1977

Child, Parent, State and the Due Process Clause: An Essay on the Supreme Court’s Recent Work

John H. Garvey

The Catholic University of America, Columbus School of Law

Follow this and additional works at: https://scholarship.law.edu/scholar

Part of the Family Law Commons, and the State and Local Government Law Commons

Recommended Citation


This Article is brought to you for free and open access by the Faculty Scholarship at CUA Law Scholarship Repository. It has been accepted for inclusion in Scholarly Articles and Other Contributions by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
More than a half a century ago the Supreme Court first suggested that the Constitution affords minors, as well as adults, certain rights which must be protected. Since that time the Court has spelled out the extent of that protection. It has concluded that a child has, among others, rights to equal protection against discrimination because of race or illegitimacy, to the safeguards of due process in both criminal and civil contexts, and to freedom of speech. The recognition that children are mentally, physically, and emotionally different from adults in ways which lawmakers may justifiably recognize has, quite rightly, proven no obstacle to the enforcement of those guarantees.

The extension of constitutional rights to minors becomes more difficult when the state attempts to regulate juvenile behavior, or to decide who should have custody of a child. The greater complexity of these
last cases can be traced to two related factors. First, excluding the areas of behavior regulation and custody, limits can usually be set to contain state intervention without taking consideration of the incapacity of children, up to a certain age, to make their own decisions. Second, governmental action in the area of behavior regulation and custody can have considerable impact on the parent-child relation.

Until quite recently, questions concerning the permissibility of state control over juvenile behavior or custody have been treated as problems ultimately and uniquely involving the issue of parental rights: if there are limits on what the state may do, it is because those who have primary control over the child have an interest, protected by the due process clause, in making decisions on the child's behalf. During the past two Terms, however, one group of cases has indicated that the child himself has rights which may limit state intervention even when it is exercised in support of parental choices. In Planned Parenthood of Central Missouri v. Danforth\(^7\) and Bellotti v. Baird\(^8\) the Court stated that the state could not condition a minor's right to an abortion on parental consent.\(^9\) In Carey v. Population Services International,\(^10\) the Court indicated that a state may neither prohibit children from procuring contraceptives, nor leave the decision with the parents. In both situations the child's right of "privacy," protected by the due process clause, was found to outweigh whatever interest parents and state might have in proscribing a contrary course of conduct.\(^11\)

All three decisions seem to acknowledge the possibility that the child whose right is being protected against a parent-state coalition will not be competent to decide whether to exercise the right. The necessity for judicial assistance in this eventuality might be easier to justify if the intervention were characterized as upholding the child's best interests against an irrational or selfish assertion of otherwise protected parental prerogatives. But the intervention coexists uneasily with the Court's simultaneous recognition that the interest in familial privacy protected by the due process clause is not strictly parental, but relational—a right held by parent and child alike. Last Term, in Smith v. Organization of Foster Families for Equality and Reform\(^12\) (OFFER) and Moore v. City

---

9. Danforth, 428 U.S. at 72-75; Bellotti, 428 U.S. at 151.
11. See id. at 692-99.
of East Cleveland the Court for the first time explicitly indicated that the child was protected by the due process clause against at least some forms of state interference with the family structure because of his interest in receiving parental guidance. There thus results a collision of two claims, both of which have been circulating in the foggy ambiance of due process "privacy": the child's right to autonomous development, and the child's right to receive the benefits of parental control.

This Article will suggest that the right of autonomy, which limits state control over children, should be considered to reside not in the child alone, but in the family, just as the right against state interference with the family structure resides in the family. The shift in focus from children's rights to family rights implicitly accounts for the mental, physical, and emotional differences between children and adults. Moreover, protecting a family's right of autonomy insures that decisions on behalf of the child will be made by those presumptively best able to make such decisions, the parents.


Unquestionably the most infectious source of confusion plaguing attempts to consider the limits of permissible state control over juvenile behavior has been the assumption that one constitutional right is just like another—that while the child may not be entitled to the full force of any, he at least is entitled to the benefits of each to the same extent. This assumption was a factor critical to the results in both Danforth and Carey. To be sure, each case, in concluding that minors' rights

14. See OFFER, 431 U.S. at 850-54; Moore, 431 U.S. at 499, 503-06; text accompanying notes 199-243 infra.
15. The Court stated:
   Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. See, e.g., Breed v. Jones, 421 U.S. 519 (1975); Goss v. Lopez, 419 U.S. 565 (1975); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); In re Gault, 387 U.S. 1 (1967).
428 U.S. at 74-75.
16. "[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." 431 U.S. at 692 (quoting In re Gault, 387 U.S. at 13). Justice Brennan summarized the rights of minors in a footnote:
were entitled to somewhat less stringent protection than the corresponding rights of adults,17 declared that the state has broader authority to regulate the "activities"18 or "conduct"19 of children than it does with respect to adults. The Court did not consider, however, whether the state has broader authority to regulate the behavior of minors than it does to interfere with other rights minors may have.20 Litigation in the lower courts on the issues presented in Danforth and Carey revealed a similar willingness to lump together the lot of rights which have been recognized for children.21

This tendency ignores the effect which a child's competence or maturity has, or should have, on the process of selective incorporation of rights for children. It is suggested below that the cases cited by Danforth and Carey22 can be reconciled with the proposition that age and maturity are relevant to recognition of children's rights. Nevertheless, at this stage it can at least be said that the great majority of cases extending the protection of the Bill of Rights and the fourteenth

---

17. The Court in Danforth stated that restrictions on the minor's right to an abortion could be justified only if there were some "significant state interest . . . not present in the case of an adult." 428 U.S. at 75; accord, Carey, 431 U.S. at 693 & n.15.
20. Justice Brennan's opinion in Carey did suggest that restrictions on a minor's right to acquire contraceptives might warrant a less rigorous review than the "compelling state interest" test applied to restrictive on the privacy of adults, because "the law has generally regarded minors as having a lesser capability for making important decisions." Id. That recognition, however, did not inhibit him from concluding that the minor's privacy interest was a "fundamental right," id. at 696, 697 n.22, and hence presumably entitled to as stringent protection as any right a minor might have.
21. See, e.g., Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554, 566-67 (E.D. Pa. 1975); State v. Koome, 84 Wash. 2d 901, 904, 530 P.2d 260, 263 (1975); In re P.J., 12 Crim. L. Rep. 2549 (D.C. Super. Ct. 1973); cf. Poe v. Gerstein, 517 F.2d 787, 789-91 (5th Cir. 1975) (common law did not distinguish between mature teenagers and infants but treated both as the property of the parents); Filipel & Zuckerman, Abortion and the Rights of Minors, 23 Case W. Res. L. Rev. 779, 795-96 (1972) (concluding that since minors are "persons" they are entitled to the protections of the Bill of Rights); Note, Parental Consent Requirements and Privacy Rights of Minors: the Contraceptive Controversy, 88 Harv. L. Rev. 1001, 1008-10 (1975) ("[t]he Court appears to have determined that . . . capacity is not relevant in determining applicability of fundamental rights to minors"). A refreshing deviation from the trend is offered in Letwin, After Goss v. Lopez: Student Status as Suspect Classification?, 29 Stan. L. Rev. 627, 641-43 (1977) (arguing that some constitutional rights should hinge on possession of adult competency).
22. See notes 1-6 supra.
amendment to minors do not necessarily control when the issue is regulation of behavior.

A. Equal Protection

The best established, and virtually unquestioned, extension of constitutional rights to minors is the application of the equal protection clause to school desegregation cases. Where the only question is whether the state has power to impose racial separation, it is difficult to maintain that an affirmative answer is made more acceptable by the youth of the students. In fact, the rationale of Brown v. Board of Education\(^23\) may be taken to indicate just the contrary. In concluding that segregation deprived minority children of equal educational opportunities, the Court stressed that separation "'generates a feeling of inferiority,'"\(^24\) which in turn "'affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children . . . .'"\(^25\) If we were to suppose that the institution of segregation were confined to those who had reached majority, then it would seem to follow from the Court's reasoning that the effects might—at least in the aspects mentioned—be less serious. Put another way, denial of equal protection in the context of school segregation has effects which vary inversely, rather than directly, with age. In this respect, the right at stake is quite different from, for example, the right to make political speeches, where the severity of the deprivation would seem to vary with the intelligence or concern of the speaker.

Another perspective on this difference is afforded when one realizes that the fundamental interests strand of contemporary equal protection analysis has never required parity of treatment between children and adults.\(^26\) If it did, of course, it would provide a bootstrap

---


\(^{24}\) Id. at 494 (quoting finding of court in Brown v. Board of Educ., 98 F. Supp. 797 (D. Kan. 1951)).

\(^{25}\) Id.

\(^{26}\) It has been suggested, however, that such a reading of the equal protection clause would be desirable. See, e.g., Schulz & Cohen, Isolationism in Juvenile Court Jurisprudence, in PURSUING JUSTICE FOR THE CHILD 20, 35-37 (M. Rosenheim ed. 1976); Pilpel & Zuckerman, supra note 21, at 801-04. A modified form of the equal protection argument is proposed in Letwin, supra note 21, at 655-62. Justice Black has suggested that it would "be a plain denial of equal protection of the laws—an invidious discrimination—to hold that . . . children [could] be denied [the] same constitutional safeguards" afforded adults in criminal prosecutions. In re Gault, 387 U.S. at 61 (concurring opinion). The position, however, was not one which Black was willing to apply across the board. See, e.g., Tinker v. Des Moines School Dist., 393 U.S. 503, 515-16 (1969) (Black, J., dissenting).
technique for applying the Bill of Rights to children in a wholesale manner, rather than by the piecemeal process of incorporation which the Court has followed. What *Brown* and its progeny hold is that one child should be treated like another of the same age, not that the child's right to acquire knowledge is coextensive with an adult's.\(^\text{27}\)

Much the same can be said of the other situation in which the equal protection clause has been employed to protect the rights of minors: protection of the illegitimate child's right to receive financial support on the same terms as legitimate children.\(^\text{28}\) Not only is the severity of the deprivation likely to vary inversely with age (after a certain time the child can support himself), but the Court's conclusion amounts to no more than a declaration that children must be treated like one another, not like adults.

### B. PROCEDURAL DUE PROCESS: JUVENILE COURT ADJUDICATION

The extent of constitutional protection to which the minor is entitled has also been the subject of heated debate in the Court's recent consideration of the procedural safeguards required in the juvenile court adjudication process. In re *Gault*\(^\text{29}\) held that a constitutional right to notice, counsel, confrontation and cross-examination, and a privilege against self-incrimination\(^\text{30}\) existed for juveniles facing possible incarceration as a result of delinquency charges. In re *Winship*,\(^\text{31}\) decided 3 years later, held that proof beyond a reasonable doubt was required when a juvenile was charged with an act that would be a crime if committed by an adult. Most recently, *Breed v. Jones*\(^\text{32}\) concluded that the

---

\(^{27}\) Ginsberg v. New York, 390 U.S. 629 (1968), seems in fact to settle this latter matter by holding that a child has no right to read scatological material for which an adult could claim first amendment protection.


\(^{29}\) 387 U.S. 1 (1967).

\(^{30}\) The privilege against self-incrimination was first recognized in Haley v. Ohio, 332 U.S. 596 (1948). *See also* Gallegos v. Colorado, 370 U.S. 49 (1962).


\(^{32}\) 421 U.S. 519 (1975). Between *Gault* and *Breed*, the Court held that a jury trial was not
double jeopardy clause prevents prosecution in criminal court after an adjudicatory proceeding in juvenile court.

Gault and Winship might be taken to stand for the apparently innocuous proposition that the individual's interest in the protections of procedural due process is not age-dependent. Put another way, these cases might be read as standing for the following principles:

1. The concern of the fifth and sixth amendments, as augmented and applied to the states by the fourteenth amendment due process clause, is to avoid "inaccurate findings of fact and unfortunate prescriptions of remedy"; and (2) whatever additional control a state may have over a child's liberty, youth does not justify a denial of due process which results in a mistaken or unfair deprivation of any interest.

In fact the matter is more complex, largely because it is wrong to suppose, as this interpretation does, that any "liberty" interest, however minute, deserves the maximum possible protection against the chance of mistaken infringement. Invoking full due process protection will always involve costs, and the decision to impose those costs must always balance them against the nature of the right being protected. Ultimately, Gault and Winship involve the question whether a juvenile has the same interest in avoiding commitment to a state institution required for adjudication of delinquency charges. McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971).

33. The suggestion that the procedural due process cases may be analyzed in the fashion suggested in the text is advanced in Letwin, supra note 21, at 642.

34. The privilege against self-incrimination.

35. The rights to counsel, notice, confrontation, and cross-examination of witnesses.

36. Winship held that the right to have guilt proven beyond a reasonable doubt, although not explicitly mentioned in the Bill of Rights, is protected by the due process clause of the fourteenth amendment. 397 U.S. at 364.


38. Indeed, if we start from the premise that children and adults have the same right to avoid the mistaken deprivation of any kind of freedom, it would seem that the child has an even better claim to the protection of counsel and the privilege against self-incrimination, given his lack of maturity and understanding. See In re Gault, 387 U.S. at 38 n.65 ("The most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot") (quoting THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 86 (1967)), 45 ("What transpired would make us pause for careful inquiry if a mature man were involved. And when . . . a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used") (quoting Haley v. Ohio, 332 U.S. 596, 599 (1948) (Douglas, J.).

as does an adult, and hence whether the youth deserves the same protection against an erroneous decision. To trace the matter back to the Constitution, the issue is whether some different process is "due" the juvenile because "liberty" means something different for him than it does for an adult.\textsuperscript{40}

This abstract proposition is one which the Court in \textit{Gault} and \textit{Winship}, for all its talk about the "debatable" "constitutional and theoretical basis" for the juvenile court system,\textsuperscript{41} did not deny.\textsuperscript{42} Several good reasons may account for this silence. First, it is surely less offensive to control the child's freedom to act as he pleases, even if he has not misbehaved, than it is to control an adult's. The child has less self-direction with regard to socially acceptable behavior, while the adult need only be constrained \textit{post hoc} in the public interest. Moreover, the child's perception of the privation will likely be quite different from the adult's, since the satisfaction which comes from setting and accomplishing one's own objectives depends in some measure on the individual's intellectual and emotional development.

Second, there was an implied recognition in \textit{Gault} that, even if control of the child's behavior might be warranted, it matters a great deal who exercises the control, because the \textit{parents} also have an interest in the fair adjudication of any charges against their child. Notice must be provided not only for the sake of the offender, but also because "his parents' right to his custody [is] at stake."\textsuperscript{43} Not only the child, but "his parents must be notified" of the right to counsel, which be-

\textsuperscript{40} The suggestion that "liberty," as the term is employed in the due process clauses of the fifth and fourteenth amendments, might have a different and more restricted meaning when applied to children, as opposed to adults, need not, of course, entail an acceptance of "the gradual process of exclusion" of adult rights from those clauses, on which the Supreme Court has recently embarked. \textit{See} Monaghan, \textit{Of "Liberty" and "Property,"} \textit{62 Cornell L. Rev. 405} (1977). Even if the term "liberty" is read as broadly as possible to include the rights "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men," \textit{Meyer v. Nebraska}, 262 U.S. 390, 399 (1923), it remains true that the protection extended to children by the common law was less extensive than that recognized for adults. \textit{See}, e.g., \textit{In re Ingraham} v. \textit{Wright}, 430 U.S. 651, 659-63 (1977) (corporal punishment of students). \textit{Meyer} itself, after all, in holding that a state could not forbid the teaching of foreign languages in elementary school, relied on the rights of parents and teachers, not of students. \textit{See} 262 U.S. at 399-401; text accompanying notes 15-22 \textit{supra}.

\textsuperscript{41} \textit{In re Gault}, 387 U.S. at 17. \textit{But see id.} at 66 (Harlan, J., concurring in part and dissenting in part) (characterizing majority's premise as "the product of reasoning which is not described").

\textsuperscript{42} \textit{See} Schultz & Cohen, \textit{supra} note 26, at 22-24.

\textsuperscript{43} \textit{In re Gault}, 387 U.S. at 33-34. The Court seemed to contemplate the possibility that the parents could, in some circumstances, waive the requirement of notice. \textit{Id.} at 34 n.54.
longs to both parent and child. Further, the validity of a waiver of the privilege against self-incrimination depends not only on the age of the child, but on "the presence and competence of parents." From one perspective then, *Gault* and *Winship* can be taken to stand for the proposition that the state cannot disrupt the relation of parent and child without the exercise of considerable caution; this idea is opposed to the notion that the child has any traditional kind of "liberty" interest protected by the due process clause.  

Third, even if the state’s authority to control the behavior of adolescents were coextensive with the authority possessed by their parents, the procedural protections invoked by *Gault* and *Winship* might still be appropriate. The fond hopes of the architects of the juvenile court system have proven completely chimerical; the "claimed benefits of the juvenile process"—reduction of recidivism through good training during commitment, avoidance of the stigma attendant upon criminal convictions, confidentiality with regard to disposition, and compassionate consideration by the court—have simply not materialized. Even if one assumes that a child’s sensitivity to the real effects of an unfounded conviction are diminished in proportion to his lack of understanding, the consequences will still be with him years later when he will appreciate them, although at that time he will be unable to do anything about them. Given that government agencies, and even private employers, may have access to court and police records of juvenile proceedings, that the child’s development is likely to be significantly impaired as a result of commitment, and that the term “delinquent” “lias come to involve only slightly less stigma than the term ‘criminal’ applied to adults,” the only way to protect the juvenile’s future interest in avoiding the mistaken infliction of those consequences is by the present imposition of due process requirements.

---

44. Id. at 41-42. Again, the Court indicated that the parent alone might be able to waive the right. Id. at 42.
46. The role of the parents is highlighted by the Court’s statement in *Gault*:
Under traditional notions, one would assume that in a case like that of Gerald Gault, where the juvenile appears to have a home, a working mother and father, and an older brother, the Juvenile Judge would have made a careful inquiry and judgment as to the possibility that the boy could be disciplined and dealt with at home, despite his previous transgressions.

387 U.S. at 28.
47. See *In re Winship*, 397 U.S. at 365-66; *In re Gault*, 387 U.S. at 21-27.
49. McKeiver v. Pennsylvania, 403 U.S. 528 (1971), supports the suggestion that *Gault* and *Winship* turn in part on the necessity of protecting the claims of the adult-to-be against mistaken
Upon close examination, the application of double jeopardy requirements mandated in *Breed v. Jones* may be seen to rest on similar principles. The possibility of transfer from a juvenile court to a court of general criminal jurisdiction once adjudicatory proceedings have begun puts the defendant in a difficult position. If he chooses to cooperate in the hope of compassionate consideration from the juvenile court, and the case is then transferred, he will not only have given the prosecution a preview of his defense, but may also have made inculpatory statements—later admissible against him—under the misapprehension of assisting his disposition as a juvenile offender. On the other hand, if he chooses to remain silent in anticipation of transfer, he runs the risk of not having the case transferred, and thereby losing the opportunity to present his case, as well as prejudicing his chances for lenient treatment by appearing uncooperative. In either eventuality there exists the risk that the state will intervene unfairly. Moreover, in both cases the convicted juvenile will have received penalties, the enduring effect of which he will be unable to undo upon reaching maturity.

*interference. Justice Blackmun's plurality opinion, in distinguishing *Gault* and *Winship*, stated that those cases emphasized “factfinding procedures. The requirements of notice, counsel, confrontation, cross-examination, and standard of proof naturally flowed from this emphasis. But one cannot say that in our legal system the jury is a necessary component of accurate factfinding,” Id. at 543. Justice White's concurrence began: “Although the function of the jury is to find facts, that body is not necessarily or even probably better at the job than the conscientious judge.” Id. at 551. Moreover, the other ends which are served by a jury trial, preventing “abuses of official power” and providing a “hedge against corrupt, biased, or political justice,” id., may become irrelevant as the age of the offender diminishes. “Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or the lack of them) or of other forces beyond their control.” The juvenile court system has built in “an operative force against prejudice and short-tempered justice.” Id. at 551-52; cf. id. at 550 (opinion of Blackmun, J.) (juvenile court system contemplates paternalistic attention).


51. It is true that one major objective of the prohibition against multiple trials is the avoidance of a double imposition of the “pressures and burdens—psychological, physical, and financial—on a person charged.” 421 U.S. at 530. Also, it is not irrational to suppose that the effects of double jeopardy are more attenuated on the very young, who may not appreciate the potential consequences, and do not bear the costs of their own defense. Thus, *Breed's* recognition of a child's right to the protection of the double jeopardy clause might be taken as some support for the proposition that the Bill of Rights shields any individual regardless of age or maturity.

A possible response, adopted by the Court in *Breed*, is that an adjudicatory hearing does engender “elements of 'anxiety and insecurity' in a juvenile, and imposes a 'heavy personal strain.'” 421 U.S. at 530-31 (citation omitted); see Snyder, *The Impact of the Juvenile Court Hearing on the Child*, 17 CRIME & DELINQUENCY 180 (1971). Perhaps more important, though, is the fact that the very context in which the question arises virtually removes the issue from the area of children's rights. Jeopardy attaches for the second time when the offender has been transferred to a court of general criminal jurisdiction. In California, for example, if the minor was 16
C. Procedural Due Process: School Discipline

A third current topic concerning the constitutional rights of minors has been the applicability of procedural due process to school disciplinary proceedings. Recently, *Goss v. Lopez*\(^{52}\) held that suspension from high school could not be imposed without some kind of notice and hearing.\(^{53}\) On the other hand, *Ingraham v. Wright*\(^{54}\) decided just last Term, concluded that corporal punishment in public schools need not be preceded by notice and hearing.\(^{55}\) Both cases recognize that the student has "property" and "liberty" interests which are implicated in school disciplinary measures,\(^{56}\) but together they may be taken to stand for the proposition that the extent of protection those rights deserve is determined to a significant degree by the youth and immaturity of the individual.\(^{57}\)

Whether the immediate impact of suspension on the student affected is serious enough to warrant a requirement of notice and a hearing may be questioned. As Justice Powell suggested in his dissent in *Goss*, a 10-day dismissal might provide a welcome mid-semester break and, depending on the student's circle of friends, might enhance rather than tarnish the offender's reputation.\(^{58}\) Nevertheless, suspension may entail consequences which the child does not appreciate, but which are both enduring and uniformly recognized in the adult world as undesirable. For one thing, suspension interrupts the child's education;\(^{59}\) for another, a record of suspension, however unjustified, may result in the denial of future employment or of admission to institutions of higher

---

52. 419 U.S. 565 (1975).
55. *Id.* at 672-82.
56. *Goss* suggested two such rights: a property interest in a public education, and a liberty interest in avoiding the erroneous sustaining and recording of charges which "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." 419 U.S. at 574-75 & n.7.
57. Unlike the adjudication process in juvenile court, the imposition of discipline in public schools does not implicate, to any important degree, the relation between child and parent. Thus, whatever protection is given students under the due process clause must ultimately be referable to rights which they can claim unassisted by the interest in familial ties and direction. *Ingraham*, 430 U.S. at 662 & n.22; Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.), aff'd, 423 U.S. 907 (1975).
58. 419 U.S. at 598-99 n.19.
59. But see *id.* at 589 (suspension of 8 days will "rarely affect a pupil's . . . scholastic performance").
The interest in avoiding these detriments, whether the child appreciates them or not, is one which quite properly should not vary with age.\textsuperscript{61}

The interest in avoiding the unjustified imposition of corporal punishment is different in nature from the interest against suspension. The individual petitioners in \textit{Ingraham v. Wright} were eighth and ninth grade students at a junior high school in Dade County, Florida, who had been paddled apparently more severely than was permitted either by local school board regulations or by state law.\textsuperscript{62} Seeking damages on their own behalf, and declaratory and injunctive relief on behalf of all Dade County students, the students sued a number of school officials, claiming deprivation of their rights to procedural and

\textsuperscript{60} \textit{Goss} did note that § 513 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 571, (codified at 20 U.S.C. § 1232(g) (1976)) (adding § 438 to the General Education Provisions Act), precluded release of student records to employers without parental consent. Under that section, however, records may still be released to other schools, and although parents are permitted to challenge the inclusion of inaccurate or misleading information, it is not clear that a parent can contest the underlying basis for a suspension. \textsuperscript{419} U.S. at 575 n.7.

The immediate alternative to the Court's requirement of notice and a hearing was review under Ohio's general administrative review statute, \textit{Ohio Rev. Code Ann.} § 2506.01 (Supp. 1973). The Court found the code inadequate because it did not provide for \textit{de novo} review and suspension could not be stayed pending hearing. \textsuperscript{419} U.S. at 581-82 n.10.

\textsuperscript{61} Suspension or dismissal from school for academic reasons will, of course, have consequences at least as severe as those accompanying suspension for misconduct. The basis for the Court's recent conclusion that due process does not require a formal hearing in such cases, Board of Curators v. Horowitz, \textit{98 S. Ct.} 948 (1978), is the countervailing weight accorded the nature of the inquiry, which is necessarily more "subjective and evaluative" than the typical disciplinary question and is not conducive to adversarial determination. \textit{Id.} at 955.

\textsuperscript{62} Ingraham's testimony, which the district court accepted as credible for purposes of its ruling on a motion to dismiss, related that he had been hit 20 times with a wooden paddle, resulting in a hematoma which required medical attention and kept him out of school for 11 days. Andrews testified that he had been hit on the arms on two occasions, and was deprived of the full use of one arm for a week. \textsuperscript{430} U.S. at 657.

At the time the incidents occurred, Florida law provided: "[A teacher] shall not inflict corporal punishment before consulting the principal or teacher in charge of the school, and in no case shall such punishment be degrading or unduly severe in its nature." \textit{Fla. Stat.} § 232.27 (1975) (amended 1977). Dade County School Board Policy 5144, effective during the 1970-71 school year, provided:

- Corporal punishment . . . is administered as a means of changing the behavior of the student . . .
- Corporal punishment may be used in the case where other means of seeking cooperation from the student have failed . . . . The punishment must be administered in kindness and in the presence of another adult, at a time and under conditions not calculated to hold the student up to ridicule or shame.
- In the administering of corporal punishment, no instrument shall be used that will produce physical injury to the student, and no part of the body above the waist or below the knees may be struck.

substantive due process, and infliction of cruel and unusual punish-
ment. The district court's dismissal was ultimately affirmed by the
Court of Appeals for the Fifth Circuit en banc,\textsuperscript{63} and by the Supreme
Court.\textsuperscript{64}

Addressing itself to the procedural due process claim, Justice Pow-
ell's majority opinion first indicated that a student had no "liberty" interest in avoiding corporal punishment administered within the limits of the common law privilege afforded teachers who "reasonably [bel-
ieve their actions] to be necessary for the child's discipline or train-
ing."\textsuperscript{65} Although a student did have a constitutional claim against
unprivileged punishment, prior notice and hearing requirements would not significantly increase the protection already afforded by Florida's
tort law and criminal penalties.\textsuperscript{66} Moreover, "even if the need for ad-
vance procedural safeguards were clear,"\textsuperscript{67} to impose them would "en-
tail a significant intrusion into an area of primary educational
responsibility,"\textsuperscript{68} and afford protection that was not "appropriate to the
constitutional interests at stake."\textsuperscript{69}

This Article has suggested that the protection of the due process
clause might have been extended to delinquency and school suspension
cases not simply because the individual's interest in avoiding the mis-
taken imposition of any penalties might not vary with age, but also
because the sanctions in those cases had enduring consequences which
the child was entitled to avoid regardless of his age or maturity. By
contrast, a mistaken imposition of corporal punishment has fewer long-
term effects: the pain is present, and of short duration.

Since, presumably, the young feel pain just as acutely as adults do,
it might fairly be asked why the child does not have a "liberty" interest in
avoiding the infliction of pain that is at least coextensive with that of
an adult. That he does not is made clear by the fact that the law has
long carved out privileges—notwithstanding the equal protection and
due process clauses—for those, including state employees, who disci-
pline children.\textsuperscript{70} The justification for these privileges has traditionally

\textsuperscript{63} 525 F.2d 909 (5th Cir. 1976) (en banc).
\textsuperscript{64} 430 U.S. 651 (1977).
\textsuperscript{65} \textit{Id.} at 677; \textit{see id.} at 676-77 & n.45.
\textsuperscript{66} \textit{Id.} at 677-79.
\textsuperscript{67} \textit{Id.} at 680.
\textsuperscript{68} \textit{Id.} at 672.
\textsuperscript{69} \textit{Id.} at 683 n.55.
\textsuperscript{70} Parents are liable neither in tort or under criminal law for punishments that they reason-
ably believe to be in the child's best interest. Teachers have similar privileges both under com-
been that, until the individual’s rational and ethical faculties are fully developed, physical discipline is an effective means of signaling unacceptable conduct. Because the imposition of pain is not for retribution, but rather for providing information, the fact that somebody else “did it” is not necessarily controlling. Though we do not generally spank children when they have done nothing wrong, mistakenly spanking Johnnie, who was only with Billy when Billy “did it,” may keep Johnnie out of trouble the next time. And unlike suspension, spanking has no long-term consequences comparable to the interruption of education or the entering of a permanent and harmful record.

The scope of the common law privilege recognizes this by providing immunity for the use of physical force not only when Johnnie “did it,” but also when the teacher reasonably believes the discipline is necessary for Johnnie’s proper control, training, or education. Obviously then, due process affords a child less protection from the use of physical force than it does an adult, whose behavior the state has no right to try to improve without proof beyond a reasonable doubt that a clearly designated offense has been committed. The nature of the liberty interest which the child does possess helps to explain why the Ingham Court refused to require prior notice and a hearing before a teacher imposes corporal punishment. In this case, unlike the suspension situation, the issue at any hearing would be not whether the child had done the act, but the reasonableness of the teacher’s belief. Not

mon law and by statute. See, e.g., Ingraham v. Wright, 430 U.S. at 662-63 nn.23, 28 (citations of cases and statutes); N.Y. Penal Law § 35.10 (McKinny 1967) (providing an exemption for parents and teachers for actions that would otherwise be classified as intentional torts); MODEL PENAL CODE § 3.07(1) (Prop. Off. Draft, 1962) (no criminal liability—parents); RESTATEMENT (SECOND) OF TORTS § 147(1) (1965) (parental tort exemption); id. §§ 147(2), 153(2) (same—teachers); 1 W. BLACKSTONE, COMMENTARIES *453; 3 id. at *120; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 27 (4th ed. 1971) (same—both).


72. See Ingraham v. Wright, 430 U.S. at 674 n.43.

There is, of course, one school of thought with numerous and distinguished adherents which contends that the psychological consequences of corporal punishment may be both damaging and enduring. See, e.g., A. LEVINE & E. CARY, THE RIGHTS OF STUDENTS 84-86 (rev. ed. 1977). Given the overwhelming background of historical and contemporary approval of reasonable corporal punishment, however, it would be stretching the point to suggest that these mere conjectures bring the child’s claim against physical discipline within even the broadest reading of due process “liberty”—“those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” Meyer v. Nebraska, 262 U.S. 390, 399 (1923); see note 40 supra.

73. See note 70 supra.

74. 430 U.S. at 659-63, 670-71.
only is that issue inherently less susceptible to on-the-spot proof, but it is also one that requires some third party, besides the teacher and the student, to make the decision. This added burden, given the already unlikely prospect of completely arbitrary action by the teacher, may have been the deciding factor.

Read together, Goss and Ingraham indicate that the due process to which a child is entitled depends to a significant extent on the nature of the right being protected. When the severity of the consequences the child will suffer is unrelated to youth or immaturity, there is no reason to afford juveniles fewer procedural safeguards than would be due adults. When, on the other hand, the impact which even an unjustified invasion of personal security is likely to have varies significantly with the individual's stage of growth, the protection afforded by constitutional rights should vary as well.

D. Free Speech

The strongest support for the proposition that the protections of the Bill of Rights should be extended uniformly, if not with full force, to children is provided by Tinker v. Des Moines School District. The Tinker Court held that several students—ages 13, 15, and 16—in public schools had a right protected by the first amendment free speech clause to wear black armbands to protest the Vietnam War. It is difficult to dispute that the individual's interest in expressing political views is one that grows with his awareness of political issues, and with a perception of the importance of participation in public debate. Yet the Tinker Court made no distinction with respect to the strength of the rights asserted by the 13-year-old and the 16-year-old. Justice Stewart, concurring, went so far as to accuse the Court of uncritically assuming that, "school discipline aside, the First Amendment rights of children are coextensive with those of adults."

75. In Goss, the Court contemplated that in the case of suspension, "the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred." 419 U.S. at 582.

76. A teacher might be capable of determining, without bias, whether the student accused of the punishable act had in fact committed it. It is difficult, however, to suppose that a teacher could make an independent determination of the reasonableness of his belief that punishment was "necessary for [the child's] proper control, training, or education." RESTATEMENT (SECOND) OF TORTS § 147(2) (1965).


78. The free speech guarantees of the first amendment are extended to the states by the fourteenth amendment due process clause. Gitlow v. New York, 268 U.S. 652 (1925).

79. 393 U.S. at 515.
As the Court suggested, one possible justification for that assumption is that the child's ultimate selection of values and ideas will be made from the variety offered for his inspection at an early age, so that restriction of debate during early years results in thought control over the future adult. But such an argument merely presents the same issue from a different perspective. If it is true that the individual's interest in expressing ideas varies with his awareness of issues and commitment to values—increases with cognitive and affective growth—the same would seem to be true of the right to receive ideas. Put another way, the underlying premise of the commitment to the free market of ideas is that those arguments of most persuasive force will ultimately be valued highest and drive out competing concepts. This premise, however, assumes on the part of those who enter the market an ability to appreciate persuasive force, which the very young may not possess.

This is not to suggest that the outcome in *Tinker* is wrong, but rather that the Court failed to articulate the crucial role played by the students' parents. As Justice Black noted in his dissent, the Tinker children's father was "a Methodist minister without a church . . . paid a salary by the American Friends Service Committee," and the mother of the 16-year-old was "an official in the Women's International League for Peace and Freedom." The students' decision to wear armbands, according to the Court, was reached at a meeting of both adults and students, and the petitioners' parents concurred in the decision. In those circumstances the students' right to advocate a particular position gains considerably more strength, having behind it not merely the weight of childish ratiocination and commitment, but also the support of parental counsel on which the students quite justifiably are entitled to rely. It is not merely "a symbolic battle between adults, each using children as sacrificial pawns," for the children do have an interest in the matter. But that interest is inextricably bound up in familial ties: it is the right to be brought up, and to behave despite state objection, in a way the parents have experienced and found valuable.

80. This proposition seems to underlie the Court's reference to the child's right at an early age to enter the free market of ideas: "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Id.* at 512 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).
81. 393 U.S. at 516 (Black, J., dissenting).
82. *Id.* at 504.
83. *Burt, Developing Constitutional Rights Of, In, and For Children, LAW & CONTEMP. PROB.,* Summer 1975, at 118, 123.
84. This conclusion is consistent with the cases on which *Tinker* relied for the proposition
Once it is understood that *Tinker* was about family rights, not strictly children's rights, the case becomes much easier to reconcile with *Ginsberg v. New York*, which only a year before had upheld a New York criminal obscenity statute prohibiting the sale to minors under 17 of material which would not have been obscene as to adults. Underlying the Court's conclusion that a minor had no constitutionally protected right to procure such literature was the explicit recognition that "a child might not be as well prepared as an adult to make an intelligent choice as to the material he chooses to read". "[T]he factor of immaturity, and perhaps other considerations, impose different rules." It would certainly be splitting hairs to resolve the two cases by suggesting that the adolescent has a greater interest in expressing political views than in learning about sex especially given the typical teenager's preoccupation with the latter. Rather, New York's law was permissible primarily because it 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. . . . [T]he prohibition against

that children had rights protected by the first amendment. *Engel v. Vitale*, 370 U.S. 421 (1962), held that a nondenominational prayer composed by the state and used in school violated the establishment clause. Although the plaintiffs, parents of 10 students, claimed that the use of the prayers violated the "beliefs, religions, or religious practices of both themselves and their children," *id.* at 423, the Court found it unnecessary to distinguish between the rights of parents and the rights of the students. *Epperson v. Arkansas*, 393 U.S. 97 (1968), struck down the Arkansas "anti-evolution" statute on establishment clause and free exercise grounds. Although the plaintiff was a teacher at a Little Rock high school, a parent of children attending the public schools intervened, alleging "his interest in seeing that his two then school-age sons 'be informed of all scientific theories and hypotheses . . . .'") *Id.* at 110 (Black J., concurring). The Court did not consider whether the sons themselves might have some independent interest. *Tinker* also relied on *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), which struck down as an infringement of free speech a state law requiring participation in the pledge of allegiance to the flag. The suit was a class action brought by three parents on behalf of themselves, their children, and others similarly situated. Again, the Court found it unnecessary to ascribe the right in question to either parents or children. At some points in its opinion, the Court seemed to refer to the free speech rights of the students, *see id.* at 637 ("[t]hat they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes"); at others, to the rights of the parents, *see id.* at 641 ("[p]robably no deeper division of our people could proceed from any provocation than from finding necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing").

85. 390 U.S. 629 (1968).
86. *Id.* at 642 n.10 (citing Gaylin, Book Review, 77 YALE L.J. 579, 594 (1968)).
87. 390 U.S. at 638 n.6 (quoting Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, 939 (1963)). *See also* 390 U.S. at 649-50 (Stewart, J., concurring opinion) ("I think that a State may permissibly determine that, at least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees").
sales to minors does not bar parents who so desire from purchasing the magazines for their children.\textsuperscript{88}

\section*{E. Summary}

In the cases considered in this section, the Court was not really forced to determine the extent to which youth may diminish the constitutional protection a minor enjoys. Children were found to have an interest in equal protection at least equal to that of adults, in part because the impact of discrimination may vary inversely with age. In the procedural due process cases, the present interest of the minor may have been different from that of an adult, but two other factors accounted for the Court's decisions. One was the effect of delinquency adjudication and school discipline on the child's future life. In order to protect the minor against consequences which might be delayed until adulthood, procedural safeguards had to be given him during childhood. The second factor was the interest the parents—and indeed, the family as a unit—had in limitation on state action. This interest becomes even more crucial in the first amendment context. Even hard cases like \textit{Tinker}, closely examined, do not repudiate the maxim that children should be seen but not heard; it makes all the difference in the world that their parents have allowed—indeed encouraged—them to speak. A more difficult situation arises when child and parents are in conflict over a decision that the child is not competent to make for himself.

\section*{II. State Support of Parental Choices in Parent-Child Conflicts}

Until 1976, the Supreme Court did not really face the issue of whether children have independent constitutional rights. In the last 2 years, however, several cases have presented the issue of the child's rights when the parents oppose the child's decision, and the state does no more than align itself with the parents.

\footnote{88. 390 U.S. at 639 (citation omitted); see Elias, \textit{Sex Publications and Moral Corruption: The Supreme Court Dilemma}, 9 WM. & MARY L. REV. 302, 320-21 (1967); cf. Henkin, \textit{Morals and the Constitution: The Sin of Obscenity}, 63 COLUM. L. REV. 391, 413, n.68 (1963) (laws that impose a morality on children are distinguishable from those that support right of parents to determine morals of children).}
A. The Right to an Abortion: Planned Parenthood of Central Missouri v. Danforth and Bellotti v. Baird

At issue in Planned Parenthood of Central Missouri v. Danforth was a Missouri law passed a little over a year after the Supreme Court's decision in Roe v. Wade and Doe v. Bolton. The statute provided in part that no abortion could be performed on an unmarried woman under the age of 18 without the consent of a parent or guardian, unless it was necessary to preserve the life of the mother.

The state's defense of its law emphasized the Court's prior decisions holding that a state may at times subject minors to more stringent limitations than would be permissible with respect to adults, in part because some decisions are "outside the scope of a minor's ability to act in his own best interest or in the interest of the public . . . ." The state claimed that its ability to protect the best interests of the minor was reinforced by the nature of the statute, which did nothing more than sustain parental decisions affecting the child. Parental discretion in that regard was itself an interest of constitutional status protected from state interference.

Justice Blackmun's majority opinion, rejecting the state's claims, hinged on the premise of a "right of privacy [in] the competent minor mature enough to have become pregnant." Given the existence of

89. 428 U.S. 52 (1976).
90. 410 U.S. 113 (1973) (state criminal abortion law that only permits abortion to save mother's life without regard to stage of her pregnancy and other interests violates right to privacy under due process clause of fourteenth amendment).
91. 410 U.S. 179 (1973) (state criminal law imposing procedures and restrictions on right to abortion violates fourteenth amendment, although right to abortion not absolute).
92. The Court unanimously upheld provisions of the Act defining viability, requiring the woman's consent in writing, and imposing various recordkeeping requirements for health facilities and physicians concerned with abortions. 428 U.S. at 63-67, 79-81, 89, 101. A majority of the Court held invalid the requirement of spousal consent to an abortion, the prohibition of saline amniocentesis as a technique for abortion after the first 12 weeks of pregnancy, and the definition of the standard of care to be exercised by people performing or assisting in abortion. Id. at 67-72, 75-79, 81-84, 89, 101.
93. See 428 U.S. at 84, 85 (statute is reproduced as the Appendix to the Opinion of the Court).
94. Id. at 72. Examples of such limitations include compulsory education, statutes relating to child labor, and the regulation of the sale of cigarettes, alcohol, and obscene literature.
96. 428 U.S. at 75. As authority for the extension to minors of that right, established for adults by Roe and Doe, Justice Blackmun pointed to In re Gault, Breed v. Jones, Goss v. Lopez, and Tinker v. Des Moines School Dist. Id. at 74-75.
that right, the Court concluded that the law could be upheld only upon a showing of some "significant state interest" not present in the case of an adult. The Court concluded that neither interest was likely to be advanced by a requirement of parental consent "where the minor and the non-consenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure."

The right of "privacy" on which the Court's opinion relied is an ambiguous concept. It has been a dozen years since the right was established in *Griswold v. Connecticut*, but experience has not yet succeeded in defining and categorizing its various aspects. It is clear, however, that "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." The right to have an abortion, the Court has recognized, is of the latter sort.

If the Court meant to say in *Danforth* that Missouri's statute was invalid because some unmarried pregnant women, not yet 18, were sufficiently mature and independent to make their own decisions regarding abortion, then recognizing their right to autonomy in the decision would seem a natural extension of *Roe v. Wade*. There are strong indications, however, that the Court intended to unshackle the right of privacy from the age or maturity of the pregnant minor altogether.

---

97. *Id.* at 75.
98. *Id.*
99. *Id.*
100. 381 U.S. 479 (1965).
103. 410 U.S. 113 (1973). Such a reading of the Court's opinion is suggested by the qualified recognition of a "right of privacy of the competent minor mature enough to have become pregnant." 428 U.S. at 75 (emphasis added). It might also be inferred from Justice Stevens' dissenting statement: "The Court assumes that parental consent is an appropriate requirement if the minor is not capable of understanding the procedure and of appreciating its consequences and those of available alternatives." *Id.* at 104. But Justice Stevens' opinion went on to say that the Court also seemed to presume any minor to be capable who had "the capacity to conceive a child." *Id.* at 105.
104. Justice Stevens understood the Court to assume "that the capacity to conceive a child
The majority's opinion did explicitly note that not "every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy."\(^{105}\) The Court's conclusion,\(^{106}\) on the other hand, seems to be that even those too young or immature to give effective consent have a right of privacy which protects them against state delegation to their parents of "an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."\(^{107}\)

The same day *Danforth* was decided, the Court cast some light on who may make decisions for an immature child once the parental veto has been eliminated. In *Bellotti v. Baird*,\(^{108}\) the Court considered an attack on a Massachusetts statute which, according to the plaintiffs, did "not permit abortion without parental consent . . . in the case of a minor incapable of giving consent, where the parents are irrationally opposed to abortion."\(^{109}\) Unlike Missouri's statute, however, the Massachusetts law provided that if parental consent were refused, "consent may be obtained by order of a judge of the superior court for good cause shown . . . ."\(^{110}\) Although the Act had never been construed by the Massachusetts courts, the three-judge district court held it invalid because it read the "good cause" requirement as protecting parental rights "independent of, and hence potentially at variance with, [the minor's] personal interests."\(^{111}\) The Supreme Court vacated the judgment and ordered that the question of the appropriate construction of the Act be certified to the Massachusetts Supreme Judicial Court.\(^{112}\) It found that the construction suggested by the Massachusetts Attorney

and the judgment of the physician are the only constitutionally permissible yardsticks for determining whether a young woman can independently make the abortion decision." *Id.* at 105. Justice White's dissent on this point, in which the Chief Justice and Justice Rehnquist joined, rested on the conclusion that the Court had effectively stripped the immature minor of the protection states had traditionally given her and were entitled to give her, against "immature and improvident decisions." *Id.* at 95.

105. *Id.* at 75.
106. *See id.* at 74-75.
107. *Id.* at 74.
109. *Id.* at 146.
112. 428 U.S. at 151-52. Abstention is appropriate not merely where construction by the state judiciary will obviate altogether the need for a federal constitutional decision, but also where a state decision may avert that necessity in part, or even materially change the nature of the problem. Carey v. Sugar, 425 U.S. 73, 78-79 (1976); Colorado River Constr. Dist. v. United States, 424 U.S. 800, 813-14 (1976); Kusper v. Pontikes, 414 U.S. 51, 54-55 (1973); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500-02 (1941).
General and the other appellants would mean that even a minor unable to give informed consent could get a court order without consulting her parents, by showing that abortion was in her own "best interests."113

The conclusion which emerges from Danforth and Bellotti, then, is that the right of privacy, which before had only protected the individual's interest in autonomous decisionmaking, has been extended to embrace the incompetent individual's interest in having decisions made in his own best interests. The best interests of the child, when child and parents disagree, are to be determined by a court according to its own standards.114

B. THE RIGHT TO PURCHASE CONTRACEPTIVES: CAREY v. POPULATION SERVICES INTERNATIONAL

If Danforth and Bellotti left some uncertainties about the due process rights possessed by immature minors, the situation was not much clarified by Carey v. Population Services International,115 decided last Term. Section 6811(8) of the New York Education Law made it a crime for any person to sell or distribute any contraceptive of any kind to a minor under the age of 16, and for anyone other than a licensed pharma-

113. The Court stated:
   The picture thus painted by the respective appellants is of a statute that prefers parental consultation and consent, but . . . permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interests. The statute, as thus read, would be fundamentally different from a statute that creates a "parental veto."

114. Justice Stewart, whose concurrence in the Danforth opinion was joined in by Justice Powell, put the two cases together in this fashion:
   With respect to the [Missouri] law's requirement of parental consent, § 3 (4), I think it clear that its primary constitutional deficiency lies in its imposition of an absolute limitation on the minor's right to obtain an abortion. The Court's opinion today in Bellotti v. Baird, post, at 147-148, suggests that a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child.

cist to distribute contraceptives to persons over 16.\textsuperscript{116} Although it had not previously done so, the Court announced that the adult's "right of access to contraceptives" was a fundamental right protected by the due process clause of the Constitution, because it affected the individual's "'decision whether to bear or beget a child.'"\textsuperscript{117} Given the burden New York's law imposed on that right, the Court examined and rejected as not sufficiently compelling the state's asserted interests in contraceptive quality control, in avoiding the sale of contraceptives by young people, and in facilitating enforcement of the other provisions of the statute.\textsuperscript{118}

With respect to children under 16, Justice Brennan's plurality opinion\textsuperscript{119} announced that "the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults."\textsuperscript{120} Indeed, the opinion went so far as to state that this interest of the minor under 16 occupied the status of a "fundamental right."\textsuperscript{121} Moreover, if\textit{Danforth} and\textit{Bellotti} left any lingering doubt as to whether an immature minor, incapable of making her own abortion decision, possessed a due process right to have the decision made in her best interests, \textit{Carey} seems to have laid it to rest. The right of access to contraceptives recognized by a majority of the Court is one held by all minors, of whatever age or maturity, who may have an interest in procuring them. Since New York was unable to demonstrate that any significant state interest, such as discouraging sexual activity among the young, was furthered by restrictions on that right, the plurality found the provisions of section 6811(8) unconstitutional.

\textsuperscript{116} Id. at 681. The law also forbade advertising and display of contraceptives. An exception to § 6811(8) was provided in § 6807(b), which permitted a physician to dispense contraceptives to patients of any age if he deemed it "proper in connection with his practice." Id. at 681 n.1.

\textsuperscript{117} Id. at 685 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

In striking down state regulation of the use of contraceptives in Griswold v. Connecticut, 381 U.S. 479 (1965), the Court emphasized the individual interest in keeping secret "the sacred precincts of marital bedrooms," and stressed that its decision did not affect laws "regulating their manufacture or sale." 381 U.S. at 485-86. In\textit{Eisenstadt}, the Court held that the equal protection clause afforded unmarried individuals the same right to procure contraceptives as it did married individuals, but declined to say exactly what that right was. 405 U.S. at 453.

\textsuperscript{118} 431 U.S. at 690-91. The Court also held invalid the restriction on advertising and display. Id. at 700-02.

\textsuperscript{119} Justice Brennan's opinion on this point was joined by Justices Stewart, Marshall, and Blackmun.

\textsuperscript{120} 431 U.S. at 691-96.

\textsuperscript{121} Id. at 696 n.22.
Justice Brennan's opinion is odd in its insistence that the right in question was the minor's right to make "decisions affecting procreation," for it simultaneously recognized that minors have "a lesser capability for making important decisions." In fact, he made it clear that the "decision proceeds on the assumption that the Constitution does not bar state regulation of the sexual behavior of minors." If it is true that the minor has no right to engage in sexual relations, it is difficult to see how he or she has a right to make any meaningful decision "affecting procreation" at all.

It appears, therefore, that the right of privacy about which the Carey opinion speaks fits comfortably within neither of the forms which the Court has previously been willing to recognize: the "interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions." Rather, it is a right to be protected against certain consequences—venereal disease and unwanted pregnancy—of improvident decisions to engage in sexual relations. This right is very much like the interest which the Court attempted to secure in Danforth and Bellotti, with this significant difference: the decision whether or not to abort was seen as having serious consequences no matter how it was made, and since it would have to be made differently for different individuals, judicial assistance was necessary in the case of immature minors. The anti-contraceptive statute in Carey, however, failed because the state did not demonstrate that any harm would follow from selling contraceptives to minors, although serious consequences might ensue if they were not made available. New York's argument that sexual activity in itself was harmful to minors (a proposition the Court did not dispute), and was likely to increase if contraceptives were made freely available, was found unsupported by any evidence.

Viewed in this light, Carey has two interesting implications. The first is apparent from the burden of proof the Court imposed on the

122. Id. at 693.
123. Id. at 693 n.15.
124. Id. at 694 n.17.
125. See note 101 and accompanying text supra.
126. Justice Stevens objected to § 6811(8) not because it deprived minors of an interest in "making certain kinds of important decisions," but because it randomly imposed a "government-mandated harm," pregnancy and venereal disease, on sexually active minors. 431 U.S. at 715-16. Justice White concurred in the result "primarily because the State has not demonstrated that the prohibition against distribution of contraceptives to minors measurably contributes to the deterrent purposes which the State advances as justification for the restriction." Id. at 702-03.
127. 431 U.S. at 696 (Brennan, J.), 702-03 (White, J., concurring).
state to demonstrate that harm would follow from making contraceptives unrestrictedly available. Although Justice Brennan's opinion spoke at times of a mere rationality standard, it demanded "supporting evidence" that "limiting access to contraceptives [would] in fact substantially discourage early sexual behavior"; it is clear that this closer scrutiny was subscribed to by a majority of the Court. It is not difficult to understand the Court's acceptance of the proposition that the complete unavailability of contraceptives might result in increases of venereal disease and unwanted pregnancy, given the fairly well documented incidence of sexual activity among teenagers. But the ring of Gyges argument advanced by the state, that sexual activity would increase if its more obvious adverse consequences could be avoided, is at least not irrational. The possibility was in fact admitted by several of the commentators cited by the Court and the empirical evidence offered on the deterrence question showed only that many adolescents engage in sexual activity without regard to the availability of contraceptives. The rejected propaganda argument—that failure of the state to disapprove of the purchase of contraceptives could in itself encourage sexual activity—was one the Court had accepted on equally slender evidence in the obscenity context. The point is that

128. \textit{Id.} at 696.
129. \textit{Id.} at 695-96 (Brennan, J.) (emphasis added).
130. \textit{See id.} at 691-99 (Brennan, J.), 702 (White, J., concurring) ("the State has not demonstrated that the prohibition against distribution of contraceptives to minors measurably contributes to the deterrent purposes which the State advances as justification for the restriction") (emphasis added). The Court's approach seems to reflect an application to the due process clause of a model used to explain the Burger Court's equal protection cases and typified by a constitutional requirement "that legislative means must substantially further legislative ends." \textit{See} Gunther, \textit{The Supreme Court, 1971 Term—Forword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 20 (1972).}
132. \textit{See} Reiss, \textit{Contraceptive Information and Sexual Morality, J. Sex Research,} April 1966, at 51, 52 (cites Kinsey report for proposition that "only" 44% of his females gave "fear of pregnancy" as their reason for restricting coitus); Note, \textit{supra} note 21, at 1010 ("[I]t is likely that preventing access to contraceptives has some deterrent effect on sexual conduct...”).
133. \textit{See note 131 supra.}
134. \textit{See} 431 U.S. at 715 (Stevens, J., concurring).
135. In Ginsberg v. New York, 390 U.S. 629 (1968), the Court upheld a New York law that made it a criminal offense to sell to a minor under 17 "any picture... which depicts nudity... and which is harmful to minors," or "any... magazine... which contains... [such pictures]..."
the Court did not simply choose to reduce one set of acknowledged harms (pregnancy and venereal disease) at the cost of increasing another (the mental and emotional problems associated with sexual activity by children), for it is far from clear that sexual activity does increase in proportion to the availability of contraceptives. Rather, the Court read the Constitution as affording minors a special measure of protection against certain kinds of adverse and enduring consequences, though its decision on the minor's behalf might in some cases lead to equally harmful consequences of another sort.

The second interesting implication of Carey arises from its clear indication that New York could not delegate the decision on contraceptive access to parents any more than it could forbid access altogether. Justice Brennan stated that "less than total restrictions on access to contraceptives that significantly burden the right [of a minor] to decide whether to bear children must also pass constitutional scrutiny." Although New York permitted physicians but not parents to make a final decision on the child's right of access, the distinction was not significant for the Court's purposes. If the conflict in Carey is really, as it

. . . and which, taken as a whole, is harmful to minors." Id. at 633. The Court noted that "the growing consensus of commentators is that 'while these studies all agree that a causal link has not been demonstrated between obscenity and the impairment of the ethical and moral development of youngsters' they are equally agreed that a causal link has not been disproved either.'" Id. at 642 (quoting Magrath, The Obscenity Cases: Grapes of Roth, 1966 Sup. Ct. Rev. 7, 52). "[P]sychiatrists . . . made a distinction between the reading of pornography, as unlikely to be per se harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive . . . . To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval—another potent influence on the developing ego.'" 390 U.S. at 642-43 n.10 (quoting Gaylin, Book Review, 77 YALE L.J. 579, 594 (1968)).

Justice Brennan's attempt to distinguish Ginsberg, echoing similar sentiments in the district court's opinion, Population Servs. Int'l v. Wilson, 398 F. Supp. 321, 332 (S.D.N.Y. 1975), is a bit confused. According to him, a more imposing burden of persuasion could be required in Carey because "Ginsberg concerned a statute prohibiting dissemination of obscene material that it held was not constitutionally protected. In contrast § 6811(8) concerns distribution of material access to which is essential to exercise of a fundamental right." 431 U.S. at 697 n.22. But the Ginsberg Court explicitly noted that the magazines involved were not obscene for adults. 390 U.S. at 634. And the conclusion that the materials in question were obscene as to minors, i.e., that minors did not have a fundamental free speech right to procure them, was established only after it was concluded that the legislature had not acted irrationally in deciding that exposure to the designated materials was harmful to minors. Id. at 641-43.

136. 431 U.S. at 696 n.21 (Brennan, J.), 714-16 (Stevens, J., concurring).
137. Id. at 697.
138. Section 6811(8) forbade even parents to distribute contraceptives to their minor children. 431 U.S. at 708 (Powell, J., concurring). A doctor, however, was permitted to dispense such contraceptives as he deemed "proper in connection with his practice." See note 116 supra.
139. "Such ‘absolute, and possibly arbitrary’ discretion over the privacy rights of minors is precisely what Planned Parenthood condemned." 431 U.S. at 699 n.24. The outcome of the case
seems, between alternatives for minimizing the combined impact of two different types of harm to immature minors, it is at least conceivable, as Justice Powell's concurrence suggests,\textsuperscript{140} that a requirement of parental permission would increase communication between parent and child, resulting in wiser decisionmaking regarding the child's sexual behavior. It is also possible that such a statute would produce a pregnancy rate which was no higher than that resulting from the unrestricted availability of contraceptives.\textsuperscript{141} The outcome in \textit{Carey} means, though, that the state is prohibited from entrusting decisions on some matters (such as contraceptive access) to parents because the parental decision may harm the child, even though in some—perhaps most—cases, parental advice and even coerced compliance would be helpful, and its absence harmful, given the immaturity of the child.\textsuperscript{142}

itself also suggests that New York could not permit access only through parents. The appellees, plaintiffs in the district court, included: Population Planning Associates, Inc., a corporation primarily engaged in the mail-order retail sale of nonmedical contraceptives; Population Services International, a nonprofit corporation disseminating birth control information and services; Rev. James B. Hagen, director of a venereal disease prevention program which distributed contraceptives; three physicians; and a parent who claimed that New York's law inhibited his freedom to acquire contraceptives and to distribute them to his minor children. The district court decided only that Population Planning Associates and Hagen had standing, and did not consider the standing of the other plaintiffs. Population Servs. Int'l v. Wilson, 398 F. Supp. 321, 327-30 (1975). The Supreme Court held that Population Planning Associates had the requisite standing, since its operations were restricted by the law prohibiting distribution to minors, and found it unnecessary to consider the claims of the other appellees. Given the obvious impossibility of determining the consumer's age by mail, however, the Court, by striking down the relevant provision on Population Planning Associates' behalf, indicated that a state may not constitutionally restrict sales to adults. \textit{Cf.} 431 U.S. at 713 (Stevens, J., concurring) (fact that statute applied to distribution by parents was not enough to justify injunction against other applications of the statute). But see \textit{id.} at 711 n.5 (Powell, J., concurring). Moreover, had the Court wished to indicate that the statute was unconstitutional with respect to minors only insofar as it restricted parents' freedom to distribute contraceptives to their children, there was an appellee presenting precisely that issue.

Justice White, although concurring only in the result of this portion of Justice Brennan's opinion, apparently did not agree with Justice Powell's suggestion that a state might allow only parents to distribute contraceptives to minor children. \textit{See id.} at 702-03 (White, J., concurring), 708 (Powell, J., concurring).

140. \textit{Id.} at 709-10.

141. To begin with, it is questionable whether free access to contraceptives has any significant effect on the teenage pregnancy rate. \textit{See, e.g.}, 431 U.S. at 715 n.2 (Stevens, J., concurring in part); \textit{Note, supra} note 21, at 1010-11 n.67. Whatever the effect might be, it is not irrational to suppose that in their decision to withhold contraceptives, most parents would consider the improbability of any deterrent effect and the chances of pregnancy.

142. Even if we suppose that adolescent sexual activity is not deterred by the complete unavailability of contraceptives, \textit{see generally} Kantner & Zelnik, \textit{supra} note 131, at 9; Pilpel & Wechsler, \textit{supra} note 131, at 37, the possibility of access through parents would encourage discussion in cases where it might not otherwise take place. The result might often be successful discouragement of adolescent sexual behavior, presumably a desirable objective. If words alone were not enough, parents would be able to withhold contraceptives in cases where their informed judgment indicated that such actions would have the desired deterrent effect.
C. THE BEST INTERESTS OF THE CHILD: THE ROLE OF THE JUDICIARY IN CHILD BEHAVIOR AND CUSTODY ADJUDICATION

The suggestion in Danforth and Bellotti that the pregnant minor has a right to state assistance in assuring that the abortion decision is made in her best interests has a familiar ring. While it is not generally thought that judicial determinations of child custody are constitutionally required to protect the child’s rights, the parens patriae power of the state, especially during the course of the past century, has been thought to justify intervention in family affairs to make a custodial determination that is in the best interests of the child. If the state has the far more drastic power, and perhaps in some cases the duty, to sever the parent-child relationship altogether, it would seem a fortiori proper for the state to intervene on a much more limited, episodic basis to protect the child against parental manipulation or oppression.

Appealing as the analogy is, however, it is severely misleading. In the first place, custody decisions are often provoked not by the need for protection of the child, but merely incidentally to the resolution of private disputes in which the child has necessarily become involved. In divorce proceedings, often the court must choose between two possible homes, equal perhaps in advantages and disadvantages, largely because the parents themselves cannot come to agreement. A similar question arises in contested guardianship proceedings.

Perhaps more important is the fact that although the standards for intervention to provide custody in the child’s best interests are vague,
even for cases such as abuse and neglect,\textsuperscript{147} there is at least "a shared assumption that the court's child-protection function is to enforce \textit{minimum} social standards, not to intervene coercively in an attempt to do what is best or least detrimental."\textsuperscript{148} While particular events may be crucial to the determination made by the court, the decision is grounded on whether the child's environment is so detrimental that a complete transplanation is necessary for his proper development. It is doubtless because of the nature of that "shared assumption" that the indeterminancy of the "best interests" test has recently evoked widespread dissatisfaction.\textsuperscript{149} A number of commentators have charged that the judicial dislocation of the child's ongoing relations with parents, foster parents, or other adult protectors has taken place too frequently without sufficient justification. Not only is there seldom enough information about the child's existing relationships, but there are severe predictive problems surrounding the desirability of alternative placements, and a great danger of infusion of the personal values of judges, social workers, and professionals into the decision to remove a child from his home.\textsuperscript{150}

By contrast, a particular, episodic decision like that involved in \textit{Danforth} and \textit{Bellotti} is ordinarily an attempt not to enforce "minimum social standards," but rather to make a more finely tuned determination of which of two sets of adverse consequences will more detrimentally affect the adolescent. To be sure, when the parental decision not to abort entails a probability of serious danger to the child's physical health, the question may be said to resemble cases of child abuse or neglect. On the other hand, when the predominant issue is the effect that the decision will have on the minor's emotional stability and development, it is safe to say at least that the decision whether or not to abort would best be made differently for different individuals.\textsuperscript{151} More importantly, the determination of this issue by the parents, even

\textsuperscript{147} Id. at 240-41 & n.68.

\textsuperscript{148} Id. at 268 (emphasis in original); see Goldstein, \textit{Medical Care for the Child at Risk: On State Supervision of Parental Autonomy}, 86 YALE L.J. 645, 649 (1977).

\textsuperscript{149} The most widely publicized critique of the best interests approach to child custody is J. GOLDSTEIN, A. FREUD, & A. SOLNIT, \textit{Beyond The Best Interests of The Child} (1973). Freud's contributions to that book are prefigured in \textit{Alternatives}, supra note 144.

\textsuperscript{150} J. GOLDSTEIN, A. FREUD, & A. SOLNIT, \textit{supra} note 149, at 31-64; Mnookin, \textit{supra} note 144, at 257-61, 268-72.

\textsuperscript{151} This, at least, seems to be recognized by all the opinions in \textit{Danforth}. \textit{See} 428 U.S. at 67 (Blackmun, J.), 91 (Stewart, J., concurring), 94-95 (White, J., concurring in part and dissenting in part), 102-05 (Stevens, J., same). The individualized measure is also implicit in \textit{Bellotti}'s suggestion that a hearing be held to determine whether or not an abortion would be in the best interests of the minor too immature to consent.
when their conclusion differs from that of the pregnant child, takes place within a family structure which will be, if nothing else, at least intact enough to make an involuntary termination of parental custody unjustified. From this point of view, the critical premise underlying Danforth's conclusion is the largely gratuitous assumption that "the minor and the nonconsenting parent are . . . fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure."¹⁵²

Danforth, Bellotti, and Carey took certain decisions on behalf of the unemancipated child out of the hands of the parents and put them into the hands of the court. But if the Court's premise regarding the cohesiveness of the family structure is unfounded, there would seem to be a number of compelling reasons for permitting those decisions to remain with the parents. First, there is the difficulty a court would encounter in evaluating the bases for the parents' and child's respective positions. Parental objection to abortion, for example, might rest on religious principle, a desire to punish, legitimate concern for the child's emotional health, or a combination of these factors; a parental choice for abortion over the child's objection might arise from fear of social embarrassment, a concern over lack of resources, or again, a conclusion that the child would be better off emotionally. The pregnant minor's motives might include any of these, or might be as evanescent as anxiety about being pregnant during the swimming season, a desire to substitute a real baby for recently abandoned dolls, or a wish to spite her parents for entirely unrelated reasons. Though nominally opposed to her parents' position, she might unconsciously share their convictions to some unacknowledged extent.

Of course the ascertainment of mental states is not a task to which the judicial system is entirely unaccustomed. To take the most obvious example, a determination of intent is a necessary component of most criminal and many tort decisions. But intent is a relatively well-defined and narrow concept—whether a party had a particular result as his conscious objective—and one that might fairly be taken for granted in the abortion dispute. The minor intends either to have an abortion or to have the child; her parents may intend the contrary. It is motive which is relevant to the "best interests" decision. Moreover, the reasons why the minor and those who know her best would opt for or against abortion or contraception are likely to be as pertinent as any other information about what course of conduct is most desirable for the

¹⁵². Id. at 75.
adolescent.\textsuperscript{153} Again, of course, it is true that in criminal and other cases motive provides at least evidentiary matter relevant to the establishment of intent, \textit{e.g.}, revenge as motive for intentional murder. But to make a substantive, rather than evidentiary, decision about motive introduces an element of psychoanalysis that would take the matter beyond the capabilities of most judges.

The difficulty of judicial resolution is compounded by severe predictive problems. Even if it were possible to determine with some precision the psychological dynamics of the minor's present personal and family situation, it would be rash to suppose that a court could, with any degree of confidence, foresee the long-term effects of its decision on the minor. For example, would the child, after an abortion was ordered over a religious objection by the parents, come to regret the decision after several more years of assimilating the parents' views? Would the effect of parental rejection after such a decision be more severe than the consequences of childbearing would have been? On the other hand, if abortion is denied over parental objection, would the minor soon be unwilling or unable to care for the infant? What effect would the sudden projection into adulthood have on her? As with the predictive problems inherent in custody determinations, we have in this situation "[n]o theory at all . . . widely capable of generating reliable predictions about the psychological and behavioral consequences of alternative dispositions for a particular child."\textsuperscript{154}

Underlying these factual problems is the still more profound difficulty implicit in the very notion of "best" interests—choosing for the minor a system of values according to which her choices may be ranked. The outcome of either the abortion or contraception decision may depend on the value placed on emotional health, preservation of nascent life, maximization of possibilities for future lifestyles, maintenance of an accustomed standard and style of living, or even preservation of physical health. A rational adult making an identical decision on her own behalf might base her choice on any one of these values, and consider the others undesirable, or even morally repugnant. It goes without saying that a consideration of the "best" interests of a minor

\textsuperscript{153} In \textit{Bellotti} the Court, as grounds for abstention, relied heavily on the Massachusetts Attorney General's interpretation of the Massachusetts statute. According to him, "'[I]n operation, the parents' actual deliberation must range no further than would that of a pregnant adult making her own abortion decision.' . . . And the superior court's review will ensure that parental objection based upon other considerations will not operate to bar the minor's abortion." 428 U.S. at 144.

\textsuperscript{154} Mnookin, \textit{supra} note 144, at 258.
plaintiff would surely be influenced by a judge's own predilections; if not, the judge in many cases would have no less arbitrary alternative than to roll dice to choose a justification for acting one way or another.

Judicial intervention for particularized decisionmaking on the minor's behalf thus shares to a great extent the difficulties inherent in the use of the best interests standard in custody cases. While the custody decision may require more information, raise more severe predictive problems, and perhaps impose more difficult value-choices than many types of particularized decisionmaking because the question concerns an entire change of the child's environment, *Danforth*, *Bello/i*, and *Carey* also concern decisions which will radically affect future life-choices. Unlike the custody determination, localized intervention would take place when the parents are still sufficiently interested in the minor to make a total severance of the family relationship unjustified. Not only will the parents have a far more profound understanding of the child's psychological makeup and of the long-term consequences of the decision than will a court, but also their conclusion will ordinarily rest on love for the child and the family's mutual self-interest.155

Additionally, intervention by the court to make a particular decision on the minor's behalf does not impose any continuing obligation on the state, unlike the need in many custody cases to provide extended foster or institutional care.156 The temptation to intervene, therefore, is unlikely to be lessened by offsetting costs. Moreover, intervention in custodial cases is justified by the parens patriae power of the state, a power which the child cannot require the state to exercise; in contrast, the basis for intervention recognized by *Danforth* and *Bello/i* is the minor's personal due process right. This distinction might result in a more active judicial role in abortion and contraceptive decisionmaking.

In substituting judicial for parental determination of the child's best interests, *Danforth*, *Bello/i*, and *Carey* also have significant implications for a number of other contexts. None of the three cases would go so far as to inhibit a state from leaving to parents the decision whether minors may consume alcoholic beverages before attaining the state's applicable age of majority. There the consequences of denying the child's preference are far less severe than pregnancy, venereal disease, abortion, or an unwanted child. The lesson is far more easily

---


156. *Cf.* Mnnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599, 610-13 (1973) (legal responsibility for children in foster care remains with state; although foster care should be temporary, state seldom attempts to return children to natural parents).
transferred to decisions about the proper medical treatment for a sick or injured child, a decision traditionally left with parents or guardian. To be sure, a parental decision not to treat, or to treat in a particular way, affects no “privacy” interest the child may have in procreation (as the laws struck down in Danforth and Carey were said to), but it is silly to suppose this is what teenage sex is about anyway. The real due process question in Carey, Danforth, and Bellotti, if not the child’s interest in autonomous decisionmaking, is rather the restriction of life-choices through the imposition of serious and lasting consequences by state and parents. If this is so, it becomes difficult to distinguish the decision whether to operate on a spine curvature from the decision whether to refuse an abortion or deny contraceptives. In such a situation, the cases seem to indicate that the child has a constitutional right, something like due process privacy, to an independent judicial determination of her best interests uncontaminated by the religious, ethical, or psychological predilections of the parents.

Nor does there seem to be any a priori reason why the principle of “serious and lasting consequences” should be restricted to physical harm. Suppose, for example, that the state of Wisconsin permitted Amish parents to withdraw their children from public school after the fifth grade.157 Surely the deprivation of 5 years of secular education would prove a serious obstacle at least to those children who eventually leave the Amish community.158 If so, it seems the child could force a hearing on the issue of his due process entitlements.

Abortion and contraception are, of course, unique in that there is a natural lower limit to the age group interested in claiming rights to them. Thus, it might be contended that recognition of a constitutional right against state delegation of judgment to parents in those cases might not carry over mutatis mutandis to cases involving the minor’s rights in school, religious activity, work, freedom of expression, and other forms of medical care, where the harm from nonrecognition of rights does not so clearly coincide with the occurrence of a definable aspect of physical maturity. The harm that Danforth sought to avoid, however, was not simply parturition; rather, it was the possibility that the decision whether or not to abort would be made wrongly in light of the effect it would have on the minor’s mental and emotional health, family and social circumstances, and life plans and possibilities.

158. But see id. at 224 (missing 2 years would not be serious).
Faced with New York's claim in *Carey* that the state had simply made a choice between two types of harm, the Court decided to afford minors constitutional protection against—and to employ a more exacting standard of review in cases involving—the harm which the court considered more enduring and "devastating." But it is not difficult to imagine cases where decisions about the minor's education, employment, religious upbringing, medical treatment, or freedom to speak, act, or associate, if wrongly made, would have similarly profound consequences whether made at age 6 or 16.

It might also be argued that the Constitution provides special protection to decisionmaking autonomy in the abortion and contraceptive contexts because these choices involve consequences that are qualitatively different from other situations. Whether the effects are the denial of the opportunity to give birth to and raise the child, or the distresses associated with an unwanted child, prior cases have vigorously supported adults' interests in making their own choices free from state coercion. Where a reproduction decision will certainly not be intelligently made, however, the Constitution has provided the individual little substantive protection; witness the laws regulating the age for marriage and defining statutory rape. It is thus not at all clear that the Constitution protects reproduction decisions any more vigorously than it does free speech or the free exercise of religion. To be sure, the consequences of the decision whether or not to bear a child are grave, and it is of the utmost importance that the choice be made in the minor's best interest. But if *Danforth* and *Bellotti* indicate that the decision must ultimately be made by a court should the parents and child disagree, then the same should be true when the minor wants to attend public school rather than the parochial school chosen by her parents or opposes surgery which her parents feel would be beneficial.

159. See 431 U.S. at 696 & n.21.
165. See, e.g., N.Y. PENAL LAW § 130.05(5)(a) (McKinney 1975).
If Danforth, Bellotti, and Carey stand for the child's right to judicial assistance in avoiding serious and lasting consequences imposed at least in part by the state, it is perhaps fair to conclude by asking whether they in fact represent any extension of the principles underlying the procedural due process cases involving delinquency adjudication and school suspension. In both these situations the justification for the imposition of adult-style procedures rested in part on the fact that such judgments involve severe, detrimental, and lasting consequences for the minor. Surely the decision whether or not to have an abortion will affect the minor more permanently and profoundly than would any suspension from school. The difference, if there is one, cannot simply be that in the procedural due process cases the parents were aligned with the child against the state. Although that fact played an important role in In re Gault, such a suggestion would lead to the unsupportable conclusion that an adolescent could be unfairly incarcerated or suspended merely because his parents did not join his opposition to the state's misguided decision.

There are, however, at least two important distinctions between the two types of cases, one related to the nature of the decision which affects the minor, the other concerning the justification for state intervention in the decisionmaking process. When the state seeks to impose sanctions for misbehavior in delinquency proceedings or in a school disciplinary proceeding, the decision ultimately turns on whether the minor has engaged in certain proscribed conduct. When, by contrast, the state attempts to make a decision which the child is too immature or uninformed to make for himself, the minor's conduct is quite beside the point. Whether she has engaged in sexual intercourse, for example, is irrelevant to whether an abortion should be ordered. The difference is between so-called "act-oriented" and "person-oriented" decisions. The latter require for their adjudication the kinds of information that parents alone are most likely to possess. Thus, although the Constitution might well be read to protect the immature minor against certain kinds of harm caused by the state, it is wrong to characterize as "harm" the delegation of judgment—which by hypothesis cannot rest with the minor—to the presumptively most capable deci-

167. See text accompanying notes 27-51 supra.
168. See text accompanying notes 52-76 supra.
169. See text accompanying notes 48-51, 58-60 supra.
171. See Fuller, Two Principles of Human Association, in Voluntary Associations 3, 17-19 (J. Pennock & J. Chapinan eds. 1969); Mnookin, supra note 144, at 250-51 & n.130.
sionmaker: the parents. This is true even though the parents’ decision proves ultimately to be misguided, for the simple reason that there is no assurance that a court can decide better, or even less arbitrarily.172

The second distinction is related to the first, or perhaps it is simply another way of characterizing it. In delinquency adjudication and school discipline situations the state must act in the interest of the public, rather than simply in the interest of the child.173 Not only must the state take some action to contain interruptions of the school system by juveniles, but the dispositional decision in such cases is not one that can conveniently be left to parents because of the presumed bias generated by family ties and parental concern with their own children’s best interests. The same rationale does not apply to the judicial decisionmaking of Danforth, Bellotti, and Carey. There is no similar public interest which requires a decision by the government. It cannot, therefore, be said that the same factors which required judicial protection from harm in the procedural due process cases also require judicial decisions in abortion and contraceptive cases.

III. THE DEVELOPING NOTION OF FAMILY PRIVACY

The child’s interest in privacy which Danforth and Carey found protected by due process liberty was an interest in having certain decisions made consistent with the child’s best interests. But there is another facet of what is broadly considered under the heading of “privacy.” It concerns not so much the strictly individual interest in autonomous decisionmaking as it does the right to participate with others in an intimate relationship, that is, the “private realm of family life which the state cannot enter.”174 Although historically family privacy has been addressed as an issue of spousal and parental rights, the Court for the first time last Term intimated that children as well may have a constitutional interest in the family relationship which is protected by the due process clause. This recognition of the child’s right to participate in that relationship may, at least in some cases, be fundamentally at odds

172. See text accompanying notes 153-54 supra.

173. This analysis does not apply to status offenses which may be the predicate for delinquency adjudication. See, e.g., Note, Parens Patriae and Statutory Vagueness in the Juvenile Court, 82 YALE L.J. 745 (1973). But attempts to deal with such questions by legislative definition and judicial enforcement have proved singularly unproductive. See generally ABA INSTITUTE OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR (tent. Draft, 1977); Note, supra.

with the right of the state to intervene in the family relationship on behalf of the child which emerges from *Danforth* and *Carey.*

A. **HISTORICAL DEVELOPMENT: THE PARENTS' INTEREST**

The Court has frequently spoken of constitutional protection for different elements of the family relationship. Prior to last Term, however, the decisions indicated that the locus of protectible interests was in the parents alone. As a result, some commentators failed to recognize that claims for state protection of the child's right to autonomous development conflict not only with parental claims for psychological gratification, but also with the child's constitutional right to be directed, until some difficult-to-define point of maturation, according to familial patterns of growth.\(^{175}\)

One line of cases which has found due process protection for the family, while focusing on parental rights, has concerned state attempts to direct the growth of children within the context of the compulsory educational system. The earliest of these cases is *Meyer v. Nebraska,*\(^{176}\) which overturned a state law prohibiting the teaching of modern languages in elementary school. Although the Court stated that the issue was "whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the teacher by the Fourteenth Amendment," the conclusion that it did was heavily influenced by the rights of the parents themselves.\(^{177}\) The Court expressed some sympathy with "[the desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters],"\(^{178}\) but a ban on instruction in foreign languages seemed a rather roundabout way to that distant goal.\(^{179}\)

---


176. 262 U.S. 390 (1923).

177. The Court stated:

> [The liberty [guaranteed by the fourteenth amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men . . . . [Meyer's] right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.

*Id.* at 399-400.

178. *Id.* at 402.

179. "No emergency has arisen which renders knowledge by a child of some language other
Pierce v. Society of Sisters\textsuperscript{180} was more explicit regarding the parents’ rights. At issue was an Oregon law which made it a misdemeanor for parents to send children between the ages of 8 and 16 to private schools. Injunctive relief was sought by a society of Catholic sisters and by Hill Military Academy, both of which operated private schools, but the Court found that their standing to sue depended on their ability to assert the rights of their patrons.\textsuperscript{181} The Court held the law unconstitutional because the parents enjoyed a due process right to bring up children as they saw fit, free from unreasonable state interference.\textsuperscript{182}

Although the Court in both Meyer and Pierce relied on the due process clause, and although subsequent cases have repeatedly tied parental rights to that provision,\textsuperscript{183} it is clear that the values of which the Court was so solicitous were ones which today would fit more comfortably under the first amendment: the right of access to ideas protected by the free speech clause, and the free exercise of religion. The surprising thing about Meyer and Pierce is the fact that the parents seem to have been permitted to assert claims of free access and free exercise on the child’s behalf although no independent interest of their own was at stake.\textsuperscript{184} Perhaps more accurately, the parents were permitted to assert an interest which might be characterized, consistently with Meyer and Pierce, in one of at least two ways. The first, building on the familiar phenomenon of living one’s life through one’s children, might be called the parent’s right to exercise his religion through the child, and to extend through the child ideas, language, and customs which the parent believes to be important. The second, recognizing at

\textsuperscript{180} 268 U.S. 510 (1925).
\textsuperscript{181} Id. at 535-36.
\textsuperscript{182} The Court stated:

\begin{quote}
[We] think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control . . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. 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.
\end{quote}

\textit{Id.} at 434-35.


\textsuperscript{184} See, e.g., Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (characterizing Pierce and Meyer as first amendment cases).

\textsuperscript{185} See Note, \textit{Standing to Assert Constitutional Jus Tertii}, 88 Harv. L. Rev. 423, 429-30 (1974) ("The Court appears never to have heard a case in which a litigant's only assertion of harm was that the challenged action deprived third parties of their constitutional rights").
least some element of disinterested love of parent for child, might be called the parent's right to pass on to the child ideas and beliefs which the parent has found important and rewarding, and believes will contribute to the child's future happiness and goodness.

The Court also found due process protection for the family while focusing exclusively on the rights of parents in a series of cases dealing with the right to custody in a broad sense. Typical is Stanley v. Illinois,186 in which the Court held invalid an Illinois law under which the children of unwed fathers become wards of the state upon the death of the mother. Concluding that Stanley had a due process right to a hearing before being deprived of custody, the Court began with the assumption that the right at stake was "the interest of a parent in the companionship, care, custody, and management of his or her children..."187

The remaining cases protecting family rights decided under the due process clause have all concerned one aspect or another of conception and childbearing, whether it be contraception,188 abortion,189 or interference with pregnancy by the state.190 It is, however, obvious that these elements of family life are ones in which the child, yet unborn, has only the most metaphysical interest.

Cases outside the due process sphere which have protected what might broadly be called familial interests have similarly focused exclusively on the rights of the parents. The Court in Wisconsin v. Yoder,191 in striking down Wisconsin's compulsory school attendance laws as applied to Amish parents, justified its exacting scrutiny of the state's asserted interests in compulsory education by reference to the free

186. 405 U.S. 645 (1972).
187. Id. at 651. In May v. Anderson, 345 U.S. 528 (1953), the Court held that Ohio was not bound to give full faith and credit to a Wisconsin decree awarding custody of a child to the father after granting an ex parte divorce. The Court stated that "[r]ights far more precious to [the wife] than property rights will be cut off if she is to be bound by the Wisconsin award of custody" granted without personal jurisdiction. Id. at 533. Most recently in Quilloin v. Walcott, 98 S. Ct. 549 (1978), the Court held that Stanley did not require a natural father's authority to veto adoption by the mother's husband to be measured by the same standard that was applied to a divorced father. The effect of this holding, however, was simply to give "full recognition to a family unit already in existence," id. at 555, in a case where the natural father had borne no responsibility for the child's care.
188. Griswold v. Connecticut, 381 U.S. 479 (1965); id. at 495-96 (Goldberg, J., concurring); id. at 502-03 (White, J., concurring in the judgment).
exercise claims of the parents, not of the children. The Court's opinion in *Prince v. Massachusetts,* which has been used as authority for the proposition that "there does exist a 'private realm of family life which the state cannot enter,'" began by noting that the only real obstacle to upholding Massachusetts' child labor laws was whether the laws "contravene[d] the Fourteenth Amendment by denying or abridging appellant's [Sarah Prince, the aunt and custodian of a 9-year-old girl] freedom of religion and by denying to her the equal protection of the laws." Finally, the equal protection cases on which the Court has relied as support for the existence of the right of privacy have dealt with the right to marry and the problem of compulsory sterilization; again these are aspects of familial relationships in which the child has an inchoate interest at best.

B. THE RELATIONAL INTEREST

1. Smith v. OFFER

In *Smith v. OFFER,* the Court considered the constitutionality of New York's procedures for removing children from a foster home where they had resided for a year or more. The statutory and administrative scheme, which applied statewide, provided that an agency having custody of a foster child could remove the child from a foster home after providing the foster parents with 10 days' advance notice and an opportunity for a "conference" with the social services department, at which the foster parents might appear with counsel to object, and would be advised of the reasons for removal. If the child was removed after the conference, the foster parents could appeal to the department of social services for a full adversary administrative hear-

---

192. *Id.* at 230-31.
195. 321 U.S. at 160.
201. 18 N.Y. CODES, RULES, & REGS. § 450.10(a)-(d) (1977). The Court assumed that those procedures, as well as the rights of appeal, *see note 202 infra,* applied to all removals from foster homes, whether transfer was being made to another foster home, or to the natural parents. 431 U.S. at 830 n.28.
ing with a right of judicial review. In addition, if the child had been in foster care for 18 months or more, the foster parent could obtain a judicial review of the child's status before any agency decision was made. Within New York City this scheme was supplemented by regulations providing that in any case in which a foster child was being transferred to another foster home rather than to his natural parents, the foster parents could, before the child was removed, request a full hearing similar to a trial. These procedures were challenged by OFFER and a group of individual foster parents, who brought a class action suit against New York State and City officials on behalf of themselves and children for whom they had provided homes for a year or more.

The three-judge district court held the procedures invalid, concluding that any transfer of a foster child, whether to another foster home or to the natural parents, must be preceded by a hearing at which all concerned parties could appear and present any relevant information. The Supreme Court reversed.

The fundamental premise on which the foster parents based their argument for greater procedural protection was that, at least after a child has lived in a foster home for more than a year, the bond linking foster parents and foster child is strong enough to create a "psychological family" entitled to protection under the due process clause of the fourteenth amendment. Justice Brennan's majority opinion stated that it was unnecessary to decide the validity of that premise. At the same time, the Court seemed willing to accept the proposition that foster families have some liberty interest protected by the due process

203. N.Y. SOC. SERV. LAW § 392 (McKinney Supp. 1977); see 431 U.S. at 831-32.
204. 431 U.S. at 831 (citing New York City Human Resources Administration, Department of Social Services—Special Services for Children, Procedure No. 5 (April 5, 1974)).
206. 418 F. Supp. at 282.
207. 431 U.S. at 839; see, e.g., J. GOLDSTEIN, A. FREUD, & A. SOLNIT, supra note 149, at 19 ("Whether any adult becomes the psychological parent of a child is based ... on day-to-day interaction, companionship, and shared experiences. The role can be fulfilled either by a biological parent or by an adoptive parent, or by any other caring adult—but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be"); cf. Alternatives, supra note 144 (suggesting that child custody disputes be decided mainly on the basis of preserving the most important "affection-relationship" that the child has developed).
208. 431 U.S. at 847.
clause. Although the word "family" usually implies the existence of a blood relationship, the Court found that "the emotional attachments that derive from the intimacy of daily association" also deserved protection.\textsuperscript{209} Moreover, the right asserted was not merely parental, but relational—a right to "familial privacy... in the integrity of [the foster] family unit."\textsuperscript{210} Thus, the claim was one which foster parents might assert on the children's behalf as well as their own, even though the court-appointed counsel for the children and the intervening natural parents objected.\textsuperscript{211}

The Court found, however, at least two important distinctions between the foster family and the natural family. First, the foster family, because it is the creature of state law and contractual arrangements,\textsuperscript{212} has expectations and entitlements which are much more limited than those of the natural family, even in the case where deep emotional attachments develop. Perhaps more importantly, while the privacy interest of the natural family usually exists in isolation, any rights which the foster family has will almost necessarily conflict with the claims of the natural parents, who in the ordinary case will have given the child up with the understanding that it might be returned on demand.\textsuperscript{213} Because of these distinctions, the Court held that the city and state removal procedures were consistent with the standards required by procedural due process.\textsuperscript{214}

\begin{itemize}
\item \textsuperscript{209} Id. at 844.
\item \textsuperscript{210} Id. at 842.
\item \textsuperscript{211} Id. at 841-42 & nn. 44 & 45.
\item \textsuperscript{212} Id. at 845-46. In New York, foster parents are licensed by the state or certified by an authorized foster care agency. N.Y. Soc. Serv. Law §§ 375-377 (McKinney 1976). They provide care under a contract with the agency, and are compensated for their services. See 18 N.Y. Codes, Rules, & Regs. §§ 606.2, 606.6 (1977). Contracts typically reserve the agency's right to remove the child on request. OFFER v. Dumpson, 418 F. Supp. 277, 281 (S.D.N.Y. 1976), rev'd sub nom. Smith v. OFFER, 431 U.S. 816 (1977); see N.Y. Soc. Serv. Law § 383(2) (McKinney 1976). Where placement is voluntary the natural parent has a right to have the child returned, absent a court order, within 20 days of notice to the agency. N.Y. Soc. Serv. Law § 384-a(2)(a) (McKinney Supp. 1977).
\item \textsuperscript{213} 431 U.S. at 846.
\item \textsuperscript{214} Id. at 847-56. The test employed by the Court was that announced in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), which requires consideration of the nature of the private interest
\end{itemize}
The district court had faulted the city's procedure for insufficiently protecting the child's rights in several respects: it was available only on request of the foster parents; neither child nor natural parent was a party to the hearing; and, no hearing at all was provided in the case of return to the natural parents. But since the right affected, however, was "a right of family privacy," a relational interest, the Court presumed that the child would have nothing to lose by separation from a foster parent who did not care enough about him to contest the removal; such a family would have little emotional cohesion. Nor was it fatal that child and natural parent were not represented at city hearings; natural parents' rights were not at stake in removals from one foster home to another, and they would know little about foster home conditions which the foster care agency did not. Because the sole criterion for an agency's decision to remove was the child's best interests, any function performed by an independent representative for the child would be essentially duplicative. Finally, where removal was made to the home of the natural parents, the relative strengths of the rights involved permitted the agency to dispense with any prior hearing.

The Court also sustained the state procedures which provided not only a preremoval conference and postremoval hearing, but also a prior judicial hearing before any removal of a child who had been in foster care for 18 months or more. Although the latter procedure was not available to all class members, the Court saw little reason to presume that the emotional attachments being protected ripened in 1 year rather than 18 months.

Justice Stewart, although concurring in the judgment, took issue with the Court's "assumption that either foster parents or foster children in New York have some sort of 'liberty' interest in the continuation of their relationship." Since the foster family was wholly a

involved, the risks of erroneous deprivation from the procedures employed, and the relative cost and value of the alternative safeguards available. Id.

215. 418 F. Supp. at 285. The district court also found that the city removal procedure improperly overlapped with the state "conference" and postremoval hearings, Id., a finding that the Court disposed of summarily. 431 U.S. at 853.
216. 431 U.S. at 850 (emphasis in original).
217. Id. at 851.
218. Id. at 852 n.59.
219. Id. at 853.
220. Id. at 853-54.
221. Id. at 856 (Stewart, J., concurring) (joined by Burger, C.J., and Rehnquist, J.).
222. Id. at 857.
creation of state law, which conferred "no right on foster families to remain intact, defeasible only upon proof of specific acts or circumstances," there was not even a state-created liberty or property interest to which an expectation of continuity could attach. Although close emotional attachments might develop, such a development, far from being a protectible interest, would represent a breakdown of the state system, since it might hinder adjustment to a permanent home.  

2. Moore v. City of East Cleveland

In Moore v. City of East Cleveland, the Court reversed the conviction of a homeowner who had violated a city housing ordinance requiring single family dwellings and limiting the definition of "family" to include only a few categories of related individuals. Moore lived in her East Cleveland home with her son Dale and her grandsons, Dale, Jr., and John Moore, who were cousins. According to the ordinance, a family could include "not more than one dependent . . . child of the nominal head of the household . . . and the . . . dependent children of such dependent child." In Village of Belle Terre v. Boraas, the Court had sustained a similar ordinance limiting the types of groups which could occupy a single dwelling unit, finding that such a limitation bore a rational relationship to a permissible state objective.

Justice Powell's plurality opinion, noting that the ordinance in Boraas had permitted cohabitation by all who were related by "blood, adoption, or marriage," held that a different standard of review was required: "[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." Moore's decision to live with her son and grandsons, unlike Boraas which involved the decision of a group of students, was entitled to more vigorous substantive due process protection rights "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." This tradition encompasses

223. Id. at 859.
224. Id. at 857-62; see In re Jewish Child Care Ass'n, 5 N.Y.2d 222, 156 N.E.2d 700, 18 N.Y.S.2d 65 (1959).
226. Id. at 496 & n.2.
228. 431 U.S. at 499 (Powell, J.) (joined by Brennan, Marshall, and Blackmun, JJ.).
229. Id. at 503-04 (footnotes omitted).
extended as well as nuclear families. Measured by the more stringent standard, the ordinance was found to serve only marginally the city's admittedly legitimate goals of preventing overcrowding, minimizing traffic and parking congestion, and avoiding undue financial burdens on the public schools. Justice Stevens, who concurred in the judgment, would simply have held that the East Cleveland ordinance deprived Moore of the right to use her property as she saw fit, and could not be justified "under the limited standard of review [appropriate for] zoning decisions."231

In dissent, Justice White agreed that Moore's claim to family privacy represented "a liberty interest within the meaning of the Due Process Clause."232 Whatever historical or traditional antecedents her claim may have had, however, it was not entitled to the protection of substantive due process because the right to live with a particular set of grandchildren was not "‘implicit in the concept of ordered liberty.'"233 It was sufficient that the ordinance protected "the head of the household . . . and spouse, their parents, and any number of their unmarried children."234 Dissenting separately, Justice Stewart also found the case inapposite for substantive due process review because the challenged regulation "did not dictate to [Moore] how her own children were to be nurtured and reared . . . [and] does not prevent parents from living together or living with their unemancipated offspring."235

3. The Implications of Offer and Moore

With respect to the proposition advanced here—that the child's right to parental direction is the correlate of, and equal in strength to, the parent's right to guide the child—it must be admitted that Offer and Moore give only indirect support. Neither case dealt with the garden variety family relationship: Moore concerned the mutual rights of grandmother and grandson; Offer concerned the rights of foster parents and foster child. Nevertheless, both cases recognize for the first time that family rights are relational—that there can be no right in the parent which does not have its correlative in the child.

230. Id. at 499-500.
232. Id. at 547.
233. Id. at 549; see Palko v. Connecticut, 302 U.S. 319, 324-25 (1937).
234. 431 U.S. at 550.
235. Id. at 536 (Stewart, J.) (joined by Rehnquist, J.). Chief Justice Burger would have affirmed because Moore had failed to avail herself of the administrative remedy provided in the city's variance procedure. Id. at 521.
The nature of those rights was most clearly explicated in *Offer*, where a majority of the Court was willing to assume, although it explicitly did not decide, that the foster family was entitled to the protection of the due process clause because the intimacy of its interaction constituted a "liberty" interest. Although prior cases had spoken only of the parental interest in childrearing and "promoting a way of life," *Offer* clearly attributes an interest to all family members involved. The contest was not simply a triad of foster parents, natural parents, and state; the children themselves were plaintiffs. Indeed, although the district court had appointed independent counsel to represent the children, the Court found that the foster parents could also assert the children's "right to familial privacy," since "this interest... to whatever extent it exists, belongs to the foster parents as much as to the foster children."*

The Court ultimately rejected the procedural safeguards granted by the district court, but the grounds for its rejection were at times revealing. In overturning the judgment that the "independent review" administrative proceeding should be provided as a matter of course, rather than only upon request of the foster parents, the Court noted that if the foster parents did not care enough about the child to request a hearing, then the emotional relationship sought to be protected would not be present in any event.

Undoubtedly the most significant aspect of *Offer* is that the majority was tentatively willing to attribute to the foster family the right of family privacy which, in prior cases, had been attributed only to natural parents. The significant distinctions which Justice Brennan's opinion noted between foster and natural families were simply that the former is a creature of state law, with consequently diminished

---

236. 431 U.S. at 844.

237. *Id.* at 818-21 & n.4.


239. 431 U.S. at 842 & n.45. Helen Buttenwieser, independent counsel for the children, maintained throughout the litigation that the foster parents had no constitutional interest independent of the children's, and that the children's best interests would not be served by the adversary hearing process. See 418 F. Supp. at 278.

240. 431 U.S. at 850-51 & n.57.
CHILD, PARENT, AND STATE

Neither distinction suggests that familial rights which are relational in the foster family would not also be relational in the natural family. Justice Stewart in fact indicated affirmatively that the natural family's right is relational.242

In Moore, of course, only the surrogate parent, not the child, was a party. The plurality opinion, however, spoke throughout of Moore's right, not simply as that of a parent to extend her own persona through her children's children, but as a participatory due process right accruing to her as a member of a family.243 And that right, which the plurality recognized for the extended family, was one that the dissents of Justices Stewart244 and White245 were willing to attribute at least to the more traditional nuclear family.

C. PARENT, CHILD, AND THE RELATIONAL INTEREST

1. The Role of the Parents

Not surprisingly, the emphasis on parental rights in the familial relationship, to the exclusion of whatever interest the child might have in the relationship's integrity, has increased the willingness of both commentators and courts to advocate state intervention whenever it might be appropriate to preserve the child's autonomous development with regard to health, education, or sexual or social maturity.246 If the parental interest is merely one in living vicariously through the child, or in perpetuating for the parents' own sake ideals and customs they find

---

241. Id. at 850-51 (Brennan, J).
242. Id. at 862-63 (Stewart, J., concurring in the judgment).
243. Id. (emphasis added).
244. See id. at 536-37 (Stewart, J., dissenting).
245. See id. at 549-51 (White, J., dissenting).
important, the attitude is easy to understand. After all, the mere fact that the parental interest is constitutionally protected should not mean that the state cannot intervene to safeguard the child’s best interests against a parental desire for psychological gratification. In the exercise of their rights, parents must, of course, necessarily affect the behavior and thoughts of the child, but it would be fully consistent with a recognition of the parental right to say that it ends at the point where the child’s rights begin. If, on the other hand, it is assumed that there is some element of disinterestedness in parental control over the child’s conduct and environment, then it is considerably more difficult to justify state intervention on the child’s behalf as merely rescuing the child from parental self-aggrandizement.

The real question, given this latter assumption, is whether the parent or the state is better able to determine the child’s best interests. What is important about Moore’s and OFFER’s recognition of the child’s relational interest in family privacy is its necessary implication that the answer to that question is the parent, not the state.

It is the parents who are most familiar with the effects which a particular decision might have on their child. They are also in the best position to understand the motives behind a child’s wishes and, indeed, to know what the child’s unexpressed wishes are. A family right to autonomy would maximize the communication between family members. Moreover, family members are likely to be more capable than the state of providing the kind of continuing understanding and care


248. The force of that conclusion is not attenuated by the suggestion in OFFER that foster families, as well as natural ones, might be entitled to due process protection of their privacy rights. It is certainly true that by approving New York’s administration of its foster family program the Court indicated that a state could determine the claimants’ respective rights of custody, and make that decision on the basis of the child’s best interests. A custody decision by a state, however, is very different from a state deciding that the child’s welfare will be served by a certain medical treatment, or by public rather than Amish education, or by being able to have an abortion. See text accompanying notes 143-52 supra. The former decision should be solely a function of “the emotional attachments that derive from the intimacy of daily association, and from the role [the familial relationship] plays in ‘promoting’ a way of life through the instruction of children.” 431 U.S. at 844 (quoting Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972)). The latter, on the other hand, seeks to maximize the child’s possible future choices of ways of life at the expense of those that the child’s custodian would disinterestedly prefer for the child. What OFFER seems to indicate by confirming the child’s constitutional right to noninterference in the familial relationship is that the child has a right to grow up within the pattern—necessarily limited—that his or her parents think best.
necessary after any decision has been made that affects the long-term welfare of the child.

Of course, the issue concerns not merely parent-child relations in the abstract, but the constitutionality of state support for parental choices, or the wisdom of state assistance in the child's choice. The most obvious solution to this Hobson's choice would be for the state to withdraw from the field of controlling child behavior altogether, permitting child and parents to square off when they disagree and have the outcome determined by the strength of pre-existing family ties.\(^\text{249}\) The difficulty with such a solution is that children too young to break family bonds and incompetent to make certain behavioral decisions on their own behalf may nonetheless defy parental authority and by so acting compel the state to take a position. An immature child who makes a contract, attempts to marry, requests medical assistance, or tries to buy liquor acts within a legal matrix in which his ability to make a decision will determine the contractual rights or tort liabilities of third parties. Common law notions, and their statutory embodiments, regarding capacity to contract, informed consent, and the age of majority reflect a perception that up to a certain point minors are not capable of making intelligent decisions on their own behalf, and dictate that until they are, decisions ought to be made for them by some adult. Such ideas are most commonly implemented not by directions to the minor or the adult decisionmaker, but by various sanctions imposed on the third party dealing with the minor.\(^\text{250}\) Given that legal substratum, the only realistic alternatives are to vest decisionmaking authority in the parents and support their conclusion, or to provide for the independent judicial determination of the child's best interests,\(^\text{251}\) as occurred in \textit{Danforth}, \textit{Bellotti}, and \textit{Carey}. The family right of autonomy recognized in \textit{Moore} and \textit{OFFER} suggests, however, that the former alternative is the better one.

\(^{249}\) This solution was suggested in \textit{Danforth}, 428 U.S. at 75; see Note, supra note 21, at 1017-20.


\(^{251}\) The other possibility would be, of course, to abolish the role of competence and informed consent in the law of contracts and torts, and dispense with any statutory age of majority, which would amount to throwing the baby out with the bath.
2. Family Privacy and the Child's Independent Rights

The district court in *OFFER* concluded that New York's procedure for removal of a child from a foster home was invalid because, among other reasons, the "independent review" administrative proceeding was only available on the request of the foster parents. In rejecting this argument, the Supreme Court stated that if the foster parents did not care enough to request a hearing, no interest of the child was invaded by the removal from the foster home.

It is surely unobjectionable, even assuming a right of family privacy, to suppose that the state may intervene on the child's behalf when the parent, or other custodian, cares not a whit for the child. The more difficult question raised by the Court's statement concerns the circumstances under which the child's disaffection with the parent will justify the conclusion that family privacy no longer warrants enforcement of parental decisions on the child's behalf. The issue is not so much at what point in the child's development he should be considered sufficiently mature to be able to break ties with the family and strike out on his own. While hard to define, that point is surely reached between the ages of 12 and 21; isolating its occurrence for each individual requires considerably more psychological insight than can be furnished here. Rather, the issue is whether it makes sense for the law to posit for the child both a right to parental direction and a right to make, or rather to have made by a court, certain decisions over the combined objections of both state and parents, before the child is sufficiently mature to sever familial ties. It has already been suggested that deciding whether an immature minor should have an abortion, or should continue to attend a public school over her parents' religious objection, is a task for which the judiciary is especially ill-equipped. What has not been considered is the effect which enforcement of parental decisions against an unwilling minor will have on the child's development and relation with his family.

It is important to recognize that in many cases the conflict between parents and child, despite the minor's forceful objections, will be a false one. Suppose, for example, a child is afflicted with severe curvature of the spine. His parents may favor a difficult operation to fuse the spine, because of the effect they perceive the deformity is having on his emo-

254. *See* notes 153-66 and accompanying text *supra.*
tional development and social adjustment in school. The child may well express opposition to the operation, out of fear, and yet be more gravely, though less poignantly, disturbed by the daily difficulties that the deformity presents for him. In such a case the minor’s opposition may in fact be a plea for more support in carrying out a decision which, ultimately, he favors just as his parents do. The principle of family privacy is perhaps most usefully employed in such “conflict,” where parents can best perceive the child’s uncertainty, and are in a unique position to assist him in coping with the consequences of the decision.

When the child’s disagreement with a parental choice is more firmly entrenched, the difficulties inherent in the state aligning with the parents, or intervening on the child’s behalf become most pointed. The problems are nicely illustrated by a possibility the Court was able to avoid in *Wisconsin v. Yoder.* There the Court held that the state had no parens patriae power to compel Amish children to attend secondary school against the religious wishes of their parents. Justice Douglas, dissenting in part, suggested that if the children had no such scruples, and in fact wanted to attend school, a proper recognition of their right to religious freedom would require a court to align itself with the children, rather than with their parents. Such a conflict becomes intractable because the position chosen by the children—whatever their age or maturity—far from being irrational, is one to which the great majority of us would subscribe.

If one begins by assuming that the eighth-grade student is not sufficiently mature to decide the future course of his education autonomously there are several reasons why the principle of family privacy provides the most acceptable solution. It bears repetition that a judicial decision purportedly in the child’s best interest entails severe complications in collecting relevant information, making a prediction as to the minor’s future behavior, and most particularly in choosing values on which to base a decision as to his “best” interests.

One suggestion that attempts to avoid the problem of value choices would weigh the possible decisions according to the probability that they would advance the child’s capacity for individual auton-


257. *Id.* at 241-43.
omy, his capacity to choose what his parents might not have chosen for him or for themselves. The commitment to individual autonomy is of course no less than a commitment to the puritan ethic or hedonism, a choice for a particular value. As applied to the situation which Yoder almost presented, however, such an approach would permit the child, within limits, to begin to exercise his own ability to hold an independent view by choosing a commitment widely shared in America: public education. Selection of autonomy as the decisional criterion also seems to sidestep the very real possibility that state intervention on the child’s behalf will ultimately lead to the standardization of youth that was condemned in *Meyer v. Nebraska*.

Such a solution conflicts with any wholehearted commitment to the notion of familial privacy recognized in *Moore* and *OFFER*; on the other hand, it seems consistent with the indications in *Danforth*, *Bellotti*, and *Carey* that the due process clause affords even the immature minor a right to express and have heard his views regarding significant life-choices. For these reasons, it appears that the effort to augment individual autonomy in parent-child conflicts might ultimately be self-defeating; and any such attempt would undoubtedly undermine significant values that can be preserved only by maintaining family integrity until the child reaches psychological, if not chronological, maturity. In the first place, intervention on the child’s behalf only when he appeals, over parental objection, to otherwise widely shared social values is likely to lead to the standardization of behavior among the young. The state’s decision to intervene on behalf of parent or child will ultimately tilt toward the lesser nonconformity. Apart from this, autonomy in the future adult may best be ensured not by giving the child a potentially decisive vote in all crucial decisionmaking processes at an early age, but by providing the child with the security of a stable environment with relatively constant values which may serve

---

261. 262 U.S. 390, 402 (1923).
262. *See id.*
as a pattern for identification and a safe target for aggression.\textsuperscript{263} To be sure, there is little hope of fostering genuine independence if the child is excluded altogether from family councils and not informed of the justifications for her parents’ conclusions. On the other hand, the extent of the autonomy given must be appropriate to the child’s age, with the parents retaining ultimate control.\textsuperscript{264}

Perhaps even more significantly, permitting the immature child to seek state intervention to oppose parental choices deprives him of one of the primary benefits that Moore and Offer attributed to the familial relationship: “the role it plays in ‘promot[ing] a way of life’ through the instruction of children.”\textsuperscript{265} This notion encompasses more than the mere socialization and education of the young so that they may become productive and well-adjusted participants in society. Any of numerous types of upbringing can satisfactorily accomplish that task. The nonfungible components of the familial relationship are rather the sense of belonging and having roots in a distinct tradition, which derive their strength and importance from the fact that they deviate in crucial respects from otherwise widely shared social values. Their importance to the individual is not only that they provide a sense of identity, different from others, but also that they allow the family to act as a buffer between the family member and the larger community.\textsuperscript{266}

Finally, state intervention on any side but that of the parents almost necessarily interferes with “the emotional attachments that derive from the intimacy of daily association.”\textsuperscript{267} As Goldstein, Freud, and Solnit have observed, although adolescents may give the impression that they wish a severance of family relationships, any breaks should be initiated by the adolescents themselves in order not to be perceived as abandonment or rejection.\textsuperscript{268}

To permit the Amish child to remain in public school over his parents’ objection could well result in precisely that sort of rejection; it would surely strain relations between parent and child to such a degree that they would become less intimate. To be sure, intervention on the

\textsuperscript{263} See J. Goldstein, A. Freud, & A. Solnit, supra note 148, at 9-52.
\textsuperscript{264} Conger, A World They Never Knew: The Family and Social Change, 100 Daedalus 1105, 1125-28 (1971).
\textsuperscript{266} See also R. Nisbet, The Quest for Community 212-79 (1969).
\textsuperscript{267} J. Goldstein, A. Freud, & A. Solnit, supra note 148, at 34.
parents' behalf to permit withdrawal of the child from school will do nothing to dissolve the child's disaffection with that parental choice. It is far more likely, however, that he will come to see things their way than it is that the parents will abandon their notions concerning the value of a traditional Amish upbringing.

The maturing child always retains, as do the parents, the option of breaking family ties, and becoming responsible for himself. Until he is ready to do that, however, the preservation of parental affection is probably more crucial to his psychological development than is the type of education which he receives. As long as the family remains intact, the rights of a child are best protected by state support of parental decisions, whereby the child may receive the full benefit of parental care and control.