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PRIVACY OR PROTECTION: THE JUVENILE DILEMMA

I. INTRODUCTION

For little over a decade, the United States Supreme Court has been active in delineating the constitutional status of children vis-à-vis their parents and the state. While the Court has consistently upheld the constitutional rights of children, it has been reluctant to establish clear guidelines as to the nature and extent of a child’s interests, particularly when these interests are in conflict with those of his parents.

The Court’s most affirmative statement in this area has come in its recent recognition that minors possess a right to privacy. Thus far, this “privacy” right has been asserted only in the cases involving minors’ decisions regarding abortions and the use of contraceptives. This comment analyzes current case law and distills elements that may be used in determining the existence and extent of a minor’s “right of privacy” in factual contexts other than those involving contraceptives and abortion. Part II reviews the traditional treatment of children in our society and Part III examines the United States Supreme Court’s selective incorporation of constitutional rights with respect to children. The comment next considers the Court’s recent recognition of children’s privacy rights as a basis for the further extension of constitutional protections to minors. In this regard, Part IV examines the general development of the constitutional right to privacy with particular emphasis on the nature of children’s privacy.
Part V examines the limitations that state and parental authority place on the scope of children's constitutional rights and questions whether status as a minor is a proper justification for minimizing a child's constitutional safeguards. Various decisions discussed below have qualified the constitutional protections given to minors to such an extent that, in order to understand the scope of a child's right to privacy, it is necessary to examine the context — school, family, hospital — in which minor's rights are asserted, as well as the reasons given to support the curtailment of these rights. The comment concludes by considering the Court's probable future treatment of minors' constitutional rights and discusses the factors that the Court focuses on in determining the scope of children's rights.

II. TRADITIONAL TREATMENT OF CHILDREN

The twentieth century attitude toward children in our society has been rooted in a legal paternalism based on the state's interest in protecting health and preserving life. Under the doctrine of parens patriae, or parent substitute, the state is seen as having a duty to protect and provide for the welfare of children whose parents have failed to do so. In addition, our society recognizes that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."5

John Stuart Mill felt that it was necessary to limit the freedom of children so as to protect them from "their own actions as well as against external injury."6 Our society has traditionally endorsed that principle and recognizes "that the


"In Ex Parte Crouse, 4 Wharton 9, 11 (Pa. 1839), the parens patriae doctrine suddenly emerged, setting forth a supposed inherent right of the state as superior parent for those children whose parents were deemed unfit, a right on the part of the state to separate them for the supposed welfare of the child and the state." Nat'l Juvenile Law Center, Law and Tactics in Juvenile Cases 2 (2d ed. 1974).

5. In more recent times, "the Latin phrase [has proven] to be a great help to those who [seek] to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance." In re Gault, 387 U.S. 1, 16 (1967).


status of youth differs from the status of adulthood." Consequently, although children are afforded certain protections, numerous rights and privileges enjoyed by adults are denied to them.\footnote{W. Stapleton & L. Teitelbaum, In Defense of Youth, A Study of the Role of Counsel in American Juvenile Courts 11 (1972)[hereinafter cited as In Defense of Youth].}

In recognizing the fundamental differences between children and adults, the juvenile courts were established by the state to deal solely with the unique problems and needs of children. The rationale of the juvenile court system is to rehabilitate delinquent children and to protect them from the impersonal treatment and harsh consequences of the adult criminal justice system.\footnote{See, e.g., McKeiver v. Pennsylvania, 403 U.S. 528 (1971)(juveniles are denied the right to jury trials in delinquency adjudication proceedings).} However, the state in this \textit{parens patriae} role somewhat inconsistently limits the application of adult court procedures and constitutional protections to juveniles within the juvenile court system, allegedly in order to serve the "state's interest in promoting the health and growth of children."\footnote{In re Scott, 24 Cal. 3d 395, 401, 595 P.2d 105, 155 Cal. Rptr. 671 (1979).}

It is necessary to review the nature of the juvenile court system because the state has asserted interests in the system that the courts have considered in deciding whether to extend a particular constitutional right to children. The state has two basic interests in limiting children's procedural protections within the juvenile court system.\footnote{See generally Eber, Application of the Rules Against Search and Seizure to Juvenile Delinquency Proceedings, 16 Buffalo L. Rev. 462 (1966-67).} First, it is argued that the non-adversary and civil character of juvenile court makes such protection unnecessary.\footnote{See In Defense of Youth, supra note 7, at 12-23.} The state acts in the child's best interests within the juvenile court system, which is ostensibly modeled after the family structure rather than the criminal justice system. The state's theory seems to be that, since there is no fear that the minor will be "convicted" or "labeled" in the juvenile court system, there is no need for adult procedural protections.\footnote{See Kent v. United States, 383 U.S. 541, 554-55 (1966).}

\footnote{Although juvenile delinquency dispositions are aimed at rehabilitating rather than punishing errant youth, children are oftentimes deprived of their freedom as a result and are labeled "delinquent," which carries similar negative connotations to that of "convict" and creates similar disabilities. See, e.g., In re Winship, 397 U.S.}
The second and more persuasive justification given by the state for limiting the use of adult procedural protections in the juvenile court system is the need to preserve the personal nature of juvenile proceedings. The argument is that, the introduction of adult safeguards into the juvenile court system would deprive the system of its "informality, flexibility or speed," all of which are central to the state's intimate parental relationship with a child. Therefore, the state has advocated limiting the use of adult procedures and protections in juvenile proceedings because they would threaten or at least encumber this protective purpose of the juvenile court system.

In the past decade, however, the state's assumption that the legal safeguards inherent in the juvenile court system adequately protect the rights of children has been challenged. As a result of evidence of abuse of children's rights and of a startlingly high rate of recidivism among children treated in the juvenile system, courts have begun to recognize the need for applying constitutional protections to children.

III. THE EXTENSION OF CONSTITUTIONAL RIGHTS TO CHILDREN

It was not until the last quarter century that the United States Supreme Court recognized a child's right to protection against unfair treatment by the state. The Court had previously guaranteed these rights only to adults under its inter-

17. The United States Supreme Court has stated that "there is evidence ... that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." Kent v. United States, 383 U.S. 541, 556 (1966).
18. The California Legislature noted that "[n]ot a single shred of evidence exists to indicate that any significant number of [beyond control children] have benefited [by juvenile court intervention]. In fact, what evidence does exist points to the contrary." J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 213 n.2 (1979) (quoting Report of the California Assembly Interim Committee On Criminal Procedure, Juvenile Court Processes 7 (1971)).

THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME (1967) cites evidence of the failures of the juvenile system and reports that "one-third of all delinquency cases involved repeaters . . . ." Id. at 23.
pretation of the scope of the Bill of Rights. Starting with the Court's recent determination that children are "persons" to be protected under the fourteenth amendment, the Court has gradually begun to grant due process and other constitutional rights to minors.

Although the fourteenth amendment automatically affords due process protections to adults, the Court has historically treated children's due process rights as being conditional. While it is true that constitutional rights are never absolute, even when regarding adults, adults are at least acknowledged to possess an unconditional and enforceable right to receive substantive and procedural constitutional protections in the criminal and, to a more limited extent, civil contexts. It is well settled that adults may be barred from exercising these constitutional rights, however, if countervailing state interests outweigh the adults' constitutional interests at issue.

In contrast, it seems that children are not presumed to possess constitutional rights. They must first demonstrate a justifiable need for such protections before the Court will utilize a balancing test to determine if a child's interests outweigh the state interests involved: a two-step process as opposed to the one-step balancing used by the Court in adult cases. Children's constitutional rights are thus conditional and the Court has tempered these rights by weighing the state's interests in protecting the child, and preserving the flexible and informal nature of the juvenile court system, against the child's need for, as opposed to the right to, the procedural safeguard at issue. In this regard, the Court has consistently employed a due process balancing test in determining whether to extend to children a particular constitutional safeguard enjoyed by adults.

As a result of balancing the state's protection interests against the child's due process rights to fair treatment, the

Court has thus far denied juveniles the right to a jury trial, while selectively granting the right to a reasonable doubt standard of proof in juvenile "criminal" proceedings; the safeguards of due process in a civil, as well as a criminal context; freedom of speech; and rights to equal protection against discrimination because of illegitimacy.

In its most far-reaching decision in this area, In re Gault, the Court urged that "whatever may be their precise impact, neither the fourteenth amendment nor the Bill of Rights is for adults alone." The Court held that, in the adjudicatory phase of a juvenile delinquency proceeding, the juvenile is entitled to the rights to counsel, to notice of charges, to the privilege against self-incrimination, and to the opportunity for cross-examination of witnesses when faced with the possibility of incarceration. All of these safeguards had, up to that time, been available only in adult criminal proceedings.

What is significant about this line of cases is that the Court in each instance initiated its inquiry by examining the importance of the juvenile's procedural protection at issue. The Court then weighed the consequences of denying the constitutional safeguard to the minor defendant, against the burden such procedures would impose upon the beneficial aspects of the juvenile system. Thus, what comes out of these decisions is the notion that, when the right under consideration by the Court is procedural in nature, the Court must counterbalance the state's interests in protecting children and preserving the unique nature of the juvenile system, against the child's assertion of due process rights to fair treatment.

It is important to distinguish that when a child's consti-

30. Id. at 13.
31. The Court limited its holding to apply only to the adjudicatory stage of juvenile proceedings. Id.
tutional right to *procedural* protections is at issue, the Court’s investigation will not include consideration of the child’s privacy interests because they are usually not relevant in the procedural context.\(^4\) Instead, the Court will most often focus *only* on whether the individual received the fundamentals of due process and fair treatment,\(^5\) and whether the state’s interests in preserving the unique nature of the juvenile system and in protecting children are involved.

On the other hand, in those situations where the Court is examining the potential application to children of a *substantive* right involving privacy, *both* a child’s due process rights and his privacy rights are relevant to the Court’s inquiry. In addition, any state interest in protecting the child that may justify a restriction on his rights, as well as any state interests in parental autonomy and family integrity will also enter into the balancing process. The state’s interest in preserving the informal, flexible nature of the juvenile system, however, will not be relevant in the privacy context as it often is in the procedural rights context. The specific factors that the Court examines in the privacy rights analysis, and the particular manner in which they are weighed by the Court, can best be understood after reviewing the privacy decisions which follow.

In addition, in those situations where a child’s privacy rights are involved, state interests in parental autonomy and family integrity will be weighed by the Court *against* the child’s privacy interests. The specific factors that the Court examines in a privacy rights analysis, and the particular manner in which they are weighed by the Court, can best be understood after reviewing the privacy decisions which follow.

**IV. Federal Privacy Rights**

**A. The Development of a Constitutional Right of Privacy**

As recognized by the Court in *Whalen v. Roe*,\(^6\)

the concept of a constitutional right of privacy still re-

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34. Fourth and fifth amendment cases involving the question of whether to exclude certain illegally obtained evidence or coerced confessions are unique in that both procedural due process and privacy issues are involved. In those cases, the minor should assert his rights available under the specific constitutional provision violated as well as his right to privacy.

35. *See text accompanying note 22 supra.*

mains largely undefined. There are at least three facets that have been partially revealed, but their form and shape remain to be fully ascertained. The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion. The second is the right of an individual not to have his private affairs made public by the government. The third is the right of an individual to be free in action, thought, experience and belief from governmental compulsion.37

The seminal decision in this area is *Griswold v. Connecticut*,38 in which Justice Douglas found a fundamental right of privacy to exist in the penumbra of explicit constitutional guarantees of the first, fourth and fifth amendments.39 According to subsequent interpretations of *Griswold*, the Court was concerned in that decision with unjustified governmental intrusion into personal autonomy.40

The Court further established privacy as an implicit constitutional right in the landmark case of *Roe v. Wade*.41 The majority in *Roe* held the right of privacy to "be founded in the fourteenth amendment's concept of personal liberty."42 The Court determined that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy."43 However, the Court found that "the privacy right . . . cannot be said to be absolute"44 and accordingly acknowledged that these rights could be limited "where important state interests provide compelling justifications for intervention."45

These cases establish a right to privacy, although they are not in agreement as to the particular provision of the Constitution from which the right emanates. As to the nature of the privacy right, *Roe* gives us guidance in stating that it involves only fundamental personal rights which must be weighed

37. Id. at 599 n.24.
38. 381 U.S. 479 (1965)(held invalid a prohibition against the use of contraceptives by married people).
39. Id. at 483-85.
41. 410 U.S. 113 (1973)(held that absent a compelling state interest, the state may not interfere with a woman's decision whether to procure an abortion).
42. Id. at 153.
43. Id. at 152 (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
44. Id. at 154.
45. Id. at 165-66.
against countervailing state interests. Other privacy decisions have utilized the balancing test embraced in Roe and have further defined the right of privacy as "the right of an individual . . . to be free of unwarranted governmental intrusion . . ." into matters regarding the family or involving an individual's "independence in making certain kinds of important decisions."

B. Recognition of Children's Privacy Rights

In Planned Parenthood v. Danforth, regarding a minor's right to decide whether to abort, the Court explicitly extended the right of privacy to minors. The Court reasoned that "[c]onstitutional 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.”

The Court restated this view in Carey v. Population Services International. Carey involved a state statute that made it a crime (1) "for any person to sell or distribute any contraceptive of any kind to a minor under 16 years; (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or over; and (3) for anyone, including licensed pharmacists, to advertise or display contraceptives." Justice Brennan, speaking for only a plurality of the Court, held invalid the provision prohibiting the sale and distribution of contraceptives to minors on the ground that it impermissibly interfered with a minor’s privacy rights. Justice Brennan’s opinion emphasized that minors are endowed with constitutional rights, but noted that state power over children

46. Id. at 154-59.
49. Whalen v. Roe, 429 U.S. at 599-600.
51. Id. at 74 (holding in part, that a state does not have constitutional authority to condition a minor's decision to terminate her pregnancy on parental consent).
52. Id.
53. 431 U.S. 678 (1977)(held restrictions on minors' access to contraceptives invalid).
54. Id. at 681.
55. Id. at 691-99. On the minors’ issue, Justice Brennan’s views were joined only by Justices Stewart, Marshall, and Blackmun.
may be greater than that over adults. Brennan warned that "the question of the extent of state power to regulate the conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible to precise answer." 57

Justice Brennan's observation has rung true in the Court's recent decisions. Since Danforth and Carey, the Court has obfuscated the parameters of children's privacy rights, although the Court has given some indication of the factors which play a role in limiting these rights. In both Parham v. J.R. 58 and Bellotti v. Baird 59 the Court gave great weight to the state's interest in preserving the family unit, but with opposite results. The issue in Parham was whether due process requires a hearing before a parent or guardian may commit a child to a state mental hospital. The Court acknowledged that a child has a protectible right to privacy "in common with adults," which it called a liberty interest. 60 The majority initially diluted the minor's rights by subordinating them to parents' concerns. 61 The Court then weighed them against the state interests involved and subsequently denied the child's right to a pre-commitment hearing. The Court thus treated children as having only conditional liberty or a qualified right of privacy.

Most recently in Bellotti the Court acknowledged the unique status of children in our society and further emphasized that the important state interest in the family "required that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children." 62 Although Justice Powell's opinion 63 enumerated "three reasons

56. Id.
57. Id.
58. 442 U.S. 584 (1979)(upheld a statute providing for commitment of minors to state mental hospitals by their parent or guardian without a hearing prior to commitment, but required a neutral fact-finder to take part in the admissions decision).
59. 443 U.S. 622 (1979)(held invalid a law requiring unmarried pregnant minors to obtain consent of both parents, or, when parental consent is denied, to obtain judicial approval following notification of the minor's parents as prerequisite to an abortion).
60. 442 U.S. at 608.
61. Id. at 599-600.
62. 443 U.S. at 634.
63. The Court divided 8 to 1 in holding the consent provision unconstitutional, but split 4 to 4 regarding the judicial "good cause" proceedings as a viable alternative to a parental consent provision. Id. at 652. Justice Powell's opinion was joined by
justifying the conclusion that the constitutional rights of children cannot be equated with those of adults,"64 the Court nonetheless recognized that minors are granted constitutional protections, albeit to a lesser degree than those accorded to adults. Justice Powell's opinion noted that "[a] child, merely on account of his minority, is not beyond the protection of the Constitution."65 However, consistent with the Court's decisions regarding children's procedural safeguards in the juvenile court system, the Court noted its approval of selective incorporation of constitutional protections for children, stating that "legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children."66 The Court thus reiterated its reluctance to extend all of the constitutional safeguards afforded by the Bill of Rights to juveniles.67

The principle to be gathered from these cases is that, while children are clearly "persons" as defined by the Constitution,68 and are therefore constitutionally entitled to rights of privacy, these rights are no more absolute for children than they are for adults.69 The real issue, then, is whether a child's privacy rights are more narrowly circumscribed than an adult's; "whether some different process is 'due' the juvenile because liberty means something different for him than it does for an adult."70

Although the Court weighs state interests against an adult's interests when scrutinizing an adult's privacy rights, Bellotti and Parham in particular indicate that the balancing test is somewhat different when applied to children. In the case of a minor, the Court initially limits the child's interests by tempering them with any applicable state interests in preserving the family or promoting parental authority before

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64. Id at 634. The Court's justifications for restricting minors' constitutional rights are 1) the peculiar vulnerability of children, 2) their inability to make critical decisions in an informed, mature manner, and 3) the importance of the parental role in child-rearing. Id.

65. Id.

66. Id.


68. See cases cited note 19 supra.

69. See text accompanying note 20 supra.

weighing the child's privacy interests against the other state interests involved.\textsuperscript{71} Thus, a child's right to privacy is qualified, before it even enters into the balancing process, by the interests of both the parents, as legal guardians of their children, and the state, as substitute parent under the doctrine of \textit{parens patriae}.

The extent to which a child's rights are limited, however, depends upon the context in which they are asserted and, particularly, upon whether parental interests are in conflict with the child's interests, thus jeopardizing the family unit. In analyzing children's privacy rights then, the interests involved are the child's fundamental autonomy interests, parental concerns, and important state interests. These three interests are not actually balanced against one another, but are treated by the Court as a tripartite among which it tries to reach a consensus, or a compromise.

V. LIMITATIONS ON CONSTITUTIONAL RIGHTS OF CHILDREN

A. State Limitations on Children's Rights

Although parents are legally responsible for the care and support of their children, the state has traditionally held both a right and an obligation to protect and provide for children whose parents are not performing their duties adequately. Quite apart from what either the parents or their children may wish, certain juvenile behavior is controlled by state statutes which operate as "legally imposed limitations on a child's power to decide."\textsuperscript{72} The state has generally been held to possess somewhat broader authority to regulate the activities of children in certain areas because of their inherent vulnerability and the need to provide for their welfare.\textsuperscript{73}

For example, in \textit{Prince v. Massachusetts},\textsuperscript{74} the Court upheld the conviction of the guardian of a nine year old girl for violating child labor laws by allowing the minor to sell reli-
igious pamphlets on a public street. The Court noted that "[w]hat may be wholly permissible for adults . . . may not be so for children, either with or without their parents’ presence." The Court supported state authority to limit children’s rights on the notion that "democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens . . . . It may secure this against impeding restraints and dangers within a broad range of selection." The Court went on to note that "[a]cting to guard [this] general interest in youth's well-being, the state as parens patriae may restrict the parents' control by requiring school attendance, regulating or prohibiting the child’s labor and in many other ways."

In *Ginsberg v. New York,* the Court again upheld the state’s "independent interest in the well-being of its youth." The majority validated a state statute which subjected a minor’s first amendment freedoms to restrictions which would not be constitutionally permissible if applied to adults. Under that statute, luncheonette owners were criminally prosecuted for selling materials to a sixteen year old boy that were found to be obscene with respect to minors under the age of seventeen, but which were not obscene for adults.

In justifying the state’s limitation on minors’ first amendment rights, the Court explained that "[t]he well-being of its children is of course a subject within the State’s constitutional power to regulate." The Court in *Ginsberg* described two state interests that provided a rational basis for the regulation in question. First, the court recognized the state’s independent interest in protecting children from abuse by imposing reasonable regulations on the sale of obscene materials to them. The Court accorded great weight to this protection interest. Second, the regulation aids parents in their responsibility for their child’s well-being by setting a standard for what sex-related material is suitable for minors. In examining this

75. *Id.* at 169.
76. *Id.* at 168.
77. *Id.* at 166.
78. 390 U.S. 629 (1968).
79. *Id.* at 640.
80. *Id.* at 639.
81. *Id.* at 640-41.
82. *Id.* at 639.
state interest, the Court emphasized that the state was not displacing parental authority under the statute, as it had in *Prince*, but in effect deferred to parental authority since the statute did not prohibit parents from buying and distributing obscene materials to their children. This differentiation is significant only because it bears on the context in which the minor’s rights are asserted, i.e., in the home versus in public, with parental approval as opposed to without or against parental approval.

In this regard, the Court’s approach in *Prince* and *Ginsberg* provides guidance for privacy cases. The limitations upheld in *Prince* and *Ginsberg* were justified by the state’s interest in protecting the health, welfare and morals of minors. These decisions demonstrate the Court’s willingness to restrict minors’ rights and limit parental control in certain situations. Specifically, the Court is more restrictive regarding a child’s activities in a public setting where he is potentially more vulnerable than in his own home, and a child’s conduct rather than his decision-making ability regarding personal matters. Thus, it appears that when a minor’s privacy rights are challenged by state regulation of his conduct outside of the home, the state’s interest in protecting children will outweigh both the child’s right to autonomous development and the parents’ interest in autonomous control of their child.  

Recently, however, the Court has challenged actions by the state when it restricts minors’ conduct in its role as a parent-substitute. In *Tinker v. Des Moines School District*, the Court protected minor students’ rights to non-disruptive free speech from intervention by state public school officials. The Court balanced state educational goals against students’ constitutional rights and upheld the students’ right to wear armbands in public school. The Court found that, even though school officials act in loco parentis to their students, they do not possess absolute authority over school children since the

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83. As basis for the argument that the Court accords more deferential treatment to conduct exalted in the home, see *Stanley v. Georgia*, 394 U.S. 557 (1969)(Court upheld an adult’s right to view obscene materials at home).
85. The Court in *Tinker* held unconstitutional an attempt by the state to suspend students who wore black armbands to school in protest of the Vietnam War. The majority concluded that “[s]tudents . . . are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect.” *Id.* at 511.
children's parents do not even possess such authority. Furthermore, the authority of school employees over children differs from the scope of parental authority because the educational institution does not enjoy explicit constitutional protection as does the family.

The school setting presents particular problems in defining the scope of the state's authority over minors. School officials are state employees who have a duty to enforce both school regulations and local laws on the school premises. They also have an obligation to maintain discipline in order to protect the health, safety and morality of the students. The congregation of large numbers of children in school makes their discipline and control imperative. Therefore, the state has legitimate interests in promoting the smooth operation of schools and in protecting the welfare of students. Because the students' conduct in Tinker did not affect the health, safety or morality of fellow students, the state's interest in controlling the students was not sufficient to outweigh the minors' constitutional rights. It follows, then, that the Court will give greater deference to privacy rights if the student's conduct does not significantly disrupt the school atmosphere or challenge the child's welfare.

The Supreme Court's most explicit statement regarding state limitations on privacy rights with respect to individual decision-making ability came in Roe v. Wade, which involved state interference with a woman's abortion decision. Roe demonstrates that the Court will give greater weight to a person's privacy rights, in the case of an adult, when the state is interfering with an important personal decision, such as whether to obtain an abortion or to use contraceptives. The majority in Roe called for minimum state interference with a woman's right of privacy absent a legitimate state concern for health and safety.

The privacy interest in making intimate decisions that was established in Roe was extended to minors in Planned Parenthood v. Danforth. The Court in Danforth explicitly

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86. The discussion here is limited to the grade and high school situations because higher educational institutions deal primarily with persons over the age of majority.
87. See, e.g., CAL. EDUC. CODE § 48900 (West Supp. 1980).
89. 428 U.S. 52 (1976).
recognized a minor's privacy rights and further limited state intervention concerning abortions. In invalidating a statute that required a pregnant minor to obtain her parents' consent for an abortion, the majority emphasized that "the State does not have constitutional authority to give a third party an absolute, and possibly arbitrary, veto..." over a minor's decision whether to abort. The Court held that the minor's right of privacy outweighed parental and state protection interests.90 Danforth and Roe seem to warn the state to remain as neutral as possible in situations involving the privacy rights of parents and of children so as to not threaten family unity.91

Central to the Court's holding in Danforth was the conclusion that children have as much right as adults to make important personal decisions which significantly affect their psychological and physical health (although children's rights regarding their conduct may be more limited).92 Consequently, the state must show more than an interest in the minor's welfare to justify intruding into the most private aspects of her life. Roe provides guidance as to how much "more" of a state interest the state must demonstrate. The Court in Roe held that the state's interest in a pregnant woman becomes compelling at the end of the first trimester of the pregnancy since at that point the life of the mother would be seriously endangered by an abortion.93 Therefore, it is reasonable to conclude that the Court will find any state interference with a minor's right of privacy regarding important personal decisions to be unduly burdensome unless the state can demonstrate a compelling justification for the intrusion.

The majority in Carey v. Population Services International94 also rejected unreasonable state limitations on the privacy rights of minors, but seemed to lower the threshold for justifiable state interference. Justice Brennan's quartet95 rejected the state's argument in justification of a law which

90. Id. at 74.
91. Id. at 75.
92. As clarified by the Court in more recent decisions, state interests in keeping a family intact serve as primary justification for the Court to limit children's privacy rights. See, e.g., Bellotti v. Baird, 443 U.S. 622 (1979).
93. See note 83 and accompanying text supra; note 99 and accompanying text infra.
94. 410 U.S. at 162-63.
96. See note 55 and accompanying text supra.
prohibited distributing contraceptives to persons under sixteen. Justice Brennan concluded that an alleged "significant" interest in promoting the state's policy of discouraging sexual activity among minors was not a sufficient basis for regulating the conduct of minors. Thus, after Carey, the Court may allow further restrictions on a child's right of privacy since the state must show only a significant, rather than a compelling reason for the limiting of the child's rights in decision-making.

It appears that a state interest in the morality of minors, in light of the Court's decision in Carey, does not constitute a "significant interest" to justify limiting minors' privacy rights. The Court in Ginsberg v. New York, however, found the state's morality concerns sufficient to justify restriction of first amendment freedoms. This discrepancy demonstrates the Court's position that greater state interests are required to overcome a minor's privacy right in making certain personal decisions than are required to restrict the minor's right to privacy in engaging in certain conduct. Therefore, it seems that the right of privacy provides more significant protection against state intrusions regarding an individual's right to independently make certain decisions concerning situations not directly covered by the Bill of Rights, such as the right to use contraceptives, than regarding conduct explicitly protected under the Constitution, such as the first amendment right to freely express oneself by wearing an armband. The Court in Bellotti v. Baird, for example, emphasized the "unique nature of the abortion decision" and concluded that limitations on minor's rights in contexts other than involving abortion have traditionally been imposed and will continue to be permissible where reasonable. The Court thus expressed its uneasiness with the privacy analysis.

The decisions in Bellotti and in Parham signify a retreatment, based upon the Court's priority for preserving

97. 431 U.S. at 694-96.
98. 390 U.S. 629 (1968).
99. See, e.g., United States v. Carolene Products Co., 304 U.S. 144 (1938) (Justice Stone, in a now renowned footnote, first alluded to a double standard of judicial review, although in a different context than pursued in this article, and advocated closer scrutiny of situations involving fundamental personal rights than the deference traditionally accorded matters concerning commercial transactions). Id. at 152 n.4.
100. 443 U.S. at 642. In distinguishing the abortion situation, the Court stated that "there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." Id.
the family structure, in the area of children's rights. The majority in Bellotti goes out of its way to indicate a willingness to uphold limitations on minors' rights which are protective of the child and of the family unit, as long as those restrictions are not unduly burdensome. Likewise, the Court in Parham emphasized its deference to the traditional concept "of the family as a unit with broad parental authority over minor children." Both decisions reflect the Court's present reluctance to further extend this broad and rather amorphous right of privacy. Bellotti and Parham also indicate how the children's rights issue becomes further complicated where conflicting family or parental interests, as well as state concerns, are involved.

B. Parental Interests Limiting Children's Rights

Where no conflicting interests are asserted by a child, parental interests in the welfare of their off-spring have generally been given precedence over countervailing state interests. The Court has consistently respected the parental liberty, protected by the fourteenth amendment, to freely direct their children's development. In both Meyer v. Nebraska and Pierce v. Society of Sisters, the Court asserted that "the liberty of parents and guardians to direct the upbringing and education of children under their control" is essential to the successful operation of our society. Although parents are commanded by statutes in many areas to restrict their child's freedom, as well as to provide adequate care for the child, they are usually allowed substantial deference in the performance of these duties.

The rationale for allowing parents to exert such broad authority over children is that parents typically act in their children's best interests. Furthermore, such deference is seen as

101. 442 U.S. at 602.
102. 262 U.S. 390 (1923)(invalidating a statute forbidding the teaching in school of any language other than English through the eighth grade).
103. 268 U.S. 510 (1925)(invalidating a statute that required children between the ages of eight and sixteen to attend the public schools of the state that prohibited them from receiving private instruction).
104. Similarly, the Court in Prince stated that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 321 U.S. at 166.
encouraging a strong family unit which is considered fundamental to our society. Since the family is viewed as the basic social unit charged with inculcating values and morals in our youth, providing for their physical needs and taking responsibility for their socialization, the Court should allow the state to interfere with the parent-child relationship only as a last resort. Parents do not have absolute dominion over children, however, since the state is justified in using statutes to limit parental liberty where necessary for the good of the child or society.

Where the interests asserted by a child are in conflict with those of his parents, however, the Court's approach differs due to the potential family disharmony. It is clear that whenever a child's interests are challenged by state action, family interests are inextricably involved and have been historically shown great deference by the Court. The notion of a right to family autonomy was embraced by the Court in Parham v. J.R. and Bellotti v. Baird in particular. The right to family autonomy grew out of due process and privacy concepts and gained substance as a means of protecting and promoting the parent-child relationship.

Family autonomy is distinct from parental autonomy in the practical sense that the Court will always balance a combination of the parents' autonomy interests and the child's concerns, against the state interests in examining a child's privacy right. The right to family autonomy, however, will enter into the Court's balance only if the family unit is intact and the interests of parent and child are not in conflict. It is therefore important to consider the status of the family relationship when examining a minor's privacy right.

Where family interests are in direct conflict with the child's interests, the Court will most likely weigh family interests against the child's interests. That is, the child's interests must outweigh both state interests and parental concerns.

106. See Moore v. City of East Cleveland, 431 U.S. 494 (1977); see also J. Goldstein, A Freud & A. Solnit, Before the Best Interests of the Child 3-14 (1979).
108. See note 72 and accompanying text supra.
The underlying reason for this approach is that in certain situations, such as juvenile pregnancy, conflict may arise between parent and child and the family structure is often fractured. Consequently, the state interest in safeguarding the family unit and parental authority is diminished and is no longer sufficient to outweigh the child's interest in personal autonomy. The Court is faced in these situations with the dilemma of having to independently consider both the child's right to autonomous development and his right to the benefits of behavioral control exerted by both the state and his parents, which might well be in conflict with one another. Greater weight will probably be given to the minor's privacy interests than to parental concerns when the family is in conflict.

However, where the family unit appears intact, additional state interests attach and therefore may outweigh the child's privacy interests. The result is that the odds are greater in the juvenile context that a child's constitutional protections will be limited due to countervailing state interests bolstered by family interests.

In all cases involving juvenile privacy rights, the Court will consider the same factors: the nature of the child's interests at stake, family concerns, and state interests involved. The test will always remain the same—a balance. However, the results may differ since the factors may be aligned differently depending on whether the child is in conflict with the family, or whether the right under consideration is procedural in nature, or whether it involves the child's right to engage in certain conduct or to make decisions of a personal nature.

VI. Conclusion

On the one hand, it is easy to rationalize that children, due to their immaturity and vulnerability, have a need for greater constitutional protections than are typically afforded adults. On the other hand, it can be argued that if children are subject to the same constitutional protections as are adults, families will be exposed to increased risks of judicial and state interference and the nature of parental responsibil-

111. See Planned Parenthood v. Danforth, 428 U.S. at 75.
112. This dilemma is examined in detail in Hafen, Puberty, Privacy and Protection, 63 A.B.A. J. 1383 (1977).
The Court will no doubt continue to employ a balancing analysis when examining a minor's privacy interests because the weighing process gives the Court much flexibility in its treatment of these issues. The Court's decisions in *Parham* and *Bellotti* emphasize that the most determinative factor in the Court's decision whether to award greater deference to juvenile privacy interests than to state and parental protection interests, is the status of the family unit and whether the right asserted by the minor has caused substantial family conflict. In the absence of such disharmony, it will be extremely difficult for the child's privacy interests to prevail in the weighing process unless the right asserted by him involves a decision of a sensitive personal or medical nature. If the minor's interest under scrutiny subjects him to greater vulnerability, particularly of a physical nature, it will be that much more difficult for him to prevail. The limiting language in the *Parham* and *Bellotti* decisions signals that the Court may be willing to recognize the privacy rights of children only where explicit provisions of the Constitution are not directly applicable. Consequently, the present Court has set the parameters of minors' privacy rights just inside his parents' reach. It may be socially preferable to restrict a minor's rights, but is it really for his own good? The Constitution provides substantial protection for adults—let children enjoy its protections too, and let them keep their privacy.

*Page Humphrey*