things like sofas or watches or buildings. And indeed, these are forms of movable and
immovable property which individuals may claim as their own, with all that ownership entails. But property can be incorporeal or intangible. *Ballentine’s Law Dictionary* (2010) defines *intangible property* as ‘[r]ights not related to physical things, being merely relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in the courts.’ Students in law schools throughout the English-speaking world learn that the most basic form of property at common law is the *chose in action*, a personal right to sue for the enforcement of rights arising out of contracts or agreements or relationships between persons in a court of Law or Equity. Thus, in effect, *standing* to raise claims in court is both a basic form of property and, at the same time, one of the most basic of legal rights.  

In the absence of standing to make rights claims in court, one has only interests, wishes or hopes. This is a problem for minors in the United States, because American law ascribes to ‘infants’ a serious legal disability until they reach the age of majority, *viz.* an inability to contract, and a concomitant inability to raise legal rights claims independently. Hence legal rights are institutionally contingent, but not in the sense that they are freestanding entities ‘transformed’ by particular institutional contexts. Warnick credits Anne Newman (2013) for these unfounded ideas and adopts aspects of her instrumentalist conception of rights discourse as a means to social change in lieu of a philosophically sound conception of moral rights or a jurisprudentially sound conception of legal rights: ‘When we speak of a “right”, we are referring to the strength of [a] moral claim rather than a particular domain of protection’, he writes. ‘Rights are claims that are among the strongest claims in our moral vocabulary. They often are seen as trump cards, things that we are strictly owed and things that we strictly owe to others’ (2013, pp. 9–10, 169). Thus, in his analysis of the ‘special characteristics of the school environment’, Warnick (2013, p. 22) ‘looks at how rights are transformed when students are already playing roles of learners within educational institutions.’

Legal rights are institutionally contingent in the sense that there must be an institutional structure within which claims may be raised, recognised, and enforced. ‘The legal power to claim (performatively) one’s right or the things to which one has a right seems to be essential to the very notion of a right’, says Feinberg (1970, p. 251). ‘A right to which one could not make claim (i.e. not even for recognition) would be a very “imperfect” right indeed!’ Institutional contingency may entail even more than this. Henry Shue (1980, p. 75) argues that ‘[e]njoyment of the substance of a right is socially guaranteed . . . only if all social institutions, as well as individual persons, avoid depriving people of the substance of the right and some provide, if necessary, aid to anyone who has nevertheless been deprived of the substance of the right.’ This broader view of rights as ‘socially guaranteed’ seems consistent with that of John Stuart Mill (1952, pp. 470–1):

> When we call anything a person’s right, we mean that he has a valid claim on society to protect him in the possession of it, either by the
force of law, or by that of education and opinion. . . To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of.

This seems to comport well with the doctrine of *parens patriae*, at least insofar as it requires the State to safeguard the independent welfare and developmental interests of children. But Mill did not conceive of children as rights-holders. How, then, can any legal rights be ascribed to minors?

For his part, Carl Wellman (1995) argues that ascribing legal rights to persons incapable of bringing suit or otherwise acting on their behalf within existing legal institutions distorts the concept of legal rights. For academic jurists who view legal rights as a mechanism for protecting the exercise of reason or agency, or for those who identify the utility of legal rights with the exercise of ‘sovereignty over some domain of social existence’ (Dwyer, 2006, pp. 293–294), Wellman’s objection to ascribing legal rights to incompetent persons makes sense. ‘[W]hat clue do we find, in ordinary legal discourse, toward limiting the word in question [a “right”] to a definite and appropriate meaning?’ asked Wesley Newcomb Hohfeld. ‘That clue lies in the correlative “duty”, for it is certain that even those who use the word and the conception “right” in the broadest possible way are accustomed to thinking of “duty” as the invariable correlative’ (1914, p. 31). Because the State as *parens patriae* has a sovereign duty to safeguard and promote the welfare and developmental interests of legally incompetent persons through the regulation of custody, minors have a corresponding common law right to custodial arrangements that safeguard and promote these interests. This claim is consistent with the venerable Hohfeldian conception of legal rights as correlates of legal duties. But how can minors lacking standing claim such rights? James G. Dwyer (2006, p. 294) notes that parents and guardians *ad litem* allow children to make rights claims vicariously. My own view is that if judges have a duty to act in a *parens patriae* capacity in proceedings in which the custodial interests of children are implicated, it makes sense, from a Hohfeldian perspective, to say that these interests need not be claimed (Blokhuis, 2010, p. 212). ‘The Judge acting for the State as *parens patriae* is responsible for protecting the interests of the children which come before him and thus, so to speak, for representing them’, wrote Justice Zukerman of the Family Court of New York in *In re Catherine S. and Darlene S.* (1973, p. 158). ‘Although the *parens patriae* concept has been characterized as murky in meaning and dubious in historic credentials the unequivocal essence of the responsibility to the minor is the moral imperative of the fiduciary’, wrote Justice Schwartz of the Family Court of New York in *In re Janet G. v. New York Foundling Hospital* (1978, p. 144).

Granted, this theory of automatic judicial cognizance would apply only to the custodial interests of minors. In order to have a constitutional right in the United States, one must have standing to raise a judicily-cognizable claim that under a specified clause of the Constitution, the State must do *x* (a positive duty) or must forebear from doing *x* (a negative duty).
If the judge accepts such a claim and makes an enforceable order in favour of the claimant, then she and others similarly situated can meaningfully say they have a constitutional right. The difficulties inherent to any unqualified ascription of legal rights to minors may help to explain why Kenneth Strike, in a chapter entitled ‘Student Rights’ wrote mostly about the interests of children. ‘First, and most obvious, the child has an interest in nurture’, he wrote, recognising that children have welfare interests in common with all persons. ‘Second, the child has an interest in acquiring the prerequisites of moral agency, personal autonomy and independence’, he wrote, recognising that children, unlike adults, have developmental interests based on their immature status. ‘Third, the child has an interest in access to the resources and guidance that will help them to acquire a set of rational preferences and develop their own unique potential’, he wrote, recognising that children have an interest in an education that is, in his words, ‘liberating and humanizing in the broadest sense’ (Strike, 1982, pp. 132–134).

Writing at a time when many recent law school graduates were trying to come to terms with the unprecedented ascription of constitutional rights to minors in custodial contexts in *Kent, Gault,* and *Tinker,* Hilary Rodham (1973, p. 487) cautioned, ‘Asserting that children are entitled to rights and enumerating their needs does not clarify the difficult issues surrounding children’s legal status.’ Before *Kent, Gault,* and *Tinker,* minors had only a limited number of judicially-cognizable interests corresponding to the publicly-determined purposes of custody. The ascription of limited constitutional rights to minors in custodial contexts at the height of the Civil Rights Era was an important and necessary development. To be clear, students in public schools do have limited constitutional rights, and this is a good thing. The jurisprudential point I wish to emphasise is that the constitutional rights that can be ascribed to pupils are limited or ‘imperfect’ by virtue of their legal status. Unemancipated minors remain subject to the custodial authority of their parents no matter where they are. Inside the public school gates, they are concurrently subject to the limited custodial authority of teachers and school officials. Because public school teachers and school officials are agents of the State, their decisions are generally subject to constitutional scrutiny. Because private school teachers and school officials are parental delegates exercising custodial authority in loco parentis, their decisions are not generally subject to constitutional scrutiny. To the extent that pupils have limited constitutional rights while under the limited custodial and tutelary authority of public school teachers and school officials, these rights are lost when they exit the schoolhouse gates. And no matter what constitutional rights the Supreme Court has ascribed to minors in custodial contexts, including pupils in public schools, they still lack standing to raise constitutional claims independently in the United States. Unlike Joseph Frederick, pupils must rely on their parents or other litigation guardians to raise such claims on their behalf. This is itself an exercise of custodial authority and an affirmation of the significance of custody for understanding ‘student rights’ in American jurisprudence.
CONCLUDING REMARKS

As I have emphasised in this article, public schools have ‘special characteristics’ which the US Supreme Court has consistently defined in terms of the custodial and tutelary relationship between teachers and pupils since 1995. Common law doctrines and principles are extinguished to the extent that they are found to be inconsistent with the Constitution, but only to that extent. Thus, for minors in the United States, where the prospects for ratification of the UN Convention on the Rights of the Child remain dim, there can be no unqualified presumption in favour of ‘student rights’ coextensive with those of adults in any context, including public schools. Instead, there is a presumption against legal rights coextensive with those of adults for individuals who lack standing to claim or vindicate any legal rights independently. Constitutional rights protect the liberty interests ascribed to competent persons, so they cannot easily be reconciled with the custodial interests ascribed to minors at common law. Hence, any constitutional right ascribed to a minor is in a practical and theoretical sense, limited and ‘imperfect.’

In the United States, public schooling in general and compulsory schooling laws in particular are predicated on the authority of the State as parens patriae to safeguard and promote the interests of minors through the regulation of custodial authority. The ascription of limited constitutional rights to students in public schools in Tinker necessarily undermined to a similarly limited extent the common law basis for teacher authority, in much the same way that parental authority would be undermined if American children were able to challenge the constitutionality of their parents’ decisions in the federal courts. This may sound strange to many European readers, as children in a number of EU member states do have standing to raise constitutional and human rights claims before the European Court of Human Rights and, in some jurisdictions, in civil courts as well. In at least one civil law jurisdiction outside Europe, a minor may, ‘with the authorization of the court, institute alone an action relating to his status, to the exercise of parental authority or to an act that he may perform alone . . .’. Hence in 2008, a 12-year-old in Quebec sued her father after he refused to sign a parental consent form for a school trip, having ‘grounded’ her for posting inappropriate pictures of herself online. In a decision subsequently upheld on appeal, the lower court found the father’s punishment overly severe (CBC News, 2009). This is the stuff of nightmares for Justice Clarence Thomas and many other Americans. However, I do not endorse Justice Clarence Thomas’s calls in Morse (2007) and Safford (2009) for a complete restoration of in loco parentis in public schools, as this would shield all disciplinary decisions by public school officials from scrutiny by federal court judges while stripping students of the limited constitutional protections afforded them since 1969. I think it is appropriate to regard public schools as ‘mediating structures’ between the private and the public spheres (see Hafen, 1987), as institutions within which teachers are concurrently parental delegates and agents of the State as parens patriae.
‘[S]omeone might say that . . . [b]y preventing students from exercising free speech until they reach maturity, students learn both to esteem their rights as something special and to better understand their obligation to exercise their rights responsibly’, writes Warnick (2009, p. 159). ‘By waiting until their education is finished, students learn that free speech comes with the burden to be informed and to speak in context-appropriate ways.’ I would indeed say this—and more. If minors were ascribed constitutional rights coextensive with those of adults, it would undermine the custodial and tutelary nature of the relationship between teachers and pupils in public schools. Any child could ask why she should have to go to school at all. As we have seen, there is no such presumption for minors, whose legal status makes them ordinarily and appropriately subject to custodial authority at all times, including their time in public schools:

67B Am Jur 2d Schools §284 (2013):

. . . Because of the State’s custodial and tutorial authority over the students, public school students are subject to greater degree of control and administrative supervision than is permitted over a free adult. . . .

Moreover, to the extent that public schools were established to help prepare minors for the future exercise of adult liberties, the unqualified ascription of constitutional liberties to minors would undermine their raison d’être.37 A fundamental purpose of public schools as custodial and tutelary institutions is to facilitate the capacities associated with the prospective autonomy or legal competence of children as future adults—as future rights-bearers. There appear to be sound jurisprudential reasons why compulsory schooling and minority status tend to end at the same time. Moreover, if constitutional rights coextensive with those of adults were ascribed to minors, it is not at all clear what the legal basis for compulsory schooling laws would be.38

What is clear is that the ascription of limited constitutional rights to minor students in public schools in Tinker generated inconsistencies in judicial reasoning for twenty-five years and, to this day, some confusion amongst philosophers of education. But the Supreme Court has not left forever undefined ‘the special characteristics of the school environment.’ Accordingly, in this article, I have argued that greater familiarity with American jurisprudence will help philosophers of education recognise the difficulties inherent to any unqualified ascription of constitutional rights to pupils, whose legal relationship with teachers and school officials is ‘custodial and tutelary’. For in American jurisprudence, it is this relationship that gives public schools their ‘special characteristics’.

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ACKNOWLEDGEMENTS

This article is part of a larger research project for which I gratefully acknowledge a Philosophy in Educational Policy and Practice Strategic Initiatives Grant from the Spencer Foundation and a Kluge Fellowship at the Library of Congress. I would like to thank Samuel Mosonyi of the University of Cambridge for his very capable research assistance and Gerry Callaghan, Randall Curren, Jonathan Feldman, Brian Hendley, Michael Merry, Tyll van Geel, and the anonymous reviewers at the Journal of Philosophy of Education for their helpful comments on various drafts.

NOTES

1. West Virginia State Board of Education v. Barnette (1943) was not a ‘student rights’ case per se. It involved a group of parents who claimed their constitutional rights were violated by a school district policy by which their children could be expelled for refusing to salute the flag.

2. Justice Fortas served as Associate Justice from 4 October 1965 to 14 May 1969.

3. David S. Tanenhaus (2011, p. 109) notes that Justice William Brennan was subsequently forced to remove the following passage from his opinion in In re Winship (1970): ‘The . . . denial of rights available to an adult may be offset, mitigated, or explained by action of the [State], as parens patriae, evidencing solicitude for the juveniles.’ In Winship, the Supreme Court mandated the ‘reasonable doubt’ standard of proof in criminal cases involving juvenile defendants.

4. Until Kent (1966), the Supreme Court had exempted juvenile court proceedings from constitutional scrutiny on the ground that the interests of minors were protected by the individualised care and concern juvenile court judges were to provide under the parens patriae doctrine.

5. In Gault (1967), the Supreme Court determined that juveniles accused of crimes were entitled to many of the due process rights afforded adults.

6. Tinker (1969) involved two high school students and a junior high school student who had been suspended for wearing black armbands to protest the Vietnam War in violation of school policy. Justice Fortas found that the school policy banning ‘symbolic speech’ violated students’ First Amendment rights and their armbands had not ‘materially and substantially interfered’ with the requirements of appropriate discipline in the operation of the school.

7. The Supreme Court retreated almost immediately in juvenile justice cases; see Winship (1970) and McKeiver v. Pennsylvania (1971). The Court retreated more slowly in public school cases; see Tinker (1969), Bethel School District v. Fraser (1986), and Hazelwood School District v. Kuhlmeier (1988). Student speech that did not meet the ‘substantial disruption’ standard in Tinker could be suppressed if it was indecent (Fraser) or if it bore the imprimatur of the school (Hazelwood).

8. This has not gone unnoticed by legal scholars. The Hein Online database includes 301 articles containing the phrase ‘custodial and tutelary’ from Scalia’s initial use of the term in 1995 to the present. It also includes 48 articles containing both the phrase ‘special characteristics of the school environment’ and the phrase ‘custodial and tutelary’ from 1995 to the present.

9. In Davis (1999), Justice Sandra Day O’Connor found a school district could be held liable for the sexual harassment of a fifth grader by a classmate, noting that ‘the nature of the state’s power over public schoolchildren is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.’ In Earls (2002), Justice Clarence Thomas found a district policy mandating drug tests for all students involved in extracurricular activities to be consistent with ‘the custodial responsibilities of school officials.’ In Morse (2007), an eighteen-year-old unsuccessfully claimed that his school principal had violated his First Amendment rights when she suspended him for hoisting a banner reading ‘BONG HITS 4 JESUS’ during a school-sponsored outing. In Safford (2009), public school officials were granted qualified immunity for the unconstitutional strip search of a seventh grader.


12. Harry Brighouse and Paula McAvoy (2010) observe that in loco parentis declined in higher education in the 1960s without fully explaining why. A series of court decisions contributed to its demise throughout the 1960s, beginning with Dixon v. Alabama State Board of Education (1961) and Carr v. St. John’s University (1962). Following the Twenty-Sixth Amendment, the in loco parentis concept no longer applied because the vast majority of university students were no longer minors. This continues to present an insuperable legal barrier to the revival of in loco parentis that Brighouse and McAvoy advocate (2010, p. 178). University students are not ‘in the charge’ of their professors in the custodial sense of that phrase.

13. Henry Sumner Maine (1861) famously described the evolution of the Law of Persons in progressive societies in a manner reflective of the development of individuals from legal incapacity to legal competence—from status to contract.

14. See 52 Am Jur 2d Marriage §18 (2013): ‘... It is generally within the legislative power to determine the age at which persons can marry ... A state’s interests in mature decision making, and in preventing unstable marriages, are legitimate under its parens patriae power to protect and promote the welfare of children who lack the capacity to act in their own best interest. ...’

15. See the entry in Ballentine’s Law Dictionary (2010) for ‘statutory emancipation’.

16. See 628 Am Jur 2d Constitutional Law §400 (2013): ‘... Even fundamental constitutional rights are not absolute and may be reasonably restricted in the public interest; see also 628 Am Jur 2d Constitutional Law §414 (2013): ... Every constitutional right or privilege must be enjoyed with such limitations as are necessary to make its enjoyment by each consistent with a like enjoyment by all, since the right of all is superior to the right of anyone. ...’

17. See 628 Am Jur 2d Constitutional Law §608 (2013): ‘... [Liberty] embraces every form and phase of individual right that is not necessarily taken away by some valid law for the common good. The guarantee of due process protects the liberty of the individual. The cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest is that a government should be one of laws, and that all persons are equal before the law. ...’

18. See Am Jur 2d Municipal Corp., Counties, Other Political Subdivision §416 (2013): ‘Municipalities may pass curfews, based solely on age, that discriminate against minors and limit their liberty ...’

19. See 8 Am Jur 2d Automobiles and Highway Traffic §719 (2013): ‘In some states, statutes require that a parent or other custodian of a minor who applies for a license to drive a motor vehicle sign the application and assume liability for the licensee’s negligence or wilful misconduct in the operation of such a vehicle. ...’

20. Hence Justice Scalia’s observation in Vernonia (1995, p. 654) that ‘When parents place minor children in private schools for their education, the teachers and administrators of those schools stand in loco parentis over the children entrusted to them.’


22. Frederick’s attendance had effectively become voluntary two years prior to the BONG HiTS 4 JESUS incident; see Alaska Statutes §14.30.010 (a) (2013): ‘... Every parent, guardian or other person having the responsibility for or control of a child between seven and 16 years of age shall maintain the child in attendance at a public school in the district in which the child resides during the entire school term ...’

23. See 42 Am Jur 2d Infants §13 (2013): ‘The State, as parens patriae, is authorised to legislate for the protection or care of children within its jurisdiction. Therefore, generally, each state has a duty to assure that the children within its borders receive adequate care and treatment. ... In recognition of this legal principle, the legislatures in many states have enacted statutes designed to set minors apart and afford them privileges and immunities not possessed by adults. The legislature may define the status of infants requiring guardianship and may enforce state control and education of infants coming within that class. ...’

24. See 42 Am Jur 2d Infants §12 (2013): ‘The State, through its proper organs, exercises its power for the protection of its resident infants since it, as parens patriae, is the guardian of the children within its jurisdiction. Stated otherwise, each state has a substantial or
compelling interest in the welfare of its children and in preventing and deterring mistreatment of them.’
25. See 59 Am Jur 2d Parent and Child §19 (2013): ‘...[T]he State has parens patriae authority to ensure that children receive reasonable medical treatment. Thus, where parents . . . fail to provide or refuse to permit medical treatment that the child requires, the State may take custody from the parents . . .’
26. See 42 Am Jur 2d Infants §15 (2013): ‘To ensure the best interest of the child, the power of the State transcends the right of the natural parents, and if they are unfit to have custody, their children may be taken from them . . .’
27. See 24A Am Jur 2d Divorce and Separation §864 (2013): ‘When parents terminate their marriage, the courts become the “parens patriae” of their children and are empowered to determine what is best for the children, despite the parents’ opposition. . . . Children of divorcing parents are, in a very practical sense, wards of the court, which is by law charged to regard their best interests. . . .’
28. See 67B Am Jur 2d Schools §271 (2013): ‘...A statute may similarly provide that each person who has legal custody or care and control of a child within a certain age see that the child attends school or receives instruction as required by law.’
29. See 59 Am Jur 2d Parent and Child §63 (2013): ‘It is the natural and legal duty of a parent to give his or her children an education. In fact, parents have a duty to support their children until they complete high school regardless of whether they are older than 18. If the parents fail to perform their duty to educate the child, the State may assert its power as parens patriae . . .’
30. Parents retain primary custodial authority while their children are attending public schools; see DeShaney v. Winnebago County Dept. of Social Services (1989).
34. Based on the entry in his online vita, it would appear that Rob Reich (2012) appropriately changed the title of his chapter in the Oxford Handbook of Philosophy of Education from ‘Educational Authority and Children’s Rights’ to ‘Educational Authority and the Interests of Children’ prior to its publication. Harry Brighouse (2002) added a fitting caveat to his titular question, ‘What Rights—If Any—Do Children Have?’
37. Whether or not this actually occurs in contemporary public schools is not a valid objection to this claim.
38. I will elaborate on this point in another paper.

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