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Rights and Interests of Parent, Child, Family and State: A Critique of Development of the Law in Recent Supreme Court Cases and in the North Carolina Juvenile Code

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COMMENTARY FROM THE BENCH

RIGHTS AND INTERESTS OF PARENT, CHILD, FAMILY AND STATE: A CRITIQUE OF DEVELOPMENT OF THE LAW IN RECENT SUPREME COURT CASES AND IN THE NORTH CAROLINA JUVENILE CODE

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I. INTRODUCTION

By many accounts the renaissance of basic rights and freedoms begun in the early Nineteen-Fifties is over. While the winds of social and legal change that formerly fanned constitutional issues to a blaze have subsided in many areas, in one very important area—basic family rights—the storm still rages, fed by emerging social theory. The rights at stake are embedded so deeply in our social structure that, ironically, the necessity for recognizing and defining them has come late in our legal history and, in the fabric of recent development of other fundamental freedoms, has gone relatively unnoticed.

The rights at issue, subdivided into their most recognizable groups are: rights and interests of children, rights and interests of parents, rights and interests of the family unit and the interests of the state in all three groups. A period of discovery and definition of these rights should be welcomed as a time of opportunity and recognized as a time of danger. The rights are not explicitly stated in state and federal constitutions. Yet, undoubtedly, they are deeply cherished and often constitutionally protected.[1] Currently they are being discovered and created by courts and legislatures piece-by-piece in the swirling eddies of the more notorious rights of the Nineteen-Fifties and Sixties renaissance and in a whirlwind of powerful but often transcendent social theories which batter and confuse efforts at lasting definitions. It is in this process that the danger lies.

On a national level this process is the evolution of family rights in the United States Supreme Court decisions. On the North Carolina state level it occurs primarily in the formulation and implementation of the new North Carolina Juvenile Code.[2] While there is a tendency to view the formulae in the Supreme Court decisions and the new Juvenile Code as finished products, this is a mistake in an area as unsettled as family rights. Analysis of exam-

1. *See* Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) and cases cited therein in n.12.

2. N.C. GEN. STAT. §§ 7A-516-732 (1979).

ples from the new Code and the Supreme Court docket will illustrate the difficult decisions society faces in the family law area, the present underdevelopment of the issues at stake, and the skewing effect of current social and political forces on those decisions.

II. EXAMPLES OF THE PRESENT IMBALANCE AMONG RIGHTS OF PARENT, CHILD, FAMILY AND STATE

A. Bellotti v. Baird[3] *(Bellotti II) and H.L. v. Matheson.*[4]

In *Bellotti II* the Supreme Court held unconstitutional a Massachusetts statute which required parental consent for a minor to obtain an abortion and which failed to provide mature minors an opportunity for judicial consent without prior notice to parents. From the outset the Court was on treacherous ground. Not only was the struggle between the conflicting rights of children and parents, but it was charged with the issue of abortion (and the subliminal issue of women's rights) and fought on the quicksand of liberty interests and the right to privacy. The outcome is surprising and has far reaching implications for the future of the family.

In striking the Massachusetts law, the Court itself postulated the necessary statutory ingredients to pass constitutional muster:

> [E]very minor [seeking an abortion] must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion. If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation . . . or the court may in such a case defer decision until there is parental consultation in which the court may participate. But this is the full extent to which parental involvement may be required.[5]

Under a statute meeting these criteria, a pregnant thirteen-year-old could, through her own initiative, obtain a legal abortion

3. 443 U.S. 622 (1979), *reh'g denied*, 444 U.S. 882 (1979).
4. 450 U.S. 398 (1981).
5. 443 U.S. 622, 647-648 (1979), *reh'g denied*, 444 U.S. 882 (1979).

without apprising her parents of her pregnancy and could do so, not only with the state's sanction, but its complicity. As one commentator has suggested, "In effect, the statutory scheme proposed by the Court would empower the state, through the courts, to take temporary custody of a child for the purpose of deciding, exclusive of the parents, an important dilemma."[6] Furthermore, the state (or state court) is allowed to assume this control without any showing of parental default in caring for the child. The traditional requirements of allegation or proof of abuse, neglect or dependency[7] are not required. Indeed, for all the court may know, the parents may be exemplary models of nurture, attention and reasonable discipline, and despite that, may be excluded from perhaps the most important and future-affecting decision in their daughter's life. In lone dissent, Justice Byron White is a voice crying in the wilderness:

> Until now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision.[8]

What led our highest and presumably most gifted court to this result? The opinion begins traditionally enough, reviewing early cases extending and limiting the Bill of Rights as it applies to juveniles.[9] It notes the long recognized state interest in protecting minors in their "diminished capacity,"[10] and the rights and duties of parents to control and nurture their children.[11] Given the diminished capacity of children to make important decisions, and the interests of the state and parents in their protection, states may

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6. Watts, *Parent, Child, and the Decision to Abort: A Critique of the Supreme Court's Statutory Proposal in Bellotti v. Baird*, 52 So. CAL. L. REV. 1869, 1893 (1979). North Carolina's recent attempt to legislate the relation of parents and minors in the abortion decision, Senate Bill 451, 1980-81 Legislative Session, died in committee. The bill left notice to parents in the discretion of the physician if "such notification is deemed appropriate".

7. In North Carolina, alleging and proving these categories are the first steps to the state's taking temporary (and later permanent) custody of the child. *See* N.C. GEN. STAT. § 7A-574 (1979).

8. 443 U.S. 622, 657 (1979), *reh'g denied*, 444 U.S. 882 (1979) (White, J., dissenting).

9. *Id.* at 633-635.

10. *Id.* at 635-637.

11. *Id.* at 637-639.

reasonably conclude, the Court suggests, that parental consultation is "particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns."[12] And here the reasoning begins to stumble. Because of the "unique nature"[13] and potentially grave consequences of the abortion decision, which are "not mitigated by . . . minority,"[14] the court concludes, citing *Planned Parenthood of Central Missouri v. Danforth*,[15] absolute parental veto cannot be allowed. Further, allowing a pregnant minor access to a court with notice to parents is "unrealistic" because "many parents hold strong views on the subject of abortion" and are apt to obstruct access to the court.[16]

There is reason in all this, but it is flawed. Why does the abortion decision of a minor differ from any other important, emergency medical decision (from which parents are generally not excluded without due process)?[17] Is it more consequential than other non-medical decisions over which we give parents control of unemancipated minors, such as the decision to marry? And if the abortion decision is so important, why is that not more reason to involve the parents?[18] And if parents hold strong views on abortions, is that not more reason for them to be included? The Court denies, without any basis in evidence or fact, what has previously been a fundamental presumption: parents are generally the best and certainly the most socially desirable directors of their children's welfare. With the fall of this presumption, the rights of par-

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12. *Id.* at 640.

13. *Id.* at 642.

14. *Id.*

15. 428 U.S. 52 (1976). In *Danforth* the Court held that "the State may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy." *Id.* at 74.

16. 443 U.S. 662, 647 (1979), *reh'g denied*, 444 U.S. 882 (1979).

17. *See* N.C. GEN. STAT. § 7A-732 (1979), which carefully protects parental rights in allowing emergency medical treatment for minors when parents refuse.

18. The Court's tact in *Bellotti v. Baird* contrasts sharply with its disposition in Wisconsin v. Yoder, 406 U.S. 205 (1972). There the Court allowed the religious views of Amish parents to control whether their children would obtain a public education and ignored, entirely, except in Justice William Douglas' dissent, the prospect that the rights and interests of the children might differ from those of the parents. Part of the Court's rationale for its holding was the particular strength of the right involved—freedom of religion. In *Yoder* the importance of the right at stake had precisely the opposite effect on the Court's reasoning from the effect it had in *Bellotti v. Baird*.

ents, asserted by the Court earlier in the decision, are cast to the wind. The idea of the family unit being itself a repository of rights and interests and the potential effect of the *Bellotti II* decision on those rights receive no mention at all.

In *Bellotti II* the Court followed a rabbit trail—abortion—and failed to recognize and weigh all the competing rights and interests at stake. It also failed to analyze the abortion right itself in light of the peculiar circumstances of the case. The abortion right is an offspring of the right to privacy. *Griswold v. Connecticut*[19] first established the right to privacy in the context of protecting the marital relationship from governmental regulation of contraception. It was in concept a decision which protected the family unit (there, man and wife) from unwarranted governmental intrusion. There is some irony in the evolution of that right through the *Bellotti II* decision, which allows government usurpation of a basic family function, thereby fragmenting the family unit and polarizing the parent and child.

As the numerous concurring opinions in *Bellotti II* indicate, the Court in that decision was itself fragmented,[20] revealing the unsettled nature of the law in the area of intra-family rights. This trend continued in the most recent case in the struggle over a minor's right to abortion, *H.L. v. Matheson*.[21] There a three-judge plurality restricted the more expansive language of *Bellotti II*, and

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19. 381 U.S. 479 (1965).

20. Chief Justice Burger, author of the majority opinion in H. L. v. Matheson, 450 U.S. 398 (1981), summarized the divergent theories in *Bellotti v. Baird* as follows:

> We held, among other things, that the statute was unconstitutional for failure to allow mature minors to decide to undergo abortions without parental consent. Four justices concluded that the flaws in the statute were that, as construed by the state court, (a) it permitted overruling of a mature minor's decision to abort her pregnancy; and (b) 'it requires parental consultation or notification in every instance, without affording the pregnant minor an opportunity to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interest.' [*Citing* Bellotti v. Baird, 443 U.S. 622, 651 (1979)], *reh'g denied*, 444 U.S. 882 (1979)]. Four other Justices concluded that the defect was in making the abortion decision of a minor subject to veto by a third party, whether parent or judge, 'no matter how mature and capable of informed decisionmaking' the minor might be. [*Citing* Bellotti v. Baird, 443 U.S. 622, 653-656 (1979), *reh'g denied*, 444 U.S. 882 (1979).]

Id. at 1170-1171.

21. 450 U.S. 398 (1981)

upheld on narrow grounds a Utah statute requiring doctors, from whom a pregnant minor sought an abortion, to first notify and consult with her parents. The Court explicitly limited its holding, and that of *Bellotti II*, to the facts at hand in each case—in *Matheson* to a dependent, unemancipated minor who made no claim to maturity, and in *Bellotti II* to a "class of concededly mature pregnant minors."[22] The majority opinion reasoned that, as the *Matheson* plaintiff had made no allegations of maturity, she had no standing to challenge the statute in behalf of pregnant minors who were mature.[23] Thus the question of unconstitutional overbreadth was not reached.

Emphasizing the maturity/immaturity distinction and the failure of the *Matheson* plaintiff to allege that her best interests would be served by abortion without parental notice (a second test mandated in *Bellotti II* to determine the necessity for parental notice)[24] Justice Powell (author of the four-man majority opinion in *Bellotti II*) and Justice Stewart concurred.[25] Justice Stevens concurred saying the Utah statute was constitutional even as applied to mature minors.[26] Justices Marshall, Brennan and Blackmun dissented, arguing the Utah statute did not protect the "best interest" inquiry required by *Bellotti II* and further violated precedent because it "cut a pregnant minor off from any avenue to obtain help beyond her parents. . ."[27]

The divergence among the Justices in both *Bellotti II* and *Matheson* obfuscates any consistent legal trail through the two opinions other than the stark result: states may require prior notice to parents of immature minors seeking abortions, but not to parents of mature minors. Whether the second inquiry mandated by *Bellotti II*—"best interest" of the minor—is still a constitutional prerequisite for a majority of justices, for either mature or immature minors, is unclear at best. Certainly *Matheson* represents a retreat, albeit on the narrow procedural ground of standing, from the *Bellotti II* decision. Also, the *Matheson* majority at least paid lip-service to the interest of parents in "authority in their own

22. *Id.* at 408.

23. *Id.* at 406.

24. Bellotti v. Baird, 443 U.S. 662, 642-648 (1979), *reh'g denied*, 444 U.S. 882 (1979).

25. 450 U.S. 398, 413 (1981).

26. *Id.* at 420.

27. *Id.* at 453.

household,"[28] and in their "guiding role"[29] in the upbringing of their children. Beyond this, however, the idea of family autonomy is undeveloped and the idea of mutual interests of family members in the family unit is untouched. These concepts fare no better with the dissenters who discuss family autonomy primarily in terms of parental authority.[30]

It is equally clear from *Matheson* that the central failing of *Bellotti II* is left intact: parents of "mature minors" may be excluded from any notice or right to be heard on their daughter's abortion decision.[31] In addition, *Matheson* leaves in doubt the requirement in *Bellotti II* that where prior parental consultation or notification is required, a pregnant minor must be afforded an opportunity to obtain an independent judicial determination that she is mature enough to make the decision herself or that an abortion without notice to parents is in her best interest. *Bellotti II* appears to require this option as part of the statutory scheme. The Utah statute upheld in *Matheson* makes no such allowance, and by that default, would require a minor seeking to avoid parental notice or consultation to bring suit to enjoin her physician from notifying her parents. While the assertiveness of the average American teenager should not be underestimated, an assumption that many or even a small portion of them would have the legal sophistication or financial means to take such a step is at best fanciful. As the *Matheson* dissenters note, the effect will be to bind most pregnant minors (mature and immature) to the decision of their physician and paying his or her bill.[32]

In *Bellotti II* the state is allowed to deny parents and family a voice in a minor's abortion decision. In *Matheson* the most likely effect of the state's action is to silence the voice of the pregnant child. In both cases important rights are read out of court.

B. Treatment of Undisciplined Juveniles Under the New Juvenile Code.

Under the new Juvenile Code an undisciplined juvenile is:

> A juvenile less than 16 years of age who is unlawfully absent from school; or who is regularly disobedient to his parent, guardian, or

28. *Id.* at 410.
29. *Id.* at 410.
30. *Id.* at 447-453 (Justices Marshall, Brennan and Blackmun, dissenting).
31. *Id.* at 398.
32. *Id.* at 425.

> custodian and beyond their disciplinary control; or who is regularly found in places where it is unlawful for a juvenile to be; or who has run away from home.[33]

Central to the definition is loss of control by parents and school authorities. The question is, given the fact that a child is beyond parental control, what, if anything, can the state do?

The new Juvenile Code suggests a number of possible solutions, most of which involve referrals to counseling, "supervision" by a person or an agency, placement of the juvenile elsewhere, or physical or psychological testing. The solutions are "treatment" oriented and involve no compulsory confinement for over 24 hours (and that in only limited circumstances).[34] Currently there are no provisions in the new Code for compelling an undisciplined juvenile to do anything and no provisions for punishment for contempt. Thus, in cases where the problem is, by definition, loss of control, there is ultimately no control solution. Parents, the usual petitioners in undisciplined child cases turn to the courts for help and often find the court has no more power over the child than they did. Currently under the Juvenile Code, there is no way a North Carolina Court can make an undisciplined child submit to medical or psychological evaluation or treatment, stay in any placement, go to school, go to work, come home at night, obey his parents or do anything he refuses to do. Where the child persists in rebellion and defiance, as many do, the state has virtually acquiesced. The parents' control (if it ever existed) is often lost forever, and the family unit is damaged.

As in the *Bellotti II* decision, the initial reasoning behind this state of affairs was sound. The history of governmental mistreatment of juveniles in this country is now well recognized and documented.[35] In the past, juvenile statutes often failed to distinguish between juveniles who had committed crimes and juveniles who were mere status offenders. Until July 1, 1978, in North Carolina, undisciplined juveniles who had broken no law but violated terms

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33. N.C. GEN. STAT. § 7A-517(28) (1979).

34. Until the North Carolina General Assembly passed House Bill 772 on May 21, 1981, the maximum compulsory confinement for undisciplined juveniles was 24 hours. House Bill 772, amending N.C. GEN. STAT. § 7A-574, became effective October 1, 1981.

35. *See, e.g.*, F. MCCARTHY, *et al.*, JUVENILE LAW AND ITS PROCESSES, 23-51, 143-167 (1980); C. SILVERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE, 309-370 (1978); and Thomas, *Juvenile Justice in Transition—A New Juvenile Code for North Carolina*, 16 WAKE FOREST L. REV. 1 (1980).

of probation imposed for a status offense could be adjudicated delinquent and sent to training school. Since, as a general rule, probation is the first alternative even for delinquent juveniles, there was little actual difference in treatment of the two categories. Because undisciplined children are as often victims as they are perpetrators of their predicament, this sort of treatment was often harsh and destructive. The new Code wisely rejected these excesses but creates some of its own.

As in *Bellotti II* and *Matheson*, the Code has not recognized and carefully weighed all of the rights and interests affected. The juvenile's constitutional and procedural rights are carefully protected, but what of the rights of the parents to control and nurture the child and to direct his growth? What of the rights of the parents and child to protection and nurture of the family unit? What of the child's right to guidance and protection from his own incapacity? In many undisciplined cases under the new Code, the Court's hands are ultimately tied in its endeavors to protect any of these rights. The child's constitutional and procedural rights are in total ascendency.[36]

The new Juvenile Code and the *Bellotti II* and *Matheson* decisions not only fail to recognize all the rights involved in each case, but fail also to distinguish between the nature of the rights. Bruce C..Hafen, Professor of Law at Brigham Young University,

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36. It is often argued in defense of the new limitations on the Court's authority in undisciplined cases in North Carolina that the Code simply follows the sound, long-standing principle that children should not be confined or punished where the same may not be done for adults. This argument suffers from two weaknesses: First, it ignores the diminished capacity of juveniles to make, in some cases, even the simplest decisions for their own welfare (such as, obtaining treatment of venereal diseases or prenatal care for pregnancy). Forced confinement is often necessary to achieve these ends. Second, the argument is not true in fact. Numerous laws and customs provide for punishment or confinement of juveniles where the same could not occur for adults. Two examples in North Carolina are state laws forbidding minors from possessing alcoholic beverages (N.C. GEN. STAT. § 18A-35) and prohibiting persons under 16 from operating a motor vehicle on a public highway (N.C. GEN. STAT. § 20-9). Both offenses carry possible jail terms. In 1977 the United States Supreme Court held that the Eighth Amendment to the United States Constitution does not prohibit corporal punishment of children by school officials. Ingraham v. Wright, 430 U.S. 651 (1977). This cannot be done even to adults who are convicted felons. In addition, numerous other laws sanction and enforce disparate treatment for juveniles and adults in recognition of the diminished capacity of juveniles: voting laws, marriage laws, contract laws, motor vehicle laws, tort laws, laws governing ownership of property and licensing of firearms, rules of evidence—the list is fairly comprehensive.

and recognized authority on juvenile rights, suggests viewing those rights in two categories: rights of protection and rights of choice.[37] He begins with the premise that "[c]hildren develop from incapacity toward capacity."[38] As they assume the latter, their rights to choose for themselves (i.e., to marry, to have an abortion, to quit school, to leave home) deserve more recognition. Until that point, however, they also have rights to protection from their own incapacities in physical size and ability, judgment and survival skills. The present limitations on the court's authority to deal with undisciplined juveniles, and the autonomy afforded abortion-minded juveniles in *Bellotti II*, fail to sufficiently recognize and promote the child's protection rights. The rights of choice are disproportionately elevated.

III. COMING TO TERMS WITH ESTABLISHED AND DEVELOPING JUVENILE, PARENTAL AND FAMILY RIGHTS

The foregoing reviews of *Bellotti II* and *Matheson* and the undisciplined juvenile problem in the new Juvenile Code reveal what every juvenile court judge knows when parents, children, attorneys, guardians, district attorneys and social workers file into court in a juvenile case: there is a lot going on here! Juvenile cases often are not traditional two-sided litigation. In fact, it is quite common to have attorneys representing the state, each parent, the child, the Department of Social Services and perhaps various relatives in one case. (Fortunately the North Carolina Juvenile Code divides juvenile proceedings into stages, and it is relatively rare to have all of the above present in court at once). Involvement of people from various sides should not be viewed as a sign that the system is losing efficiency. Quite the contrary, it signals that at last the real rights and interests involved are being represented. It will be helpful to attempt to delineate these rights and interests in the adversarial contexts in which they arise.

A. Rights and Interests of Juveniles Versus Intrusion by the State.

Juveniles are now recognized to have most of the basic consti-

37. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 BRIGHAM YOUNG L. REV. 605 (1976).

38. *Id.* at 648.

tutional rights of adults, although in some cases the juvenile's rights are less expansive.[39] Juveniles have the right to equal protection of the laws,[40] and in delinquency proceedings they have the right to procedural due process, including notice, right to counsel, right of confrontation and cross examination, privilege against self-incrimination[41] and the right to proof beyond a reasonable doubt.[42] They also have freedom from double jeopardy in delinquency cases,[43] but, in the most notable exception to co-equality with adults in the criminal law area, have been denied the right to jury trial.[44] Juveniles have been afforded the right to procedural due process (including notice and right to hearing) to protect property and liberty interests in a school discipline case where suspension was threatened[45]—analogous in some respects to public employee discipline and dismissal cases for adults—and virtually denied it in a school discipline case involving corporal punishment.[46] They have the right to freedom of speech[47] and to privacy, including the right to abortion[48] and access to contraceptives.[49]

Except for cases involving the right to privacy, most of the rights listed above arise in basic, two party contexts (often in delinquency proceedings) where the juvenile's interests are pitted against the powers and alleged interests of the state. If parents' interests are involved, they are usually subjugated to the interests of the juvenile, who is directly affected. Applying Professor Hafen's categories of the rights of choice and protection,[50] these juvenile rights are of the latter variety, protecting the child from the power

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39. Two noted writers on the subject have characterized juvenile rights in this manner: "[I]t is by now fair to say that children have the same liberty interests as adults, but that the occasions for legitimate state restriction of the exercise of those liberties are more frequent." Teitelbaum and Ellis, *The Liberty Interest of Children: Due Process Rights and Their Application*, 12 FAMILY LAW QUARTERLY 153, 158 (1978).

40. Brown v. Board of Education, 347 U.S. 483 (1954).

41. *In re* Gault, 387 U.S. 1 (1967).

42. *In re* Winship, 397 U.S. 358 (1970).

43. Breed v. Jones, 421 U.S. 519 (1975).

44. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

45. Goss v. Lopez, 419 U.S. 565 (1975).

46. Ingraham v. Wright, 430 U.S. 651 (1977).

47. Tinker v. Des Moines School District, 393 U.S. 503 (1969).

48. Bellotti v. Baird, 443 U.S. 622 (1979), *reh'g denied*, 444 U.S. 882 (1979); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

49. Carey v. Population Services Int'l, 431 U.S. 678 (1977).

50. Hafen, *supra* note 37, at 645-650.

of the state. Though most of the cases establishing these rights were milestones when decided, in retrospect, and in comparison to children's rights cases where other interests than those of the child and the state are present, they are (again with the exception of the right to privacy cases) relatively uncomplicated, though perhaps no less difficult decisions.[51]

B. Rights and Interests of Parents Versus Intrusion by the State.

The Supreme Court cases establishing the rights of parents to control of their children against state intrusion are now monuments on the landscape of family law. In 1923, in *Meyer v. Nebraska*,[52] the Court enunciated the right "to marry, establish a home and bring up children,"[53] the "right of control" over one's children and the "corresponding . . . natural duty of the parent to give his children education. . ."[54] as liberty interests which protected the teaching of languages other than English to children of foreign-born parents in public schools. Shortly thereafter, *Pierce v. Society of Sisters*[55] struck the same chord by upholding the right of Oregon parents to educate their children outside the public schools. The Court said:

> The 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.[56]

Later cases through *Matheson* and *Parham v. J.R.*,[57] have not waivered from this statement in verbalizing the rights of parents to control their children without undue interference from the state. A careful reading of this statement reveals, however, that it is not a bare, unconditional assertion of parental rights. From the outset in *Meyer* and *Pierce* the Court spoke of a corresponding duty. Re-

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51. A number of the rights now guaranteed to juveniles by the Constitution are also guaranteed by the new Juvenile Code—particularly due process rights, including notice, right to an attorney and right to a full hearing. N.C. GEN. STAT. § 7A-631 (1979). In addition the new Code carefully regulates police investigative procedures in regard to juveniles (*Id.* at §§ 7A-594-599) and carefully limits the power of the state in terms of punishment and confinement (*Id.* at §§ 7A-571-578, 646-649 and 952).

52. 262 U.S. 390 (1923).

53. *Id.* at 399.

54. *Id.* at 400.

55. 268 U.S. 510 (1925).

56. *Id.* at 535.

57. 442 U.S. 584 (1977).

cently, in *Parham v. J.R.*, the Court upheld a Georgia statute allowing psychiatric commitment of a juvenile at a parent's request without a hearing, in large part because there was no showing that the parents had forfeited their right to control by default in their corresponding duty of care. Though the ruling elevates the parent's right to control over the child's interests in due process, the Court clearly views that right as conditional and subject to state intervention where the corresponding duty is sufficiently neglected.[58]

This scheme is central to the approach taken in abuse, neglect and dependency proceedings under the new Juvenile Code. In these proceedings the Code implicitly recognizes parents as the rightful (and perhaps preferred) protectors and controllers of the child's survival and development.[59] The state may not assume this role in most cases without proof by clear, cogent and convincing evidence that the child is abused, neglected or dependent. Even when this is proven, change of custody does not automatically follow. The disposition portion of the Code cautions that: "If possible, the initial approach should involve working with the juvenile and his family in their own home. . ."[60] and directs the court to select "the least restrictive disposition both in terms of kind and duration. . . ."[61] Outside the Juvenile Code, in proceedings to terminate parental rights, the same conditional preference for natural parents inheres. Even where abuse, neglect or other grounds for termination are proved, the court may consider the child's best interest and refuse to terminate parental rights.[62]

Parental rights are the oldest (in terms of date of consecra-

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58. *Id.* at 604.

59. In two significant instances the Code runs contrary to its basic presumption that parents are the rightful and preferred child raisers: The definition of Neglected Juvenile in Section 7A-517(21) as one not receiving "proper care, supervision, or discipline from his parent" or "who lives in an environment injurious to his welfare," aside from being constitutionally suspicious due to breadth and vagueness, and in spite of the clear, cogent, and convincing standard of proof imposed on the State, allows the State wide latitude to interfere with parents' control of their children. Further, in Sections 7A-647(2)(b) and (c) the Code allows custody to be transferred from parents to the State, private agency or "other suitable person" on a simple adjudication of delinquency without any showing of parental failure or incapacity or any prior notice to the parents once the adjudication is made. These two provisions are inconsistent with the careful protection of parental rights in other sections of the Code governing potential loss of custody.

60. N.C. GEN. STAT. § 7A-646 (1979).

61. *Id.*

62. *Id.* at § 7A-289.31(a).

tion) among the rights in contention in family court, and, though not specifically stated in constitution or code, generally command great deference. Parents' rights exist primarily because they have always been an underlying assumption upon which our society operates. But parental rights have been recognized in recent history as conditional rights, and as the welfare and interests of children gain more attention in our society, they are likely to become more conditional.

C. Rights and Interests of Children Versus Rights and Interests of Parents.

When the rights of children and parents come into legal conflict, a third party—the state—is usually present. When the rights are litigated, the state is often doubly present—as an advocate promoting the rights and interest of the parents or child as interests of the state, and in the form of the court itself as arbitrator, judge and enforcer. This was precisely the situation in *Bellotti II*, where the state (Massachusetts) attempted by statute to define the relative rights of parent and child in regard to the minor's right to an abortion, and the state (federal court) overruled the statute (and, thus, indirectly the rights of the parents) in favor of the rights of the child. In *Matheson* the same scenario existed with opposite results. As the preceding discussion of *Bellotti II* and *Matheson* notes, such cases tend to become quite complex, and there is substantial danger in deciding the struggle in terms of the interests of either the parent or the child versus the state, without sufficiently recognizing the effect of that decision on the other rights involved.[63]

Professor Hafen's choice/protection dichotomy is helpful in understanding the contexts in which the rights of parents and chil-

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63. While *Bellotti II*, 443 U.S. 622 (1979), *reh'g denied*, 444 U.S. 882 (1979), illustrates the detriment to parental rights where the Court unduly narrows the focus to the child versus state context, it is arguable that the Court has erred in the other direction as well. In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court invalidated, in favor of Amish parents, a Wisconsin statute compelling public school attendance for children under the age of 16. The Court specifically limited the case to a contest between the state and the rights of the parents and excluded the interests of the children in their own education because, "[t]he children are not parties to this litigation." *Id.* at 231. In dissent, Justice William Douglas argued that the majority acted in effect as another arm of the state, enforcing the religious views of the parents upon their children who themselves might prefer to attend public school. *Id.* at 241.

dren are opposed. In *Bellotti II, Matheson* and *Carey v. Population Services International,*[64] (striking a New York law forbidding sale of contraceptives to persons under age 16) the rights of the minor to choose an abortion and contraception were opposed, directly by the state, and indirectly by the parents' right to control the conduct and govern the welfare of the child. The state's interest in such cases is often couched in terms of protecting the rights of the parents or protecting the child from his own incapacity and resulting exploitation and abuse by others. (Other state interests, less central to the parent-child contest, such as the interest in quality control of contraceptives, raised in *Carey,* also play a part). The basic duel in these cases, however, and in undisciplined juvenile cases under the new Juvenile Code, and the one of greatest consequence to the structure of society, is between the parent and the child. Who is in control and under what terms and conditions? The state's interests devolve from this issue.

In another context the state emerges as the defender of the interests of the child from violation by the parents. Where a child is alleged under the new Juvenile Code to be abused, neglected or dependent, the state steps in, ostensibly to further the state's interest in protecting the child, but usually to advance the interests of the child against the parent.[65] The child's interest in such cases, though not explicitly stated in the Code, is in physical and emotional safety and the opportunity for at least minimal standards of development to maturity. The state's interest, also undefined, is basically in protecting the child's interests, in maintaining minimal living conditions for families, in promoting family development and family ties and in preventing family violence and other antisocial activity. The parents' interests, discussed previously in Section II, B., and again, not specifically stated in the Code, were summarized by the U.S. Supreme Court in *Stanley v. Illinois* as,

> [T]he interest of a parent in the companionship, care, custody, and management of his or her children [which] 'come[s] to this

64. *See* Carey v. Population Services Int'l, 431 U.S. 678 (1977).

65. The new Juvenile Code correctly recognizes that the State's interest in protecting the child and the child's interests may not always coincide and provides for appointment of a guardian *ad litem* in neglect and abuse cases to advocate the child's interests in court. N.C. GEN. STAT. § 7A-586 (1979). Sometimes this difference exceeds a mere difference in perspective, and the guardian, perceiving the child's interests to lie in reunion with imperfect parents rather than in state provided foster care, sides with the parents or takes a third position in opposition to the State.

> Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."[66]

As when the state intrudes to dictate or arbitrate the relation between the child's right to choose versus the parents' right to control, where it intrudes to protect the child from abuse or neglect by the parent, its interests derive largely from the rights and interests in the central struggle: parent versus child. This does not mean the state's interests are any less worthy of consideration, but where they are viewed in relation to the central issue, there is less danger that one side of the central issue will be undervalued.

D. Rights and Interests of Children Versus Rights and Interests of Children—Choice Versus Incapacity.

As noted previously, children's rights to make some fundamental choices have been vindicated by the courts.[67] Further, we have seen that the incapacity of children to insure their own basic welfare and development is widely recognized by society and accepted as a basic reality by the courts.[68] While the courts and statute writers frequently view this incapacity in terms of a child's needs for protection from parents (abuse, neglect and dependency statutes, for example), from the state (i.e., the *Gault* and *Winship* decisions, insuring juvenile due process, and North Carolina General Statute, § 7A-595(b), requiring parental presence for policy interrogation of a child under 14 years of age) and from the child's

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66. 405 U.S. 645, 651 (1972) [*Citing* Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).] *See also* Parham v. J.R., 442 U.S. 584, 602 (1977), and cases cited therein.

67. Prime examples are the rights to choose abortion and contraception discussed *supra*.

68. The diminished capacity of children as addressed by the Supreme Court in the *Bellotti II* decision is discussed *supra*. In *Parham v. J.R.* the Court said: "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment." 442 U.S. 584, at 603. *See also* J. GOLDSTEIN, *et al.*, BEFORE THE BEST INTERESTS OF THE CHILD 7-9 (1979), for a discussion of diminished capacity of children as interpreted by Jeremy Bentham and Freud. Another commentator has suggested that compulsory attendance laws and the juvenile justice system are themselves implicit recognitions by society that children require special attention because of their diminished capacity. Watts, *supra* note 6, at 1872. This suggestion is supported by the Supreme Court's holding in *Bellotti v. Baird* that, "[T]he State is entitled to adjust its legal system to account for children's vulnerability . . . ." 443 U.S. at 635.

own actions (*Bellotti II* and *Carey*), rarely, if ever, is it stated in positive terms as a condition which itself engenders rights and expectations.

Professor Hafen proposes a child's right "not to be abandoned to his rights,"[69] and discusses this "right" in terms of the child's need for control and guidance in the family unit.[70] Basically, it is a right that recognizes the child's incapacity to make life-affecting decisions alone and to provide always for his own welfare. It views the child as a developing, but incomplete, person who has expectations of certain minimal achievements in assuming his place in society. Generally, these are, as stated in part previously, the right to physical and mental security, the right to a minimum standard of living and the right to a basic education. They also include, however, the right to parental advice, guidance and discipline in making choices, parental love and nurture, and, where the situation permits, a meaningful membership in a family unit. In sum, it is the right to guided growth from incapacity to capacity. This "right" requires protection from the state and parents, and also from the child's right to make choices, and is frequently recognized in those contexts, not as a right, but in terms of the child's incapacity. But why not view it in positive terms and assert it as a right to contend with other rights in the field? Had that occurred in *Bellotti II*, or in formation of the undisciplined juvenile provisions of the new Juvenile Code, the results in those two instances might have been more balanced.

E. Rights and Interests of the Family Versus Interests of the State.

It is not altogether clear now whether the family as a unit is a repository of rights limiting state intrusion or whether it is the individual rights contained in the family relationship (i.e., the child's right to nurture and the parents' rights to control) which protect the family from the state. Perhaps, in effect, it makes little difference. Two fairly recent United States Supreme Court decisions

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69. Hafen, *supra* note 37, at 651.

70. *See also*, GOLDSTEIN, *et al.*, *supra* note 62, at 9-14; Wald, *State Intervention on Behalf of "Neglected Children": A Search for Realistic Standards*, 27 STANFORD L. REV. 985, 992-993 (1975); and Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STANFORD L. REV. 625, 638-639 (1976).

seem to adopt the former view.

In *Moore v. City of East Cleveland,*[71] the Court struck down a housing ordinance limiting occupation of a dwelling unit to closely defined "nuclear" family members and excluding "extended" family members. Drawing on " 'the teachings of history [and], solid recognition of the basic values that underlie or own society,' " [*Griswold v. Connecticut,* 381 U.S. 479, 501 (Harlan, J., concurring)], the Court held that the Constitution,

> protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.[72]

Further, the Court stated, these familial bonds are not limited to members of one's immediate family.[73] In *Smith v. Organization of Foster Families for Equality & Reform,*[74] the Court expanded the family's liberty interest in the interrelationship of its members to include foster families, stating that, "biological relationships are not exclusive determination of the existence of a family."[75]

In both *Moore* and *Smith* the battle was between non-parents in parental roles (grandparents and foster parents) and the state. The rights asserted, therefore, were not parental rights to control as such (though, arguably, those could have been asserted) but the interests of the family unit. Separate interests of the children in the family, if there were any separate interests, were not the subject of the decisions. It is thus difficult to speculate how the family rights confirmed in *Moore* and *Smith* will apply in situations where the rights of parents and children are opposed, or whether in that context, they will appear as family rights at all or merely separate interests of the opposing sides (and the state) in the family structure. In any event, this issue has not been carefully addressed, but had it been addressed in *Bellotti II* and the undisciplined juvenile provisions of the new Code, different products might have resulted. While it is true in those two instances, that the state (or, Court, in *Bellotti II*) does not directly tread upon family rights as in *Moore* and *Smith,* it nevertheless fails to acknowledge them as part of the equation, and the result is potential,

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71. 431 U.S. 494 (1977).
72. *Id.* at 503.
73. *Id.* at 504.
74. 431 U.S. 816 (1977).
75. *Id.* at 843.

severe damage to the family.

IV. CONCLUSION—WHERE WE GO FROM HERE: PRESERVING AND RECONCILING THE RIGHTS AND INTERESTS OF CHILDREN, PARENTS, STATE AND FAMILY

In a simpler, paternalistic society, where extrafamilial options for juveniles were few, and the government was a less ardent solver of social problems, conflicts among family members and between them and the state were relatively simple matters. The area of law discussed in this article did not begin to develop in any significant degree until the early Twenties with the Supreme Court decisions of *Meyer v. Nebraska*[76] and *Pierce v. Society of Sisters.*[77] The revolution in juvenile's rights, still expanding today, began only 14 years ago with *In re Gault.*[78] Relatively speaking, juvenile, parental and family rights are a new area of the law. For the most part this area is rooted only indirectly in the Constitution through judicial precedent and "the basic values that underlie our society."[79] It is especially susceptible to the winds of cultural change and prevailing social theories. It needs to be anchored both in constitutional decisions by the Supreme Court and in statutory law.

This will not be an easy task, but the method for its accomplishment is at hand, is time-tested and forms the basis upon which our judicial system operates. Simply put, it involves giving each interested party the opportunity to be heard and considered before the decision is made. Where the interests of parents, children, family and state are all to be affected by judicial decision or statute, they all should be considered and given a voice. Before this can be done, they must all be identified and recognized.

Courts are designed to do this and have inherent power to carry it out. As the Supreme Court becomes more experienced in the developing area of family law, we may hope rights will be more carefully identified and weighed than in the *Bellotti II* and *Matheson* decisions.

As for statutory law, North Carolina has made giant strides in the right direction. The abuse and neglect provisions under the new Code are, with some minor exceptions, excellent examples of

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76. 262 U.S. 390 (1923).

77. 268 U.S. 510 (1925).

78. 387 U.S. 1 (1967).

79. Griswold v. Connecticut, 381 U.S. 479, 501 (Harlan, J., concurring), as cited in Moore v. City of East Cleveland, 431 U.S. at 503.

how contending rights can all be recognized, weighed together and resolved in a very careful and deliberate manner.[80] Other portions of the Code are also great improvements, particularly sections establishing basic rights of juveniles[81] and setting procedural limitations on freedom-limiting dispositions in delinquency cases.[82] Other improvements can still be made which would insure that important interests and rights will not be overlooked.

First, there should be, either in constitution or statute, a careful statement of what rights and interests we intend to recognize. Such a statement should not be written by lawyers alone or by clergymen or psychologists. It must be remembered that the interests at stake concern some of the most basic and traditional beliefs and freedoms and that these will clash with and be weighed against other rights and freedoms in court. It is certainly arguable that most, if not all, of these rights (as discussed in Section III above) have already been identified through statute, court decisions or social commentary. In any event, a definitive statement of these rights will be helpful as a point of reference in their advocacy and implementation.

Second, once the rights are identified and defined, current statutes—specifically the new Juvenile Code—should be reviewed to insure that wherever these rights or interests are potentially present, they are procedurally protected. In most cases this protection will include a meaningful opportunity to be heard and considered and the right to a legal advocate. In other instances it may involve careful delineation of the decisionmaking process, as presently occurs in the new Juvenile Code before a delinquent juvenile may be committed to training school (The Court must specifically find that other, less restrictive, alternatives are inappropriate.[83] The steps in the decision are, in effect, spelled out).

Third, in some areas the courts must be given more substantive power to enforce rights and obligations. The foremost example of a present deficiency in judicial power appears in the undis-

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80. At the present, this cannot be said of cases under the new Code wherein only dependency is alleged. In such cases, the Code does not provide for appointment of a guardian *ad litem* to represent the interests of the child. [N.C. GEN. STAT. §§ 7A-516-732 (1919)]. The Code also fails in abuse, neglect and dependency categories, to provide for appointed attorneys to represent indigent, nonbiological parents, such as close relatives or friends, who are filling a parental role.

81. N.C. GEN. STAT. §§ 7A-584-586, 595 (1979).

82. *Id.* at §§ 7A-646-652.

83. *Id.* at § 7A-652.

ciplined juvenile category of the new Code. Under present provisions, the rights of the parents to control the child, the rights of the child to protection from his own incapacity, and the right of the family to integrity and state protection (if, indeed, that right exists) are totally subservient to the child's freedom of choice. If all these rights are to come into court, the court should have power to protect them.[84] If the abuse of power by some judges is a significant danger in such cases, the answer is not to deny substantive power to all courts, but to require strict procedural safeguards as the power is used.

Finally, and this will be the most difficult part, consideration should be given to whether one set of rights and interests should be paramount in any situation over another. Where that is found to be so, it should be stated in the Code. This is already done in traditional child custody disputes, where the interests of the child are placed above those of the contending parents.[85] In close factual situations in neglect cases, for example, do we want a presumption of the inviolability of family integrity to prevail over potential harm to the child, or do we want the reverse? Is it better simply left to the fact-finder?

The issues in this developing area of the law are difficult and they will yield difficult answers. However, the need is urgent for a concerted effort at their solution which gathers and presents the contending rights and interests, now under piecemeal development, in an organized and procedurally logical fashion. The rights at stake are as dear as any we have. They deserve the most careful attention we can give.

84. This does not mean the Code should revert to sending undisciplined juveniles to training school. It suggests that short periods of detention may be appropriate under carefully limited circumstances to insure necessary medical and psychological examination and treatment, protection from physical harm and compliance with court orders.

85. N.C. GEN. STAT. § 50-13.2 (1976).