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FAMILY LAW SYMPOSIUM

Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"

Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a state's duty toward children. Frankfurter, J., concurring in *May v. Anderson*, 345 U.S. 528, 536 (1953).

*Bruce C. Hafen**

After the type for this article had been set, the U.S. Supreme Court decided two cases having potential implications for the constitutional rights of minors—Bellotti v. Baird, 44 U.S.L.W. 5221 (July 1, 1976) and Planned Parenthood of Central Missouri v. Danforth, 44 U.S.L.W. 5197 (July 1, 1976). In Bellotti, a unanimous Court held that the lower federal court should have abstained from determining the constitutionality of a state statute requiring parental consent to an unmarried minor's abortion but providing for judicial order of consent "for good cause shown" after parental consent is refused. The Court found the statute susceptible of an interpretation by the appropriate state court that would not impose an absolute "parental veto" power. Because such an interpretation would "avoid or substantially modify the federal constitutional challenge to the statute," abstention was held to be appropriate.

The Planned Parenthood case struck down a state statute imposing an "absolute" parental veto power over minors' abortion decisions; however, the majority opinion represented the views of only three of the nine Justices. There were four dissenters and the concurring opinion by Justice Stewart (joined by Justice Powell) implied that a statutory imposition of parental "consent or consultation" requirements short of an unconditional veto (such as the Bellotti statute might be) could well be "constitutionally permissible."

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The meaning of these decisions is unclear because of the uncertainty created by such a split among the members of the Court and the variety of potential approaches to parental consent requirements short of an absolute veto power. However, some of the language in Mr. Justice Blackmun's majority opinion in Planned Parenthood, while representing the views of but one-third of the Court, illustrates the serious lack of perspective on children's rights issues already reflected in a variety of lower court decisions and in other literature. It is that lack of perspective that gave rise to this article.

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Current court decisions and law-related writing reflect a growing concern with the subject of children's rights, in contexts ranging from juvenile courts and child custody disputes to matters of minors' rights to abortions and other forms of medical

treatment. Some interest in the topic is attributable to recent Supreme Court decisions establishing procedural due process standards for proceedings involving minors and establishing First Amendment rights for public school pupils. Many of the philosophical underpinnings of this development, however, do not have their origins in the traditional domains of juvenile and family law; rather, policies developed and articulated in the civil rights movement and other egalitarian movements it has spawned are now being applied to situations involving children. Race, sex, and age being three of the most obvious traditional categories of discrimination, it has been only natural to assume that if one form of obvious discrimination is unfair, other obvious forms of discrimination may be equally unfair. Thus, the momentum of recent antidiscrimination movements has provided a running start for a children's rights movement.

This article suggests that serious risks are involved in an uncritical transfer of egalitarian concepts from the contexts in which they developed to the unique context of family life and children. The family life context has a history all its own—a history replete with psychological, economic, sociological, and political implications. The use of “children's rights” language in this day of rights movements offers a way to leap over that history and its implications into the realm of abstract ideology. Whether that leap is the result of strategy or ignorance, its consequences are the same. The most harmful of the potential consequences is that the long-range interests of children themselves may be irreparably damaged as the state and parents abandon children to their “rights.”

I. INTRODUCTORY ILLUSTRATION: *In re Snyder*

Agents of the state, including juvenile court judges, are restricted in their power to invoke jurisdiction over family disputes unless one of a few well-known situations arises: divorce and related custody matters; adoption; parental neglect, abuse, or abandonment; and juvenile law violations by minors—either delinquent acts or status offenses such as ungovernability. Although many families have voluntarily accepted the advice of juvenile court authorities in circumstances approaching one or more of these traditional categories, juvenile court judges and court-appointed professionals are not viewed as arbitrators empowered to intervene unless the particular circumstances rise to the serious level of one of the mentioned categories. The advisory intervention that has occurred short of that level has typically

been at parental request (often at the suggestion of a social worker), and has virtually never been at the request of children unless serious parental fitness questions were invoked. Recently, however, the merits of parental decisionmaking on general lifestyle subjects have attracted the attention of juvenile court judges in new ways.

A recent case in Washington, for example, raises the possibility that children may now be able to secure significant judicial intervention into traditional parental prerogatives—including the termination of parental custody rights—when there are parent-child conflicts over lifestyle preferences. In this case, *In re Snyder*,¹ a bright, independent 15-year-old girl who had never had trouble with the law, but who was antagonistic toward her parents, asked a juvenile court to declare her “incorrigible” and place her in a foster home. She had lived all her life with her natural parents, who were fairly typical middle-class people with traditional ideas about the role of parents in disciplining and rearing their children. The family had experienced friction because of differences of opinion between the parents and the girl concerning her dating, her friends, and her desire to smoke. In an early phase of the case, the parents were found to be “fit” in the statutory sense, so that neither their conduct nor their competence was technically at issue when the incorrigibility question subsequently arose. After hearing the basis for the girl’s incorrigibility claim, the juvenile court judge initially thought that it would be “improper” for him to “simply accommodate her [the girl] by her just saying ‘I am incorrigible and I want out.’” He went on to state, “I do not think it works that way yet. I think these parents are responsible for this girl and I think that it is their duty to try to raise her.”² After further consideration, however, the judge granted the girl’s request, apparently concerned that she might otherwise run away from home. On appeal to the Supreme Court of Washington, his decision was upheld.

The *Snyder* result seems to imply that, even when a family problem does not reach the level of traditional juvenile court jurisdictional requirements, a dissatisfied child should be permitted to leave the family at her own request when her discontent is serious enough to indicate that jurisdictional levels may soon be reached and when some stress can be avoided if the court simply

1. 85 Wash. 2d 182, 532 P.2d 278 (1975), noted in Comment, *Status Offenses and the Status of Children’s Rights: Do Children Have the Legal Right To Be Incorrigible?* 1976 B.Y.U.L. Rev. 659.

2. Record, vol. 1, Statement of Facts, at 82, *In re Snyder*, 85 Wash. 2d 182, 532 P.2d 278 (1975).

moves in. This theory is essentially an argument for the proposition that a child should be able to "divorce" (or at least achieve separation from) his or her parents on grounds of incompatibility.

Although *Snyder* is arguably just another family breakdown case, the lawyers for the state acknowledged that they had been unable to find "applicable case law" governing the facts of the case.³ They argued that *In re Gault*⁴ suggests the new idea that "children are autonomous individuals, entitled to the same rights and privileges before the law as adults."⁵ They also cited Foster and Freed's proposed "Bill of Rights for Children"⁶ for the proposition that a child should have the legal right to emancipation from the parent-child relationship when that relationship has broken down and the child has left home due to . . . serious family conflict."⁷

One may wonder just how great a step it is from traditional variations on the family breakdown theme to a child-initiated request for divorce on simple incompatibility grounds. The step requires little stretching if one assumes that, since children are people too, they should have some right to choose their own living environment. On the other hand, the step becomes a quantum leap if one assumes that family life is fundamental and, therefore, that state intervention in the parent-child relationship must be a last resort. Perhaps only questions of degree are involved, but as Justice Holmes once wrote, questions of degree are the only ones worth arguing about in the law. Further, these are potentially watershed questions, representing differing assignments of priorities between two significant American traditions—individualism and the family. Recent legal and social developments suggest that these two traditions may be on a collision course. Certain modern conceptions of children's rights, if carried through to their logical implications, assure that collision. Resolving the effects of the collision may be one of the critical legal problems of our time.

3. Brief for State Respondent at 23, *In re Snyder*, 85 Wash. 2d 182, 532 P.2d 278 (1975) [hereinafter cited as Brief for State Respondent].

4. 387 U.S. 1 (1967).

5. Brief for State Respondent at 23, *In re Snyder*, 85 Wash. 2d 182, 532 P.2d 278 (1975).

6. Foster & Freed, *A Bill of Rights for Children*, 6 FAMILY L.Q. 343 (1972).

7. *Id.* at 347.

II. TWO TRADITIONS ON A COLLISION COURSE

A. *The Individual Tradition*

1. *The Enlightenment and American democratization*

The writers of the European Enlightenment argued that sound political theory must begin with the individual in the idealized "state of nature." Government was thought of as the contractual creation of a collection of such individuals. This notion was a revolutionary departure from prevailing ideas about man as a creature of the state. Although at least one writer made a belated attempt to demonstrate that the "state of nature" concept was nothing more than a clever rhetorical device that hardly reflected the legal and cultural origins of Western society,⁸ these beginnings of the philosophy of the individual tradition so captured the imagination of European and American thinkers that the philosophy became for many a set of self-evident truths.

Nowhere was that philosophy more influential than in the United States. Notions about the natural rights of man, about the right of revolution, and of men being created equal may have been derived from the a priori reasoning of Europeans, but they were not therefore less significant to Americans like Thomas Jefferson. The philosophical context in which the American Republic was created assumed at a most fundamental level an individual tradition.

The assumption, however, was not unqualified:

The eighteenth century republicans who founded the nation understood equality in terms of equality among those having equal status. Like the constitutionalists of antiquity, they were, in the main, not democrats in the sense of extending the rights and privileges of citizenship to *all* persons.⁹

Even the significant democratization attributed to the Jacksonians did not extend to "the abolition of slavery, the emancipation of women from legal and political subjection, or the eradication

8. H. MAINE, *ANCIENT LAW* (1st American ed 1870). Maine pointed out that under the ideal theory of Roman law, the propositions that "all men are equal" or men are entitled to equal protection of the laws had a purely legal (as distinguished from political) meaning: to the extent that Roman civil law coincided with a natural law of equality, Roman tribunals would have to apply the same law to citizen and foreigner, freeman and slave. *Id.* at 89. Maine observed that beginning in the 14th century and continuing through the revolutions in France and England, the concept of equality took on the more political meaning that "all men ought to be equal." *See id.* at 89-90. The concept then became an assumption underlying the hypothetical state of nature. "This," wrote Maine, "is the enunciation not of a legal rule but of a political dogma; and from this time the equality of men is spoken of by the French lawyers just as if it were a political truth which happened to have been preserved among the archives of their science." *Id.* at 90.

9. 1 B. SCHWARTZ, *STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS* 3 (1970).

of all constitutional discriminations based on wealth, race, or condition of servitude."¹⁰ Only after the Civil War was "equality" introduced into the Constitution in the form of the equal protection clause of the Fourteenth Amendment.

Gradually, the voting franchise was extended, women's rights were more widely recognized, and American political institutions were increasingly democratized. But the Reconstruction statutes did not guarantee equality in fact, and from 1875 until 1957 there was no new federal civil rights legislation—perhaps because there was little public concern with equality for disadvantaged classes. Then, given great impetus by *Brown v. Board of Education*¹¹ in 1954, a serious movement for racial equality was born. That movement grew into an irresistible appeal to the national conscience that culminated in the Civil Rights Act of 1964. The relative success of the civil rights movement generated other movements seeking greater equality for women and minority groups. The current high level of interest in these movements makes it easy to forget how recently they have come to the nation's attention. Nevertheless, the individual tradition in America has seldom been more broadly alive than it is today.

2. *The exclusion of children from the individual tradition*

In 1861, Sir Henry Maine observed that the movement toward individualism was changing the role of both slaves and women.¹² Children, however, had not been included in the theoretical formulations that gave birth and growth to democratic concepts; nor were they included in any pre-1960 applications and extensions of those concepts. Some of the early writings about individual liberty were explicit about the reasons for excluding children. Viewing their position as a matter of legal theory, Maine noted that "[children] before years of discretion" were classified with "the adjudged lunatic" because "they do not possess the faculty of forming a judgment on their own interests; in other words . . . they are wanting in the first essential of an engagement by Contract."¹³

For John Locke, limited capacity necessarily excluded minors from participation in the Social Contract. He explained in some detail why "[c]hildren . . . are not born in this state of equality, though they are born to it."¹⁴ Although Adam was "cre-

10. *Id.* at 5.

11. 347 U.S. 483 (1954).

12. H. MAINE, *supra* note 8, at 163-64.

13. *Id.* at 164.

14. J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 55 (1952).

ated" as a mature person, "capable from the first instant of his being to provide for his own support and preservation . . . and govern his actions according to the dictates of the law of reason,"¹⁵ children lacked a "capacity of knowing that law."¹⁶ Parents were therefore under an obligation of nature to nourish and educate their children to help them attain a mature and rational capacity, "till [their] understanding be fit to take the government of [their] will."¹⁷ "And thus we see how natural freedom and subjection to parents may consist together and are both founded on the same principle."¹⁸

John Stuart Mill later addressed the topic in conjunction with his classic statement of the libertarian principle:

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others must be protected against their own actions as well as against external injury. . . . Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion.¹⁹

In this same passage, Mill acknowledged that authoritarian guidance for the incapacitated was justifiable only as a means of bringing them to the necessary point of maturity.

Locke and Mill did not discriminate arbitrarily on the basis of age but rationally on the basis of capacity. Neither would have justified discrimination against children once capacity had been attained, and Locke particularly saw the parental role (as well as the duty of children to their parents) as designed precisely to develop mature capacities.

15. *Id.* § 56.

16. *Id.* § 59.

While Locke may have reference to the law of England, his thesis is that children are born "ignorant and without the use of reason" and therefore are not "under the law of reason." *See id.* § 57.

17. *Id.* § 59.

18. *Id.* § 61. Locke was convinced that there was no alternative for children but to be subject to their parents. "From this obligation no state, no freedom can absolve children." However, he clearly saw that the parental role was an educational one designed for the benefit of the children, and, as such, it did not give parents "a power of command over their children, or an authority to make laws and dispose as they please of their [children's] lives and liberties." *Id.* § 66.

Locke also saw the capacity problem as the source of limitations on the freedom of lunatics and idiots. "And so lunatics and idiots are never set free from the government of their parents." *Id.* § 60.

19. J. MILL, ON LIBERTY 13-14 (1956).

The law has long assumed the necessity of capacity. The assumption is reflected in restrictions on the freedom of children to vote, hold office, marry, drive automobiles, shoot firearms, gamble, enter into contracts, consent to sexual acts, and to make many other binding decisions about their own lives. The presumption of minors' incapacity has been so strong that the growth of democratic ideals in American society, rather than encouraging the "liberation" of children from limitations upon their liberty, has encouraged even greater discrimination on the basis of age—to protect children from the excesses of their immature faculties and to promote the development of their ability ultimately to assume responsibility. The juvenile court movement and the expansion of compulsory public education are obvious examples of the way American democratization has reflected the views of Locke and Mill about protecting and developing the capacities of the young.²⁰

B. *The Family Tradition*

1. *Origins*

Philippe Ariès' classic work on the history of the Western family—more particularly the history of childhood²¹—is frequently cited for the idea that childhood is a relatively recent social invention. Thus, it has been argued that a family tradition which includes a legal concept of minority status does not reflect a natural condition, and that assumptions about the limited capacities of minors may represent vested parental interests rather than a fact of nature.²² Primarily by reference to iconographic sources, Ariès documents that medieval children were typically absorbed into the working world of adults at about the age of seven.²³ The concept of a longer childhood emerged gradually with the coming of the Renaissance, the Enlightenment, and the Industrial Revolution.

One is not justified, however, in concluding from Ariès' work

20. Even with the American commitment to shielding children from their own immaturity, American sociologist Seymour Lipset has documented some revealing accounts reflecting the influence of egalitarian principles on child-rearing in the early history of the United States. He notes that foreign visitors have often been shocked by the extent to which American children have been "treated like rational beings," to the creating of a "dictatorship of the young" in which parents "avoid to the utmost the exercise of authority, and . . . make children friends from the very beginning." S. LIPSET, *THE FIRST NEW NATION* 119-20 (1963).

21. P. ARIÈS, *CENTURIES OF CHILDHOOD* (1962).

22. R. FARSON, *BIRTHRIGHTS* 17-25 (1974).

23. P. ARIÈS, *supra* note 21, at 411.

that childhood has been only recently invented. It has, rather, been rediscovered. Ariès himself notes, in an offhand way, that medieval society had lost sight of established Greek and Roman concepts about education and childhood:

Medieval civilization had forgotten the *paideia* of the ancients and knew nothing as yet of modern education. . . .

. . . The age groups of Neolithic times, the Hellenistic *paideia*, presupposed a difference and a transition between the world of children and that of adults, a transition made by means of an initiation or an education. Medieval civilization failed to perceive this difference and therefore lacked this concept of transition.

The great event was therefore the revival, at the beginning of modern times, of an interest in education.²⁴

Both family life and the prolonged education of children flourished during the high points of ancient Greek and Roman cultures.²⁵ Indeed, it was usually the family that took chief responsibility for educating the young. In these greatest of the ancient societies, childhood was viewed as a time for obtaining the education necessary for responsible entrance into the adult community. As the glories of the Roman Empire gave way to the Middle Ages, childhood, family, and education all took on drastically reduced importance. When Western civilization gradually emerged from the darkness of that period, the ancient concept of childhood, with its concomitant emphasis on prolonged education, returned. This reappearance was not remarkable in an age that sought to emulate the art forms, law, political institutions, and philosophy of the Greeks and Romans.

Sir Henry Maine's *Ancient Law* attempts to demonstrate that ancient Western society began with a primary focus on the group, not the individual. According to Maine, the primal group was the family.

[S]ociety in primitive times was not what it is assumed to be at present, a collection of individuals. In fact, and in the view of the men who composed it, it was an aggregation of families. The contrast may be most forcibly expressed by saying that the unit of an ancient society was the Family, of a modern society the Individual.²⁶

24. *Id.* at 411-12.

25. See generally J. CARCOPINO, *DAILY LIFE IN ANCIENT ROME* (1940); H. JOHNSTON, *THE PRIVATE LIFE OF THE ROMANS* (1903); J. MAHAFFY, *SOCIAL LIFE IN GREECE FROM HOMER TO MENANDER* (1902).

26. H. MAINE, *supra* note 8, at 121.

Maine then hypothesizes that the movement of Western society has been from Status to Contract, arguing that while the ancient societies attached legal and social significance to individual action primarily as a function of the group or family to which the individual belonged, modern society has attributed increased significance to individual action.²⁷ Maine's generalization suggests the steady growth of the individual tradition and its separation from the family tradition. The continued movement from Status to Contract is reflected in the democratic egalitarianism of modern times and the diminished influence of extended family kinship ties in today's highly mobile, industrialized society. Still, the concept of the nuclear family has continued to influence modern thinking to such an extent that children have not yet been fully included in the individual tradition.

Recognition of the family tradition by English and American law occurs primarily in cases involving parental rights. Several tributaries contribute to a mainstream judicial attitude historically favorable to protecting parents' interests in their children. The common law and certain constitutional doctrines have developed along similar lines.

2. *The common law view*

The common law has long recognized parental rights as a key concept, not only for the specific purposes of domestic relations law, but as a fundamental cultural assumption about the family as a basic social, economic, and political unit. For this reason,

27. Maine explains his "Status to Contract" theory as follows:

The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The individual is steadily substituted for the Family, as the unit of which civil laws take account. . . . Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of individuals. . . .

The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated. . . . All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status . . . to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.

Id. at 163-65.

both English and American judges view the origins of parental rights as being even more fundamental than property rights.²⁸ Parental rights to custody and control of minor children have been variously described as "sacred,"²⁹ as a matter of "natural law,"³⁰ and as "inherent, natural right[s], for the protection of which, just as much as for the protection of the rights of the individual to life, liberty, and the pursuit of happiness, our government is formed."³¹ These judicial word choices imply that the parent-child relationship antedates the state in much the same sense as natural individual rights are thought to antedate the state in American political philosophy. It has been said:

Our political system is superimposed on and presupposes a social system of family units, not just of isolated individuals. No assumption more deeply underlies our society than the assumption that it is the individual [parent] who decides whether to raise a family, with whom to raise a family, and, in broad measure, what values and beliefs to inculcate in the children who will later exercise the rights and responsibilities of citizens and heads of families. . . .

. . . [T]he family unit does not simply co-exist with our constitutional system; it is an integral part of it. In democratic theory as well as in practice, it is in the family that children are expected to learn the values and beliefs that democratic institutions later draw on to determine group directions. The immensely important power of deciding about matters of early

28. Much children's rights literature argues that children should no longer be regarded as the "property" of their parents. For example, Pilpel, *Minors' Rights to Medical Care*, 36 ALBANY L. REV. 462, 463 (1972), states that "the common law regarded children largely as the property of their parents," and implies that this view prevailed even until *In re Gault*, 387 U.S. 1 (1967). A similar statement is made by the Fifth Circuit Court of Appeals in *Poe v. Gerstein*, 517 F.2d 787, 789 (5th Cir. 1975): "The [common] law did not distinguish between the infant and the mature teenager, treating them both as the property of their parents, who could make all decisions affecting them." The court also implied that this view continued until *Gault* and *Tinker v. Des Moines Independent Community School District*. *Id.* at 789-90. The "children-as-chattels" view, however, has not in fact been taken seriously for many years, as suggested not only by the cases cited in this section, but also by the limitations that have long existed on the exercise of parental rights. See notes 89-91 and accompanying text *infra*.

29. *In re Hudson*, 13 Wash. 2d 673, 685, 126 P.2d 765, 771 (1942).

30. *People ex rel. Portnoy v. Strasser*, 303 N.Y. 539, 542, 104 N.E.2d 895, 896 (1952).

31. *Lacher v. Venus*, 177 Wis. 558, 569-70, 188 N.W. 613, 617 (1922); cf. *In re Adoption of Anderson*, 235 Minn. 192, 200, 50 N.W.2d 278, 284 (1951), which states:

Parents who faithfully discharge their parental obligations with assiduity and to the full extent of their means and abilities are entitled to the custody of their children. Parental rights, however, are not absolute and are not to be unduly exalted and enforced to the detriment of the child's welfare and happiness.

socialization has been allocated to the family, not to the government.³²

Parental power is thought to be plenary—prevailing over the claims of the state, other outsiders, and the children themselves unless there is some compelling justification for interference.³³ Such compelling justifications have been recognized for centuries where natural parents have abandoned, neglected, or abused their children in some way that required state intervention to avoid serious harm to the children.³⁴ Although judicial percep-

32. Heymann & Barzelay, *The Forest and the Trees; Roe v. Wade and Its Critics*, 53 BOSTON U.L. REV. 765, 772-73 (1973).

33. The Supreme Court of Rhode Island, in *Matarese v. Matarese*, 47 R.I. 131, 132-33, 131 A. 198, 199 (1925), stated the following concerning the law's regard for parental authority:

Immemorially the family has been an important element of our civil society, one of the supports upon which our civilization has developed. Save as modified by the legislature, in domestic affairs the family has remained in law a self-governing entity, under the discipline and direction of the father as its head. . . . These fundamental principles are traceable to ancient customs and usages and are fixed by tradition and evidenced by the decisions of the courts. Anything that brings the child into conflict with the father or diminishes the father's authority or hampers him in its exercise is repugnant to the family establishment and is not to be countenanced save upon positive provisions of the statute law.

Similarly, the Supreme Court of Mississippi stated:

The kind and extent of education, moral and intellectual, to be given to a child and the mode of furnishing it are left largely to the discretion of the parents Unless shown to the contrary, the presumption is that natural parents will make the best decisions for their offspring.

. . . . [T]his important parental right is protected by common-law principles. It is also a right protected by the due process clauses of the Federal and State Constitutions. . . .

. . . . The family is the basis of our society. [The parent in this case] has an interest in [the education of his children] which lies on a different plane than that of mere property. Moreover, a child has no higher welfare than to be reared by a parent who loves him and who has not forfeited the right of custody. The agencies of our democratic government are obligated to preserve that right, which is not recognized in a totalitarian society.

In re Guardianship of Faust, 239 Miss. 299, 305-07, 123 So. 2d 218, 220-21 (1960).

34. Blackstone mentioned England's historical limitations on parental authority in the following statement:

The ancient Roman laws gave the father a power of life and death over his children; upon this principle, that he who gave had also the power of taking away. But the rigor of these laws was softened by subsequent constitutions

. . . . The power of a parent, by our English laws, is much more moderate; but still sufficient to keep the child in order and obedience. He may *lawfully* correct his child, being under age, *in a reasonable manner*; for this is for the benefit of his education.

tions of abuse and neglect have varied over time, American courts and legislatures have expressed increasingly lower tolerance for serious physical harms inflicted by parents on their children.

Some authorities have suggested that in more modern times (the 20th century) the interests of parents in claims to custody and control have been limited by increased emphasis on "a social interest in the protection of dependent persons."³⁵ Similarly broad statements have been made about "the waning of parental rights"³⁶ in British Commonwealth countries; however, such statements actually refer to increased limitations on the rights of biological parents in situations where the normal parent-child relationship has already been interfered with by the application of traditional criteria giving rise to custody disputes or parental neglect claims. The criteria themselves have undergone no significant change. The domain of parental discretion has also been modestly limited within the last century by increased state concern with such specific subjects as child labor and public education, attention to various categories of child behavior classified under juvenile delinquency laws, continued extension of the circumstances under which emergency medical treatment may be given to children, and a greater judicial commitment to the best interests of children involved in custody disputes.

1 W. BLACKSTONE, COMMENTARIES "451 (emphasis added).

A 19th century English court enunciated the justifications for judicial interference in parental authority:

A father has a legal right to control and direct the education and bringing up of his children until they attain the age of twenty-one years . . . and the Court will not interfere with him in the exercise of his paternal authority, except (1) where by his gross moral turpitude he forfeits his rights, or (2) where he has by his conduct abdicated his paternal authority.

In re Agar-Ellis, [1883] 24 Ch. D. 317 (C.A.).

35. Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 182 (1916).

36. J. M. Eekelaar begins his article, *Deprivation of Parental Rights: Legislative Contrasts in England, Wales, Australia, and Canada*, 7 FAMILY L.Q. 381 (1973), with this statement: "One of the outstanding features of the twentieth century development of the law relating to children has been the emergence of the doctrine which promotes the child's welfare over parental rights." As support for this premise, Eekelaar refers to an article by Hall, *The Waning of Parental Rights*, 31 CAMBRIDGE L.J. 248 (1972), which briefly documents that a gradual erosion of parental rights during this century is due to "the ever-increasing concern of society for the well-being of its youngest members." An examination of the cases cited by Hall reveals, however, that the only changes he identifies are modifications in judicial attitudes when the custody of a child or the rights of parents have already been called into question. At this point the "best interests of the child" standard has been given increasing recognition over the bare legal claim of a natural parent who may have relinquished practical custody in some obvious way. There is no evidence from these authorities that there has been any recognizable change in the criteria initially giving rise to an inquiry about child custody, such as parental neglect, abandonment, divorce, or other custody disputes.

Still, the most fundamental legal aspects of the parent-child relationship, including the basic presumption favoring custody and control by parents in relatively normal family situations, have remained unchanged. Indeed, many aspects of the juvenile court movement have probably strengthened traditional assumptions favoring parental custody rights.³⁷ One authority has recently stated, "[t]he truth of the matter is that there has been no radical change in the child's situation in American law or indeed in the thinking about his condition for over a century."³⁸

3. *Constitutional rights of parents*

A series of Supreme Court opinions has addressed the subject of parental prerogatives in a number of contexts and appears to have established a strong presumption favoring parental control, at least as against intervention from the state. Because the Supreme Court has not yet dealt directly with a conflict between parental rights and alleged children's rights, however, it is unclear whether the pro-parent decisions arise from concerns about protecting children from the excesses of state interference with their lives or from efforts to affirm a constitutional doctrine that there is some separate parental right.³⁹

Many of the cases state clearly that parental rights warrant constitutional protection based upon established cultural preferences for parent-directed family life. The effect of these cases is to create both constitutional protections for parents and constitutional limitations on the state's role in child-rearing. In *Pierce v. Society of Sisters*,⁴⁰ a case striking down an Oregon compulsory

37. Relatively recent modernizations of state juvenile court statutes typically contain statutory-purpose sections stating explicit legislative preferences for parental custody and family support. For example, the Illinois Juvenile Court Act states the following purpose:

The purpose of this Act is to secure for each minor subject hereto such care and guidance, preferably in his own home, as will serve the moral, emotional, mental, and physical welfare of the minor . . . ; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal. . . .

ILL. REV. STAT. ch. 37, § 701-2 (1973). See also CAL. WELF. & INST'NS. CODE § 726 (West 1972); UTAH CODE ANN. § 55-10-63 (1953).

38. S. KATZ, *THE LEGAL RIGHTS OF CHILDREN*, Introduction (1974).

39. Thus, the question has recently been asked whether *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and other cases discussed in this section of the text "mean that parents have a constitutionally sanctioned role in their children's lives; or does it mean that the state has a constitutionally limited role in child-rearing that typically, but not necessarily, is enforced by deference to the parents?" See Burt, *Developing Constitutional Rights of, in and for Children*, 39 LAW & CONTEMP. PROB. 118 (1975).

40. 268 U.S. 510 (1925).

education statute which in effect precluded attendance at private schools, Justice McReynolds expressed what was later called in *Wisconsin v. Yoder* "a charter of the rights of parents to direct the religious upbringing of their children."⁴¹ He stated that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."⁴² The Court in *Yoder* then made this broad statement:

The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.⁴³

In *Meyer v. Nebraska*, a 1923 decision invalidating a state statute that prohibited foreign language instruction to young schoolchildren, the Court said that a teacher's right to teach a foreign language "and the right of parents to engage him so to instruct their children" are protected by the due process clause of the Fourteenth Amendment.⁴⁴ *Meyer* rejected the state claim that patriotism and good citizenship would be advanced by ensuring that English would be the mother tongue of all children raised in the state. Acknowledging the right of German-speaking parents in an American community to have their children taught German, the Court referred expressly to the social structure discussed in Plato's *Republic*, in which family life was to be replaced entirely by state child-rearing activities so pervasive that "no parent is to know his own child, nor any child his parent."⁴⁵ Regarding this system, the Court stated:

Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.⁴⁶

41. 406 U.S. 205, 233 (1972).

42. 268 U.S. at 535.

43. 406 U.S. at 232.

44. 262 U.S. 390, 400 (1923).

45. 262 U.S. at 401-02.

46. *Id.* at 402. Because *Meyer* involved the prosecution of a private schoolteacher rather than a parent, this language might be regarded as dicta. However, the case also involved the larger question of how much liberty foreign-born parents should have to influence their children with the customs, attitudes, and language of their native culture.

In stating that the ideas of those who would have removed the interposition of the family between the individual and the state were "wholly different from those upon which our institutions rest," the Court seems to have acknowledged that our culture presupposes a system of family units, not just a mass of isolated individuals.⁴⁷

In *Ginsberg v. New York*,⁴⁸ the Court upheld a New York statute making it unlawful to sell pornographic magazines to persons under 17 years of age. The Court identified two justifications for the statutory restrictions. First, "Constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."⁴⁹ Second, "[t]he state also has an independent interest in the well-being of its youth."⁵⁰ Because parental control cannot always be provided, the Court acknowledged that the second rationale justified regulation of the availability of pornographic materials to juveniles on standards more stringent than those that govern distribution to adults. Since the Court might have disposed of *Ginsberg* solely by reference to the state's interest in protecting the welfare of its youth, the explicit recognition of parental authority as a separate justification suggests that the Constitution contemplates a direct role for parents in the lives of their children—a role distinct from the state-child relationship.

One of the strongest statements about independent parental interests was made in *Stanley v. Illinois*,⁵¹ in which the Court struck down a state statute providing that illegitimate children, upon the death of their mother, become wards of the state without a hearing on the parental fitness of the father. In holding that the Fourteenth Amendment entitled the father to a hearing, the Court stated:

The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and

47. Contrary to this conclusion, Professor Burt seems to think that the Court's reference to "the relation between the individual and State," together with the fact that a parent was not a party to the litigation in *Meyer* suggests that the Court was talking about the relationship between the state and individuals, not the relationship between the state and parents or families. Burt, *supra* note 39.

48. 390 U.S. 629 (1968).

49. *Id.* at 639.

50. *Id.* at 640.

51. 405 U.S. 645 (1972).

management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."⁵²

The authorities cited for this proposition included *Meyer* and *Prince v. Massachusetts*,⁵³ from which the following language was cited: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."⁵⁴ The Court recognized in *Stanley* that the children would suffer from uncertainty and dislocation under the arrangement proposed by the state, but it was to the interest of the parent, not to the interest of the children, that the Court directed its attention.

An authority cited by the *Stanley* Court contrasting a parent's interest in his children with an "economic" interest offers some rebuttal to the oft-cited but inaccurate statement that, until the *Gault* case in 1967, children were regarded as the "property" of their parents.⁵⁵ The *Stanley* Court quoted the 1953 decision of *May v. Anderson*, which referred to parental custody rights as "[r]ights far more precious . . . than property rights."⁵⁶

A similar distinction elevating the right of parental custody and control beyond the level of property rights was also made in Justice Goldberg's concurring opinion in *Griswold v. Connecticut*.⁵⁷

Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its preeminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

52. *Id.* at 651.

53. 321 U.S. 158 (1944).

54. 405 U.S. at 651.

55. See note 28 *supra*.

56. 345 U.S. 528, 533 (1953)(custody dispute between divorced parents of minor children).

57. 381 U.S. 479, 495 (1965) (right of access of married persons to contraceptive information and devices given constitutional protection).

This language from *Griswold* introduces another line of Supreme Court cases that construes the right to marital privacy and the right to raise a family as "fundamental." This line of cases includes *Skinner v. Oklahoma*,⁵⁸ in which a state statute providing for the sterilization of habitual criminals was struck down because it threatened the right of "marriage and procreation," which the Court found to be "one of the basic civil rights of man," and "fundamental to the very existence and survival of the race."⁵⁹ and in *Eisenstadt v. Baird*,⁶⁰ the Court extended to unmarried persons the privacy protection given married persons in *Griswold* by holding unconstitutional a state statute that prohibited the distribution of contraceptives to single persons. The *Eisenstadt* Court explicitly acknowledged that the right to be free from governmental intrusion on matters as private as the decision whether to have a child is the right of an *individual*, married or single, rather than a right granted to a married couple as an independent entity.⁶¹

One additional line of Supreme Court cases helpful in defining the nature and limits of constitutionally protected parental rights is that dealing with state attempts to regulate the education and religious activity of children. Both *Meyer* and *Pierce* arose within this subject area. The general principles established by these cases⁶² were limited somewhat in *Prince v. Massachusetts*,⁶³ wherein the Court sustained the conviction of an adult member of a Jehovah's Witness family for violating a state law prohibiting street solicitation by certain minors. The Court rejected Mrs. Prince's claim that the conviction violated her due process rights to raise the children for whom she was responsible as well as the freedom of religion claim exerted on behalf of the child involved, a 9-year-old girl who had enthusiastically volunteered to go with her guardian to assist in selling religious literature on a public street. The Court acknowledged the conflict between the state's claims and the "sacred private interests" associated with the parental claim, but held that, under its *parens*

58. 316 U.S. 535 (1942).

59. *Id.* at 541.

60. 405 U.S. 438 (1972).

61. *Id.* at 453. Of course the marital privacy cases involved considerations other than the right to bear children and have their custody once they are born. These cases also provided basic authority for the abortion decisions, *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973), which extended the "fundamental right" of privacy to women confronted with a decision whether to submit to an abortion.

62. See notes 40-47 and accompanying text *supra*.

63. 321 U.S. 158 (1944).

patriae authority, the state had a duty to limit parental control by requiring school attendance, regulating child labor, and otherwise protecting children against the evils of employment and other activity in public places.⁶⁴ The gist of the Court's view is captured in its statement that "[p]arents may be free to become martyrs themselves. But it does not follow [that] they are free . . . to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."⁶⁵

Prince makes it clear that there are limits (unrelated to basic parental fitness) to the authority of parents to control the educational and religious activities of their children. Nonetheless, *Prince* was significantly narrowed in 1972 by *Wisconsin v. Yoder*,⁶⁶ which upheld parental claims, based on grounds of both religious freedom and parental rights, to exempt children from state compulsory education laws as applied to children beyond the eighth grade. Writing for the *Yoder* majority, Chief Justice Burger noted that prior case law had limited the *Prince* doctrine substantially.⁶⁷ *Yoder* indicated that the state may not interfere with First Amendment freedoms of parents unless there is "harm to the physical or mental health of the child or to the public safety, peace, order, or welfare."⁶⁸ *Yoder* thus circumscribes state interference with parental control considerably more than *Prince*. The removal of children from obligations imposed by compulsory education laws (even if only after the eighth grade) would seem to portend a greater impact on youthful minds and choices than an afternoon of selling religious literature on a streetcorner.

The freedom of parents to impose their values upon their children as part of their overall discretion in child-rearing was enunciated in both *Meyer* and *Pierce*, limited in *Prince*, and then broadly reaffirmed in *Yoder*, at least when the parental preference is associated with a religious belief.⁶⁹ The religious freedom claim was explicitly buttressed by *Yoder's* references to *Pierce* and to the "history and culture of Western Civilization [which] reflect a strong tradition of parental concern for the nurture and upbringing of their children."⁷⁰

64. *Id.* at 166.

65. *Id.* at 170.

66. 406 U.S. 205 (1972).

67. *Id.* at 230.

68. *Id.*

69. Chief Justice Burger implied that he might have taken another view of the situation in *Yoder* if the Court had not been persuaded that the claims of the Amish parents were genuinely religious. *Id.* at 235-36.

70. *Id.* at 232.

Under the *Yoder* test, parental discretion will be interfered with, not when parental choices deviate from the mainstream of public opinion or the views of state authorities, but only "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."⁷¹ As an example of the kind of fact situation in which such jeopardy might arise, *Yoder* cites the *Georgetown College* case,⁷² where a federal court of appeals upheld a lower court order that a blood transfusion be given to a Jehovah's Witness patient who, along with her husband, had been unwilling to consent to the transfusion. It may be noted that this limitation on parental authority is consistent with the common law limitations discussed earlier.⁷³

The dissent of Justice Douglas in *Yoder* has been widely quoted by children's rights advocates because of Douglas' concern that *Yoder* imposed the religious views of parents upon their children.⁷⁴ The majority opinion dealt specifically with the questions raised by Justice Douglas and concluded that it was in fact the right of the parents that was at stake in the case.⁷⁵

The common law and constitutional developments concerning parental rights are mutually reinforcing and arrive at the same basic posture—children should be subject to the custody and control of their natural parents until the parents' conduct falls below the minimum standards established in such areas as neglect and abandonment, or until the parents propose to subject the child to some action that would interfere with his or her

71. *Id.* at 234.

72. Application of the President and Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir. 1964).

73. See notes 33-34 and accompanying text *supra*.

74. Douglas stated:

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

. . . It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the rights of students to be the masters of their own destiny.

406 U.S. at 244-45 (Douglas, J., dissenting).

75. Chief Justice Burger, speaking for the majority, stated:

Contrary to the suggestion of the dissenting opinion . . . our holding today in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents. It is the parents who are subject to prosecution here for failing to cause their children to attend school, and it is their right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent.

Id. at 230-31.

health or safety. The pro-parent presumption is rebuttable. But its rebuttal is not dependent upon the relative quality of parents' child-rearing practices, at least not until that quality reaches some almost obvious extremes. Our society and its children are not infrequently required to bear difficult burdens as part of the price we pay for this degree of parental leeway. To this point in our history, the price has not seemed too high.

4. *Parental rights: in whose best interest?*

In spite of the widespread agreement on general principles that emerges from the common law and constitutional decisions, few of the cases shed much light on the reasons why parental rights have been recognized for so many years.⁷⁶ A question that naturally arises is whether these principles protect some interest of parents independent of the social, psychological, or other interests of children that flow from the family autonomy tradition. This question is relevant because, if all that matters is what is most advantageous to a particular child, perhaps state intervention in parent-child relationships should be more readily allowed than it is under existing law and practices.

The language chosen by many of the judges who have dealt with parental interest issues, however, suggests that more is at stake than the welfare of children.⁷⁷ The Supreme Court in *Meyer v. Nebraska* selected the right "to establish a home and bring up children" along with "the right[s] . . . to contract, to engage in any of the common occupations of life . . . [and] to worship God

76. Some relatively obvious social interests are served by the general discharge by parents of their duties toward their children as a concomitant of their rights to control and care for them. Whether viewed as parental rights or simply as family autonomy, some sense of parental sovereignty has been thought necessary in order to reinforce the responsibility that must be assumed by parents for maintenance of the social order. Roscoe Pound pointed out that the law should refrain from securing too vigorously the interests of children against their parents because of what would follow if any incentive were available to minors to abandon their family home rather than submit to necessary parental discipline. Thus, "a child impatient of parental authority might be incited to set at naught all reasonable domestic control by holding over his father's head the alternative of allowing him his way at home, or of paying for his support abroad. Accordingly it has been said that no one shall take it upon him to dictate to a parent what clothing a child should wear, at what time it shall be purchased, or of whom. All that must be left to the discretion of the father or mother." *Ramsey v. Ramsey*, 121 Ind. 215, 217, 23 N.E. 69, 70 (1889), *quoted in* Pound, *supra* note 35, at 186-87.

In addition to ensuring domestic control, our assumptions about parental authority have been thought necessary to ensure the fulfillment of basic functions served by the family that are necessary for the continuance of our culture. Such functions include the processes that involve socializing children as well as providing for their biological, psychological, and economic needs. See S. KATZ, *WHEN PARENTS FAIL: THE LAW'S RESPONSE TO FAMILY BREAKDOWN* ch. 1 (1971).

77. See notes 28-31 and accompanying text *supra*.

according to the dictates of [one's] own conscience" as a few of the most obvious illustrations of the meaning of "liberty," as the term is used in the due process clause of the Fourteenth Amendment.⁷⁸ Similarly, the Court in *Stanley v. Illinois* included within the protections of the due process clause "the interest of a parent in the companionship, care, custody, and management of his or her children."⁷⁹

The right of parents to bring suits against third parties for alienation of the affections of their children has been recognized within the limited categories of relational interests protected by common law tort actions.⁸⁰ Parents may also recover for injuries to that relational interest under most wrongful death statutes, just as children may recover under those statutes for the death of a parent.⁸¹ The existence of a significant economic interest does not satisfactorily explain these statutes. Corporations, for example, do not have a protected relational interest in their "key men" sufficient to justify a wrongful death action, even though the economic damage to a corporation through the loss of a key man may be of greater economic detriment than the loss by a family of its breadwinner. Similarly, the associational or companionship interest within families is valued in common law tort actions while that same interest is not protected as between close friends. That particular distinction may be influenced somewhat by the difficulties inherent in proving who one's friends are, but it is still a meaningful way of demonstrating the peculiar recognition given by the law to the uniqueness of intrafamily relational interests.

A recent Eighth Circuit decision acknowledges interests of this kind in recognizing the standing of a father to bring a civil rights action against police officers who had shot and killed his son.⁸² In concluding that the killing invaded the father's "constitutionally protected rights under the due process clause of the Fourteenth Amendment,"⁸³ apart from the father's claims under wrongful death statutes, the court cited *Meyer and Griswold*,

78. 262 U.S. at 399.

79. 405 U.S. at 651. The Court cited three of its earlier decisions as authority for protecting the parental interest—a due process case, an equal protection case, and a Ninth Amendment case.

80. W. PROSSER, *THE LAW OF TORTS* § 124 (4th ed. 1971).

81. See, e.g., UTAH CODE ANN. § 78-11-6 (1953): "[A] father, or in case of his death or desertion of his family, the mother, may maintain an action for the death or injury of a minor child when such injury or death is caused by the wrongful act or neglect of another"

82. *Mattis v. Schnarr*, 502 F.2d 588 (8th Cir. 1974).

83. *Id.* at 593.

saying: "The familial relationship between parent and child is fundamental to our civilization," and "[t]he practical effect of [the shooting by the policeman] was to deny the plaintiff the fundamental right to raise his son."⁸⁴

It is quite possible that when family life is involved, some natural law attitudes linger, even in this age of sociological jurisprudence. Thomas Aquinas wrote that one of the most obvious examples of the operation of natural law is the education of one's own offspring.⁸⁵ Men and women in most cultures have long viewed their offspring as somehow being an extension of themselves, and as more than mere "property." The bearing and raising of children has probably brought people into contact with some sense of the Infinite, the mysteries of the universe, or Nature—however one may express it—more than any other human experience. Thus, it is not surprising that common law judges refer to parental interests as "sacred," "natural," or "fundamental" rights, especially when the constitutional standard for a "fundamental" right is whatever judges find when they

look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." The inquiry is whether a right involved "is of such character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'"⁸⁶

This search for fundamental rights is thought by some scholars to be in the nature of a search for natural law.⁸⁷

Some special interest of parents (distinct from the welfare of their children) has been and should be the subject of legal and constitutional protections. What the parental interest may mean—especially where it is pitted against the interests of children—remains to be developed more fully. Nevertheless, the well-established cultural assumption favoring parental interests re-

84. *Id.* at 594, 595. The court added, "We believe that 'parenthood is a substantial interest of surpassing value and protected from deprivation without due process of law'—a fundamental legal right." *Id.* at 595.

85. T. AQUINAS, *SUMMA THEOLOGICA*, TREATISE ON LAW, Question 94, in *THE GREAT LEGAL PHILOSOPHERS* 67 (1959).

86. *Griswold v. Connecticut*, 381 U.S. 479, 493 (Goldberg, J., concurring) (citation omitted).

87. See Dixon, *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U.L. REV. 43; Kauper, *The Higher Law and the Rights of Man in a Revolutionary Society* (AEI's Distinguished Lecture Series on the Bicentennial 1974).

quires that the interests of children not be the only factor weighed when considering the state-family relationship.

Furthermore, as discussed more fully below,⁸⁸ the evidence suggests that the maintenance of parental interests within a family tradition is also in the best interests of children.

5. *Protection for children within a family tradition*

As suggested above, the family tradition has not been insensitive to the need for protecting children against potential abuse by parents or others who might be in a position to exploit their limited capacities. Although there is some dispute about the philosophical origins of the common law right of children to be protected from parental neglect, abuse, or abandonment,⁸⁹ the beginnings of such rights were recognized—at least theoretically—in Blackstone's day.⁹⁰ Protections against child abuse and other forms of parental unfitness have grown until today they represent fundamental limitations on parental rights. Statutes proscribing various forms of parental misconduct are found in every state,⁹¹ with remedies ranging from supervision of parental custody to criminal prosecution and permanent termination of parental rights.

Significantly, protections against parental unfitness exist as part of the family tradition. Parental authority per se is not questioned, but only its abuse. Forms of protection for children consistent with, or part of, the family tradition may be found in such developments as child labor laws, the growing breakdown of intrafamily tort immunity, statutory recognition for the preferences of minors involved in custody disputes, the emergence of favorable tort doctrines applicable to child trespassers, and the maintenance of rights entitling minors to inherit and own property and to be parties to litigation (albeit through adult representatives). Such developments reflect continuing awareness of the special needs of children.

The family tradition has developed its own balance between

88. Notes 146-58 and accompanying text *infra*.

89. Compare Kleinfeld, *The Balance of Power Among Infants, Their Parents and The State*, 4 FAMILY L.Q. 410, 411-12 (1970) (Aristotle is the source for the theory that the purpose of parental control is the welfare of the child rather than the welfare of others in society or benefit to the parent) with Kelly, *On Some Changes in the Legal Status of the Child Since Blackstone*, 13 INT'L REV. 83, 90, 91 (1882) (protection of the child is a natural right inherent in the child), in THE LEGAL RIGHTS OF CHILDREN (1974).

90. 1 W. BLACKSTONE, COMMENTARIES *450.

91. See Katz, Howe & McGrath, *Child Neglect Laws in America*, 9 FAMILY L.Q. 1 (1975).

the rights of parents and the rights of children; its purpose is to support the family as an institution and at the same time provide state protection for children where parental authority is abused. The juvenile court system, which has had the responsibility of balancing children's and parents' rights, has produced its share of disappointments, but even after the close scrutiny given it in *Gault* and its progeny, its unique contributions are still highly valued. This system, together with the common law and constitutional doctrines that have been developed in the family law context, contain at least the conceptual tools for accommodating the competing claims and needs of parents and children. Thus, the notion of "children's rights" is neither as original nor as recent as it may sound.

C. *When Traditions Collide: The Abolition of Childhood?*

As indicated above, children have not been part of the individual tradition. They have, however, been very much a part of a family tradition intended to prepare them for entry into the individual tradition. The fairness of maintaining that relationship between the two traditions has gone unquestioned for years. However, since the civil rights movement and recent Supreme Court decisions giving constitutional dimensions to certain rights for children, new questions have been raised.

1. *The effect of other rights movements*

One significant fact about the civil rights movement of the 1950's and '60's is the extent to which it involved students and other concerned citizens from all parts of the country. Such participation contributed materially in bringing the concerns of the movement to the nation's attention. It also exposed a large number of people already characterized by a strong social conscience to the plight of disadvantaged groups. Thus, many of the same persons who cut the teeth of their social activism in the civil rights movement were later attracted to other social action causes. It was no coincidence, then, that rising concern about poverty and discrimination against ethnic minority groups and women followed so closely on the heels of the civil rights movement.⁹²

Civil rights workers recognized early that poverty was a sig-

92. See generally Freeman, *The Origins of the Women's Liberation Movement*, 78 AM. J. SOCIOLOGY 792 (1973).

nificant impediment in the path toward equality of opportunity. The effects of poverty and racial discrimination seemed especially harsh when visited upon the children of disadvantaged families. As a result, a specific concern about the needs and rights of those children emerged within the context of larger concerns.⁹³ The peculiar needs of disadvantaged children were more a function of the widespread impact of racial discrimination and poverty than of discrimination against children per se. Nevertheless, the social and political powerlessness of disadvantaged families seemed especially poignant when considered from the viewpoint of the children within those families, who lacked ability to change their circumstances not only because of their minority or economic status, but also because of their childhood.

Increased public awareness of the damage caused to members of minority groups by cultural deprivation and other forms of discrimination also increased public concern about child abuse and neglect. The inability of children to defend themselves against such parental failures has made it logical to view them as another class of victims being harmed by the exploitation of those holding a position of relative power and advantage.

The recognition of disadvantage and discrimination in these circumstances has made irresistible the inclination to lump children together with other disadvantaged classes who are struggling for their own kind of liberation. It has been said that the civil rights movement and the various liberation efforts that have followed it have made the nation begin "to see the necessity for children's liberation."⁹⁴ One advocate of a general children's liberation movement has written that "the arguments for and against perpetuation of [minority] status have a familiar ring. In good measure they are the same arguments that were advanced over the issues of slavery and the emancipation of married women."⁹⁵ Another has echoed, "[t]he child's subjugated status was rooted in the same benevolent despotism that kings, husbands, and slave masters claimed as their moral right."⁹⁶

As a result of this conceptual consolidation, many of the arguments for granting greater rights to children proceed from

93. See *The Rights of Children—A Statement by Senator Walter F. Mondale*, 43 HARV. EDUC. REV. 483 (1973); Polier, *Myths and Realities in the Search for Juvenile Justice*, 44 HARV. EDUC. REV. 112, 121 (1974) ("the denial of services to children from minority groups [has] shadowed every aspect of child care and juvenile justice"). See generally CHILDREN AND POVERTY (N. GLAZER & C. CREEDON eds. 1968).

94. R. FARSON, BIRTHRIGHTS 2 (1974).

95. Foster & Freed, *supra* note 6, at 343.

96. Wald, *Making Sense Out of the Rights of Youth*, 4 HUMAN RIGHTS 13, 15 (1974).

general premises of philosophical egalitarianism rather than from evidence that children as a class are damaged in some demonstrable way by existing constraints upon their liberty or that removal of such constraints would benefit them in some way. A sociologist who advocates full abolition of legal and social concepts of minority status from compulsory education laws to laws restricting sexual activity, voting, marrying, divorcing, and contracting has stated:

In another sense, asking what is good for children is beside the point. We will grant children rights for the same reason we grant rights to adults, not because we are sure that children will then become better people, but more for ideological reasons, because we believe that expanding freedom as a way of life is worthwhile in itself.⁹⁷

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If all this sounds too open and free, we must recognize that in this society . . . we are not likely to err in the direction of too much freedom.⁹⁸

2. *Supreme Court decisions*

Within the last decade, the Supreme Court has begun to address children's rights in constitutional terms. There does not

97. FARSON, *supra* note 94, at 31.

98. *Id.* at 31, 153. The a priori justification advanced by Farson for his point of view is shared by other children's liberation advocates who are unable to offer much support for their "radical version of children's rights"—"[I]ts most convincing justification is simply that it is right." Wald, *supra* note 96, at 29. Farson's views have received wide and provocative press coverage. Note, for example, the leading article by Joan Nassivera, *Get Ready for Kids' Lib*, National Observer, Sept. 14, 1974, at 1, col. 1. Also, see Farson's treatment of the same topic in the L.A. Times, Oct. 19, 1975, part IV, at 5, col. 2.

A point of view similar to Farson's is outlined in educator John Holt's *ESCAPE FROM CHILDHOOD* (1974), which outlines and then treats at length a proposed list of rights that, it is argued, should be made available "to any young person, of whatever age, who wants to make use of them." *Id.* at 18. The list includes the right to vote, the right to financial independence and responsibility, the right to choose where one lives, how one is educated—"the right to do, in general, what any adult may legally do." *Id.* at 19. See also *CHILDREN'S LIBERATION* (D. Gottlieb ed. 1973); *CHILDREN'S RIGHTS* (1971); M. GERZON, *A CHILDHOOD FOR EVERY CHILD: THE POLITICS OF PARENTHOOD* (1973).

Such sources contain criticisms of the public school systems, assumptions about family life, and the effect of modern technological society upon children, with occasional reference to some legal issues. The prevailing tone of this literature is that of disappointment and frustration with American institutions. Consider, for example, the statement by child psychiatrist Paul Adams that "the family's vital role in authoritarianism is entirely repugnant to the free soul in our age." Adams, *The Infant, the Family and Society*, in *CHILDREN'S RIGHTS* 51, 52 (1971). Adams asks for a restructuring of society in favor of children, but states that the conditions necessary to achieve the goals to which children are entitled are "to end war as an institution; then to eliminate poverty; then racism; and finally to put an end to the meaninglessness of living in a bureaucratized society." *Id.* at 76.

seem to be any necessary relationship between these cases and the country's heightened equality consciousness, at least not in the language of the decisions, but the coincidence in timing suggests that the two developments are not unrelated. Still, the Court's concerns have been confined to much narrower contexts than the large-scale legal and social changes advocated by those who would reject the concept of minority status. The possibility that the Court's decisions may improperly be cited as authority for implications well beyond the Court's intent is no small risk in the current climate. It is therefore important to read the cases closely in search of both legal effects and underlying intentions. What follows is a descriptive summary of relevant recent cases. Further classification and analysis of these cases is offered in a subsequent section.⁹⁹

*In re Gault*¹⁰⁰ established the principle that minors may not be denied basic procedural due process in juvenile court proceedings. Drawing upon prior cases in which "restricted aspects" of procedural due process protection for minors had been acknowledged, Justice Fortas wrote that whatever the precise impact of the prior cases, "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."¹⁰¹

Gault was an especially compelling case. A 15-year-old boy had been committed to a state industrial school for a period up to 6 years on charges arising out of a lewd phone call. The facts indicated flagrant abuse of the simplest procedural protections, from lack of notice about the nature of the charge to absence of the complaining witness from the hearing. The opinion expressly rejects the idea that a child's only right is to custody, not liberty,¹⁰² thereby expressing the clearest idea to emerge from *Gault*—that there is nothing about minority status that requires the courts to exclude ideas about due process protections from proceedings involving juveniles. What the case meant for the juvenile court philosophy of protecting minors against the full-blown formality of criminal proceedings, however, was less than clear in 1967.

The meaning and implications of *Gault* have been developed in subsequent cases, many of which are summarized in *McKeiver v. Pennsylvania*,¹⁰³ wherein the Court rejected a claimed right to

99. Notes 130-45 and accompanying text *infra*.

100. 387 U.S. 1 (1967).

101. *Id.* at 13.

102. *See id.* at 17.

103. 403 U.S. 528 (1971).

trial by jury in the juvenile courts. In *McKeiver*, the Court explained that its collective decisions on due process requirements for juveniles arose from a special need to remedy what had become an inadequate fact-finding process in delinquency proceedings, rather than from a rejection of the basic philosophy of the juvenile justice system. The Court stated that *Gault* and its progeny "do not spell the doom of the juvenile court system or . . . deprive it of its 'informality, flexibility, or speed.'"¹⁰⁴ Further, the Court made it clear that it "has not yet said that all rights constitutionally assured to an adult accused of crime . . . are . . . available to the juvenile" ¹⁰⁵ Rather, said the Court, denial of the right to a jury trial in fact promotes a desirable preferential treatment of minors accused of crimes:

The imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function, and would, contrarily, provide an attrition of the juvenile court's assumed ability to function in a unique manner. It would not remedy the defects of the system. Meager as has been the hoped-for advance in the juvenile field, the alternative would be regressive, would lose what has been gained, and would tend once again to place the juvenile in the routine of the criminal process.¹⁰⁶

104. *Id.* at 534, quoting *In re Winship*, 397 U.S. 358, 366 (1970).

105. *Id.* at 533.

106. *Id.* at 547. The Court continued:

We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial.

. . . .
 . . . Concern about the inapplicability of exclusionary and other rules of evidence, about the juvenile court judge's possible awareness of the juvenile's prior record and of the contents of the social file; about repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers—all to the effect that this will create the likelihood of pre-judgment—chooses to ignore, it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates.

Id. at 547, 550.

The disappointments of the juvenile court movement are hardly unique. The same report on which the Supreme Court relied so heavily in summarizing some of its negative conclusions about the juvenile courts also stated that to "say that juvenile courts have failed to achieve their goals is to say no more than what is true of criminal courts in the United States. But failure is most striking when hopes are highest." THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 7 (1967), quoted in *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

In the juvenile justice context, then, the Court has evidently not rejected the validity of a legal minority status, although it is willing to provide constitutional protection against the abuse of that status.

The public school setting is the second major area in which the Supreme Court has acknowledged minors' rights of constitutional dimensions. In *Tinker v. Des Moines School District*,¹⁰⁷ the Court found that the First Amendment rights of three students had been violated when school authorities suspended them from school for wearing black armbands to protest the government's policy in Vietnam. Writing for the majority, Justice Fortas stated that, "[s]tudents in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect"¹⁰⁸ The Court did not elaborate on the meaning of "fundamental rights," leaving the reader uncertain whether the Court had in mind the introduction of any new principles broader than necessary to achieve the result of the case. This lack of clarity prompted Justice Stewart's concurring opinion, in which he stated that he could not "share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults." Continuing, he stated that: "Indeed, I had thought the Court decided otherwise just last Term in *Ginsberg v. New York*."¹⁰⁹

Tinker, like *Gault*, demonstrates the Court's willingness to recognize constitutional protections for minors. It is far from

107. 393 U.S. 503 (1969).

108. *Id.* at 511.

109. *Id.* at 515 (citation omitted). For a summary of *Ginsberg* see notes 48-50 and accompanying text *supra*. In an emotional dissent by Justice Black, whose record in support of First Amendment freedoms needs no explanation, great concern was expressed about the implications of the *Tinker* decision:

[I]f the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary. The next logical step, it appears to me, would be to hold unconstitutional laws that bar pupils under 21 or 18 from voting, or from being elected members of the boards of education.

. . . . The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders.

Id. at 518, 522. As pointed out more recently by Justice Powell in *Goss v. Lopez*, 419 U.S. 565, 600 n.22 (dissenting opinion), some of Justice Black's fears have been realized since *Tinker* through a "flood of litigation" by children alleging violations of their constitutional rights by school officials.

clear, however, that the *Tinker* Court intended directly to address the question of minority status.

One of the cases apparently spawned by *Tinker* reached the Supreme Court in *Goss v. Lopez*,¹¹⁰ a 1975 decision holding that students facing temporary disciplinary suspensions from a public school are entitled to such due process protections as prior notice and an opportunity for a hearing. The *Goss* majority opinion, written by Justice White, also said nothing about the larger question of minority status raised by the concurring opinion in *Tinker*; however, Justice Powell's dissent in *Goss* did briefly address the larger question:

[T]he Court ignores the experience of mankind as well as the long history of our law, recognizing that there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office. Until today, and except in the special context of the First Amendment issue in *Tinker*, the educational rights of children and teenagers in the elementary and secondary schools have not been analogized to the rights of adults or to those accorded college students. Even with respect to the First Amendment, the rights of children have not been regarded as "co-extensive with those of adults."¹¹¹

Justice Powell's statement accurately summarizes statutory and common law attitudes as well as the prior opinions of the Court, all of which have consistently recognized differences between adults and children—both by express acknowledgment and by assumptions of the obvious.

Because the *Goss* majority did not explicitly deal with the historic distinction between the legal statuses of adults and minors, it is doubtful that the Court intended to address that question by mere implication. It is more reasonable to expect that issues of that significance would be dealt with explicitly if the Court intended to deal with them at all. Perhaps the most that is intended by *Goss* is found in Justice Powell's suggestion that minors' rights in the school context have now been "analogized" to the rights of adults.

The Court has not yet addressed the issue of minor's constitutional rights in a case where a minor's claim was pitted against

110. 419 U.S. 565 (1975).

111. *Id.* at 590-91 (Powell, J., dissenting) (emphasis in original).

the alleged constitutional rights of parents. In rejecting Justice Douglas' dissenting argument that the desires of the Amish children were relevant to the resolution of the case, the majority in *Wisconsin v. Yoder*¹¹² did come close to dealing with that kind of conflict:

Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary. Recognition of the claim of the State in such a proceeding would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions. It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom¹¹³

This view reflects obvious concern with the family tradition and the implications for that tradition of a child's constitutional claim against the interests of his parents. Also, in such circumstances it is the "claim of the State" that would create the conflict, rather than the claim by a child. The assumption that the child's claim would be asserted by the state rather than by the child may arise out of the compulsory school law context of *Yoder*, but it may also reflect the implicit assumption that minors would lack the capacity, legally, and perhaps practically, to assume responsibility for evaluating and asserting their own position. A further attempt to classify and evaluate the Court's children's rights decisions is made below.¹¹⁴

3. *Lower court interpretations of Supreme Court decisions*

The failure of some key Supreme Court majority opinions to respond to invitations for clarification made by concurring and dissenting opinions may have left the impression that perhaps the Court has intended to make the constitutional rights of minors coextensive with those of adults. At least, the scarcity of clear statements on the general validity of a legal minority status has allowed some lower courts to conclude that they may, consistent

112. 406 U.S. 205 (1972).

113. *Id.* at 231.

114. Notes 130-45 and accompanying text *infra*.

with Supreme Court precedent, severely limit the effect of that status, if not abandon it completely.¹¹⁵ *State v. Koome*,¹¹⁶ a 1975 Washington case, illustrates such an interpretation. The significance of the case arises not only from its language, but also from the possible effect of its reasoning in a later Washington case, *In re Snyder*.¹¹⁷

Koome involved an appeal by a physician who had been convicted of violating a state criminal statute by performing an abortion on a woman under the age of 18 without the consent of her legal guardian. In holding that the statute unduly infringed on minors' constitutional right of privacy, the Supreme Court of Washington reasoned that: (1) *Roe v. Wade*¹¹⁸ established that state regulation of abortions in the early stages of pregnancy violates a pregnant woman's fundamental constitutional right of privacy; (2) minors are people and, therefore, have a fundamental constitutional right to privacy; and (3) statutory parental consent requirements constitute state interference with personal privacy to an extent not justified by any compelling state interest. Some equal protection arguments were also dealt with regarding the failure of any asserted state interest to justify age classifications affecting the fundamental right of privacy. Four of the nine judges in *Koome* dissented on the grounds that, even assuming the existence of a fundamental right of privacy for minors, the state had a sufficiently compelling interest in the "quality" of a minor's abortion decision and in the mental health of minors to justify the consent requirement.¹¹⁹

A major difference between the reasoning of the majority and dissenting opinions is the extent to which each recognized the legal status historically given to minors. The dissent defended the distinction between minors and other persons with broad, general arguments, citing authorities ranging from Supreme Court cases acknowledging the legitimacy of the classifications to the introductory section of *American Jurisprudence 2d's* treatment of "infants." The majority view deeply undercut the distinction:

115. See *Poe v. Gerstein*, 517 F.2d 787, 789 (5th Cir. 1975).

116. 84 Wash. 2d 901, 530 P.2d 260 (1975).

117. 85 Wash. 2d 182, 532 P.2d 278 (1975).

118. 410 U.S. 113 (1973).

119. The dissenting opinion was influenced by the statute's requirement of consent by a "legal guardian" rather than by the minor's "parent," because the "guardian" language would permit a juvenile court to intervene in the parent-child relationship under its neglect statute and appoint a guardian who could consent to an abortion in circumstances where parental refusal amounted to neglect. 84 Wash. 2d at 921, 530 P.2d at 272.

Prima facie, the constitutional rights of minors, including the right of privacy, are coextensive with those of adults. Where minors' rights have been held subject to curtailment by the state in excess of that permissible in the case of adults it has been because some peculiar state interest existed in the regulation and protection of children, not because the rights themselves are of some inferior kind.¹²⁰

The majority's choice of language betrays the contradiction inherent in its reasoning. By acknowledging that a "peculiar state interest" in "the regulation and protection of children" has justified differential treatment, the court disproves its premise that "prima facie, the constitutional rights of minors . . . are coextensive with those of adults." The pattern has not been to presume "coextensive rights" or coextensive capacities; rather, the law has presumed the existence of basic differences between the capacities and needs of children and adults.

Because of this presumption, the basic inquiry in contexts involving minors has been the extent to which their peculiar limitations and needs justify or require greater flexibility, supervision, protection, and the like. In addition, the law has consciously considered relevant parental claims in order to foster the long-range preference of our system for the family.

Consider, for example, the common law's concern about the need for parental consent prior to the performance of surgery on a minor. The cases have long recognized that a child has a "right" to essential medical treatment. But the legal authority recognized in parents has always been carefully balanced against that right. In contrast, after suddenly concluding that a "constitutional right" may be involved in the abortion context, the Washington court only casually and inaccurately addresses the common law background. The court relies more heavily on two recent Washington statutes that authorize minors 14 years of age and older to receive treatment for drug abuse and venereal disease without parental consent.¹²¹ Although the court does not discuss the policies represented by these statutes, they appear to involve two special situations that have been singled out for legislative treatment because of the unusually strong and recent interest in assisting youth afflicted by drug addiction and venereal disease to obtain confidential nonsurgical treatment for problems that pose serious permanent threats to their physical health.

120. *Id.* at 904, 530 P.2d at 263.

121. *Id.* at 910-11, 530 P.2d at 266-67.

The court then cites and quotes at length from a 1967 Washington case which held that a jury could appropriately evaluate the capacity of a married, 18-year-old father to give an informed consent to sterilization surgery. Further, the court refers to Washington's basic age-of-majority statute, which authorizes persons 18 years of age and older to marry, consent to surgery, and otherwise act as adults. These latter two references are irrelevant to the common law positions of minors because they deal with adults, not with unemancipated minors.

The court's only other statement about parental consent requirements is a surprising misstatement of authority:

A doctor competently performing any other type of surgery [than abortion] on a consenting minor runs virtually no risk of even civil liability because of the absence of parental consent. See Pilpel, *Minor's Rights to Medical Care*, 36 Albany L. Rev. 462, 466 (1972).¹²²

Many cases have established the prevailing common law rule that liability may be imposed upon a physician in such circumstances, and Ms. Pilpel does not dispute the existence of the cases or the rule. Rather, she simply observes that "no case has been found in any jurisdiction in which liability has been imposed on a physician or health facility on the basis of failure to secure parental consent for any kind of medical treatment where the minor was over the age of 15 years." She points out that despite this fact, doctors remain fearful of treating minors without parental consent, and therefore she favors the adoption of statutes altering current consent requirements. With this as its sole authority, the *Koome* court concludes that a statute requiring parental consent for abortions is inconsistent with the common law. Existing case law, even in Washington, seems to be quite the opposite.¹²³

This brief treatment of the Washington court's lapse of both perception and judgment is not presented merely to criticize its statement of the law, but, more importantly, to illustrate the extent to which the apparent magic of a child's alleged constitutional right can desensitize a generally competent court to the real context in which a parent-child conflict arises. Any adequate discussion of the constitutionality of statutes requiring parental consent for abortions must take into account the origins and purposes of the common law rules on parental consent to surgery on

122. *Id.* at 913, 530 P.2d at 268.

123. *E.g.*, *In re Hudson*, 13 Wash. 2d 673, 126 P.2d 765 (1942). See also *In re Green*, 448 Pa. 338, 292 A.2d 387 (1972); W. PROSSER, *THE LAW OF TORTS* § 18 (4th ed. 1971).

children, just as the United States Supreme Court has taken into account the context of the juvenile court in its juvenile due process decisions and the public school context in the school discipline decisions. The involvement of a constitutional right for minors by no means lifts a case above the practical and policy problems of minority status into some abstract sphere in which an abandonment of that special body of law that has always applied to children is justified. When both parents and children are involved, as in *Koome*, the law must concern itself even more with that special context, since a court must then confront the unique legal and social role of parents.

It is doubtful whether the children's rights decisions of the United States Supreme Court warrant the conclusion that, by interjecting concerns of constitutional dimension into state processes involving minors, the Court has intended to say that the presumptions justifying the treatment of minors as a special class have become outmoded. None of the relevant cases imply that the actual capacities of minors have changed in any way that requires a change in the legal rules or assumptions that grew out of the traditional view that the competence of minors to exercise adult rights is limited. The oversimplified reasoning of courts that believe recent constitutional case law has made the "rights" of minors "prima facie . . . co-extensive with those of adults" is especially dangerous, since such reasoning permits a shift in the crucial presumptions about the status or capacity of minors. Indeed, just such a shift seems to occur in *State v. Koome* because of the heavy presumptive effect of placing the claim of a minor behind the barricades of the compelling state interest test.

This shift in presumptions in the laws dealing with minors can come legitimately only after a strong factual showing that there is no longer any basis for the premises underlying traditional treatment of minors. That there has been such a showing regarding the factual premises underlying certain limited aspects of the procedures employed by the juvenile courts or the public schools may illustrate the process by which specific, case-by-case changes in the law's treatment of minors will and should come about; but the showing in those narrow areas dealt primarily with certain procedural issues, not the general question of the capacity of minors. These cases offer no rational justification for abandoning an established, factually based presumption, the disappearance of which would have almost limitless consequences for American law.

The use of "children's rights" terminology in *Koome* not only teased the court away from dealing adequately with established presumptions about minority capacity, but it also precluded any serious attempt at dealing with established presumptions about parental roles and rights. The purpose and history of either presumption is sufficient to place the problem of minors' abortions on a different plane from the matter of adult abortions. Taken together, the two presumptions demand a broad and sophisticated judicial inquiry into both evidence and policy. No such inquiry was supplied by the Washington court, perhaps because it believed that the introduction of terms used in the individual tradition somehow made the family tradition irrelevant.

In *Poe v. Gerstein*,¹²⁴ another case dealing with parental consent requirements for abortions performed on minors, the Fifth Circuit showed a similar tendency to place what is characterized as a child's constitutional right ahead of parental and familial interests. One wonders what the logical extensions of the following reasoning might mean for the myriad other sources of normal parent-child confrontation:

[M]erely facing one's parents with the problems of unwanted pregnancy would present a considerable deterrent to abortion among teenage girls and, in fact, may adversely affect their mental and physical health and thereby arguably infringe upon the minor's constitutional rights.¹²⁵

This point of view carries overtones of an important theme in the egalitarian ethic as it applies to the parental role: "[T]he family's vital role in authoritarianism is entirely repugnant to the free soul in our age."¹²⁶

The Washington court's opinion in the *Snyder* case, discussed as the introductory illustration of this article, was handed down just 1 month after that court's decision in *Koome*. Although the court in *Snyder* avoided reference to a children's rights theory in upholding the juvenile court's finding of incorrigibility, the record and the briefs filed in the case make it clear that the parties favoring the lower court action were influenced by a broad reading of *Gault* and general literature arguing for a broad extension of the traditional rights of minors.¹²⁷ The "right" of a child to effect termination of parental custody as a means of perma-

124. 517 F.2d 787 (5th Cir. 1975).

125. *Id.* at 793 n.11.

126. Adams, *The Infant, the Family and Society*, in *CHILDREN'S RIGHTS* 51, 52 (1971).

127. See notes 4-7 and accompanying text *supra*.

nently leaving home when there is a "serious family conflict" has been advocated in various ways in recent literature.¹²⁸ However, *Snyder* may be the first case in which legal proceedings have resulted in a child-initiated termination of parental rights in the express absence of any finding of parental unfitness.

Although the *Snyder* court may not have believed it was breaking new ground, its uncritical acceptance of what amounts to a children's rights position on a matter as basic as parental custody is worthy of some attention. Under both the theory and the result of *Snyder*, there is little to prevent any other dissatisfied and "resolute" child from taking the same position and achieving the same outcome as the teenager in that case.¹²⁹ It is at least reasonable to wonder to what extent the philosophy of constitutional rights for minors made explicit in *Koome* may have influenced the court's assessment of the issues in *Snyder*.

Perhaps the courts involved in *Gerstein*, *Koome*, and *Snyder* were unwittingly influenced by the modern winds of egalitarianism; perhaps they were conscientiously trying to follow the leadership of the Supreme Court; perhaps the impact those decisions would have on the family tradition was not adequately pointed out by counsel; perhaps that impact was pointed out, understood, and rejected. Whatever their basis, cases like these convey the impression that, in the aftermath of *Gault*, the nation has suddenly awakened to the supposedly startling idea that children are people.

With that awakening comes embarrassment and an impulse to right all the wrongs ever committed against children. The vehi-

128. J. HOLT, *ESCAPE FROM CHILDHOOD* 206 (1974) (establishment of "secondary guardians" to which children could turn if they desire to leave their natural parents); FARSON, *supra* note 94, at 42-62 (1974) (Kibbutz-type cooperative arrangements to take children away from possible conflicts at home); Foster & Freed, *supra* note 6, at 368 (1972) (appointment of a public guardian to serve the best interests of children).

129. The following excerpts characterize the view taken by the state of the child's position in *Snyder*:

[C]o-respondent is a bright, able and resolute young woman who . . . knowingly and intelligently admitted the facts of the petition.

. . . .

. . . The petitioner's contention seems to be that . . . only in cases of extreme physical abuse or neglect should the state be allowed to intervene. Cynthia Snyder is a person who has apparently made a decision about her life. That decision is that she will not go home and be treated like an inanimate possession by her parents.

. . . .

. . . [C]hildren are autonomous individuals, entitled to the same rights and privileges before the law as adults.

Brief of State Respondent at 5, 11, 23.

cle for this penance is a series of judicial pronouncements that seem to incorporate by reference and thereby misapply massive amounts of constitutional law and other legal doctrines developed painstakingly over the generations in cases involving adult litigants and the classes they represent. These pronouncements also tend to ignore another large group of legal concepts already developed to meet the special needs and problems of children in families.

III. ABANDONING CHILDREN TO THEIR "RIGHTS": THE RISKS OF UNCRITICAL LIBERATION

A. *Rights of Protection vs. Rights of Choice*

When children are involved, a significant distinction can be drawn between legal rights that protect one from undue interference by the state or from the harmful acts of others and legal rights that permit persons to make affirmative choices of binding consequence, such as voting, marrying, exercising religious preferences, and choosing whether to seek education.¹³⁰ For purposes of this discussion, the first category will be referred to as rights of protection; the second, rights of choice.

Rights of protection include the right not to be imprisoned without due process, rights to property, and rights to physical protection. The protection category seems to embrace most, if not all, of the legal doctrines that have been developed to date for the benefit of minors in both the constitutional context and the juvenile law context. *Gault*, for example, was expressly concerned only with procedural protections applicable to the adjudicatory

130. A general distinction of this type has been suggested in Kleinfeld, *The Balance of Power Among Infants, Their Parents, and The State*, 4 FAMILY L.Q. 320, 321-22 (1970).

The Supreme Court has construed the "liberty" rights of the due process clause broadly and has in recent years rejected the distinction between "rights" and "privileges" which was once thought applicable to procedural due process rights. *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972). The liberty concept has been defined to include "not merely freedom from bodily restraint but also the right of the individual to contract, . . . to marry, . . . [and] to worship God according to the dictates of his own conscience" *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The elimination of the rights-privileges distinction and the use of such expansive language may appear to suggest that there is no room for a distinction between protection rights and choice rights. However, the rights-privileges distinction focuses on the form of liberty in question, while the protection-choice distinction argued for here focuses on the individual's capacity to benefit from the liberty in question. Moreover, the flexibility inherent in the broad approach to due process liberty actually encourages giving attention to factual distinctions as meaningful as capacity, so that instead of being bound by purely monolithic theories about "rights," the courts may evaluate "the significance of the state-created or state-enforced right and . . . the substantiality of the alleged deprivation." *Goss v. Lopez*, 419 U.S. at 599-600 (Powell, J., dissenting).

stage of juvenile delinquency proceedings in which incarceration may be a consequence of the adjudication.¹³¹ *McKeiver* noted that all of the Court's juvenile delinquency decisions had been limited to the application of certain procedural constitutional protections to the adjudicative aspects of juvenile proceedings.¹³² Nevertheless, the *McKeiver* Court refused to grant the right to trial by jury to juveniles precisely because that particular right did not provide a form of protection beneficial to minors, given the Court's continuing commitment to the "paternal attention that the juvenile court system contemplates."¹³³

Goss v. Lopez proceeds from the due process principle of protection against the procedurally unfair deprivation of a state-created right to education. The *Goss* Court identified this right as "a property interest . . . which may not be taken away for misconduct without adherence to the minimum procedures required by the [due process] clause."¹³⁴ The due process guarantees applied in *Goss* were also intended to protect students against the arbitrary deprivations of liberty thought to be inherent in the damage to their personal reputations caused by suspension.

Tinker is less clearly in the protection category than are the due process cases. The First Amendment rights involved in that case are probably closer, as a matter of pure theoretical categories, to choice rights than protection rights. It was this theoretical aspect of *Tinker* that caused Justice Stewart to enter a concurring opinion in which he wrote that "[a] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."¹³⁵ Justice Stewart's reasoning suggests that it is reasonable to conclude (as he did) that the school authorities in *Tinker* could be legally limited in restricting the right of students peacefully to wear black armbands without also concluding that such an outcome imputes "full capacity for individual choice" to public school students. This position flows in part from the observation that the exercise of free speech rights

131. 387 U.S. at 13.

132. 403 U.S. at 550.

133. *Id.*

134. 419 U.S. at 574.

135. 393 U.S. at 515 (1969) (Stewart, J., concurring), quoting *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968). Justice Powell, who dissented in *Goss*, would also have joined in the *Tinker* conclusion, had he been on the Court, because it was "a narrowly written First Amendment opinion which I could well have joined on its facts." 419 U.S. at 600 n.22 (Powell, J., dissenting).

in the *Tinker* context did not involve the assumption of binding and permanent responsibility that would be involved in such choice rights as voting, contracting, or marrying. It can also be argued that the rights of parents to free expression and control of their children may have been an important subject of protection in *Tinker* since the parents of the children involved had encouraged their children to wear the armbands and were obviously instrumental in bringing the litigation that ensued.¹³⁶ In that sense, *Tinker* might be considered another in the long line of cases protecting parental rights to teach and influence their children against state claims that would limit the exercise of such parental prerogatives. Thus, *Tinker* is not an obstacle to the assertion that none of the Supreme Court's children's rights cases provide authority for upholding the exercise of minors' choice rights—particularly against contrary parental claims.

The statutes creating juvenile court jurisdiction over parents are also in the "protection" category, being designed to protect children against harmful abuse, neglect, or abandonment by their parents. Moreover, the entire juvenile justice system is based upon the premise that children who are yet in the developmental stages of becoming mature adults should be protected against the long term implications of their own decisions made at a time when they lack sufficient capacity and experience to be held as responsible as an adult would be for the same decision. Thus, legal limitations on the effect of minors' choices are in fact "rights" designed for minors' protection. That basic philosophy has not been repudiated by the Court's recent juvenile due process cases, which have criticized specific inadequacies of modern juvenile court factfinding procedures, but not the concepts about the peculiar capacities and needs of children that underlie the juvenile court system.¹³⁷

More broadly, it has been of profound importance in all legal inquiries involving children that minors are presumed by all phases of the law (and by the culture reflected by our law) not to

136. See Burt, *supra* note 39, at 122-23.

137. In addition to the language from *Gault* and *McKeiver* quoted in the text accompanying notes 100-106 *supra*, consider this language from Justice White's concurring opinion in *McKeiver*:

Reprehensible acts by juveniles are not deemed the consequence of mature . . . choice but of environmental pressures (or lack of them) or of other forces beyond their control. Hence the state legislative judgment not to stigmatize the juvenile delinquent by branding him a criminal; his conduct is not deemed so blameworthy that punishment is required to deter him or others.

403 U.S. at 551-52 (White, J., concurring).

have the same basic capacities as adults. That presumption is so obvious that it has not been the subject of any discussion in the Supreme Court cases on the constitutional rights of children. Of course, nothing about the capacity presumption precludes the Court from considering whether, either in spite of the presumption or because of it, certain circumstances warrant a definition of the precise ways in which the legal position of a minor in a given situation should be protected, for constitutional or other reasons. Indeed, the presumption that minors lack adult capacity has remained preeminent in cases involving juveniles, to the extent that the Court has specifically refused to consider the "totality of the relationship of the minor and the State."¹³⁸ Rather, the Court has preferred to leave intact the basic presumption of the legal incapacity of minors, making specific, narrow adjustments on a case-by-case basis.

The presumptions arising from the limited capacities of minors account in large part for the general limitation on their exercise of rights that are in the "choice" category, because the law assumes, as suggested by Justice Stewart's concurring opinion in *Tinker*, that a basic capacity to make responsible choices is a prerequisite to the meaningful exercise of choice rights. For example, the age limitation on voting rights has been thought to fix the level above which citizens "are capable of intelligent and responsible exercise of the right to vote."¹³⁹ This restriction has persisted even though the right to vote may be the most fundamental of citizenship rights because it is "preservative of other basic civil and political rights."¹⁴⁰ Presumably, also for general reasons of capacity, the Constitution expressly limits membership in the House of Representatives and the Senate on the basis of age, and lists age as a qualification for the Presidency.¹⁴¹ Other illustrations abound, from statutes fixing the age below which one may not marry without parental consent to longstanding common law and statutory rules presuming lack of capacity to make a legal contract or to consent to sexual or tortious acts.¹⁴²

The serious question about the capacity limitation is where to draw the age line above which a given right or activity may be

138. *Ginsberg v. New York*, 390 U.S. 629, 636 (1968).

139. *Oregon v. Mitchell*, 400 U.S. 112, 240 (1970) (Brennan, White & Marshall, JJ., concurring).

140. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

141. U.S. CONST. art. I, §§ 2, 3; art. II, § 1.

142. For a discussion of limitations on the right to vote in the context of other legal restrictions based upon age see Kleinfeld, *The Balance of Power Among Infants, Their Parents and The State*, 5 FAMILY L.Q. 64 (1971).

permitted. Children develop from incapacity toward capacity. That incontrovertible natural pattern is consistent with the presumption that capacity does not exist for children as a class until the general weight of evidence shows that a given level of capacity does in fact exist.¹⁴³ To presume, to the contrary, that rational and judgmental capacities exist until the evidence demonstrates otherwise is to defy both logic and experience, because the evidence already demonstrates from the outset that such capacities among infants are negligible. Thus, the presumption of incapacity to make certain choices is compelled by nature.

The effect of the protection-choice distinction may be illustrated by reference to two specific situations. The first is where a minor desires state support of a decision to have an abortion. If the physical health of a pregnant minor were in danger in a given case, existing rights to physical protection would prevent parents from legally resisting the abortion. Otherwise, however, no right to protection from serious harm is involved, leaving the right to make the decision in the choice category. The long-range psychological implications of the decision present the young woman with formidable difficulties in trying to make a mature assessment of her ability to live with the consequences of either an affirmative or a negative abortion decision. There is no reason to assume that she would have greater capacity to evaluate the implications of an abortion than she would the consequences of voting or marrying. It can be argued, of course, that certain parents may be in no better position to evaluate those risks than are their children—and may be even less likely to provide a better evaluation than a physician or a trained social worker. Whether the adult advice received by a pregnant minor comes from a parent or a professional, however, raises larger questions than who knows more about abortions, since once children are allowed to decide whose advice about abortions they will accept, there is little reason not to extend the right to parental noninterference to many other subjects, ranging from a minor's lifestyle choices to adolescent marriage. Thus, to bar a parent's right to prevent a minor child from having an abortion when no serious danger to health exists is to provide precedent for abrogating traditional parental control over the entire range of minors' choice rights.

In spite of some lower court decisions that statutes requiring parental consent for minors' abortions are unconstitutional,¹⁴⁴ it

143. See p. 605 *supra*.

144. *E.g.*, *Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975); *Baird v. Bellotti*, 393 F. Supp. 847 (D. Mass. 1975); *State v. Koome*, 84 Wash. 2d 901, 530 P.2d 260 (1975). See also Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305 (1974).

is not clear that any general judicial change has been intended in the common law's historic recognition of parental control over children's decisions to submit to surgery, especially when such surgery is not medically necessary to their physical health. If that rule is to be overturned in the abortion context simply because the right to have an abortion has been said to be "fundamental" for adult women, a court would have difficulty refusing a minor the affirmative right to make choices that control more about her life than her body.

The *Snyder* case illustrates the second situation, where a child desires a familial separation against the wishes of legally fit parents on grounds tantamount to incompatibility. In such a case, there is no parental abuse, neglect, or abandonment involved, so the child's rights to protection are not at stake. This is, therefore, a relatively extreme minor's choice matter. Acknowledgement of a child's right successfully to make such a choice necessarily assumes mutuality of capacity between parents and children, both in the formal legal sense and in the substantive sense of individual capacity to assume total responsibility for one's decisions. To conclude that children have the capacity to participate in or initiate a legal severance of family ties requires that the present legal presumption about the incapacity of minors be reversed. This reversal requires not only a flick of the legal wrist, but also a clear evidentiary demonstration that children as a class are not characterized by actual limitations upon their capacity to form judgments, assume economic responsibility, and otherwise act independently in their own behalf.

In the absence of such a reversal, a child would require representation in such a proceeding by some adult who could assert the best interests of the child, even though some such assertions may differ from the child's preferences. But when the parents are legally fit, who is to say that a nonparental guardian or a juvenile court judge is better able to interpret the child's interests than are the child's parents? It is precisely that question that has made most students of the subject argue strongly in favor of retaining support for the protection of natural family ties, because experience has shown that to do so is a better alternative for the children involved,¹⁴⁵ even though the children themselves are not yet in a position to appreciate fully why that may be so.

145. See, e.g., Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975).

The term "choice rights" as it has been used here applies to minors' decisions having serious long term consequences that have traditionally required either legal or parental approval (or both) in order to be enforceable. To suggest that legal rights of this special character should not be given premature approval is, however, not to argue for increased state-supported parental interference with the vast variety of less solemn choices that arise daily in the lives of children. Indeed, the availability of gradually increasing freedom to live with the consequences of one's own decisions is a critical element in the development of mature judgmental capacities. Still, the development of the capacity for responsible choice selection is an educational process in which growth can be smothered and stunted if unlimited freedom and unlimited responsibility are thrust too soon upon the young. Moreover, the lifelong effects of binding, childish choices can create permanent deprivations far more detrimental than the temporary limitations upon freedom inherent in the discipline of educational processes.

The development of the capacity to function as a mature, independent member of society is essential to the meaningful exercise of the full range of choice rights characteristic of the individual tradition. Precisely because of their lack of capacity, minors should enjoy legally protected rights to special treatment (including some protection against their own immaturity) that will optimize their opportunities for the development of mature capabilities that are in their best interest. Children will outgrow their restricted state, but the more important question is whether they will outgrow it with maximized capacities. An assumption that rational and moral capacity exists, when in fact it does not exist, may lead to an abandonment of the protections, processes, and opportunities that can develop these very capacities. In this sense, the concept of restricting certain choice rights is in fact an important form of protection rights. For these reasons, some distinction between rights of protection and rights of choice must be preserved. As suggested above, the existing children's rights decisions of the Supreme Court could reasonably be categorized as cases involving rights of protection only. It would be both inappropriate and contrary to the ultimate interests of children to construe those decisions as encouraging the removal of traditional constraints upon minors' exercise of choice rights.

B. *The Right of a Child Not To Be Abandoned to His "Rights":
The Most Basic Right?*

The influences of some parental authority and responsibility are inevitable in view of the natural dependence of children. Rather than inhibiting optimal child development, however, this element of the parent-child relationship may be the child's most valuable source of developmental sustenance. Psychological evidence indicates that children "are not adults in miniature, they are being per se, different from their elders in their mental nature, their functioning, their understanding of events, and their reactions to them."¹⁴⁶ Children have many special needs that must be met in their quest for maturity and independence. The most critical of these needs is a satisfactory and permanent psychological relationship with their parents. Thus, even assuming the highest policy priority for fulfilling the actual needs of children, the worst possible results would be visited upon children by "liberating" them from the crucial psychological matrix of true family relationships. That kind of liberation would constitute the most ironic adult treatment of children—"abandoning them to their 'rights.'"¹⁴⁷ As stated by Goldstein, Freud, and Solnit:

Psychoanalytic theory . . . [and] developmental studies by students of other orientations [establish] the need of every child for unbroken continuity of affection and stimulating relationships with an adult.

. . . .

To safeguard the right of parents to raise their children as they see fit, free of government intrusion, except in cases of neglect and abandonment, is to safeguard each child's need for continuity. This preference for minimum state intervention and for leaving well enough alone is reinforced by our recognition that law is incapable of effectively managing, except in a very gross sense, so delicate and complex a relationship as that between parent and child.¹⁴⁸

This thesis suggests that parental authority must be regarded as a sovereign right if the psychological needs of children are in fact to be met. If there is insecurity or lack of commitment in the relationship, either because of governmental intrusion or because a parent has substantial doubts about the extent of his

146. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 13 (1973).

147. PANEL DISCUSSION REMARKS OF ALBERT SOLNIT, CHILD ADVOCACY CONFERENCE, MADISON, WISCONSIN, SEPT. 26, 1975.

148. J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *supra* note 146, at 6, 7-8.

or her personal authority, serious psychological deficiencies are more likely to exist in the relationship. For this reason, these authors resist the use of temporary foster parents in child-placement decisions, because foster parents "find themselves deprived of the position on which parental tolerance, endurance, and devotion are commonly based, namely that of being the undisputed sole possessor of the child and the supreme arbiter of his fate." In that kind of relationship, insecurity and lack of emotional constancy "[defeat] the very intentions of the decision to move from professional institutional care to family care."¹⁴⁹

This understanding of the needs of children enables a more long-range interpretation of what children may well "prefer" under the most theoretical views of egalitarian fairness. In *A Theory of Justice*, John Rawls would include children within the class of beings protected by his principles of justice, because children possess innate (although unrealized) moral capacity.¹⁵⁰ He maintains that guardians should be "guided by [the child's] own settled preferences and interests insofar as they are not irrational."¹⁵¹ He acknowledges, however, that children generally lack the rationality to act for themselves¹⁵² and therefore suggests that adults in a guardian role should try to obtain for a child "the things he presumably wants, whatever else he wants."¹⁵³ Rawls has been interpreted to mean that no one (including parents) should be permitted to act on behalf of children until the absence of a child's "full ability to decide" for himself has been affirma-

149. *Id.* at 24-25.

New York Family Court Judge Nanette Dembitz has expressed her concern that *Beyond the Best Interests of the Child* focuses too exclusively on the interests of children while ignoring basic parental rights: "The doctrine of the biological parent's natural rights, which continues to appear in numerous New York decisions, reflects a deeply held ethic." Dembitz, Book Review, 83 *YALE L.J.* 1304, 1306 (1974). Judge Dembitz may be among others who have seen the Goldstein-Freud-Solnit work as advocating premature interference with biological parent-child relationships. However, close reading of the book as well as conversations with its authors confirms that the authors favor parental autonomy as a general rule, as indicated in the text, except in cases of neglect, abandonment, or other recognized circumstances that give rise to custody disputes. They have not advocated new intervention standards, but merely new standards for evaluating custody dispositions once existing standards have put custody into issue.

150. J. RAWLS, *A THEORY OF JUSTICE* 509 (1971) states:

[T]he minimal requirements defining moral personality [those entitled to equal justice under his theory] refer to a capacity and not to the realization of it. A being that has this capacity, whether or not it is yet developed, is to receive the full protection of the principles of justice. [This includes] . . . infants and children . . ."

151. *Id.* at 249.

152. *See id.* at 209, 244.

153. *Id.* at 249.

tively demonstrated in a given situation¹⁵⁴—in other words, that the existing presumptions about minors' lack of capacity should be reversed. But Rawls has offered no new proof about the capacities of children, nor does he purport to know what children "presumably" want, especially when that presumed wanting is to be evaluated, under his theory, according to the view a child would have if he enjoyed adult capacity at the time a decision affecting him is made. It is arguable under Rawls' theory, given the evidence showing the critical psychological value of secure, parent-directed family relationships, that the encouragement of parental authority is the most likely means of satisfying the long-range needs of children. When imagining themselves as children, persons who accept that evidence would "presumably" prefer subjection to parental control up to the point of actual abuse or neglect, even if that meant their expressed preferences as children would frequently be overridden.

There is a group of legal scholars in the family law field who recognize the need for family autonomy, but whose commitment to the individual tradition leaves them ideologically uncomfortable with the thought that state policies should encourage parental authority over children. Consider, for example, this statement from a student treatment of problems arising from statutory parental consent requirements as a condition to the availability of contraceptives to minors:

Moreover, it is a misconception to equate the preservation of family structure with reinforcement of parental control. Maintaining the integrity of the family is not only a reflection of interests of the parents. It also mirrors a distinguishable, relational privacy interest, arguably rooted in first amendment associational values, the thrust of which is not merely to protect parental authority, but also to safeguard from state encroachment the intimacy and autonomy of the family relationship. Where, as in the contraceptive context, individual interests of parent and child are likely to collide, protection of their shared relational interest assumes independent importance and should not be directed at reinforcing the values of parents alone, which results when a parental consent requirement is imposed, but rather at fostering autonomous intrafamilial resolution of controversies.¹⁵⁵

This comment reflects the merit of encouraging the auto-

154. Worsfold, *A Philosophical Justification for Children's Rights*, 44 HARV. EDUC. REV. 142, 156 (1974).

155. Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001, 1017-18 (1975).

mous resolution of family differences, but it necessarily assumes a degree of equality in capacities and roles within the family relationship that is neither realistic nor in the ultimate interests of children. The psychological value of autonomy in the family relationship cannot truly be accomplished if parental authority is not ultimately authoritative. While authority may be most effectively used when based upon patient persuasion rather than only upon brute force, the family that operates as a true democracy is less likely to provide the security, the role-modeling, the leadership, the socializing, the growth, or many of the other interests preserved by a basic policy decision that parental authority is worthy of some state support. That has been the premise underlying much juvenile court law, and, in spite of the abuses that have been generated in extreme cases by inept caseworkers and insensitive parents, the concept retains a soundness that is still preferable to the anarchy that would result from state support of some kind of democratic egalitarianism among all family members. The failure of the state to provide some support for parental authority—even if as a last resort—is likely to diminish the power of parent-child relationships to provide the psychological matrix necessary to optimize the preparation of children for independent participation in adult society.

It has nevertheless been argued¹⁵⁶ that concerns about state intervention into family life should apply not only to direct acts by state agents, but also to the use of state resources as supports for parental authority. This view of opposition to state intervention seems to derive from a philosophical position that opposes not only governmental action but also any authoritarian interference with the lives of children. Ironically, limiting parental authority is likely to require some kind of state intervention on behalf of children, perhaps in the form of more far-reaching recognitions of children's rights in contexts where their actual needs for protection are not at stake. It is not possible for the state to remain truly neutral, particularly when parents begin with a position of authority over their children within the inherent status quo. Denying a portion of parental authority necessarily adds to the authority of children. Such an addition may be appropriate when the circumstances make it clear in an individual case that children have some special need. But, as long as the limited capacities of children make it either impossible, unrealistic, or un-

156. Burt, *supra* note 39, at 132.

fair to them to let them assume full responsibility for their own lives, ultimate control over their conduct must and will necessarily rest either with their parents or with the state. Thus, reducing parental authority simply creates increased state involvement. That, it is submitted, would be the worse of two potential evils.

Professor Michael Wald has advanced a compelling series of arguments for a reduced level of state intervention in parent-child relationships. He maintains that a desirable diversity of views, lifestyles, and attitudes is encouraged by parental autonomy; that since our society is unsure of the best methods or even the objectives of child-rearing in any event, children should be protected only from the more obvious harms upon which policymakers can agree; and that state intervention has a long record of placing children in more detrimental positions than they would have been without such intervention.¹⁵⁷ These observations, particularly the extensive documentation related to the frequent failure of state intervention, suggest additional reasons why the maintenance of parental autonomy is, when compared to the alternatives, in the best interests of children. After an exhaustive analysis of a set of proposals designed to cope with presently inadequate standards, Professor Wald concludes:

The approach suggested in this Article might be viewed by some readers as more solicitous of parents' rights than of children's rights. As such, it may be interpreted as a defense of the "old system" against the mounting calls for emphasis on children's rights and greater state protection for children; but, to me, such charges are unwarranted. Aiding children through coercive intervention has not proven to be a success.¹⁵⁸

Filtering through the lines in this statement is a certain reluctance to acknowledge explicitly the position that seems to have been advocated, and it needs no apology: preservation of the parental authority that is a prerequisite to meaningful family autonomy is in fact in the interest of children and their most vital long-range rights.

To the extent that governmental policies foster noncommittal attitudes on the part of parents—either because parents believe they have no right to give direction to their children, or because they fear that in giving them direction they might meet the kind of state-supported resistance encountered by the parents of Cynthia Snyder—both the children of those families and the larger society will suffer.

157. Wald, *supra* note 145, at 992-1000.

158. *Id.* at 1038.

For most parents, the "rights" of parenthood leave them no alternative but an assumption of parental responsibility, because that responsibility, both by nature and by law, can be assumed by no one else until the parent has failed. But when state-enforced policies undermine traditional parental rights, those same policies will inevitably undermine the assumption of parental responsibility. To undermine parental initiative would not be wise because our society has found no realistic alternative to it. The encouragement of parental responsibility for children is certainly less detrimental than a pervasive state assumption of child-rearing. Indeed, the development of policies that encourage parental responsibility is probably the best thing we could do for our children. One might even say that children have a right to such policies.

IV. CONCLUSION

The individual tradition is at the heart of American culture. Yet the fulfillment of individualism's promise of personal liberty depends, paradoxically, upon the maintenance of a set of corollary traditions that require what may seem to be the opposite of personal liberty: submission to authority, acceptance of responsibility, and the discharge of duty. The family tradition is among the most essential corollaries to the individual tradition, because it is in families that both children and parents experience the need for and the value of authority, responsibility, and duty in their most pristine forms. When individualism breaks loose from its corollaries, however, its tendency to destroy personal fulfillment and human relationships is exposed. This result was anticipated in the infancy of the American democratic experiment by Alexis de Tocqueville:

As social conditions become more equal, the number of persons increases who, although they are neither rich nor powerful enough to exercise any great influence over their fellows, have nevertheless acquired or retained sufficient education and fortune to satisfy their own wants. They owe nothing to any man, they expect nothing from any man; they acquire the habit of always considering themselves as standing alone, and they are apt to imagine that their whole destiny is in their own hands.

Thus, not only does democracy make every man forget his ancestors, but it hides his descendants and separates his contemporaries from him; it throws him back forever upon himself

alone, and threatens in the end to confine him entirely within the solitude of his own heart.¹⁵⁹

Perhaps it is no coincidence that the recent period of expansive egalitarianism is also the period of the most widespread loneliness and alienation Western culture has known. It may also be that the tendency of democracy to make men forget both their ancestors and their descendants is causing some adults to seek the liberation of children as a way of liberating themselves from the duties, the ambiguities, and the self-denial that are necessarily required of parents and communities committed to the pattern of family life.¹⁶⁰

But individualism must remain embedded in the context of its corollary obligations to family and community if the individual tradition itself is to survive in a meaningful form. Family life, rather than subjecting the young to the permanent disadvantages caused by certain unfair discriminations against other classes, has served to nurture children's readiness for responsible participation in the individual tradition. The natural need to prepare children for entry into the fray of individualism, with its risks and obligations as well as its opportunities, has, until the last decade, kept children within the walls of the family tradition. We may now be on the verge of seeing a rejuvenated egalitarian movement break down those walls. To date, however, there is no serious evidence that society has outgrown the need for the preparatory role of the family tradition, nor has industrial society discovered substitute institutions or relationships adequate to fulfill the functions historically performed by the family.

Because of its preparatory role, maintenance of the family tradition is in fact a prerequisite to the existence of a rational and productive individual tradition. John Locke concluded his discussion of the role of children in the individual tradition with this statement: "And thus we see how natural freedom and subjection to parents may consist together and are both founded on the same principle."¹⁶¹ The principle upon which both freedom and subjection to parents are founded has to do with the most fundamental human processes of learning. Locke believed that parents were obliged by "Nature" to "nourish and educate" children in developing the minimal capacities one must possess before the liberty

159. A. DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 194 (R. Heffner ed. 1956).

160. Novak, *The Family Out of Favor*, HARPER'S, April 1976, at 37.

161. LOCKE, *supra* note 14, § 61, at 35.

to make binding choices can be meaningful. The related obligation of children is to submit to some degree of parental authority; otherwise, little significant learning can take place. In his important work on the development of individual knowledge, philosopher Michael Polanyi has pointed out that neither basic nor sophisticated skills can be learned without the kind of personal master-apprentice relationship Locke saw as existing between parents and children:

An art which cannot be specified in detail cannot be transmitted by prescription, since no prescription for it exists. It can be passed only by example from master to apprentice. . . . To learn by example is to submit to authority. You follow your master because you trust his manner of doing things even when you cannot account in detail for its effectiveness. By watching the master and emulating his efforts in the presence of his example, the apprentice unconsciously picks up the rules of the art, including those which are not explicitly known to the master himself. These hidden rules can be assimilated only by a person who surrenders himself to that extent uncritically to the imitation of another. A society which wants to preserve a fund of personal knowledge must submit to tradition.¹⁶²

It is more than coincidental that for the ancient Greeks and Romans, as well as for Western society in the post-1500 period, a strong commitment to the idea of childhood and lasting family relationships grew parallel with a strong commitment to the idea of education.¹⁶³ Childhood, as a time of life and as a frame of mind, is intimately related to educational development.

Ardent advocates of children's rights may believe that "in this society . . . we are not likely to err in the direction of too much freedom,"¹⁶⁴ but too much freedom can undermine and finally destroy the most fundamental learning processes and the human relationships that sustain them. To the extent that these relationships and processes are undetermined, it is ultimately the tradition of individual liberty that will be damaged.

162. M. POLANYI, *PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY* 53 (1964).

163. See notes 25-27 and accompanying text *supra*.

164. FARSON, *supra* note 94, at 153.