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Response

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RESPONSE

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Most, if not all, of the participants in this Symposium agree with several basic points set forth in the essay that occasioned this volume:

(1) children have fewer free-speech rights than adults, (2) children need to be protected from exposure to violent and vile material, and (3) such protection should be age-graded. This agreement is no small matter given the stature of the scholars involved—and given that they approach the problem at hand from essentially liberal or libertarian viewpoints. The difficulties involved in tackling the issues at hand are highlighted by the fact that Congress’s first attempts to find a constitutionally acceptable way to draft laws that protect children from harmful material in the media (cyberspace included) failed. Both the Communications Decency Act of 1996 (“CDA”) and the Child Online Protection Act of 1998 (“COPA”) have been found by the courts to violate the First Amendment. The Supreme Court decided, however, that the Children’s Internet Protection Act of 1999 (“CIPA”) is constitutionally acceptable in its June 2003 ruling on United States v. American Library Association, Inc. One could argue that the Court so ruled because it lost hope that Congress will come up with a truly satisfactory bill. CIPA, as I indicated in the leading essay, is a deeply flawed law, unnecessarily limiting the free speech of adults while exempting the material most harmful to children, specifically gratuitous violence.

It is also reaffirming that after the opening essay (in which an age-graded approach was suggested) was written and sent to the participants in this Symposium, the Third Circuit’s decision on remand

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from the Supreme Court notes that COPA does not limit the term "minor" in any way, and suggests that the "statute's targeted population could be more narrowly defined." In other words, the court ruled that an age-graded approach might serve best to satisfy the First Amendment's requirements.

The responding essays, however, quite clearly do not embrace my communitarian approach, but rather seek to limit the First Amendment rights of children in the interest of some other individual right. That is, they stick to a rights-centered political philosophy, to liberalism. However, apart from my concern for the well-being of children, one major reason I explored children's First Amendment rights is the light such an exploration casts on deep flaws in liberal political theory and related social philosophical positions.

I. CHILDREN'S RIGHTS VERSUS CHILDREN'S WELL-BEING

The essence of communitarianism as I see it—and where it profoundly differs from liberalism—is the observation that societies, indeed humanity as a whole, are constantly facing two profound claims. These claims, for autonomy and social order, can be reconciled only partially. Thus any attempts to build a social theory centered on one of these claims will unduly deprive the other, thus minimizing or ignoring the issues that arise when one faces the two profoundly legitimate but conflicting claims for autonomy and social order. The communitarian approach is to work through the inevitable tension, rather than wish it away by presuming that liberty or rights are absolute and that the burden of proof lies with those who advocate deviations in the interest of other considerations. In the context of the issue at hand, the great value of children necessitates a communal concern for their well-being, one that takes into account their special vulnerability and need for protection, and this concern must be given full weight when it conflicts with First Amendment rights.

Second, communitarian thinking draws on the observation that people are not free agents whose preferences must be respected because they reflect their true selves, but that they are persons shaped, in part to be sure, by their social and historical environments. In principle, there should be no objection to recasting these environments as a means to improve their preferences. For instance, if commercials manipulate a person to yearn for Marlboros, we may give considera-

7. ACLU, 322 F.3d at 253–54.
tion to running public service announcements that speak to that person's fear of dying in order to urge him to stop smoking. Note that we are talking about appeals to emotions and values, not simply sharing information that a fully autonomous person may process. To put it more technically, forces external to a person can influence (though not fully determine) his preferences, and these forces command much more respect than liberalism accords them. Liberals must assume that people are born at age twenty-one with their preferences in place, as Kenneth Boulding put it, because once they acknowledge that preferences are externally shaped—rather than freely chosen or expressive of people's values—our respect for people's choices is much diminished. Thus, if the marketing departments of corporations greatly shape what we want to buy, there is much less reason to oppose state limitations on our purchases (say, of chemically laced foods) than if these choices reflected our true wishes or were based on our understanding of the risks involved and our values to accept them.

Children provide an unparalleled opportunity to study the issue at hand because nobody can seriously question that they are born without specific preferences on most matters. While they may have some generalized predispositions, children's preferences are largely imported and not innate. For this reason, we do not consider it a violation if a parent prevents a child from exercising her "right" to run into the street, nor is it a violation of her First Amendment rights if a parent turns off the TV set and sends her to bed. Especially for infants and young children, we very properly pay relatively little mind to their preferences, and we see is not merely as our right, but as our responsibility, to influence the development of these preferences. One major factor, then, is control over children's educational environments, including the cultural materials to which they have access. Once one realizes that preferences are in part externally shaped in the young by an environment deliberately formed for this purpose, one can readily see that the external social forces at work do not suddenly die off when children come of age, thus pointing to the need for a social theory that would accommodate these forces, which liberalism does not. This issue, in other words, speaks to a fundamental problem with liberalism as a whole, namely its inability to account for the fact that external factors influence the choices and decisions of all people.

If one accepts that we are shaped by our communities, cultures, and histories, it takes only one more step to recognize that adults also are not free agents or free-standing individuals. They are shaped not
only by constraints (which liberals have no problem incorporating into their political theory and social philosophy as parts of the environment that actors take into account, such as costs), but also by processes that shape our preferences in ways of which we are unaware—for instance when we subconsciously respond to cues from those we care about, such as members of our families and communities. The same holds for religious, ideological, and other social influences that affect us not by providing information but by rearranging our inner selves. I should be quick to note that we of course have some degrees of freedom, but fewer than presumed in liberal theory. To avoid facing this issue, contemporary liberal theorists rarely deal with the unique situation of children—but when they do, they treat children as if they are adults who happen to be short in stature—and who have all the same rights.

Because the essays here assembled deal with children, they are unable to ignore the profound impact of external influences on the self. Instead, the authors resort to a rather different device to keep their liberal beliefs intact: They seek to base whatever special treatment of children they favor on some well-established or newly-fashioned individual rights. For instance, instead of recognizing a public interest in the well-being of children, some try to rely on the state’s (or community’s) right to produce healthy children—a particularly troubling move because it accords collectivities rights, which are best preserved for individuals. Others merely fashion new children’s rights to protection from harmful material in the media despite the First Amendment.

One cannot but wonder why such fine scholars would resort to intellectual contortions to base protection for children on rights claims rather than accepting the communitarian position. An overly simplistic answer is that they are liberals, and thus are bound to defend the political theory that undergirds their thinking. Scientists speak of “stubborn facts,” those that do not fit a prevailing theory. It is the duty of scientists to try to stretch a theory to determine if it can accommodate such facts before even considering a theory (or paradigm) shift. Often, theories are allowed to stand even if they cannot deal with several stubborn facts, because the intellectual costs of abandoning one theory and embracing another are so considerable. It is my task, as an advocate of the “next” social theory, to convince liberals that a shift to communitarian thinking is overdue.
Another reason my colleagues adhere to liberal theory is that, in some intellectual disciplines, especially philosophy, deriving a position from one overarching principle (in this case liberty) is considered vastly superior to making contradictions reflecting the clash of two or more incompatible principles one's starting point. In contrast, I take it for granted that no society can survive if it tries to build on—let alone 'maximize,' as some economists aspire to do—any one principle; people have contradictory legitimate needs. Adults are entitled to full First Amendment rights, but children need protection from some kinds of expression. Here is a conflict that must be worked through, and not by treating all measures taken on behalf of children as concessions adults may wish to grant against their own free-speech rights. Thus, I differ greatly from Colin Macleod when he writes that the communitarian position calls for "... context sensitive politics of the common good in which individual rights can be limited for the sake of other values." First, we should not assume that every time we take something other than rights into account, we are somehow taking something away—as if attending to any other values entails some kind of invasion on rights' turf. In terms of the Fourth Amendment, there is no right never to be searched; for when one is subject to reasonable searches, one's rights have not been violated whatsoever. Similarly, children have few First Amendment rights, and thus limiting their exposure to harmful material is not a violation of their rights. Second, as we shall see immediately, the context is relevant, but taking it into account is derived from the principle that a good society is one in which there is a carefully crafted balance between autonomy and social order and not some kind of politics of the common good, or of any other kind.

Finally, and arguably most important, is the question of being "within history." In earlier periods (say, when Locke was writing or when he became widely followed in the founding days of the republic), and still today in other societies, the common good was well protected and rights were limited. Thus, from the communitarian viewpoint, the main concern was to roll back the excessive powers of the state and the church and to provide ways of thinking that would legitimate the increased autonomy of citizens and a greater respect for rights. Over the last decades, however, especially in the United States, the language of rights has been overextended—and that of the

common good undermined. In the current historical context, we need to give more consideration to shoring up the common good, and rights inflation must be curbed. The struggle to find legal ways for the community to protect children—and basing this protection on notions of the common good rather than the extension of rights—is very much a part of this overdue historical correction.

Before I proceed, I should note that the essays in this volume are very rich, and it is regrettable that I am unable to respond to every or, indeed, very many of the points made.

II. RIGHTS-BASED PROTECTIONS

Colin Macleod argues that liberals can accept the "political" proposals I made—especially those that involve separating children from adults and thus do not involve "spillover"—but based on "liberal ideals of equality, individualism, and rights." He argues that children have multiple rights and interests, including some based on their developing moral capacities. Therefore, whatever limitations on harmful (as well as "unsuitable") material might be imposed on behalf of children can be justified by their needs, without introducing consideration of the common good. In the process, Macleod vastly expands and enriches liberal theory in ways that he concedes in passing not all his fellow travelers will want to follow, but he does stay within the very broad tent of liberalism.

David Archard's argument develops along similar lines. He delineates several different children's rights—as well as the rights of parents to direct their children's development—and sorts out the relationships among them. His most novel idea is the notion that children have a right (maybe 'interest' would be a more suitable term) to the future adult that they might become, if properly developed. Therefore, material that one may seek to deny to children out of concern for their well-being may not be denied because to do so would be to set back children's future capacities as free citizens. He argues that children have rights not only as children, but also rights as future adults. This latter category works two ways. It could mean that we

10. Macleod, supra note 8, at 56.
should deny children access to certain types of material because they have a right to become healthy, well-adjusted adults. On the other hand, it also means that children do have rights to see certain material not as children, but in the interest of becoming adults (learning how to deal with sex and violence in an appropriate way) and having a hand, to the extent possible, in their own development.

This is a well-taken point. If one were to assume that children never grow up, as is the case with a child who has a truly low IQ, we would not be concerned with the rights of the adult-in-the-child and would be less willing to allow him to be exposed to harmful material because he eventually must learn to deal with such material on his own. This argument does justify taking some risks, allowing material to be somewhat ahead of where a child is. But one should take into account, as Archard does, that when a child is harmed as a child, the adult-in-the-child is also likely to be harmed. Thus, if a child develops aggressive tendencies, he is likely to follow this same course as he grows up. The only remaining question—for me a key one—is why this argument should be put in terms of some kind of a new right rather than in terms of the interest of the community (and the family and the child) to protect the child well so that she grows up to be a good citizen and a good human being.

Emily Buss argues that children especially need free access to different kinds of cultural material, the Internet included, because they are still developing.\(^{12}\) She does favor some regulation of material—but in order to convince uptight parents to let their children roam more freely, which she considers essential for their normal development. However, a huge amount of data shows that most parents are too lax, not too controlling, when it comes to their children. Ten million children are so-called latchkey kids, living in homes in which adults are not present after school, free to do what they wish with TV, the Internet, and the liquor cabinet. Parents often come home from work exhausted, disinclined to discipline their children, and relieved when they are preoccupied by some TV show or computer game. Practically none of them activate their V-chips. In short, regulations can hardly be justified on this ground.

What difference does it make whether we justify regulations by reference to the common good rather than some children’s right that trumps their developmental or free speech rights? When we refer

exclusively to rights, we immediately face the question of which rights take precedence over others. Because liberals tend to accord the highest value to free speech, protection of children is likely to come up short—as has been the case in the issue at hand. So when Buss and others refer to the fact that the courts have taken public interest into account in other matters, such as mandatory vaccinations, the same does not necessarily hold true when it comes to the First Amendment. Surely, no reliably principled reasons come to mind why rights other than free-speech rights should prevail in liberal theory. In contrast, from a communitarian viewpoint, there is no reason to hold children's protection from violent speech any less dear than their protection from any other equivalent threats that do not involve speech.

Moreover, the rights that liberals try to balance against free speech are often contrived claims with little tradition in jurisprudence and public support. Viewing the well being of children as a public good is much more readily acceptable.

III. SPILLOVER VERSUS SEPARATION

Several authors found it useful to build on the distinction between programs that protect children even if it means also limiting adult access to some materials (that is, where controls “spill over” into adult rights) and those that protect only children (such as providing separate access to children and adults). It seems obvious to me that, to the extent it is practical, separation is to be preferred over spillover for the simple reason that it allows one to have the best of both worlds by protecting children while not violating the First Amendment rights of adults.

Not all would agree. Some social conservatives (who focus on pornography but not violence) would not mind one bit using the need to protect children as an opportunity to curb adult access as well, which is one reason that so many of the laws and regulations devised under their influence failed when tested in the courts (and, in fact, Buss, who is no social conservative, ends up making a similar argument). Some libertarians and civil libertarians—who believe that children have strong, if not total, First Amendment rights—do not appreciate either approach.

It is clear that children need to be protected one way or the other. Given the strong commitment to the First Amendment rights of adults, for now it is best to rely on separation. Most participants in
this volume, especially Nunziato, follow a similar line of thinking. However, there is no reason to object to a re-examination of the question of whether adults' access to gratuitous violence in the media should be curbed, though it is beyond the purview of this examination.

Given that children mature gradually, one kind or another of age-graded protections should be used, rather than allowing the controls that are suitable for young children to "spill over" to teenagers. Practically everybody agrees to this position, even Heins. The Third Circuit, to reiterate, made a similar suggestion in reference to COPA. Colin Macleod correctly points out that it would be better to have many more gradations. Indeed, the way to go ultimately is not to be graded only by age, but also by the capacities of the specific child. For the time being, however, practical concerns necessitate using a small number of gradations, with age standing in for a more precise measure of maturity.

IV. THE ROLE OF PARENTS

It is not reasonable to suggest that parents should regulate their children's access to the media and no other protections are needed. Parents in this day and age need all the help they can get. They cannot stay home at all times to control what their children see on TV and the Internet, and they cannot pre-screen all the tapes and games their children get hold of—hence the merit of the ratings now provided for movies, TV programs, CDs, and video games, all of which were opposed by one libertarian or another. V-chips are a particularly useful example of how the public can help parents to control the amount of violence their children are viewing at home. (The inclusion of V-chips in television sets is required by law, but, regrettably, so little effort has been made to explain to parents how V-chips work that most seem unaware of how to activate and calibrate them.) The same should now hold for computer filters. Without them, parents are very hard-pressed to protect their children.

Nunziato's analysis raises the question of whether the public might override parental preferences, or if these preferences are the last word because children are their parents' responsibility. A com-

munitarian surely would favor providing parents with the tools and encouragement to do their jobs, but not necessarily tolerating that the children of neglectful parents be left without protection. Children who grow up to be violent are a problem for the community, and thus the community is fully entitled to find ways to reduce the probability that children will turn out violent.

Birnhack and Rowbottom designate three levels of legal engagement with the problem: direct-public ordering, indirect-public ordering, and private ordering. My suggested solution, as well as CIPA, COPA, etc., falls under the first category—direct legislative action to regulate access to content. The European approach favors the latter two—legislative "incentives" for content to be regulated at the source, along with non-legislative social pressure for the same. This approach works, for the most part, because of the nature of the legal environment in Europe, where freedom of speech is recognized and protected, but better balanced with other public interests. In other words, Europe is a more hospitable environment for a critique of freedom-of-speech absolutism. The European approach is evidence that democracy can thrive and free speech can be well-nurtured even when children are better protected than they currently are in the United States.

V. A QUESTION OF EVIDENCE, RHETORIC AND CENSORSHIP

Heins's paper deserves special attention because it is such a fine example of the way civil libertarians present their briefs. In practically all such briefs I have examined, including scores of positions taken by the ACLU on greatly divergent matters, they first argue that what they are opposed to is not going to work, too expensive, redundant, and so on. (In this case, they argue that evidence does not show harm to children, that filters do not work, and so on.) If these preliminary pragmatic objections can be overcome, civil libertarians show their hand and then object to whatever measure is involved, whether or not it is effective. In the case at hand, Heins argues that the suggested filters are not accurate—they let inappropriate material through and block appropriate material. However, when told that the filters are improving, and asked to presume that one day they would be very

accurate, Heins and other civil libertarians object to them on the basis of their interpretation of First Amendment rights.

The reason civil libertarians state their position this way is obvious. If a measure is defective, no one would embrace it. But on the issue of principle, many do not share their extremism. In the case at hand, Heins goes on and on about the paucity of the social science data regarding the ill effects of violence in the media on children. It is not possible here to review the hundreds of studies that show the ill effects and to examine the methodological issues raised by them—though, granted, such issues are relevant. Instead, I cite the conclusions of those who did review the literature at great length, using meta-analysis.

Bushman and Anderson's meta-analysis found that correlation coefficients for media violence and aggression are roughly equivalent to or stronger than research concerning accepted relationships in other fields. The correlation between smoking and lung cancer was slightly greater than the correlation between media violence and aggression, but the data used for the correlation between media violence and aggression (from Paik and Comstock) were stronger than the correlations between the following: condom use and sexually transmitted HIV, exposure to lead and IQ scores in children, calcium intake and bone mass, and homework and academic achievement.

Bushman and Anderson went on to compare some of the similarities between smoking and lung cancer, and media violence and aggression.

First, not everyone who smokes gets lung cancer, and not everyone who gets lung cancer is a smoker. Similarly, not everyone who watches violent media becomes aggressive, and not everyone who is aggressive watches violent media. Second, smoking is not the only factor that causes lung cancer, but it is an important factor. Similarly, watching violent media is not the only factor that causes aggression, but it is an important factor.

Third, a single cigarette has little impact on a person's chances of getting lung cancer; however, repeated smoking (their example is a pack a day for fifteen years) greatly increases the person's risk of lung cancer and other diseases.

18. Id.
19. Id.
Similarly, watching one violent TV show has little impact on the likelihood of a child becoming a habitual violent offender, but the empirical evidence now clearly shows that repeated exposure to violent media, for example a couple of hours a day for 15 years, causes a serious increase in the likelihood of a person becoming a habitually aggressive person and occasionally a violent offender.20

Hogben wrote that "[s]ome researchers and theorists still question the existence of a link between televised aggression and aggression by viewers of televised aggression"21 despite the fact that "the majority of both the primary and review evidence at this time favors a positive overall effect of televised aggression on subsequent viewer behavior."22 He included fifty-six different studies, published between 1958 and 1992, in his analysis.23 To be included in the analysis, the studies had to meet the following four criteria: (1) analyze naturally occurring variance, (2) directly measure exposure, (3) directly measure viewer aggression, and (4) maintain a "common conceptual definition of aggression."24 His analysis found that "[v]iewing televised aggression was associated with a small increase in viewer aggression."25

The studies that Paik and Comstock analyzed had to meet the following five criteria:

(a) the study had to have information on the relationship between viewing television and antisocial behavior; (b) the study had to have a behavioral outcome measure for antisocial behavior; (c) the study had to be an original analysis of empirical data, however collected; (d) the study had to have data sufficient for meta-analytic calculation; and finally, (e) only one study from the same database was included even when it was available from several different sources.26

They found that there was a "highly significant positive association for the magnitude of effect between exposure to portrayals of violence and antisocial behavior."27

Wood, Wong, and Chachere "reviewed the existing empirical research to establish whether a causal relationship exists between expo-

20. Id.
22. Id. at 221.
23. Id. at 232.
24. Id. at 226.
25. Id. at 232.
27. Id. at 525.
sure to media violence and naturally occurring aggression."28 They analyzed twenty-three studies and used the following three criteria for choosing which studies would be analyzed: "(a) subjects were randomly assigned to experimental . . . and control conditions, (b) the dependent measure was aggressive acts directed toward another person who was physically present and in some cases also included aggression toward inanimate objects, and (c) aggression was assessed through raters' direct observation of subjects' behavior."29 They found that exposure to media violence increases viewers' aggression among children and adolescents.30

Hearold used three features to choose which studies were included in her meta-analysis: treatment, outcome measure, and treatment comparison.31 Empirical studies that measured anti- or pro-social behavior or attitudes assigned to an experimental group and that had a control group were included in the analysis, as were a few film studies conducted in the 1920s.32 Her meta-analysis includes 230 studies conducted between 1929 and 1977.33 She succinctly summarized her findings, paying special attention to those who critique the research methodology used in studies which have found a relationship between television and antisocial behavior. She wrote: "In the present instance, the meta-analysis recorded that a positive effect for exposure to an antisocial television treatment and antisocial behavior is not attributable to poor study quality or frustration or that it is confined to laboratory experiments."34

Andison noted that, although there are some problems with this type of meta-analysis, "it seems quite clear that according to the findings of the studies collected there is at least a weak positive relationship between watching violence on television and the subsequent aggression displayed by viewers of that violence."35 He also wrote that "[w]e can conclude on the basis of the present data cumulation that television, as it is shown today [in the 1970s], probably does stimulate

29. Id. at 374.
30. Id. at 378.
32. Id.
33. Id. at 85 tbl. IV.
34. Id. at 116.
a higher amount of aggression in individuals within society." 36 He went on to say that "[t]herefore, it seems reasonable to tentatively accept the 'TV violence as a stimulant to aggression' theory and to reject the 'no-difference' and 'cathartic' theories, at least until further, contradictory study is completed concerning this matter." 37

Heins anticipated my response and thus has taken two extraordinary steps reflecting an extreme anti-scientific approach. In discussing Wertham's study, she argues that "he mistakenly relied on correlations as proof of causation." 38 Given that practically all modern science is based on correlations, this move asks that we remove the study of the matter at hand from the realm of empirical examination. Indeed, by this criterion, as Heins herself attests, the studies that show correlation between smoking and various killer diseases are not evidence, which is exactly what the tobacco industry claims. And then she goes further to argue that any scientific evidence will not do because—and I quote—"that minors overall are psychologically harmed by exposure to sexual or violent content is unproven and probably unprovable." 39

Heins calls censorship any limitation put on access to any "speech" by anyone. For instance, by her definition, parents are "censoring" their young children if they prohibit them from viewing X-rated TV. This goes to the heart of the matter. Rights in general are meant to protect us from excessive government intrusion. Nothing in the Constitution suggests that children have First Amendment rights against their parents. Galston reminds us that that which is legal is not necessarily ethical and vice versa. In this case, the law, ethics, and common sense all point in the same direction: parents have a duty to educate, not merely teach, from the character of their charges. Ultimately, Heins agrees with me "that below the age of seven or eight, it makes little sense to talk of First Amendment rights for minors." 40 Actually, I said twelve or thirteen, but no matter. Even she cannot deny the need to defend children from violent material. All that we are haggling about is the precise age limit.

Nunziato provides a meticulous and extensive analysis of the history of various legislative efforts to protect children from the media

36. Id.
37. Id.
39. Id. at 231.
40. Id. at 252.
and the dire fate of these efforts in the courts, as one after the other was deemed unconstitutional. Her conclusion, that the approach here unfolded might come closer to satisfying the constitutional requirements than several others tried so far, is particularly bracing. Even stronger endorsement of the approach followed here is implied by Saunders's closing comments. His forthcoming book on the subject, *Saving Our Children from the First Amendment*, will do much to advance the constitutional protection of children from harmful material in the media.

William Galston's analysis introduces a communitarian element, although he is fully mindful of the rights involved. This is particularly evident in his argument that when separation is not possible and some spillover occurs, one is still justified in proceeding. Adults, as members of a community and not merely free agents seeking to "maximize" themselves (in my words), can be called upon to sacrifice, for instance by being unable to view hyper-violent movies on TV during early evening hours. I fully share Galston's confidence that our legal system will eventually work the matter out. However, given that so far progress has been considerably delayed, and that Congress's initial attempts at regulation were deemed unconstitutional by the courts, there is room for communitarian thinkers to seek new approaches and find their place in the constitutional scheme. This in turn involves clarifying what the constitution—a living document, given to new interpretations—has to say about children's First Amendment rights as compared to those of adults. The way the First Amendment has been understood since the 1920s, the right to free speech is more absolute than other rights. Unlike the Fourth and Fifth Amendments, it does not recognize, on the face of it, a category of public interest. Therefore, it is much more difficult to anchor the state's concern for the well-being of children in the First than to anchor security needs in the Fourth. Hence the need for constitutional deliberations and interpretation. How to justify the protection of minors from the rights accorded to adults is a key subject of the papers at hand.