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The Warren and Burger Courts on State, Parent, and Child Conflict Resolution: A Comparative Analysis and Proposed Methodology†

By SHARON ELIZABETH RUSH*

Developing a legal framework for analyzing children's rights is difficult. In part, this difficulty stems from the inherent ambiguity of the term "child." Within this general rubric are individuals whose age, maturity, education, and developmental levels encompass a wide range. The uncertainty as to how to define "children," however, is only one stumbling block preventing scholars and courts from designing a concise scheme for examining children's rights. A more important obstacle stems from the conflict between the democratic ideals of individual freedom and the sanctity of the family unit. Whether children can be given certain rights without destroying parental authority over the family is a dilemma. Taking into account these opposing principles, this Article proposes a simplified methodology for analyzing and resolving conflicts among the state, parent, and child.

The Article begins by examining several landmark Supreme Court decisions that adjudicated the rights of children. These cases are compared and contrasted with three recent Burger Court decisions concerning the state's role in family matters. The analysis illustrates the tension between the principles of individual freedom and family autonomy. An historical overview of select cases also reveals the absence of any consistently applied framework for analyzing these conflicting concerns. The Article suggests that the Burger Court has attempted to resolve the conflict by increasing the state's power over the parent and the child.

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The proposed methodology provides a framework for determining children's rights that sacrifices neither the democratic ideal of human dignity nor that of family integrity. The proposed approach rejects old notions that children and adults should be treated equally or that children should be governed by a set of legal principles entirely separate from those governing adults. Rather, the proposal selectively incorporates children into the existing legal structure, basing the incorporation on the nature of the conflict. The proposed analytical approach reduces each state-parent-child conflict to either a state-parent or a state-child controversy. It requires courts to identify and then to balance the interests of the parties to resolve the conflict. To illustrate the mechanics of this suggested framework, the model is applied to the question of children's rights in the following areas: (1) state incarceration of minors, (2) freedom of expression, (3) abortion, (4) medical treatment, and (5) education.

The Supreme Court on the State, Parent, and Child

The Supreme Court's landmark decisions resolving conflicts among the state, parent, and child fall into three general categories. The first category consists of cases from the early 1920's through the mid-1940's. These cases involved controversies between the state and the parent. The second category of cases arose in the late 1960's during the Warren Court era. In contrast to the first category, cases in this second group concerned conflicts between the state and the child. Beginning in the early 1970's and continuing through the present, the third category of cases addresses all possible combinations of state-parent-child conflict.

Early 1920's Through Mid-1940's: State-Parent Conflict

The children's rights cases decided from the 1920's through the mid-1940's concerned the validity of state regulations that allegedly interfered with parents' rights to control the upbringing of their children. These cases demonstrate the recognized parameters of permissible state control over children's development. As the United States emerged from the First World War, two state laws regulating education, and ostensibly promoting national unity and patriotism, were struck down as unconstitutional. First, in *Meyer v. Nebraska*,¹ the Supreme Court invalidated a Nebraska law prohibiting the teaching of German to students below the eighth grade level. Two years later, in *Pierce v. Society of Sisters*,² the

1. 262 U.S. 390 (1923).

2. 268 U.S. 510 (1925).

Court held that an Oregon law requiring children between the ages of eight and sixteen to attend a public, rather than a private, school was unconstitutional.

The Nebraska and Oregon statutes were held invalid for two reasons. First, neither statute promoted the state's legitimate interest in producing civic-minded children.³ Second, and more important, both statutes infringed upon the parents' constitutional right to control the upbringing of their children.⁴

Although it acknowledged the parents' right, the Court in *Meyer* and *Pierce* recognized that a state has a limited power to control a child's development. The *Meyer* Court observed that the state can require schools to teach English to students.⁵ Similarly, the *Pierce* Court noted that the state can require attendance at a school through a certain grade level.⁶

In *Prince v. Massachusetts*,⁷ which was decided at the end of World War II, the Supreme Court reaffirmed its recognition of the state's limited power over the child. The Court upheld a state law that imposed criminal sanctions on any parent or guardian who allowed a child to work in violation of the child labor laws.⁸ In upholding the statute, the Court stated that the constitutional right of the parent to control the upbringing of the child is not absolute.⁹

In *Prince*, the guardian of a nine-year-old child challenged her conviction under the statute for allowing the child to accompany her and distribute religious leaflets on public streets. The guardian claimed that the statute abridged her right to freedom of religion and her right to control the upbringing of the child.¹⁰ The Court found neither interest sufficient to outweigh the state's power, as *parens patriae*,¹¹ "to guard the

3. *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

4. *Pierce*, 268 U.S. at 534; *Meyer*, 262 U.S. at 400.

5. *Meyer*, 262 U.S. at 402.

6. *Pierce*, 268 U.S. at 534. Whether the school is public or private is a matter of choice left to the family. *Id.*

7. 321 U.S. 158 (1944).

8. *Id.* at 170.

9. *Id.*

10. *Id.* at 164. The guardian also asserted that the statute violated the child's right to distribute leaflets. See *infra* notes 212, 221 & accompanying text.

11. The doctrine of *parens patriae* originated in England and derived from the King's royal prerogative as guardian of infants, lunatics, and others with legal disabilities. 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *47. See generally Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978). In American jurisprudence, the concept of the state acting as a substitute guardian for the parent traditionally has

general interest in youth's well being."¹²

While the landmark decisions of the era afforded the parent-child relationship constitutional protection from unreasonable state interference, they did not give parents an absolute right to control their children's upbringing. From time immemorial, the parent-child relationship has been viewed as sacrosanct.¹³ Although the relationship is subject to some state regulation, it should enjoy constitutional protection from unreasonable state interference. Perhaps two world wars and the concomitant fear of an overbearing government were the necessary impetus for citizens to challenge state laws that interfered with the sanctity of the parent-child relationship. In any event, by the end of this first era, the Supreme Court had clearly established a major principle: The parent has a constitutional right to oversee the child's development, subject to reasonable state regulations.

Late 1960's: The Warren Court on State-Child Conflict

In the late 1960's, the Warren Court engendered a second group of decisions that defined the rights of the state with respect to family matters. Cases in this second group focused on the child's right to be free from unreasonable state regulations in two contexts. The first issue raised by these cases was whether a child, subject to possible incarceration, is entitled to due process in a delinquency hearing; the second issue was whether children have a first amendment right to freedom of expression.

State Incarceration

In re Gault,¹⁴ the leading case in the area of juvenile delinquency, is important for its holding and its statements regarding the juvenile justice system. *Gault* illustrates the inherent conflict between providing children

been limited to situations in which the parent has failed, either through abuse or neglect, to protect the child's welfare. See *infra* notes 164, 181 & accompanying text.

12. *Prince*, 321 U.S. at 166.

13. Some of history's great philosophers, including Aristotle and John Locke, acknowledged the right of the parent to control the child's development. See ARISTOTLE, *POLITICS* 32-33, 316 (E. Barker transl. 1962); J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 61 (1652). In early English history, the father's control of the child included his right to sell the child. 1 W. BLACKSTONE *COMMENTARIES* *451. In American society, the Supreme Court first acknowledged the "tradition" of parents controlling the upbringing of their children by rejecting in *Meyer* the philosophy of Plato that prescribed government control of the child's development. *Meyer*, 262 U.S. at 402; see also *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children.").

14. 387 U.S. 1 (1967).

with basic individual rights and acknowledging the differences between child and adult development. In *Gault*, a fifteen-year-old was charged with making obscene phone calls.¹⁵ The procedure followed by the state from the time of his arrest to the time of the child's sentencing lacked any notion of intrinsic fairness. The sheriff failed to alert the child's parents promptly of his arrest,¹⁶ and the court failed to include the complainant in the initial judicial proceedings.¹⁷ The child was detained following a hearing and finally was adjudged delinquent and sentenced to six years in a state industrial school.¹⁸ The Supreme Court reversed the delinquency determination and held that a child accused of being delinquent and subject to state confinement is entitled to due process.¹⁹ An examination of the Court's reasoning reveals its belief that state regulation of juvenile delinquency not only must protect children's developmental status, but also must afford children certain basic procedural safeguards granted to adults.²⁰

The Court based its analysis on the assumption that child offenders

15. The statutory basis for Gerald Gault's offense was unclear. The juvenile judge's initial conclusion was that Gerald was a delinquent because he "violated a law of the state or an ordinance or regulation of a political subdivision thereof." *Id.* at 8. The law he was accused of violating prohibited the use of "vulgar, abusive, or obscene language . . . in the presence or hearing of any woman or child." *Id.* The judge also testified that he convicted Gerald of being "habitually involved in immoral matters." *Id.* at 9. The basis for the latter conviction, according to the judge, rested upon more than the alleged obscene phone call. Apparently, the judge recalled an incident two years earlier in which a baseball glove was stolen and for some reason, Gerald came to the judge's mind. *Id.* The judge also recalled that Gerald admitted making other "nuisance" calls. *Id.* Finally, the judge was influenced by the fact that Gerald was on probation because he had been in the company of another young man who had stolen a wallet. *Id.* at 4.

16. Mrs. Gault learned of Gerald's arrest through the parents of another boy arrested with Gerald. On the day of the child's hearing the sheriff filed a formal petition asserting only that Gerald, a delinquent minor, was in need of the court's protection. The petition was shown neither to Gerald nor to his parents. In addition, the post-hearing "referral report" made by the probation officers was not made available either to Gerald or to his parents. *Id.* at 7.

17. At both the first and second hearings, the complainant was not present. *Id.* at 5, 7. Furthermore, no sworn testimony was taken nor was any transcript or other record kept. *Id.* at 5.

18. *Id.* at 6-8.

19. *Id.* at 30-31.

20. The Court in *Gault* held that whenever a youth is charged with a crime that subjects the youth to possible incarceration, the youth, like an adult in similar circumstances, is entitled to notice, *id.* at 33-34, counsel, *id.* at 40-41, the right against self-incrimination, *id.* at 55, and the right to confront and cross-examine witnesses, *id.* at 57. The Court did not decide whether a youth charged with committing a crime is also entitled to an appeal and a transcript, rights that are given to adults accused of criminal conduct. *Id.* at 57. Moreover, the Court in *Gault* asserted early in the opinion that not all procedural safeguards applicable to adult offenders must be given to youthful offenders. For example, relying on dictum in its opinion in *Kent v. United States*, 383 U.S. 541 (1966), the Court noted that the Constitution does not require that the rights to bail, indictment by grand jury, public trial, or trial by jury be extended to youthful

should not be treated like adult offenders. The Court cited a generally held notion that the state should act not as a prosecutor, but as a substitute parent to help rehabilitate the wayward child.²¹ The Court noted that, in keeping with this belief, every state had developed a juvenile justice system separate from the adult criminal justice system for the disposition of delinquency cases.²²

The juvenile justice system at issue in *Gault*, however, intentionally failed to provide the procedural protections available to adults because it also dispensed with some of the penalties of the adult criminal justice system. According to the state, the "rigidities, technicalities, and harshness"²³ of the criminal law could be discarded because the state, acting as *parens patriae*, intended "to save [the child] from a downward career."²⁴ The state asserted that a juvenile justice system, operating on a nonadversarial basis, protected the child from: the stigma of being labelled a "criminal;"²⁵ any civil disabilities arising from a criminal record;²⁶ public disclosure of the delinquent behavior;²⁷ and the harsh formality of an adversarial trial.²⁸

The *Gault* Court did not reject the philosophy of the juvenile justice system presented by the state.²⁹ The Court embraced the national sentiment that the state should treat the child differently from the adult offender.³⁰ The Court, however, held that the Constitution afforded due process protection to children as well as adults. Although on its face this holding seems inconsistent with the Court's support of the philosophy behind the juvenile justice system, a number of factors explain why the Court determined that children are entitled to due process protection.

First, the Court emphasized the importance of due process to "indi-

offenders. *Id.* at 14. Since *Kent*, the Supreme Court has held that a child is not entitled to a jury trial. *McKiever v. Pennsylvania*, 403 U.S. 528 (1971).

21. *Gault*, 387 U.S. at 25-26.

22. *Id.* at 14.

23. *Id.* at 15.

24. *Id.* at 26 (quoting Mack, *The Juvenile Court*, 23 HARV. L. REV. 104-20 (1909)) (footnote omitted).

25. *Gault*, 387 U.S. at 23.

26. *Id.* at 24. For example, adjudication as a "delinquent" did not disqualify a juvenile from civil service appointment. *Id.*

27. *Id.* at 24-25.

28. *Id.* at 25-26.

29. The Court, however, did question the efficacy of the juvenile justice system, recognizing that it failed to meet many of its goals. *Id.* at 17-20; see *infra* notes 35-38 & accompanying text.

30. 387 U.S. at 22 ("For example, the commendable principles relating to the processing and treatment of juveniles separately from adults are in no way involved or affected by the procedural issues under discussion." (footnote omitted)).

vidual freedom.”³¹ Second, the Court recognized data indicating that (1) when children are afforded due process, the case is often dismissed for lack of proof,³² and (2) some children who are transferred to the adult system for trial may be harmed by the lack of procedural safeguards.³³ Third, the Court was persuaded that it was fundamentally unfair to incarcerate a child for six years for making obscene phone calls, while an adult convicted of the same offense could be jailed for not more than two months or fined from five to fifty dollars.³⁴

Finally, the most compelling reason for granting children due process was the *Gault* Court’s belief that giving such protection to the child would not undermine the goals of the juvenile justice system. Withholding procedural protections from the juvenile justice system simply because they are available in the adult criminal justice system does not ensure that children will not be stigmatized. In fact, the Court detected little, if any, difference under the present system in the stigma attached to the label “delinquent” rather than “criminal.”³⁵ Moreover, the protection of due process ensured that the state could continue its policies of avoiding a criminal record for the child and maintaining confidentiality.³⁶ In considering whether due process guarantees might add a touch of formality to the proceeding, the Court cited evidence suggesting that children benefit from observing the appearance of fairness in abiding by rules.³⁷ Furthermore, the due process safeguards need not inhibit the judge’s freedom to treat the child in a protective fashion.³⁸ In sum, although the Court in *Gault* recognized the special needs of child offend-

31. *Id.* at 20.

32. *Id.*

33. *Id.*

34. *Id.* at 29.

35. *Id.* at 23-24. The Court noted that the term “delinquent” developed such invidious “connotations” that it was being replaced by the phrase “persons in need of supervision.” *Id.* at 24 n.31 (citing Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 799 n.140 (1966)).

36. *Gault*, 387 U.S. at 25. The Court, however, criticized the notion that the child’s misconduct could be protected from public disclosure. Whether court records are disclosed is, in most jurisdictions, a matter of judicial discretion. Moreover, police records, including juvenile records, generally are released to the FBI, other law enforcement and social service agencies, the Armed Services, and many private employers. *Id.*

37. The Court noted that the child otherwise may feel deceived by a judge who purports to act as a parent and then imposes severe punishment. *Id.* at 26-27. Relying on sociological studies, the Court stated that “when the procedural laxness of the ‘*parens patriae*’ attitude is followed by stern disciplining, the contrast may have an adverse effect upon the child, who feels that he has been deceived or enticed.” *Id.* at 26.

38. *Id.* at 26-27. The Court stated, “Of course, it is not suggested that juvenile court judges should fail appropriately to take account, in their demeanor and conduct, of the emotional and psychological attitude of the juveniles with whom they are confronted.” *Id.*

ers, it concluded there was no logical basis for denying children the right to due process.

Freedom of Expression

Within two years of *Gault*, the Warren Court heard two cases challenging the state's interference with the child's freedom of expression under the first amendment. Like *Gault*, these cases reflect the dichotomy inherent in state protection and regulation of children's rights. In *Ginsberg v. New York*,³⁹ a luncheonette vendor unsuccessfully challenged the validity of his conviction for selling a "girlie" magazine to a sixteen-year-old in violation of a state law that prohibited the sale of erotic materials to those under seventeen years of age. In *Tinker v. Des Moines Independent Community School District*,⁴⁰ however, five children successfully challenged the validity of their expulsion for demonstrating against the Viet Nam War by wearing black armbands to school in violation of the public school board's rules.

In *Ginsberg*, the Court articulated the view that the state may protect the special needs of children by imposing greater restrictions on their behavior than it could on that of adults. New York asserted that the statute promotes two legitimate state interests: helping parents perform their duty to protect children from harm,⁴¹ and promoting the state's "independent interest in the well-being of its youth."⁴² To uphold the validity of the New York statute, the *Ginsberg* Court had to rationalize prohibiting the sale to minors of materials that, as the parties conceded, would not be considered obscene if sold to adults. Relying on *Prince*,⁴³ the *Ginsberg* Court reaffirmed that the state, acting as *parens patriae*, has the power to place restrictions on children that would be unconstitutional if placed on adults.⁴⁴ The Court held that the state, lacking conclusive evidence of the effect that certain erotic materials would have on children's psychological development,⁴⁵ nonetheless could rationally conclude that the material might harm children; thus, the state's definition of "obscenity" for children could vary from its definition of "obscen-

39. 390 U.S. 629 (1968).

40. 393 U.S. 503 (1969).

41. *Ginsberg*, 390 U.S. at 639.

42. *Id.* at 640.

43. 321 U.S. 158 (1944); see *supra* notes 7-12 & accompanying text.

44. *Ginsberg*, 390 U.S. at 638.

45. *Id.* at 641-42. Many studies concerned with the impact of obscene material on children were cited in the opinion. *Id.* at 642 n.10. The Court acknowledged that these studies all agreed that a causal link between exposure to obscenity and harm to children was neither proved nor disproved. *Id.* at 642 (quoting Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 SUP. CT. REV. 7, 52).

ity" for adults.⁴⁶ Such a variable obscenity test would allow the state to promote its interests without unreasonably interfering with children's first amendment right to freedom of expression.

In contrast, the *Tinker* Court held that a legitimate state interest embodied in the school board rules could not be promoted at the cost of abridging students' first amendment right to freedom of speech. In *Tinker*, the state emphasized the importance of preserving the right of state officials "to prescribe and control conduct in the schools."⁴⁷ Nevertheless, the Court, citing *Meyer v. Nebraska*⁴⁸ and *Pierce v. Society of Sisters*,⁴⁹ stated that students are protected by the Constitution even within the special environment of the school.⁵⁰ To support any rule that intrudes upon students' first amendment rights, the state must demonstrate that a violation of the rule "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school,"⁵¹ or invades the rights of others.⁵² The *Tinker* Court, finding no evidence that the students' protest resulted in classroom disruption or invasion of others' rights,⁵³ held that the school board's rule proscribing wearing black armbands was unconstitutional.

Although the holdings of *Tinker* and *Ginsberg* appear divergent, they can be reconciled by the principle that any significant restriction on first amendment rights must be supported by evidence of its necessity. Thus, the potential for harm to children from exposure to erotic literature justified restricting children's first amendment rights in *Ginsburg*, while the absence of harm to children or to school discipline preserved children's first amendment rights in *Tinker*.

In summary, by the end of the 1960's the Supreme Court had established two major principles regarding the state-parent-child relationship. First, the Warren Court reinforced the principle that the parent has a

46. *Ginsberg*, 390 U.S. at 643. In order to uphold the statute, the Court had to find that the legislature could rationally conclude that exposure to material condemned by the state is harmful to minors. *Id.* at 641. The evidence of harm was inconclusive. See *supra* note 45 & accompanying text. Hence, the Court held that the legislature was rational in finding that the material might be harmful to children. 390 U.S. at 643.

47. 393 U.S. at 507.

48. 262 U.S. 390 (1923).

49. 268 U. S. 510 (1925).

50. *Tinker*, 393 U.S. at 506. The Court stated that first amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.*

51. *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

52. 393 U.S. at 513.

53. *Id.* at 509.

constitutional right, subject to reasonable state regulation, to oversee the child's development. Second, the Warren Court's decisions in *Gault*, *Ginsberg*, and *Tinker* established the principle that the child also enjoys constitutional protection from unreasonable state regulation.

Early 1970's To The Present: The Burger Court on State-Parent-Child Conflict

The early 1970's heralded a new era for the development of the state-parent-child relationship. Changes in Court personnel⁵⁴ may account for some of the significant changes in the area of child advocacy. An examination of recent decisions in the children's rights area indicates that the Burger Court has shifted the balance of power from the family to the state.

The Burger Court has faced a variety of issues involving diverse conflicts among the state, parent, and child. For example, several cases concerned the state's power to terminate parental rights.⁵⁵ The Burger Court also determined the role of parents in their minor daughters' abortion decisions.⁵⁶ An in-depth exploration of the issues of state confinement of the child and the child's freedom of expression best illustrates the analytical characteristics of the Burger Court, as well as the manner in which the Burger Court has diverged from the Warren Court's approach to resolving conflicts among the state, parent, and child.

State Incarceration

The Supreme Court's most recent pronouncement on the state's power to incarcerate a child is expressed in *Schall v. Martin*.⁵⁷ The decision in *Schall* represents a retreat from the *Gault* Court's position that, in the criminal area, children must be afforded the procedural safeguards that are given to adults. *Schall* was a class action challenging the validity of New York's preventive detention statute for juveniles. Pursuant to the statute, the state may detain a child for up to six days before holding a probable cause hearing.⁵⁸ If, at the probable cause hearing, the court

54. Not only was Chief Justice Warren replaced by Chief Justice Burger in 1969, but from 1970 to 1971 the Court also lost Justices Fortas, Black, and Harlan. Taking their places on the bench were Justices Blackmun, Powell, and Rehnquist. G. GUNTHER, CONSTITUTIONAL LAW, Appendix A (10th ed. 1981).

55. See *Lehr v. Robertson*, 103 S. Ct. 2985 (1983); *Santosky v. Kramer*, 455 U.S. 745 (1982) (discussed *infra* note 171); *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981); *Stanley v. Illinois*, 405 U.S. 645 (1972) (discussed *infra* note 171). For an excellent discussion of the Burger Court's decisions in this area, see 33 DE PAUL L. REV. 393 (1984).

56. See *infra* notes 226-33 & accompanying text.

57. 104 S. Ct. 2403 (1984).

58. *Id.* at 2413 & n.19. The first proceeding in Family Court after a petition of delin-

finds a "serious risk" that the child may commit a crime before the trial, the statute allows for the child's detention until trial.⁵⁹ New York asserted that a juvenile's pretrial detention in certain circumstances serves the legitimate state interests of protecting society from crimes and protecting the child from its own criminal activity.⁶⁰ The Court, balancing these interests against the child's due process right to be free from unnecessary state confinement,⁶¹ upheld the statute.

The *Schall* Court gave three reasons in support of its decision. First, the Court recognized the validity of the state's interest in protecting society from crime⁶² and its obligation, as *parens patriae*, to protect the child from the harm that ensues from engaging in criminal conduct.⁶³ As evidence of the legitimacy of the state's interests, the Court noted that every state and the District of Columbia have enacted preventive detention statutes similar to New York's.⁶⁴ For this reason, the Court found that the state's *parens patriae* power outweighs the child's interest in not being detained.⁶⁵

Second, the Court advanced the theory that pretrial detention does not unconstitutionally punish the child.⁶⁶ The majority found the terms and conditions of confinement compatible with the state's legitimate regulatory purposes.⁶⁷ The "brief" length of time a child may be detained

quency is filed is an initial appearance. *Id.* at 2406. If detention, at the discretion of the court, *id.* at 2405, is ordered after the initial appearance, the child is entitled to a probable cause hearing within three days. *Id.* at 2413. The court may delay the probable cause hearing for up to three days for good cause shown. *Id.*

59. *Id.* at 2405. If the child is accused of committing certain felonies, the trial must be held within 14 days of the initial appearance. *Id.* at 2413. For lesser offenses, the trial must occur within three days. In either event, the state can postpone the trial for up to three days for good cause shown. *Id.* at n.20. Thus, the maximum possible pretrial detention of a youth accused of committing a serious crime is 17 days. *Id.*

60. *Id.* at 2410.

61. *Id.*

62. *Id.*

63. *Id.* at 2411. "Society has a legitimate interest in protecting a juvenile from the consequences of his criminal activity—both from potential physical injury which may be suffered when a victim fights back or a policeman attempts to make an arrest and from the downward spiral of criminal activity into which peer pressure may lead the child." *Id.*

64. *Id.*

65. *Id.* at 2410.

66. *Id.* at 2414. The due process clause of the fifth amendment provides in relevant part: "No person . . . shall be deprived of life, liberty, or property, without due process of law" U.S. CONST. amend. V. According to a noted Constitutional authority, "[a]ny assessment of the constitutional validity of pretrial detention that is designed to prevent anticipated crimes must confront the due process challenge to such confinement." Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 380 (1970).

67. *Schall*, 104 S. Ct. at 2414. According to the Court, if pretrial detention serves a "legitimate governmental purpose," and if the terms and conditions of confinement are com-

before trial,⁶⁸ coupled with the appropriate "conditions of confinement,"⁶⁹ "provid[e] the youth with a controlled environment and separat[e] him from improper influences pending the speedy disposition of his case."⁷⁰ The Court, therefore, found no evidence of an intent to punish in the statute.⁷¹

Finally, the Court upheld the validity of the statute because it provides adequate procedural protection against erroneous and unnecessary pretrial detention.⁷² The Court rejected the contention that the statutory standard for detaining a minor is vague and leaves too much discretion to the judge.⁷³ Although it admitted that future criminal conduct is difficult to predict, the Court suggested that the judge may draw upon experience and "as much information as can reasonably be obtained" when determining whether the child presents a "serious risk" of engaging in criminal conduct before trial.⁷⁴ Because the statute requires the judge to give a child "notice, a hearing, and a statement of facts and reasons"⁷⁵ for the decision, the statute is not unconstitutionally vague or devoid of due process safeguards.

Freedom Of Expression

In *Board of Education v. Pico*,⁷⁶ the Burger Court rendered one of

patible with these purposes, the detention will not unconstitutionally punish the child. *Id.* (quoting *Bell v. Wolfish*, 441 U.S. 520, 538 (1979)). The dissent, however, criticized the majority's reliance on *Bell* for the "legitimate governmental purpose" standard. *Bell*, the dissent asserted, was "exclusively concerned with the constitutionality of conditions of pretrial incarceration under circumstances in which the legitimacy of the incarceration itself was undisputed; the Court avoided any discussion of the showing a state must make in order to justify pretrial detention in the first instance." *Schall*, 104 S. Ct. at 2423 n.12 (Marshall, J., dissenting).

68. 104 S. Ct. at 2409. At most, the child may be detained 17 days for serious offenses and six days for lesser offenses. *Id.* at 2413.

69. *Id.* Two types of confinement are used by the Department of Juvenile Justice. The "nonsecure" detention is similar to a halfway house where the youths receive schooling, counseling, and access to recreational facilities. "Secure" confinement is more restrictive, but the youths still receive education, counseling, and recreation. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 2417.

73. *Id.* at 2412-18. For a discussion of this standard, see *supra* note 59 & accompanying text.

74. *Id.* at 2418. Determination of a "serious risk" candidate is based on a number of factors including: the nature and seriousness of the charges; whether the charges are likely to be proved at trial; the juvenile's prior record; the adequacy and effectiveness of his home supervision; his school situation, if known; the time of day of the alleged crime as evidence of its seriousness and a possible lack of parental control. *Id.*

75. *Id.* at 2417.

76. 457 U.S. 853 (1982).

its strongest opinions in support of children's first amendment rights. At issue in *Pico* was whether a public school board acted unconstitutionally in removing certain books from its libraries.⁷⁷ A committee was appointed to read and review the eleven books found in the school's libraries that the school board found improper for students.⁷⁸ The committee agreed that five books should be retained, two books should be removed, and one book should be available to students with parental consent.⁷⁹ The committee could not agree on the remaining three books.⁸⁰ The board, however, ignored the committee's recommendations and ordered nine books removed from the libraries.⁸¹ The board gave no reasons for its decision.⁸²

Five students brought suit in district court, alleging that the school board's actions denied their first amendment right to freedom of expression.⁸³ The students sought a declaration that the board's actions were unconstitutional, as well as preliminary and permanent injunctive relief ordering the board to return the books to the libraries.⁸⁴ The school board justified its action as an extension of its absolute discretion to

77. *Id.* at 856. The books came to the attention of various board members during a conference hosted by a politically conservative group of parents concerned with education. The conference was sponsored by Parents of New York United. *Id.*

78. *Id.* at 857. The "Book Review Committee" consisted of four parents and four members of the school staff. Nine of the books listed as "improper" were in the high school library: BEST SHORT STORIES OF NEGRO WRITERS (L. Hughes ed. 1967); A. CHILDRESS, A HERO AIN'T NOTHIN' BUT A SANDWICH (1973); E. CLEAVER, SOUL ON ICE (1968); ANONYMOUS, GO ASK ALICE (1971); O. LAFARGE, LAUGHING BOY (1929); D. MORRIS, THE NAKED APE (1967); P. THOMAS, DOWN THESE MEAN STREETS (1967); K. VONNEGUT, JR., SLAUGHTERHOUSE FIVE (1968); R. WRIGHT, BLACK BOY (1945). One book, A READER FOR WRITERS (J. Archer ed.), was found in the junior high school library. B. MALAMUD, THE FIXER (1966), was part of the twelfth grade literature curriculum. 357 U.S. at 856 n.3.

79. In making their decisions, the members of the committee considered the book's "educational suitability, good taste, relevance [and] appropriateness to age and grade level." 357 U.S. at 857.

80. *Id.* at 858. The five books to be retained were: BEST SHORT STORIES BY NEGRO WRITERS, BLACK BOY, GO ASK ALICE, LAUGHING BOY, and THE FIXER. *Id.* at n.5. DOWN THESE MEAN STREETS and THE NAKED APE were to be removed. *Id.* at n.6. The committee could not agree to either keep or remove A HERO AIN'T NOTHIN' BUT A SANDWICH and SOUL ON ICE. *Id.* at n.7. No position was taken with A READER FOR WRITERS because not all members of the committee were able to read the book. *Id.* at n.8. Finally, the committee recommended that SLAUGHTERHOUSE FIVE be made available to students only with parental approval. *Id.* at n.9.

81. *Id.* at 858. All the books were to be removed except LAUGHING BOY, which was to be returned to the library without restriction, *id.* at n.10, and BLACK BOY, which was to be made available with parental consent. *Id.* at n.11.

82. *Id.*

83. *Id.* at 859.

84. *Id.*

"transmit community values" throughout the schools.⁸⁵ It asserted that the books were vulgar, although not obscene.⁸⁶ The Supreme Court held that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books."⁸⁷

The Supreme Court began its analysis by turning to the holdings in *Tinker*,⁸⁸ *Meyer*,⁸⁹ and *Pierce*.⁹⁰ The Court, relying on *Tinker*, reaffirmed the principle that children retain their first amendment right to freedom of expression even after they pass through the schoolhouse gate.⁹¹ The Court extended this principle by concluding that the first amendment right to freedom of expression includes the corollary right to receive ideas.⁹² The Court recognized that the school environment is a particularly suitable forum for the exchange of ideas.⁹³

The *Pico* Court nevertheless was compelled to balance the strong state interest in providing school boards with enough discretion to administer the schools against the first amendment rights of the students.⁹⁴ While the Court conceded the legitimacy of this state interest,⁹⁵ it noted that the Constitution required only that the school board's decisions not violate the students' first amendment rights.⁹⁶ The decision to remove books from the libraries would be unconstitutional if the intent "to deny [students] access to ideas with which [the board] disagreed . . . was the decisive factor in [the board's] decision."⁹⁷ The Court remanded for further proceedings because the evidence was insufficient to ascertain the board's motive.⁹⁸

Schall and *Pico* illustrate the Burger Court's deference to the state. The Court in *Schall* upheld the state's right to detain a child before trial if the judge "predicts" that the child is likely to commit a crime. Furthermore, although the Court in *Pico* recognized students' first amendment rights, the Court would not go so far as to deny the state the

85. *Id.* at 869.

86. *Id.* at 856 n.2.

87. *Id.* at 872.

88. 393 U.S. 503 (1969); see *supra* notes 47-53 & accompanying text.

89. 262 U.S. 390 (1923); see *supra* notes 1-5 & accompanying text.

90. 268 U.S. 510 (1925); see *supra* notes 2-6 & accompanying text.

91. *Pico*, 457 U.S. at 865.

92. *Id.* at 867.

93. *Id.* at 868.

94. *Id.* at 864 (school boards should be able "to establish and apply their curriculum in such a way as to transmit community values") (quoting Brief for Petitioners at 10).

95. The Court again relied on *Meyer* and *Pierce*. *Pico*, 457 U.S. at 863.

96. *Id.* at 865 ("[L]ocal school boards must discharge their 'important, delicate, and highly discretionary functions' within the limits and constraints of the First Amendment.").

97. *Id.* at 871.

98. *Id.* at 875.

authority to remove "vulgar," although not obscene, books from the library.

Comparing the Approaches of the Warren and Burger Courts

The differences between the analytical approaches taken by the Burger and the Warren Courts become evident upon comparing the Burger Court's decisions in *Schall* and *Pico* to the Warren Court opinions previously discussed. The following comparative analysis focuses on the divergent views that the Warren and Burger Courts have taken of the role of the child in society, the proper use of precedent, and the evidentiary value of statistical data. The analysis highlights the continuing failure to establish consistent principled guidelines in the area of state-parent-child conflict resolution.

The Child as an Individual

The Warren Court's respect for the child as an individual is evidenced by the Court's willingness to extend constitutional protection to children. In *In re Gault*,⁹⁹ for example, the Court not only held that a child who faces possible incarceration by the state is entitled to due process, but also presumed that the child's due process rights should comport with the procedures to which adults are entitled in similar circumstances.¹⁰⁰

Although the Warren Court emphasized a child's status as an individual, the Burger Court in *Schall* focused on the immaturity of the child and the state's power over the child. The Court in *Schall* could have presumed, as did the *Gault* Court, that a child is entitled to the same constitutional safeguards given to an adult subject to pretrial detention unless there is a reason to treat the child differently. The Court presumed, however, that it is valid to differentiate between the constitutional protection given to children and adults because children are subject to the state's *parens patriae* power.¹⁰¹ This presumption avoided the neces-

99. 387 U.S. 1 (1967).

100. *Id.* at 30. The *Gault* Court noted that the procedures for youthful offenders need not conform precisely with those of adult offenders. Nevertheless, the procedures made available to the child, like those available to the adult, "must measure up to the essentials of due process and fair treatment." *Id.* (quoting *Kent v. United States*, 383 U.S. 541, 562 (1966)).

101. *Schall v. Martin*, 104 S. Ct. 2403, 2410 (1984). In balancing the state's interest against the child's liberty interest, the Court qualified the child's interest by stating that "[c]hildren, by definition, are not assumed to have the capacity to take care of themselves In this respect, the juvenile liberty interest may, in appropriate circumstances, be subordinated to the State's 'parens patriae' interest in preserving and promoting the welfare of the child." *Id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)).

sity, in the Court's view, for a careful analysis of the law concerning adult pretrial detainees.¹⁰² The *Schall* Court's reliance upon the child's status and the state's *parens patriae* power provided a simple rationale to justify pretrial detention of juveniles.

Another example of the Warren and Burger Courts' different perceptions of the child's individualism arises in the area of first amendment rights. In *Ginsberg* and *Tinker* the Warren Court explicitly assumed that the first amendment applies to children as well as adults.¹⁰³ This assumption reflects the Warren Court's belief in the child's integrity as an individual person.

In contrast, the Burger Court in *Pico* demonstrated a much weaker commitment to the child's first amendment rights. Although the Court relied in part on *Tinker*, *Meyer*, and *Pierce*, only four justices agreed that the students' first amendment rights are protected against unconstitutional public school board action.¹⁰⁴ More important, *Pico* held that students can only enforce their rights to express and receive information by proving an unconstitutional motive behind the decision of the school

102. 104 S. Ct. at 2415. The Court did note the holding of *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975), that a probable cause hearing is a prerequisite for pretrial detention of an adult accused of a crime. The *Gerstein* Court recognized that each state has its own procedure for these hearings, including giving the accused a right to counsel and to cross-examine witnesses. *Id.* at 123. These rights, however, are not mandatory and, furthermore, do not justify foregoing a probable cause hearing. In fact, the Court stated, "[w]hatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." *Id.* at 124-25 (footnotes omitted).

The *Schall* Court, in contrast, did not even suggest that a child is entitled to a probable cause hearing before being detained. 104 S. Ct. at 2421 (Marshall, J., dissenting). Moreover, the Court did not use the *Gerstein* holding to exemplify the importance of an immediate probable cause hearing. Rather, the *Schall* Court cited *Gerstein* for its concern with the "flexibility" and "informality" of predetention hearings. *Id.* at 2415. Because the initial hearing of a juvenile is flexible and informal, the *Schall* Court found the pretrial detention of juveniles constitutionally sound. The *Schall* Court stated that if a family court judge is not required to make a finding of probable cause at the initial appearance, this fact by itself does not amount to a due process violation. *Id.* at 2416 n.27. This conclusion was in marked contrast to the *Gerstein* finding that additional procedural safeguards, such as allowing the accused to have counsel at the hearing, do not alleviate the need for a probable cause finding before detention.

103. *Tinker*, 393 U.S. at 506 (students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"); *Ginsberg*, 390 U.S. at 637 (Constitution secures "area of freedom of expression" to minors).

104. *Pico*, 457 U.S. at 865. Justices Brennan, Marshall, Blackmun, and Stevens concluded that the first amendment places limitations upon the school board's actions in removing books from public school libraries. Justices Powell, O'Connor, and Rehnquist, and Chief Justice Burger were of the opinion that the students' first amendment rights did not limit the school board's discretion in removing books from the library. *Id.* at 889 (Burger, C.J., dissenting). Justice White did not find it necessary to address the first amendment question. *Id.* at 883 (White, J., concurring).

board to remove books from the library shelves.¹⁰⁵ The *Pico* decision affords little first amendment protection because proving an unconstitutional motive is a difficult task.

The aspect of *Pico* that suggests the most disregard for the child stems from what the Court failed to say. The *Pico* Court repeatedly implied that a board decision to remove books because of their "vulgarity" is constitutionally permissible.¹⁰⁶ Prior to this implication that vulgarity is a sufficient basis for removing books from school libraries, the outer bounds of a child's first amendment right to obtain written materials was governed by the Warren Court's decision in *Ginsberg v. New York*.¹⁰⁷ The *Ginsberg* Court upheld a "variable obscenity" test for minors that proscribed the sale of potentially harmful literature to children under a certain age.¹⁰⁸ Unfortunately, although it conceded that the removed books were not "obscene,"¹⁰⁹ the school board in *Pico* failed to clarify whether it defined "obscene" under the variable test of *Ginsberg* or under an adult standard.¹¹⁰ If the board meant only that the books were not

105. *Id.* at 871. Even if the formidable burden of proving an unconstitutional motive is overcome, the students' rights are still not absolute. Removal of present library books was distinguished from acquisition of new library books. The decision in *Pico* did not affect "in any way the discretion of a local school board to choose books to add to the libraries of their schools." *Id.* After the *Pico* decision, therefore, school boards are still free to control public school library contents simply by acquiring new books that meet their standards. See Note, *Right of School Boards to Remove Books From Secondary School Libraries*, 19 WAKE FOREST L. REV. 119, 136 (1983). As Justice Rehnquist stated in his dissent in *Pico*, "this distinction between acquisition and removal makes little sense. The failure of a library to acquire a book denies access to its contents just as effectively as does the removal of the book from the library's shelf." 457 U.S. at 916 (Rehnquist, J., dissenting).

106. *Pico*, 457 U.S. at 863. The Supreme Court granted certiorari to determine if the evidence presented raised a genuine issue of fact whether the school board's "removal decision was motivated by a justifiable desire to remove books containing vulgarities and sexual explicitness, or rather by an impermissible desire to suppress ideas." *Id.* at 861 (emphasis added). Furthermore, the Court did not question the accuracy of *Pico*'s implicit concession "that an unconstitutional motivation would *not* be demonstrated if it were shown that the school board had decided to remove the books at issue because those books were pervasively vulgar." *Id.* at 871 (emphasis in original).

107. 390 U.S. 629 (1968).

108. See *supra* notes 44-46 & accompanying text.

109. *Pico*, 457 U.S. at 856 n.2.

110. The adult standard for obscenity established in *Roth v. United States*, 354 U.S. 476, 489 (1957) was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Prurient, as used by the Court, is defined as "[i]tching; longing; uneasy with desire or longing; of persons having itching, morbid, or lascivious longings; of desire, curiosity or propensity, lewd." *Id.* at 487 n.20 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (unabridged, 2d ed. 1949)).

Obscenity is currently defined for adults as any work that meets the *Roth* standard and also satisfies the following guidelines: (1) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," and (2) "the work taken,

obscene for adults, then the relationship between vulgarity and the standard of obscenity for children was raised for adjudication, but never resolved.¹¹¹ This ambiguity dangerously overshadows the *Pico* decision, leaving open the possibility that "vulgar" written materials may be obscene for children, or that "vulgarity" rather than "obscenity" now governs the outer bounds of the child's first amendment right to obtain written materials. The decision in *Pico* potentially curtails students' first amendment rights by either refining or modifying *Ginsberg* without even mentioning that case.

Use of Precedent

The second notable point of departure between the Warren and Burger Courts lies in their use of precedent. As the first Court to adjudicate the rights of the child against the state,¹¹² the Warren Court could have

as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973).

111. For example, in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), the Court was presented with the question whether the Federal Communications Commission can regulate a radio broadcast that is indecent but not obscene. *Id.* at 729. A radio station broadcast a satiric monologue entitled "Filthy Words," which contained exactly that: filthy words. After the broadcast, a father complained to the FCC that the broadcast was indecent and that it should not have been played during the day when his young son was able to hear it. The FCC agreed that the language used in the monologue was "patently offensive" but not necessarily obscene. *Id.* at 731. The FCC asserted that it could regulate such broadcasts. The Supreme Court held that because of the unique characteristics of the broadcast medium, constitutional protection of communications is not the same in every context. *Id.* at 748. Citing *Ginsberg*, the Court reasoned that the state's interest in protecting the child justified "special treatment of indecent broadcasting." *Id.* at 750. The holding in *FCC v. Pacifica* is very narrow; the FCC must consider the time of day such broadcasts would be aired, the differences between radio, television, and closed circuit transmissions, and the type of program in which the indecent language is used. *Id.* The Court cited an excerpt from Geoffrey Chaucer's *Miller's Tale* as an example of language that should not be prohibited from broadcast because, though "indecent," it would probably not catch the attention of most children: "And prively he caught hire by the queynte." *Id.* at n.29 (quoting G. CHAUCER, *THE CANTERBURY TALES*, CHAUCER'S COMPLETE WORKS 58 (Cambridge ed. 1933)).

112. *In re Gault*, 387 U.S. 1 (1967), is viewed as the harbinger of the children's rights era. Although prior cases addressed the "rights" of children, they are not significant pronouncements by the Supreme Court on children's rights. Much of their significance is lost because the children's interests, usually the same as their parents', are overshadowed by the Court's emphasis on the parents' rights. For example, the *Prince* Court stated that *Meyer v. Nebraska*, 262 U.S. 390 (1923), recognized "children's rights to receive teaching in languages other than the nation's common tongue." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). *Meyer*, however, is not recognized as a children's rights case. Indeed, it is cited for the proposition that the fourteenth amendment defines the outer boundaries for state regulation of family life. W. WADLINGTON, C. WHITEBREAD & S. DAVIS, *CASES AND MATERIALS ON CHILDREN IN THE LEGAL SYSTEM* 52 (1983); see *supra* notes 3-5 & accompanying text. In *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), the Court addressed the constitutionality of a state law that required all public school children to salute the flag each morning before school.

proceeded in one of two ways. The Court could have viewed the decisions in *Meyer*, *Pierce*, and *Prince* as the controlling precedent for allocating power among the state, parent, and child,¹¹³ or it could have interpreted the problem more broadly than a conflict concerning children and drawn on all available relevant precedent. The Warren Court predominantly chose the latter approach and relied on the wider range of cases, some of which addressed the rights of adults in similar circum-

Failure to comply resulted in expulsion for the child and prosecution of the child's parent for failing to send the child to school as required by law. A group of Jehovah's Witnesses parents successfully challenged the statute, asserting that it violated their religious freedom, which forbade them to "worship" idols such as the flag. Throughout the opinion, the Court did not distinguish the parents' and the children's rights under the first amendment. Clearly both groups had interests in seeing the statute invalidated. *Barnette*, however, has not been viewed as a children's rights case. See, e.g., Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477 (1981) (Professor Diamond uses *Tinker*, which was decided after *Barnette*, as his starting point for analyzing children's first amendment rights within the school environment); see also Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321 (1979). Although Professor Garvey acknowledged *Barnette* as a case supporting children's first amendment rights, *id.* at 327, he referred to *Tinker* as the natural place to begin an analysis of children's free speech rights. *Id.* at 338.

Finally, the Supreme Court addressed at least one other important case for children before rendering its *Gault* decision. One year before *Gault*, in *Kent v. United States*, 383 U.S. 541 (1966), the Court upheld an alleged juvenile delinquent's right to due process before the state was allowed to try the child as an adult offender. Unlike *Gault*, *Kent* is not viewed as a major case for children's rights, especially outside of criminal law. See, e.g., R. MNOOKIN, CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 107 (1978) (*Gault* presented as "wellspring for the [r]ights of [c]hildren"); *id.* at 790 (*Kent* relegated to note case in chapter discussing juvenile delinquency); W. WADLINGTON, C. WHITEBREAD & S. DAVIS, *supra*, at 197-208 (*Kent* presented as pre-*Gault* decision in chapter entitled, *Reshaping The Juvenile Justice System: Before And After In Re Gault*). Perhaps because the minor in *Kent* was sixteen years old and committed particularly heinous "adult" crimes, robbery and rape, commentators tend to focus on the criminal aspects rather than the children's rights aspects of the holding. In contrast, Gerald Gault committed the offense of making an obscene call, commonly viewed as a childish prank. In addition, *Kent* may seem less significant than *Gault* because the *Kent* decision rested upon a narrow statutory interpretation in light of constitutional principles. This narrow holding obviated the need to examine the child's constitutional rights in criminal law. *Kent*, 383 U.S. at 556; see Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 178-81.

Thus, notwithstanding the prior decisions in *Prince*, *Barnette*, and *Kent*, in which children's rights arguably were adjudicated, *Gault* is seen as the precursor of cases recognizing the rights of children under the Constitution. See Meikeljohn, *The Reconciliation Of First Amendment Freedoms With Local Control Over The Moral Development Of Minors*, 12 SUFFOLK U.L. REV. 1205, 1223 (1978) (*Gault* was the "starting point for analysis of the constitutional protections for juveniles"); see also Wald, *Children's Rights: A Framework for Analysis*, 12 U.C.D. L. REV. 255, 266 (1979) ("right of minors to adult legal status or protection has gradually increased" since *Gault*).

113. See *Ginsberg*, 390 U.S. at 638 (using *Prince* to propose that the state, as *parens patriae*, has more power to regulate child's conduct than to regulate adult's).

stances.¹¹⁴ Thus, the Warren Court limited the applicability of the early children's rights cases by establishing that state regulations governing the child's conduct cannot be justified merely by reliance on the state's *parens patriae* power.

In determining the rights of children, the Warren Court opinions regularly cited as precedent certain cases concerned with individual rights, whether those rights attached to adults or to children.¹¹⁵ The Burger Court, however, has not relied on a consistent body of precedent. In *Schall*, for example, the Court cited as precedent a group of cases exhibiting only a tangential relationship to the issue in the case before the Court.¹¹⁶ Although the cited cases all involved children, they were otherwise vastly dissimilar to *Schall*.¹¹⁷

In *Pico*, on the other hand, the Burger Court extended its focus beyond the range of cases allocating power among the state, parent, and child. For example, the *Pico* Court upheld the child's right to receive information by relying on precedent establishing that right for adults.¹¹⁸ The Burger Court thus used two different analytical approaches within a span of two years. For this reason, a comparison of the Warren Court's opinions in *Gault*, *Ginsberg*, and *Tinker* to the Burger Court's opinions in *Schall* and *Pico* indicates that the Warren Court possessed a more consistent methodology than did the Burger Court.

114. See *infra* note 204 & accompanying text for a discussion of *Gault*. See *infra* notes 165-69 & accompanying text for a discussion of *Ginsberg*.

115. See *infra* notes 150, 165-69 & accompanying text, 204 & accompanying text.

116. See *infra* note 117.

117. The *Schall* Court stated that "juveniles, unlike adults, are always in some form of custody." *Schall v. Martin*, 104 S. Ct. 2403, 2410 (1984) (citing *Lehman v. Lycoming County Children's Servs.*, 458 U.S. 502, 510-11 (1982) (involving state's power to terminate parental rights)).

To justify the proposition that children's interests in not being incarcerated must give way to the state's *parens patriae* interest of preserving and promoting the children's welfare, the *Schall* Court cited yet another Burger Court opinion. *Schall*, 104 S. Ct. at 2410 (citing *Santosky v. Kramer*, 455 U.S. 754, 766 (1982) (involving state's power to terminate parental rights)).

The *Schall* Court deduced that the state has a responsibility to see that the child is protected "from the consequences of his criminal activity," once again citing, *inter alia*, another Burger Court opinion. *Schall*, 104 S. Ct. at 2411 (citing *Bellotti v. Baird*, 443 U.S. 622 (1979) (involving minor's right to obtain abortion without parental consent)). From these broad statements derived from such dissimilar cases, the *Schall* Court concluded that the state's interest in the pretrial detention of juveniles is legitimate.

118. *Pico*, 457 U.S. at 867. The cases cited addressed the rights of adults: *Stanley v. Georgia*, 394 U.S. 557 (1969) (Constitution protects the right to receive information); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (right to freedom of expression is meaningless without corresponding right to receive ideas); *Martin v. Struthers*, 319 U.S. 141 (1943) (right to receive ideas inevitably follows from first amendment right to send ideas).

Use of Factual Data

The divergence in the approaches of the Warren and the Burger Courts is further exemplified by their use of factual data. A comparison of the *Gault* and *Schall* opinions reveals that the respective Courts gave different weight to such evidence. In *Gault*, the Warren Court relied on national crime statistics and research from sociologists and legal scholars to analyze whether the denial of due process impeded or promoted the goals of the juvenile justice system.¹¹⁹ Because it found the goals of a separate juvenile justice system independent of those involved in granting the right to due process, the *Gault* Court found no reason to treat a juvenile differently from an adult accused of a similar offense.¹²⁰

Moreover, the Court in *Gault* realistically appraised the family situation of the particular juvenile involved. The Court found that the parents offered a supportive environment and demonstrated their concern for their child's welfare.¹²¹ The *Gault* Court chided the state courts for ignoring the family and its role in the child's development.¹²² Thus, the Warren Court examined statistical and factual data pertinent to the case.

In contrast, the Court in *Schall* upheld a juvenile preventive detention statute despite substantial statistical evidence indicating that pretrial detention serves to punish the child.¹²³ The lower courts had reviewed the same evidence and invalidated the statute, based on their findings that most children detained under the statute were eventually released before or following trial;¹²⁴ many of the children who were released during the period between their arrest and initial appearance committed no crimes during release, but nonetheless were detained after the initial appearance, pursuant to the statute;¹²⁵ and finally, the determination that a child presents a "serious risk" to the community entailed a subjective

119. The *Gault* Court relied on numerous statistical reports, *see, e.g.*, 387 U.S. at 20-21 n.26, books, *see, e.g., id.* at 20 n.26, 27 n.38, and scholarly articles, *see, e.g., id.* at 15 nn.15-16, 17 n.21, 18 n.23.

120. *See supra* notes 35-38 & accompanying text.

121. *Gault*, 387 U.S. at 28.

122. *Id.* at 28-29. The Supreme Court, admonishing the trial court, noted that the possibility of allowing Gerald to be disciplined at home by his parents should have been explored. The only investigation into Gerald's home environment included brief questions by the Juvenile Judge about Gerald's school work and a trip away with his father.

123. *Schall*, 104 S. Ct. at 2415.

124. *Id.* at 2422 (Marshall, J., dissenting). The lower courts relied on 34 case histories in which the juveniles were detained before trial. Of the 34 detained youths, 23 were released either before or immediately after their trials. The majority in *Schall* dismissed these case studies as unrepresentative. *Id.* at 2414 n.21. The dissent, however, pointed to testimony that the 34 cases were typical. *Id.* at 2421 n.7 (Marshall, J., dissenting).

125. *Id.* at 2422 (Marshall, J., dissenting). Sixteen of the 34 cases in the study were in this category.

judicial evaluation whose accuracy was little better than chance.¹²⁶ The Supreme Court, however, indicated that even if the statistics had been "obtain[ed] nationwide," it would not have changed its decision.¹²⁷

Yet the *Schall* Court failed to consider the actual impact of the statute on any of the individual youths. Had it considered examples of the application of the statute, the Court might well have concluded that detention was unnecessary because many youths arrested under the statute were never tried. As the dissent pointed out, one fifteen-year-old, who was detained "for enticing others to play three-card monte," was released five days later after the juvenile court found that such conduct was not unlawful.¹²⁸ Another youth, fourteen years old, was charged with attempted first-degree robbery and second-degree assault. Following three weeks of detention without a trial,¹²⁹ his case was terminated and he was released to the custody of his father.¹³⁰

Finally, the *Schall* Court was inconsistent in its appraisal of the family situation. If the father of the fourteen-year-old discussed above ultimately provided adequate protection over the detainee, no legitimate interest was served by the state's failure to release him to his father's custody pending disposition of his case. If the state's justification for detaining a juvenile prior to trial rests upon its *parens patriae* power, the "faltering"¹³¹ of the parent should be a prerequisite to the state's interference with the family unit before trial and should justify retaining state custody over the child even after the case is terminated. Because the *Schall* Court was unconcerned with the family situations of the individual youths, it failed to specify what standards must be met before the state can be substituted for the parent. For this reason, the inconsistency of the Burger Court's analysis may be attributable, at least partly, to its failure to evaluate all the relevant evidence.

126. *Id.* at 2426 (Marshall, J., dissenting). "[T]he District Court found that 'no diagnostic tools have as yet been devised which enable even the most highly trained criminologist to predict reliably which juveniles will engage in violent crime.'" *Id.* at 2425 (quoting *Martin v. Strasburg*, 513 F. Supp. 691, 708 (S.D.N.Y. 1981)).

127. *Schall*, 104 S. Ct. at 2415 n.23. The "statistics" to which the Court referred are the 34 case studies done in New York. See *supra* notes 124-25 & accompanying text.

128. *Id.* at 2426 n.21 (Marshall, J., dissenting).

129. *Id.* at 2407. Six days after his arrest, probable cause was found to try him for the offenses.

130. *Id.* Admittedly, there may have been a variety of reasons for not trying the youth, such as lack of evidence or absence of witnesses. See *id.* at 2415.

131. See *id.* at 2410. The Court acknowledged that children are assumed to be subject to the control of their parents "until parental control falters." *Id.*

The Court's Failure to Establish Consistent Guidelines

Clearly missing from the Supreme Court's attempts to resolve conflicts among the state, parent, and child are consistent judicial standards. *Meyer*, *Pierce*, and *Prince* reflected the widely accepted social value that supreme authority over the child should vest in the parent, subject to reasonable state regulations. These decisions, however, did not establish an analytical approach for future cases. For example, in *Prince* the Court raised the question whether the child enjoys first amendment protection from state regulations that prohibit minors from distributing religious leaflets on public streets.¹³² Underlying the *Prince* holding, however, was the state's authority to override the parent's right to direct the child's upbringing for the purpose of protecting the child from a potentially dangerous situation.¹³³ Thus, the *Prince* Court posited, but left unanswered, the critical question: What relationship does the child's right have to the rights of the state and the parent?

Although the Warren Court's decisions in *Gault*, *Ginsberg*, and *Tinker* rest upon a fairly consistent analytical foundation, this consistency cannot be attributed to the application of an existing framework of analysis. *Meyer*, *Pierce*, and *Prince* certainly did not provide such a framework for the analysis of children's rights. Indeed, those opinions shied away from an examination of the child's rights. At most, any consistency that derives from the *Gault*, *Ginsberg*, and *Tinker* holdings is a result of the Warren Court's attempt to analyze children's rights cases in a scholarly fashion, consistent with its belief that the Constitution protects children as well as adults.

As the decisions in *Schall* and *Pico* illustrate, the Burger Court has departed significantly from the path charted by the Warren Court in children's rights cases. This departure would be less disconcerting if in *Schall*, *Pico*, and other opinions¹³⁴ the Court had manifested another consistent approach in this area of the law.¹³⁵ For example, the decision

132. *Prince v. Massachusetts*, 321 U.S. 158, 163-64 (1944).

133. *Id.* at 170.

134. See, e.g., *Parham v. J.R.*, 442 U.S. 584 (1979) (Burger Court upheld the commitment of minors to state mental institutions by their parents without an adversarial hearing that is constitutionally required for adults involuntarily committed) (discussed *infra* notes 159-61, 230 & accompanying text); *Bellotti v. Baird*, 443 U.S. 622 (1979) (Burger Court upheld greater restrictions on minors seeking abortions than would be permissible on adults) (discussed *infra* notes 227-30 & accompanying text); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Burger Court upheld Amish parents' rights to withdraw children from public school after completion of the eighth grade without explaining why the children's rights were irrelevant) (discussed *infra* notes 250-53 & accompanying text).

135. For a discussion of the Burger Court's inconsistent analytical approaches to resolving the conflicts in *Schall* and *Pico*, see *supra* notes 116-18 & accompanying text. The Burger

in *New Jersey v. T.L.O.*,¹³⁶ which constitutes the Court's most recent pronouncement regarding conflicts between the child and the state, demonstrates the Burger Court's continuing failure to provide the necessary guidelines for analyzing children's rights.

In *T.L.O.*, the Court addressed the scope of the fourth amendment with respect to searches and seizures within public schools.¹³⁷ The Court employed a traditional test, balancing the government's need to search against the student's expectation of privacy. The Court, however, applied the test in an unprecedented fashion, assessing the reasonableness of issuing a warrant according to the reasonableness of the search itself.¹³⁸ Additionally, the Court bypassed a careful analysis of the consti-

Court's analytical inconsistency also is evident from a comparison of its decision in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (discussed *infra* note 231), with its decision in *Bellotti v. Baird*, 443 U.S. 622 (1979) (discussed *infra* notes 227-30 & accompanying text). A third example of the Burger Court's failure to analyze children's rights consistently is the Court's use of the *parens patriae* doctrine. In at least two cases preceding *Schall*, the Burger Court held that state intervention as *parens patriae* into family matters is justifiable only when the parent is unfit. See *infra* note 181. Nevertheless, in *Schall* the Court relied on *parens patriae* to justify the pretrial detention of certain children without the required showing of parental unfitness. See *infra* notes 201-03 & accompanying text. A final example is presented by the Burger Court's failure consistently to apply established fourth amendment principles to searches and seizures of public school students. See *infra* notes 137-43 & accompanying text.

136. 53 U.S.L.W. 4083 (U.S. Jan. 15, 1985).

137. *Id.* A teacher found the respondent, T.L.O., and another young woman smoking in the school bathroom. The teacher took the two students to the Assistant Vice Principal for disciplinary action because smoking was a violation of the school's rules. *Id.* at 4084. T.L.O. denied that she had been smoking and claimed that she did not smoke at all. The Vice Principal demanded to see T.L.O.'s purse, opened the purse, and found a pack of cigarettes. As he reached into the purse to remove the cigarettes he saw rolling papers. The Vice Principal then suspected that the purse might contain further evidence of drug use. He thoroughly searched the purse, finding a small amount of marijuana, a pipe, a substantial amount of money, an index card with a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marijuana dealing. The evidence was turned over to the police and delinquency charges were brought against T.L.O. She moved to suppress the evidence, contending the search of her purse was a violation of the fourth amendment. *Id.* The Juvenile Court denied her motion to suppress. *State ex rel. T.L.O.*, 178 N.J. Super. 329, 428 A.2d 1327 (1980). The Juvenile Court concluded that the fourth amendment did apply to searches conducted by public school officials, but because the search was "reasonable," the search was legal. *Id.* at 341, 428 A.2d at 1333. T.L.O. was adjudicated a delinquent. On appeal, the court affirmed that there was no fourth amendment violation. *State ex rel. T.L.O.*, 94 N.J. 331, 463 A.2d 934 (1983). The New Jersey Supreme Court agreed that a search by school officials does not violate the fourth amendment if the search is based on a reasonable belief that the student possesses "evidence of illegal activity or activity that would interfere with school discipline and order." *Id.* at 346, 463 A.2d at 941. The court, however, stated that the search conducted by the Vice Principal was not reasonable. *Id.* at 347, 463 A.2d at 442.

138. *T.L.O.*, 53 U.S.L.W. at 4086 (citing *Camara v. Municipal Court*, 387 U.S. 523, 536 (1967)). The language taken from the *Camara* case is misplaced in *T.L.O.*. *Camara* dealt with the bounds of fourth amendment protections with respect to routine administrative searches by building inspectors. In *Camara*, the Court held that warrantless administrative searches vio-

tutional safeguards of the fourth amendment.¹³⁹ Without consideration of the historical rationale underlying the protection guaranteed by the fourth amendment, the Court held that public school officials may search students without first obtaining a search warrant.¹⁴⁰ Furthermore, the search need not be predicated on probable cause that the student committed a crime.¹⁴¹ Finally, the Court explicitly stated that school officials may discipline students by enforcing rules that prohibit conduct which would be permissible if undertaken by an adult.¹⁴² Therefore, under *T.L.O.*, public school officials may search a student if they have "reasonable grounds" to believe that the search will produce evidence of a stu-

late the fourth amendment unless an emergency situation is present. *Camara*, 387 U.S. at 539-40. The Court went on to explain that requiring probable cause that a housing violation is present to obtain a warrant for routine administrative searches would be unreasonable. It is here that the "balancing" language is found in *Camara*. The *Camara* Court stated that routine inspections are important to society because the search may lead to possible dangerous conditions. Moreover, these types of inspections are a "relatively limited invasion" of the individual's privacy. *Id.* at 537. These considerations are balanced in determining the reasonableness of issuing a search warrant. *Id.* at 536-37. The *T.L.O.* Court, however, used the balancing approach to develop a new test for deciding when the search itself is reasonable, not when it would be reasonable to issue a warrant. Justice Brennan also noted the unprecedented use of the balancing test. *T.L.O.*, 53 U.S.L.W. at 4091-92 (Brennan, J., dissenting).

139. The dissent pointed out that there are three basic principles underlying fourth amendment analysis. *T.L.O.* 53 U.S.L.W. at 4091 (Brennan, J., dissenting). First, warrantless searches are unreasonable per se unless a "specifically delineated" exception is present. Second, full-scale searches are reasonable only if there is probable cause to believe a crime has been committed. Third, less intrusive searches may be justified if the privacy interests of the individual are protected. *Id.* (Brennan, J., dissenting). The majority opinion never discussed these basic principles in any detail. Moreover, the general statements regarding the protections of the fourth amendment made in the majority opinion are immediately followed by qualifications. *See, e.g., id.* at 4086 (underlying command of fourth amendment is that search should be reasonable, but what is reasonable depends on the context); *id.* at 4087 (fundamental command of fourth amendment is that a search be reasonable and that probable cause and the requirement of a warrant bear on reasonableness; however, in limited circumstances neither is required). The Court prefaced its holding with the statement that it has dispensed with the warrant requirement in other cases when the burden on the government of getting a warrant will frustrate the governmental purpose behind the search. *Id.* (citing *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967)). It is interesting to note that the Court cites *Camara* for the proposition that in certain circumstances warrants are unnecessary. The *Camara* Court held that a search warrant is necessary for routine administrative inspections of buildings. *See supra* note 138.

140. *T.L.O.*, 53 U.S.L.W. at 4087.

141. *Id.* The Court explained that the "public interest is best served" if the standard is less than probable cause for conducting a search within the public school. *Id.* It found the interest in assuring the ability of public school officials to maintain discipline in the school controlling in this case. *Id.* The Court concluded that school disciplinary proceedings require flexibility to be effective. The proceedings, therefore, should not be unduly burdened with a requirement that a search warrant be obtained, *id.*, or that the search be justified on probable cause. *Id.*

142. *Id.*

dent's violation of a law or a school rule.¹⁴³

Like *Schall*, *Pico*, and other Burger Court opinions,¹⁴⁴ *T.L.O.* evidences the Court's failure to apply established legal principles to children's rights cases in a consistent manner. Initially, the *T.L.O.* Court invoked the traditional balancing test under the fourth amendment by weighing the government's need to search against the student's expectation of privacy. The Court's incorrect analysis of fourth amendment requirements and its misapplication of precedent, however, allowed it to depart from the traditional test.¹⁴⁵ This departure left the Court free to fashion a new standard for fourth amendment searches and seizures that seems to apply only to public school students.¹⁴⁶

In sum, the judicial resolution of conflicts among the state, parent, and child, although analytically inconsistent, has progressed along predictable lines. In *Meyer*, *Pierce*, and *Prince*, the Supreme Court upheld the parents' right to control the child's upbringing, subject to reasonable state regulations; in *Gault*, *Ginsberg*, and *Tinker*, the Court recognized that children are protected by the Constitution. Neither of these principles is objectionable or overly controversial. A recent line of cases, however, has raised the "uglier" issues, such as abortion for minors¹⁴⁷ and the commitment of minors to state mental hospitals.¹⁴⁸ These more controversial issues, as well as others discussed below,¹⁴⁹ have fallen to the Burger Court. In fact, the Burger Court may have encountered difficulty in defining the parameters of children's rights because these cases are more likely to contain issues involving parent-child conflicts. The increasing number of cases in this area and the complexity of the issues necessitate the development of an appropriate analytical framework for resolving state-parent-child conflicts.

143. *Id.* Because the Vice Principal had reasonable grounds to believe that T.L.O.'s purse contained evidence of her smoking in violation of school rules, the search was upheld. *Id.* at 4088-89.

144. See *supra* note 135 & accompanying text.

145. See *supra* notes 138-39.

146. Given the faulty basis for its holding and the Burger Court's tendency to disregard established principles in children's rights cases, however, the effect of *T.L.O.* on future fourth amendment and children's rights cases is difficult to predict.

147. *H.L. v. Matheson*, 450 U.S. 398 (1981) (upholding state law requiring parental notification before dependent, unmarried minor can obtain abortion); *Bellotti v. Baird*, 443 U.S. 622 (1979) (invalidating state law requiring mature minor to obtain parental consent before getting abortion) (discussed *infra* notes 227-30 & accompanying text).

148. *Parham v. J.R.*, 442 U.S. 584 (1979) (upholding state statute regulating commitment of minors, by parents, to mental institutions).

149. See *supra* note 134.

Developing a Framework of Analysis

Children's "Rights" in Perspective

As illustrated above, the Supreme Court has failed to analyze the status of the child under the Constitution in a consistent and principled manner. Some decisions reflect a view that the constitutional boundaries of children's rights are coterminous with those of adults¹⁵⁰ (the coterminous view), while other decisions suggest that children should be governed by a set of legal principles separate from those governing adults¹⁵¹ (the separatist view). Finally, some decisions fall in between, generally integrating principles from the law as applied to adults and modifying those principles in appropriate cases to accommodate the child's status as a child in society¹⁵² (the integrationist view). In developing a framework for analysis, the initial step must be a determination of the governing approach. The following examination of these approaches demonstrates that the integrationist view is the most satisfactory.

150. See, e.g., *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (upholding rights of public school students to wear black armbands in protest of Viet Nam war). The *Tinker* Court treated children's first amendment rights in a manner consistent with the approach it would have taken had adults' rights been at issue. *Id.* at 505. However, the *Tinker* Court was silent as to whether children and adults enjoy identical first amendment rights in all situations. Yet, in his concurrence in *Tinker*, Justice Stewart interpreted the majority opinion as holding that "the First Amendment rights of children are co-extensive with those of adults." *Id.* at 515 (Stewart, J., concurring). Some commentators have adopted Justice Stewart's reading of the majority's opinion in *Tinker*. See Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756, 1763 (1981); *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1359 (1980) [hereinafter cited as *Developments—The Family*].

A less questionable example of the view that children's and adults' rights are coterminous is found in *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). In *Barnette*, the Court did not distinguish between adults' and children's first amendment right not to salute the flag. For a discussion of *Barnette*, see *supra* note 112.

151. See, e.g., *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). The *McKiever* Court held that a juvenile delinquent is not entitled to a trial by jury. The Court examined the status of the child in society and the state's role, as *parens patriae*, in protecting the child from a formal adversarial criminal trial. The Court did not focus upon the values and purposes of a jury trial, as guaranteed to adult offenders under the sixth amendment.

152. See, e.g., *New York v. Ferber*, 458 U.S. 747 (1982). The *Ferber* Court upheld the constitutionality of a statute prohibiting the sale of child pornography. In reaching its conclusion, the Court narrowly tailored permissible restrictions on the child's first amendment right to freedom of expression by comparing the child's rights to those of the adult. Because psychological studies demonstrated that the child who participates in pornographic movies is harmed, the Court upheld greater restrictions on the child's first amendment rights than would be permissible on an adult's. *Id.* at 758; see also *Ginsberg v. New York*, 390 U.S. 629 (1968) (discussed *supra* notes 43-46 & accompanying text).

Coterminous View

Setting coterminous boundaries for children's and adults' constitutional rights is the approach that seems most consistent with democratic principles. This approach respects the child as an individual, regardless of age, and reflects a fundamental belief in individual freedom.¹⁵³ Moreover, judicial review based upon this view is simplified because adults and children enjoy the same constitutional privileges. In essence, any conflict that arises concerning the state, parent, and child would be analyzed as a conflict between two parties: the state and either the parent or the child.¹⁵⁴ Finally, the coterminous view promotes consistency and predictability in the area of children's rights because, in a given area of children's rights law, courts can draw upon a well-established body of law addressing the area from an adult perspective.

Although the coterminous view is attractive in theory, in practice it is unrealistic. First, expecting children to make adult decisions is both unfair and unrealistic.¹⁵⁵ For example, many children, especially the very young, are incapable of exercising a right to vote, deciding whether to marry, or even deciding to attend school. If everyone enjoyed the same rights regardless of age, however, children could vote without understanding the process; they could marry without being able to handle the responsibilities of married life; and they could choose not to attend school without fear of reprisal. The coterminous view is flawed because

153. The coterminous view of adults' and children's rights is similar to the "laissez-faire approach to freedom" discussed and criticized by Professor Garvey. See Garvey, *supra* note 150, at 1762-65. Both are premised upon a belief in individual dignity without regard to age.

154. In some cases the state's nominal adversary may be a third party. Any state regulation that either directly or indirectly places limits upon the child involves the parent or the child. For example, the statute in *Meyer v. Nebraska*, 262 U.S. 390 (1923), prohibited teachers from teaching German to children who had not passed the eighth grade. Nevertheless, the Court's analysis focused upon the parent's right to control the child's upbringing.

155. See generally G. MELTON, G. KOOSHER & M. SAKS, *CHILDREN'S COMPETENCE TO CONSENT* 14-16 (1983). In the area of treatment decisions, psychological studies suggest that children fifteen years and older generally are capable of making decisions on their own. In contrast, studies suggest that between the ages of eleven and fourteen, children's "important cognitive and social abilities" may still be developing. *Id.* at 15; see also J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* (1979). The authors, all child therapists who advocate minimum state intrusion into the parent-child relationship, argue that "[i]n the eyes of the law, to be a child is to be at risk, dependent, and without the capacity or authority to decide free of parental control what is 'best' for oneself." *Id.* at 7. Professor Garvey also rejects a concept of equal rights for adults and children, partly because of their varying abilities to make rational choices. Garvey, *supra* note 150, at 1764-67. On the other hand, when a child demonstrates the requisite decisionmaking ability, as does, for example, the mature minor seeking an abortion without parental consent, Professor Garvey concedes the law should uphold the child's right to self-determination. Garvey, *supra* note 150, at 1765.

it implies that courts must evaluate children's conduct by the adult standard. Moreover, the coterminous view vitiates the justification for the state to provide children with greater protection than adults. Consequently, parents would bear the entire burden of protecting the child from the evils of society. Imagine a state powerless to enact child pornography laws because the first amendment protects this form of expression for adults. Although the parent may try to teach the child why and how to avoid the pornographic industry, better protection is available to the child if the state outlaws the solicitation of children for use in producing pornographic materials.¹⁵⁶ Such laws, which are indefensible under the coterminous view, also protect the child from an exploitive parent.

Finally, the coterminous view of adults' and children's rights may result in a distortion of the child's perception of authority.¹⁵⁷ If a child perceives that society treats children and adults similarly, then the child may have difficulty reconciling different treatment within the family.

Separatist View

The separatist view, like the coterminous view, offers several advantages to the process of child-state-parent conflict resolution. Under this theory, courts are not required to apply the legal principles that have been established for adults, but are free to rely upon other children's rights cases.¹⁵⁸ As a result, courts have broader discretion and flexibility

156. See *New York v. Ferber*, 458 U.S. 747, 750-69 (1982) (legitimate state interest of protecting child's welfare is served by statute making distribution of child pornography a criminal offense).

157. Dr. Andrew Watson has stated that the parent is the principal authority figure for the child. Watson, *Children, Families, and Courts: Before the Best Interests of the Child and Parham v. J.R.*, 66 VA. L. REV. 653, 664-65 (1980). At eight or nine years of age, the child begins to respond to outside authority figures. Whether the child is able to incorporate outside authority figures into the family's notions of "good and bad" "depends critically upon family stability and continuity; anything that undermines those qualities will impair the child's ability to extend his awareness of authority concepts from the family to the world outside." *Id.* (footnote omitted).

158. The separatist view, at its extreme, would require courts to rely only upon children's rights cases, never recognizing the developmental capacity of the child. Professor David Diamond appears to have supported a separatist view of children's rights, especially in the public school setting. Diamond, *supra* note 112. He rejected the idea that children's and adults' first amendment rights are co-extensive, and criticized the *Tinker* Court for suggesting that they are so. *Id.* at 489-90. The *Tinker* Court's failure to recognize the inequality between the rights of adults and those of children, as well as its disregard for the special purposes and nature of the public school, according to Professor Diamond, resulted in widespread judicial confusion over the legal status of children. *Id.* at 497, 525. As an example, he compared *Tinker* to *Bellotti v. Baird*, 443 U.S. 622 (1979), in which the Court held that only a mature minor has a right to an abortion without parental consent. Diamond, *supra* note 112, at 490-92. Placing

to group children according to their individual stages of development and their particular needs. The separatist view allows courts to respect the child as a child and as an individual.

This approach, however, has certain disadvantages. Unlike the coterminous approach, the separatist approach also may diminish the child's integrity as an individual; thus, some courts, disregarding the child's interest, may misidentify the conflict as one between the state and the parent. For example, the Burger Court in *Parham v. J.R.*¹⁵⁹ stated that a child's liberty interest in not being unnecessarily confined in a state mental institution is "inextricably linked with the parents' interest in and obligation for the welfare and health of the child."¹⁶⁰ Relying on this initial assumption, the Court focused upon the parents' role in a commitment proceeding and whether the state's voluntary commitment procedures helped the parent fulfill that role.¹⁶¹

The separatist view also may hinder the development of consistent judicial standards. Under this view the reviewing courts have greater freedom to vary results from child to child, depending upon the individual child's needs. Consequently, this freedom may lead to unfairness and inconsistency.

Additionally, the separatist view is inefficient because it may disregard many valuable lessons and established principles from the adult legal world. Following this reasoning to its extreme, under the separatist view a court may feel that "anything goes," so long as it purports to act in the child's best interest.

Finally, like the coterminous view, the separatist view may distort a child's perception of reality. Rather than teaching the child that society expects everyone to obey general rules, this view may give a child a sense that age is a reason or excuse not to conform to adult standards. For example, children familiar with the juvenile justice system may believe that they are entitled to "one free ride."¹⁶²

Tinker, a free speech case, and *Bellotti*, a right to privacy case, into a broad category of children's rights cases typifies the separatist view.

159. 442 U.S. 584 (1979).

160. *Id.* at 600.

161. The *Parham* Court found that the state statute adequately protects against the erroneous commitment of minors because it requires a physician to determine whether the child is mentally ill before a commitment is authorized. *Id.* at 613. The state statute also requires periodic review of the child's condition to ensure that the duration of the child's stay is not unnecessarily prolonged. *Id.* at 615. At the same time, the procedures are not so formal or adversarial as to discourage parents from seeking to commit their children who are in need of psychiatric treatment. *Id.* at 605.

162. Confidential conversation with a third-year law student who, during his teens, had appeared in family court on three occasions to answer to delinquency charges.

Integrationist View

The integrationist view combines the advantages and eliminates many disadvantages of the coterminous and separatist views. This approach requires the judicial application of established legal principles, whether first applied to adults or to children, to resolve conflict among the state, parent, and child. The court must compare the rights of the child to those of an adult in a similar situation. If there is no demonstrable reason¹⁶³ to treat the child differently, the child's rights should be the same as an adult's. Conversely, if evidence shows that in a particular situation the child needs to be treated differently, the state may impose a greater restriction on the child pursuant to its police powers.¹⁶⁴ In such situations, the child's rights should be modified accordingly.

The decision in *Ginsberg v. New York*¹⁶⁵ illustrates an application of the integrationist view. In *Ginsberg*, the Supreme Court adopted a different obscenity standard for children. The Court's analysis began with an evaluation of adults' rights with respect to obscenity.¹⁶⁶ Next it examined available evidence to determine if any reason existed for modifying those rights in the juvenile setting. Lacking evidence concerning the effect of "girlie" magazines on child development,¹⁶⁷ the *Ginsberg* Court

163. A "demonstrable" reason is one other than the fact that the child is a child. Generally, courts should rely upon social and psychological studies of child development to support their decisions to impose greater restrictions upon a child than would be permissible upon an adult. Professor Michael Wald shares this opinion. See Wald, *supra* note 112, at 266-68.

164. The state's police power is invoked to justify regulations that protect and promote the public welfare. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54, 67 (1973) (injunction against private theatre owners to stop showing "obscene" movies upheld under state's police power); *Jacobson v. Massachusetts*, 197 U.S. 11, 24-25 (1905) (state law requiring vaccination against smallpox upheld under state's police power).

The state's police power is distinguishable from its *parens patriae* power. The latter justifies state intervention for the purpose of protecting and promoting the child's welfare when the parent has failed to do so. See *supra* note 11; *infra* note 181.

165. 390 U.S. 629 (1968).

166. The *Ginsberg* Court explained that "[o]bscenity is not within the area of protected speech" for adults, 390 U.S. at 635 (quoting *Roth v. United States*, 354 U.S. 476, 485 (1957)), and that obscenity may be "suppressed" without a showing that the adult is harmed. 390 U.S. at 641.

167. See *supra* note 45 & accompanying text. Although the evidence was inconclusive, the *Ginsberg* Court noted that one doctor recommended that reading pornographic material may not be harmful to children, but *permitting* the reading may be "potentially destructive." 390 U.S. at 642 n.10 (quoting Gaylin, Book Review, 77 YALE L.J. 579, 594 (1968)) (emphasis added). Dr. Gaylin explained that "[t]he child is protected in his reading of pornography by the knowledge that it is pornographic, i.e., disapproved. It is outside of parental standards and not a part of his identification processes. To openly permit the reading implies parental approval and even suggests seductive encouragement. If this is true of parental approval, it is equally so of societal approval—another potent influence on the developing ego." Gaylin, *supra*, at 594.

cautiously sought to protect the child by an extension of the state's power to proscribe obscenity for adults.¹⁶⁸ The Court upheld the state's exercise of power to prohibit the sale of the magazine to minors even though such material is not obscene to adults.¹⁶⁹

There are many advantages of an integrationist approach. This approach comports with democratic principles because the child is treated as an individual, entitled to respect and fair treatment. It also facilitates judicial review by requiring the application of recognized values and standards, regardless of the age of the party involved. Consequently, children's rights cases are more consistent and predictable. More important, the integrationist view holds courts to a higher standard of analysis because, under this view, reliance on a vague rationale of *parens patriae* is insufficient for state intervention. Consequently, the reasoning in opinions that determine the validity of state intervention will be more systematic, accurate, critical, and thorough.¹⁷⁰ Finally, state intervention into

168. See *supra* note 46 & accompanying text; *infra* notes 187-88 & accompanying text.

169. See *supra* note 44 & accompanying text.

170. The integrationist view of children's rights appears to have the greatest support among scholars in this area. Yet the method by which children's rights should be incorporated into the existing legal structure is debatable. Recent trends focus on the child's maturity level. When the child is "mature enough" to understand the consequences of a particular decision, some advocates of the integrationist view assert that the parent and state should let the child make the decision. See C. MELTON, G. KOOCHER & M. SAKS, *supra* note 155, at 245-48. The Supreme Court also accepted this view when it invalidated a state law that required a mature minor to obtain parental consent before getting an abortion. *Bellotti v. Baird*, 443 U.S. 622, 647 (1979).

Professor Goldstein, however, has argued that a determination of the child's maturity, as a prerequisite to allowing the child to make decisions, transfers control over the child from the parent to the state. Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 662-63 (1977). The child continues to be subject to an outside decision-maker. A better solution, according to Professor Goldstein, would be to establish objective, nonjudgmental criteria that could be applied to all children in a given situation. For example, he has suggested that age and the condition of being pregnant are sufficient to establish independence to make an abortion decision without parental or state interference. *Id.* at 663.

Another possibility for integrating children's rights into the legal system is to grant or withhold certain rights, depending on the nature of the particular right in question. For example, Professor Robert Keiter has suggested that a child should enjoy the right to privacy when confronted with "a fundamental and critically important matter which threatens grave and enduring consequences, necessitating prompt decision making and action." Keiter, *Privacy, Children, and Their Parents: Reflections On and Beyond the Supreme Court's Approach*, 66 MINN. L. REV. 459, 503 (1982). Adopting a theory of "liberal paternalism" drawn from the philosophical writings of Locke, Rousseau, and Kant, Professor David Richards would limit the role of the judiciary in family matters to ensuring that the child becomes an autonomous adult. Richards, *The Individual, The Family, And The Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 14-15 (1982). Accordingly, the parent's role in this process would not be to control the child, but rather to guide and educate the child into independent rationality. Thus, the child should be allowed to make certain decisions that affect the child's

the family unit will be limited to cases in which the state, as sovereign, demonstrates a legitimate interest. Thus, the preferred methodological framework is based upon the integrationist approach.

Operational Premises

The next step in developing the methodology is to insure that it promotes acceptable concepts about the child's role in society. For this reason, the methodology developed below is based upon three operational premises. The first premise is that the parent is the primary decision-maker for the child. The second premise is that fundamental rights attach to children as well as to adults. If a child's fundamental right is involved, this right should be evaluated in any dispute resolution process. Conversely, if a child's fundamental right is not implicated, the parent's right should be evaluated. The third premise is that intervention on behalf of the child by the state as *parens patriae* is justifiable only when the parent has failed to protect or promote the child's welfare. Even then, the state, acting on its own behalf as sovereign, may intervene in the parent-child relationship only to serve legitimate state interests.

The Parent as Primary Decisionmaker

Vesting primary responsibility and authority in the parent for the child's development follows from a common belief in the sanctity of the parent-child relationship¹⁷¹ and the role of the family in Western civiliza-

ability "to develop rational independence." *Id.* at 42. Under this theory, Professor Richards criticized the Supreme Court's decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder*, the Court upheld Amish parents' rights to withdraw their children from public school two years before attaining the statutory age or grade level because of their religious beliefs. Professor Richards asserted that, in not allowing the children to decide for themselves whether to stay in school, the Court violated their rights to be exposed to the values of an education. Richards, *supra*, at 42; see also *Developments—The Family*, *supra* note 150, at 1359 ("The values underlying freedom of expression justify recognizing a constitutional right for children of the same magnitude as that for adults.").

As shown by this brief review, a workable methodological approach needs to be developed to make the integrationist approach functional. See *infra* text accompanying notes 183-90.

171. The belief in the sanctity of the parent-child relationship is evidenced by the Supreme Court's reluctance to terminate parental rights without due process. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 768 (1982) (before parental rights can be terminated due process requires a more burdensome showing by "clear and convincing" evidence that the parent is unfit); *Stanley v. Illinois*, 405 U.S. 645 (1972) (father of illegitimate children entitled to fitness hearing before children can be taken from his custody and placed for adoption).

The Supreme Court appears to have recently recognized the greater importance of the child's "psychological" rather than "biological" parent. Compare *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 846-47 (1977) ("Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated when the proposed removal from the foster family is to return the child to his

tion.¹⁷² Over time, this premise has come to enjoy wide support in American jurisprudence.¹⁷³ Consequently, of the three premises, the first presents the least controversy or confusion.

Fundamental Rights of Children

The second premise, that children have fundamental rights, is the most controversial. This premise is difficult to accept because it seemingly conflicts with the first premise in two respects. First, if the parent is the primary decisionmaker, then it is logical to question whether courts should recognize that the child has any independent rights. Second, even assuming that the child has rights, it is nevertheless unclear when the child's fundamental rights should outweigh the parent's right to be the primary decisionmaker.

Although the primary role of the parent might imply a lack of rights for the child, judicial acknowledgement that the child has some rights is important for at least two reasons. First, and most important, this acknowledgement comports with society's belief in the integrity of the child.¹⁷⁴ The parental role of primary decisionmaker need not conflict

natural parents.") *with* *Lehr v. Robertson*, 103 S. Ct. 2985, 2993 (1983) (unwed father must demonstrate "a full commitment to the responsibilities of parenthood" before he has right under due process to veto adoption) *and* *Caban v. Mohammed*, 441 U.S. 380, 392 (1979) (unwed father who has "come forward to participate in the rearing of his child" is given right to veto adoption).

172. The family has been described as the basic social unit in Western civilization. *See* Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their 'Rights'*, 1976 B.Y.U. L. REV. 605, 615; *Developments—The Family*, *supra* note 150, at 1214-15. It enjoys an elevated status in our culture, not only because of its "sacredness," but also because it is essential to a democratic form of government. "As an impersonal institution, the state is simply unqualified to provide the intimacy, stability, and emotional support required for a child's healthy development." *Id.* at 1214; *see also* *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (teaching young people to be responsible citizens is "beyond the competence of impersonal political institutions"); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (law in Western civilization has always treated family "as a unit with broad parental authority over minor children"); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 844 (1977) ("importance of the familial relationship . . . to the society, stems . . . from the role it plays in 'promot[ing] a way of life' through the instruction of children" (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972))).

173. *See supra* notes 1-4, 171-72 & accompanying text.

174. In early English and Roman cultures, the parent had a great deal of control over the fate of the child. Kleinfeld, *The Balance of Power Among Infants, Their Parents and The State*, 4 FAM. L.Q. 409, 412-13 (1970). Over time, English law adopted a greater respect for the child, recognizing the child's value to the continuation of the society. *See* 1 W. BLACKSTONE, *supra* note 13, at *446-54. In American society, children have always enjoyed some rights, though limited ones. At the very least, the child is entitled to nurturance and care. For example, even though Professor Garvey disputes the notion that the child is entitled to "individual dignity" equal to the adult, Garvey, *supra* note 150, at 1764, he does not dispute that the child is entitled to some dignity, at least to the extent that the child, upon becoming an adult, will

with the child's integrity. The law imposes a duty upon the parent to protect and promote the child's welfare to ensure that the child receives the care and nurturance necessary for its survival and development into an adult.¹⁷⁵ If the parent fails to fulfill this duty, the state is justified in terminating the parent's right to control the upbringing of the child.¹⁷⁶ Although this legal understanding between the parent and the state is couched in terms of parental "rights and duties," in reality it appears to be premised upon a recognition that in our society the child has a right to be cared for and nurtured, either by the parent or the state.

Second, a recognition that the child has some rights and a willingness to define those rights are necessary to protect the child from unreasonable state regulations. If children's rights are taken seriously, then a child who suffers from unreasonable state regulation of a fundamental right would be entitled to challenge the state whether or not the parent approved. In the absence of a basic recognition that children have some rights, the child victim has no judicial outlet unless the parent is willing and able to challenge the state law on the child's behalf. Even if a parent undertakes such a challenge, absent the second premise, a "catch-22" situation exists: the Court can acknowledge the child's rights and thus properly weigh the state's interest against the child's only by looking beyond the parent's right to control the child; yet if the parent must bring the suit, the interests balanced will be the state's and the parent's.

An answer to the second conflict between the child's fundamental rights and the parent's right to control the child's upbringing rests upon an examination of the nature of fundamental rights. First, rights are elevated to fundamental status only if they are explicitly or implicitly guaranteed under the Constitution.¹⁷⁷ Second, the elevated status afforded

enjoy a sense of self-worth equal to "that shared by . . . mature members of society." Garvey, *supra* note 112, at 327.

175. The duty to protect and promote the child's welfare often is described as the *quid pro quo* for the parent's right to control the upbringing of the child. *See, e.g.,* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (childraising is parent's "primary function and freedom"); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (parents "have the right, coupled with the high duty" to care for their children); Keiter, *supra* note 170, at 507-08.

176. *See infra* notes 181-82 & accompanying text.

177. For example, the right to vote in national elections is an explicitly guaranteed fundamental right that cannot be denied on account of "race, color, or previous condition of servitude," U.S. CONST. amend. XV, § 1, or on the basis of sex, *id.* amend. XIX, or by reason of "failure to pay any toll tax or other tax," *id.* amend. XXIV, or because of age (if 18 or older), *id.* amend. XXIV. An example of an implicitly guaranteed fundamental right is the right of privacy. *See, e.g.,* Roe v. Wade, 410 U.S. 113, 152 (1973) (constitutional right of privacy found in penumbra of first, fourth, fifth, and ninth amendments); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (right of privacy implied from penumbra of Bill of Rights); *see also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (education, although impor-

fundamental rights in our legal system requires that state regulations impinging on such rights pass a higher standard of judicial scrutiny to be deemed constitutional.¹⁷⁸ Finally, recognition that certain rights are fundamental reflects our society's commitment to individual freedom and liberty.¹⁷⁹ The second premise rests upon the belief that fundamental rights are an inherent part of a democratic society; not even the parent's right to control the child's upbringing should deny a child the opportunity to have its fundamental rights defined, analyzed, and protected judicially from unreasonable state interference.

The State's Role

The third premise asserts that the role of the state in the parent-child relationship is limited. Because the parameters of acceptable state action depend upon the capacity in which the state is acting, the court must first ascertain whether the state is acting as sovereign or as *parens patriae*.

State intervention as sovereign has been upheld to support legitimate state interests. For example, in the interest of protecting children from the hazards of employment, states have enacted laws to regulate closely the terms and conditions of child labor. Such laws have been upheld as a valid exercise of a state's police power, without regard to the parent's right to control the child's upbringing.¹⁸⁰

In contrast, state intervention as *parens patriae* is justifiable in only one situation: when the parent is unfit.¹⁸¹ Because the parent-child relationship is sacrosanct in our society, a showing of parental unfitness

tant, is not a fundamental right because it is neither explicitly nor implicitly guaranteed in Constitution).

178. Generally courts apply a strict scrutiny test to evaluate the constitutionality of state laws that allegedly infringe upon fundamental rights. Under strict scrutiny, the state's interest in the regulation must be compelling and narrowly drawn to serve its purpose. *See, e.g., Roe v. Wade*, 410 U.S. 113, 163 (1973) (state's interest in protecting potential life of fetus does not become "compelling" until second trimester of pregnancy); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (denial of welfare because residency in state is too recent implicates fundamental right to travel and "must be judged by the stricter standard of whether [the law] promotes a compelling state interest." (emphasis in original)); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966) (statute that invades or restrains fundamental right to vote, "must be closely scrutinized and carefully confined").

179. *See Developments—The Family, supra* note 150, at 1178-79.

180. *See, e.g., Prince*, 321 U.S. at 168-69 (legislation to eliminate evils such as the crippling effects of child employment is within state's police power).

181. *Santosky v. Kramer*, 455 U.S. 745, 767 n.17 (1982) ("Any *parens patriae* interest in terminating the natural parents' rights arises only . . . after the parents have been found unfit." (emphasis in original)); *Wisconsin v. Yoder*, 406 U.S. 205, 232-34 (1972) (unless parents' decisions to withdraw children from school "jeopardized their health or safety," state's reliance on *parens patriae* power misplaced).

should be a heavy burden for the state to meet.¹⁸² As long as the parent protects and promotes the child's welfare, state usurpation of the parent's role by invocation of its *parens patriae* power is not justified.

Protecting and promoting the child's welfare is an interest common to the state either as sovereign or as substitute parent. As sovereign, the state's interest in protecting the welfare of children extends to all children. For example, the regulation of child labor extends to all children. On the other hand, invocation by the state of its *parens patriae* power, by definition, is limited to protecting only the child whose parents are unfit. Therefore, the methodological framework must insure that state intervention in the area of children's rights remain within the proper bounds.

Methodological Approach

Establishing the foundational premises for the proposed framework is but a preliminary step. The actual merits and mechanics of the proposal can only be assessed by examining the analytical procedures to be employed. The following discussion will delineate the analysis that should be followed by a court adjudicating a child-state or parent-state conflict.

Whenever a court is asked to settle a dispute involving the state, parent, and child, the first step should be to identify the state's real adversary—the parent or the child. For example, imagine a situation in which a child accepts a job on a factory assembly line. A conflict involving the state might arise because the parent insists that the child work even though the employment interferes with school attendance,¹⁸³ or jeopardizes the child's health.¹⁸⁴ Under these circumstances, the parent would be the state's adversary because no fundamental right of the child is implicated. On the other hand, if the child accepts an offer to star in a pornographic movie and a conflict arises involving the state, the child is the state's adversary. Because the child's fundamental right to freedom of expression is affected, the second premise becomes controlling and the child's right must be balanced against the asserted state interest.

Once a dispute is identified as either a state-parent or a state-child

182. In discussing who should make decisions about medical treatment for the child, for example, Professor Goldstein states that the parent has the greatest right and responsibility and is in a better position than the state to decide what is best for the child. Goldstein, *supra* note 170, at 654-55. Before the state may step in and override a parent's decision on a course of medical treatment for the child, the state must meet the burden of establishing that the parent's decision is wrong. The parent, on the other hand, need not prove that the family decision is right. *Id.* at 655.

183. See *infra* notes 247-49 & accompanying text.

184. See *supra* notes 7-12, 180 & accompanying text.

conflict, the court's second step should be to define the parties' interests. For example, considering the state-parent conflict in the case of the child who wants to work in a factory, the state's interests are to ensure that the child's education is not disrupted, to protect the child from exploitation, and to protect the child from the hazards of employment—in other words, to protect and promote the child's welfare.¹⁸⁵ The parent's interest is in controlling the upbringing of the child.

If the child's job is to star in a pornographic movie, the court must define the interests of the state and the child because this is a state-child conflict. In this case, the state's interests are to prevent the sexual exploitation of children¹⁸⁶ and to protect and promote the child's welfare. The child's interest is the right to freedom of expression guaranteed by the first amendment.

Under the third step of the proposed methodology, the defined interests of the adversaries should be balanced. Courts balancing these interests should adopt an integrationist approach. In a state-parent conflict, the court should invoke the same judicial standards for balancing the parties' interests that it would invoke in other cases in which a party asserts an unconstitutional state action. Similarly, in a state-child conflict, justification for the state's regulation must rest on grounds that would justify similar restrictions on adults. If, however, the evidence demonstrates that the state, as sovereign, needs to place greater restrictions on the child for the child's welfare than would be permissible on the adult, it may do so pursuant to its police powers.

To meet this burden, the state must produce evidence that a consensus exists among experts in child development and psychology that the regulation serves the legitimate state purpose of protecting and promoting the child's welfare. For example, when the Warren Court adopted a variable obscenity test for minors in *Ginsberg v. New York*,¹⁸⁷ no consensus existed among psychologists to demonstrate that viewing erotic material was or was not harmful to children.¹⁸⁸ Analytically, the *Ginsberg* Court asked the right question, but it erred by deciding that the absence of a consensus justified a greater restriction on the first amendment freedoms of the child than on those of the adults. In *Ferber v. New York*,¹⁸⁹ however, the Burger Court appropriately upheld laws that prohibited the

185. See R. MNOOKIN, *supra* note 112, at 646-62, and the authorities cited therein, for a general background on the history, purposes, and goals of child labor laws.

186. See *New York v. Ferber*, 458 U.S. 747, 759 (1982).

187. 390 U.S. 629, 643 (1968).

188. *Id.* at 641; see *supra* note 45.

189. 458 U.S. 747 (1982).

solicitation of child pornography because the experts overwhelmingly agreed that the participation of minors in the production of pornographic materials was detrimental to their psychological well-being.¹⁹⁰

Applying the Analytical Framework

The suggested analytical framework is best illustrated by applying it to conflicts concerning state incarceration of juveniles and conflicts concerning the child's freedom of expression. Application of the proposed methodology to the Supreme Court decisions in these areas demonstrates that the proposal is consistent with articulated principles. In addition, three hypotheticals based on current conflicts over abortion, medical treatment, and education are presented for review under the proposed analytical framework.

State Incarceration

The Court's decisions involving state incarceration generally have focused on the constitutionality of the state's conduct. In *In re Gault*,¹⁹¹ the issue was whether a child, subject to possible incarceration by the state for allegedly committing a crime, is entitled to due process protection. *Schall v. Martin*¹⁹² addressed the constitutionality of the pretrial detention of alleged youthful offenders whom the juvenile court believes present "serious risks" of committing other crimes before their trials. Whenever a child is subject to possible incarceration by the state for committing a crime, the child's fundamental right to liberty is jeopardized. Thus, applying the proposed analytical framework, *Gault* and *Schall* present state-child conflicts.

The *Gault* Court discussed the child's right to due process,¹⁹³ but at the same time discussed the parents' right to custody of the child.¹⁹⁴ Throughout the opinion the Court spoke of the child's rights in conjunction with those of his parents without distinguishing between the two.¹⁹⁵

190. *Id.* at 758; see *supra* note 152. The Burger Court has been far from consistent in its reliance on the weight of authority of experts in children's rights cases. See, e.g., *supra* notes 123-27 & accompanying text (discussion of *Schall*); see also *infra* notes 227-30 & accompanying text (discussion of the Burger Court's reluctance to rely on the medical profession's expertise in minor's abortion decisions and its deference to the medical profession's expertise in decisions regarding the commitment of minors to mental institutions).

191. 387 U.S. 1 (1967).

192. 104 S. Ct. 2403 (1984).

193. *Gault*, 387 U.S. at 27, 34.

194. *Id.* at 34.

195. For example, the *Gault* Court stated: "[Due process] does not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must

By confusing the child's and the parents' rights in this way, the *Gault* Court failed to identify whose fundamental interest is adverse to the state's.

The *Schall* Court recognized that the child has a liberty interest in not being confined by the state.¹⁹⁶ The Court narrowly restricted this interest, however, by defining "liberty" as the child's right to be in the custody of the parent.¹⁹⁷ Yet the Court gave only cursory attention to the role of the parent and did not discuss the parent's interest in keeping custody of the child in the home until trial.¹⁹⁸ Thus, because the Court did not fully acknowledge the child's fundamental liberty interest, it could not have viewed the child as an adversary of the state. At the same time, because the role of the parent was ignored, the parent also was not perceived as the state's adversary. Consequently, the *Schall* opinion can best be characterized as a social edict because it did not adjudicate a dispute between clearly defined adversarial parties.

The second step in the analytical framework requires the court to define the parties' interests in the dispute. In *Gault*, the state asserted an interest in protecting and promoting the child's welfare.¹⁹⁹ The *Schall* Court identified the same interest as well as the interest in protecting society from criminal activity.²⁰⁰ Both are legitimate interests of the sovereign.

Each Court, however, also accepted the state's assertion that the state was acting as *parens patriae*, a role they acknowledged without finding any evidence that the parents had failed.²⁰¹ Under the proposed methodology this role would not be invoked unless the parents were deemed unfit. The *Gault* Court recognized that the child's welfare did not require that the state assume the role of his parents,²⁰² and the *Schall* Court seemed altogether unconcerned with the parent's role.²⁰³ Thus,

meet." *Id.* at 33-34. "[T]he child and his parents must be notified of the child's right to be represented by counsel" *Id.* at 41. "[N]either Gerald nor his parents were advised that he did not have to testify or make a statement, or that an incriminating statement might result in his commitment as a 'delinquent.'" *Id.* at 43-44.

196. *Schall*, 104 S. Ct. at 2410.

197. *Id.*

198. In fact, the parents of these children are discussed only twice in the opinion. One mother refused to come to court with her son, and she did not want him home because he had been arrested too many times. *Id.* at 2408. Another youth charged with robbery and assault was released to his father after three weeks of detention without a trial. *Id.* at 2407.

199. *Gault*, 387 U.S. at 15, 26; see *supra* notes 32-36 & accompanying text.

200. *Schall*, 104 S. Ct. at 2410-11; see *supra* notes 70-71 & accompanying text.

201. *Schall*, 104 S.Ct. at 2411; *Gault*, 387 U.S. at 15.

202. *Gault*, 387 U.S. at 28; see *supra* note 122.

203. *Schall*, 104 S. Ct. at 2407-08; see *supra* notes 130-31, 198 & accompanying text.

whether the Court viewed the conflict in *Gault* or in *Schall* as one between the state and the child, or the state and the parent, the *parens patriae* doctrine was irrelevant.

At the third step the court should balance the adversaries' interests. Within the suggested analytical framework, the child's fundamental right to liberty would be balanced against the state's interests in protecting and promoting the child's welfare and in protecting society from criminal conduct. The integrationist view requires the court to apply the same legal principles to the child's case as would be applied to an adult in a similar situation, unless demonstrable evidence exists to justify treating the child differently from the adult offender.

The *Gault* decision illustrates the application of the integrationist view.²⁰⁴ As that Court found, the child's interest in not being incarcerated without due process outweighs the state's interests in protecting and promoting the child's welfare, and in protecting society from crime. Therefore, the same due process protection that the Constitution extends to adults also should be extended to the child.²⁰⁵ In contrast, the *Schall* Court adopted a separatist view, presuming that in delinquency cases the child is not entitled to liberty and that the state properly assumes a *parens patriae* role.²⁰⁶

Under the proposed analysis the *Gault* decision would have been the same, and the *Schall* decision would have been different. Both opinions, however, would have been more principled in their reasoning and the

204. In deciding what due process guarantees should apply to youthful offenders, the *Gault* Court relied upon several cases that adjudicated the rights of adults accused of committing crimes. See *Gault*, 387 U.S. at 36 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Powell v. Alabama*, 287 U.S. 45, 61 (1932) (right to counsel)); 387 U.S. at 42 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (waiver of right to counsel)); 387 U.S. at 43-44 (citing *Pointer v. Texas*, 380 U.S. 400 (1965), and *Douglas v. Alabama*, 380 U.S. 415 (1965) (right to confront and cross-examine witnesses)); 387 U.S. at 44 (citing *Miranda v. Arizona*, 384 U.S. 436 (1966) (waiver of right against self-incrimination)); 387 U.S. at 44-50 (citing *Spevack v. Klein*, 385 U.S. 511 (1967), *Garrity v. New Jersey*, 385 U.S. 493 (1967), *Griffin v. California*, 380 U.S. 609 (1965), *Malloy v. Hogan*, 378 U.S. 1 (1964), *Haynes v. Washington*, 373 U.S. 503 (1963), *Culombe v. Connecticut*, 367 U.S. 568 (1961), and *Rogers v. Richmond*, 365 U.S. 534 (1961) (privilege against self-incrimination)).

Consistent with the integrationist view, the *Gault* Court's analysis also included relevant cases adjudicating the rights of juveniles accused of engaging in criminal conduct. For example, in deciding whether Gerald was entitled to the privilege against self-incrimination, the Court in *Gault* turned to *Haley v. Ohio*, 332 U.S. 596 (1948), which reversed the conviction of a fifteen-year-old because it was based upon a coerced confession. *Gault*, 387 U.S. at 45. Throughout the *Gault* opinion, the Court also relied extensively upon *Kent v. United States*, 383 U.S. 541 (1966), in which a fifteen-year-old's right to be adjudicated as a "delinquent" was waived by the state and the youth was tried as an adult offender. See *supra* note 112.

205. See *supra* note 19 & accompanying text.

206. See *supra* notes 62-63 & accompanying text.

children in these cases would have been treated more respectfully and fairly. This higher standard of analysis would better ensure that future children's rights opinions will be thorough, critical, consistent, and just.

Freedom Of Expression

Application of the proposed methodology to cases involving freedom of expression similarly reveals that a consistently applied analysis would benefit the children's rights area of law. The Supreme Court addressed four major first amendment issues in *Prince*,²⁰⁷ *Ginsberg*,²⁰⁸ *Tinker*,²⁰⁹ and *Pico*.²¹⁰ *Prince* raised the issue of whether a state law, prohibiting the parent from allowing the child to sell religious literature in public, violated the parent's rights to freedom of religion or to control the upbringing of the child. In the other three cases, the state action allegedly violated the child's first amendment right to freedom of expression.²¹¹

Applying the suggested analysis to these cases, the first step is to ascertain the adversaries. In *Ginsberg*, *Tinker*, and *Pico*, the child's fundamental right to freedom of expression was at issue; in *Prince*, the child's fundamental right to freedom of religion was implicated.²¹² All four cases thus present a state-child conflict because they involve fundamental rights of the child.

The second step is to define the state's and the child's interests. The state's purported interests in the four cases were to help the parents discharge their parental duties,²¹³ to promote the safety and well-being of youth,²¹⁴ to educate children so that they could participate in society in a meaningful way,²¹⁵ and to prescribe and control conduct in the

207. *Prince v. Massachusetts*, 321 U.S. 158 (1944); see *supra* notes 8, 10, 12 & accompanying text.

208. *Ginsberg v. New York*, 390 U.S. 629 (1968); see *supra* notes 39, 41-42, 44-46 & accompanying text.

209. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969); see *supra* notes 40, 47, 50-53 & accompanying text.

210. *Board of Educ. v. Pico*, 457 U.S. 853 (1982); see *supra* notes 76-87, 91-98 & accompanying text.

211. For a discussion of *Ginsberg*, see *supra* notes 39, 41-46 & accompanying text; for a discussion of *Tinker*, see *supra* notes 40, 47-53 & accompanying text; and for a discussion of *Pico*, see *supra* notes 76-97 & accompanying text.

212. Whereas the Court also addressed the state-parent conflict, see *Prince*, 321 U.S. at 165, the proposed analysis would show that the issue is whether a child could distribute the leaflets in accordance with her religious beliefs. See *supra* notes 7-10 & accompanying text.

213. *Ginsberg*, 390 U.S. at 639.

214. *Id.* at 640; *Prince*, 321 U.S. at 165.

215. *Pico*, 457 U.S. at 868.

schools.²¹⁶ Each interest is a legitimate concern of the state as sovereign. The children's interests were in protecting their fundamental rights to freedom of expression and freedom of religion.

Once the parties' interests are defined, the court can balance the state's interests against the child's fundamental right. Following the integrationist view, the court should rely upon legal principles established in cases adjudicating the rights of adults in the same or similar circumstances. Unless evidence justifies imposing greater restrictions upon the child than would be permissible upon the adult, the child should enjoy the same constitutional protection.

A closer analysis of the Court's actual resolution of these first amendment issues indicates that the proposed framework is consistent with precedent. The Court in *Ginsberg* essentially employed an integrationist approach because it examined the evidence to determine the specific effect of erotic materials on children's development.²¹⁷ Similarly, the plurality in *Pico* followed this analytical methodology to uphold the child's right to receive information.²¹⁸

Even the decisions in which the Court took a separatist approach reflect a result that is consistent with the one under the proposed methodology. The decisions in *Pico* and *Tinker* reflect a separatist view because the Court's analysis and use of precedent were primarily limited to cases involving public schools,²¹⁹ and the Court in *Prince* similarly took a

216. *Tinker*, 393 U.S. at 507.

217. See *supra* notes 44-46, 166-67 & accompanying text.

218. See *supra* note 118.

219. The Court in *Tinker* relied, *inter alia*, on *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), discussed *supra* at notes 1-6 & accompanying text, for the proposition that both students and teachers have constitutional rights to freedom of speech in school. *Tinker*, 393 U.S. at 506. *West Virginia v. Barnette*, 319 U.S. 624 (1943), discussed *supra* at note 112, was cited in *Tinker* as authority for the statement that wearing an armband in protest of the Viet Nam War was a symbolic act protected by the first amendment freedom of speech clause. *Tinker*, 393 U.S. at 505. *Barnette* was cited in *Pico* for the holding that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" *Pico*, 457 U.S. at 872 (quoting *Barnette*, 319 U.S. at 642). In both *Tinker* and *Pico*, the Court relied on *Epperson v. Arkansas*, 393 U.S. 97 (1968), to affirm that states and school officials have a "comprehensive authority [to] control conduct in the schools." *Pico*, 457 U.S. at 863; *Tinker*, 393 U.S. at 507. The *Tinker* and *Pico* Courts also relied on *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), to emphasize the importance of a school atmosphere that allows the free exchange of ideas. *Pico*, 457 U.S. at 868; *Tinker*, 393 U.S. at 512. *Keyishian* had held unconstitutional a state law that required all state employees, including teachers, to sign an oath that they were not nor would become members of a subversive organization. 385 U.S. at 609-10.

The dissenting opinions in *Tinker* and *Pico* indicated a strong separatist approach. In *Tinker*, Justice Black viewed the issue as "whether students and teachers may use the schools

separatist view in upholding the prohibition against children selling religious literature on public streets.²²⁰ The result in these cases would have been the same, however, under the integrationist view. Using this approach, the Court in *Prince*, for example, would have balanced the state's interest in enacting the child labor laws against the child's fundamental right to freedom of religion.²²¹ Because evidence supported a finding that the state must regulate child labor in order to protect and promote the child's welfare, the state's prohibition was justified under its sovereign powers.²²²

Although the holdings in *Prince*, *Ginsberg*, *Tinker*, and *Pico* would not have been different under the proposed analysis, the reasoning underlying each would have been more principled and accurate. Application of the integrationist approach in *Pico*, for example, would have required a recognition of the variable obscenity test for children established in *Ginsberg*,²²³ thus avoiding the substitution, sub silentio, of "vulgarity" for "obscenity" as the standard for limiting children's first amendment freedoms. In conclusion, application of the integrationist approach to children's rights cases will result in greater predictability and consistency.

Hypothetical State-Parent-Child Conflicts

The previous discussion indicated how conflicts between the state and either the parent or the child would be resolved under the proposed methodology. Yet many current, highly controversial issues involve child-parent conflicts.²²⁴ Therefore, the utility of the methodology must

at their whim as a platform for the exercise of free speech." 393 U.S. at 517 (Black, J., dissenting). Chief Justice Burger's dissent in *Pico* indicated his opposition to recognizing students' rights. He admonished the plurality for its recognition of students' rights to receive ideas, asserting that such a "view transforms the availability of [library books] into a 'right' to have [the books] maintained at the demand of *teenagers*." 457 U.S. at 892 (Burger, C.J., dissenting) (emphasis added). Burger also criticized the plurality as demeaning the Court's "function of constitutional adjudication" by its conclusion "that the Constitution *requires* school boards to justify to its teenage pupils the decision to remove a particular book from a school library." *Id.* at 893 (Burger, C.J., dissenting) (emphasis in original).

220. *Prince*, 321 U.S. at 166; see *supra* notes 7-12 & accompanying text.

221. The state's interests as sovereign were to protect the child from harm and to give the child the opportunity "for growth into [a] free and independent well-developed" individual. *Prince*, 321 U.S. at 165. The fundamental right at issue was the child's freedom to observe and practice her religion, including preaching the gospel by distributing religious leaflets on the public streets. *Id.* at 164.

222. *Id.* at 168. The Court made note of Senate reports, Department of Labor studies, and independent studies on the dangers of child employment. *Id.* at 168 n.15.

223. See *supra* note 46 & accompanying text.

224. Prior to Justice Douglas' dissent in *Wisconsin v. Yoder*, 406 U.S. 205, 241 (1972), all major cases addressing the rights of parents and children vis-a-vis the state reflected consensus

be tested by applying it to the following hypotheticals involving child-parent conflicts. The remainder of the discussion illustrates how the methodology can be used to resolve parent-child disputes involving issues of current public concern, such as abortion, the right to other medical treatment without parental consent, and the child's right to remain in school against the parents' wishes. Although some of these issues have been addressed by the Burger Court,²²⁵ the primary purpose of analyzing the examples within the suggested framework is to demonstrate that a wide variety of issues in this area can be resolved in a systematic fashion.

Abortion

The proposed framework is demonstrated by applying it to a hypothetical situation in which Betty, a seventeen-year-old high school senior, wants to obtain an abortion without parental consent or notification. The first step of the analysis is to determine the adversaries. An abortion decision falls within the area of a woman's right of privacy, a fundamental right.²²⁶ Thus, the controversy is characterized as a state-child conflict because a fundamental right is at issue.

The court must then define and balance the adversaries' interests. As stated in a recent Burger Court decision, the state's interests are two-fold: to protect pregnant minor women like Betty from their vulnerability and inability to make decisions, and to preserve family integrity by helping parents perform their parental duties.²²⁷ Betty's interest is her fundamental right of privacy.

Under the integrationist view, the court should analyze the child's situation in light of legal principles as they apply to adult women seeking abortions. If evidence supports a reason to impose greater restrictions on Betty because she is a minor than would be imposed on a pregnant adult, then the state should be allowed to do so under its police power.

The state's legitimate sovereign interests in this case are not sufficient to outweigh Betty's fundamental right of privacy. First, the state's

between the child and the parent. *Yoder* upheld Amish parents' rights to withdraw their children from public school after they completed the eighth grade. Justice Douglas suggested that the Amish children should have been asked whether they wanted to withdraw or remain in school. *Id.* at 244 (Douglas, J., dissenting).

225. For example, in *Bellotti v. Baird*, 443 U.S. 622 (1979), the Court addressed the question whether a minor has the right to obtain an abortion without parental consent or notification. See *infra* notes 227-30 & accompanying text for a discussion of the case. The question of whether a child can withdraw from school was addressed by the Burger Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). See *infra* notes 250-53 & accompanying text.

226. *Roe v. Wade*, 410 U.S. 113, 154-55 (1973).

227. *Bellotti*, 443 U.S. at 635.

interest in affording Betty greater protection than adult women from her vulnerability and inability to make a decision about an abortion is not supported by evidence. Commentators generally agree that a minor woman seeking an abortion without parental consent or notification is not more vulnerable to emotional trauma or more indecisive than an adult woman seeking an abortion.²²⁸ Hence, the adult standard should be used to determine Betty's constitutional right to obtain an abortion.

The state's interest in preserving family integrity by helping the parents perform their parental duties also fails to override Betty's fundamental right of privacy. The Burger Court has recognized this by holding that a minor who convinces the court of her maturity may proceed with an abortion without parental consent.²²⁹ But even so, neither the individual minor's maturity, nor the maturity of the class of pregnant minors seeking abortions, should be relevant to the court's determination. Courts cannot accurately assess, on a case-by-case basis, a young woman's maturity level for the purpose of determining her right to make her own abortion decision. Moreover, when courts attempt to make such evaluations, they usurp the physician's role.²³⁰ By selecting a physician

228. Family Court Judge Nanette Dembitz, speaking from extensive experience, states that:

[A] minor's very decision to seek an abortion shows deliberation, a sense of responsibility and foresight as to consequences—qualities lacking in numerous teenagers who ignore their pregnancies, fantasizing that they will magically disappear. Minors who seek abortions express reasons similar to those of adults, and demonstrate a comparable appreciation of their dilemmas. Like adults, they are attempting to escape from a potentially shattering, life-long handicap. These minors recognize that childbirth is age-inappropriate.

Dembitz, *The Supreme Court and a Minor's Abortion Decision*, 80 COLUM. L. REV. 1251, 1255-56 (1980). Professor Goldstein also is of the opinion that "[p]regnancy alone, without regard to a child's age, would be a sufficiently objective standard for emancipation to determine whether or not to obtain an abortion." Goldstein, *supra* note 170, at 663. In contrast, Dr. Watson believes that a minor's abortion decision should involve the parents, primarily for the sake of preserving family integrity. Watson, *supra* note 157, at 670. Aside from this argument, however, Dr. Watson does not suggest that a minor is any less capable than an adult to make her own decision whether to have an abortion.

229. *Bellotti*, 443 U.S. at 647. Whether the state may notify a mature minor's parents of her abortion decision was left unanswered by the Court in *H.L. v. Matheson*, 450 U.S. 398 (1981), and remains an open question. *But see* *City of Akron v. Akron Center for Reproductive Health*, 103 S. Ct. 2481, 2498-99 n.10 (1983) (Court suggests in dictum that parental notification requirement of mature minor seeking abortion would be unconstitutional).

230. The Court announced in *Roe v. Wade*: "[T]he abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician." 410 U.S. at 166. Therefore, the *Bellotti* holding is inconsistent with the Court's prior statement of its role in health-care decisions. *Parham v. J.R.*, 442 U.S. 583 (1979), provides a recent indication of the Court's view of its ability to evaluate the emotional and psychological needs of the child. In *Parham*, the Court addressed the constitutionality of a state statute regulating the commitment of minors to mental institutions by their parents. Although

to help her secure the abortion, Betty has chosen the help of a professional who can evaluate her physical and emotional health and provide appropriate counseling. If Betty's doctor feels that her parents should be involved in her abortion decision for her medical benefit, the doctor is free to decline to treat her unless she cooperates. Of course, because the physician is not the state, the physician's refusal to perform the abortion does not unconstitutionally deny Betty's right of privacy. Betty, like an adult whose physician refuses to perform an abortion, is free to seek the help of another physician. Finally, the requirements of parental consent and notification against the child's wishes do not promote the state's interest in preserving family integrity,²³¹ but in fact may cause family disruption.²³² Again, whether parental involvement in Betty's abortion

it upheld the statutory scheme, the Court stated that "[t]he mode and procedure of medical diagnostic procedures is not the business of judges. What is best for a child is an individual medical decision that must be left to the judgment of physicians in each case." *Id.* at 607-08.

Two further reasons exist to remove maturity level from within the domain of court determination. By placing responsibility for the abortion decision with the state, as represented by the court, neither the child's nor the parents' decision-making ability regarding private or family matters is respected. See Goldstein, *supra* note 170, at 663.

Second, given the extensive common law understanding of the term "competency," it seems reasonable to conclude that by using a "maturity" standard, the Court developed a different, perhaps more stringent, standard. See Capron, *The Competence of Children as Self-Deciders in Biomedical Interventions*, in *WHO SPEAKS FOR THE CHILD* 70 (W. Gaylin & R. Macklin eds. 1982). "Competency" generally refers to one's ability to make a rational decision. See Dunn & Ator, *Vox Clamantis in Deserto: Do You Really Mean What You Say in Spring?*, in *LEGAL AND ETHICAL ASPECTS OF TREATING CRITICALLY AND TERMINALLY ILL PATIENTS* 177 (A. Doudera & J. Peters eds. 1982). Even if this standard were applied to the minor seeking an abortion without parental consent, a decision either way could not be seen as "irrational." It is clear that the maturity requirement is intended to ensure that the minor makes the "correct" decision, in light of her parents' and the court's beliefs. See Richards, *supra* note 170, at 56; Goldstein, *supra* note 170, at 662.

231. Regarding the consent requirement, the Court stated in *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976):

It is difficult . . . to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure.

But see *H.L. v. Matheson*, 459 U.S. 398, 411 (1981) (state statute requiring parental notification before immature, dependent minor may obtain abortion promotes family integrity); *Bellotti v. Baird*, 443 U.S. 622, 637-39, 648-49 (1979) (state statute requiring immature, dependent minor to obtain parental consent before abortion supports parental role in the family).

232. See Keiter, *supra* note 170, at 500-01, 506, 510 (requiring parental consent causes severe disruption of the family, and does not advance the interests of family privacy and harmony).

With respect to notification, see Dembitz, *supra* note 228, at 1257 (child's objection to parental notification indicates an awareness that her parents will scorn, abuse, or punish). See

decision is warranted for her medical benefit is a decision that should be made by her and her physician.²³³

Medical Treatment

The most controversial question regarding medical treatment of a child concerns whose interest should predominate: that of the state, the parent, or the child. Usually, the state intervenes in those situations in which someone believes that the child is not receiving proper medical care. For purposes of this analysis, life-threatening and non-life-threatening situations will be treated separately.

Life-Threatening Cases

An example of a life-threatening situation is presented by eleven-year-old Kathy, who suffers from severe kidney failure.²³⁴ She requires frequent dialysis treatments, which leave her emotionally and physically exhausted. Because of her disease, she is behind other children her age in terms of social, psychological, and physical development. She spends most of her time in the hospital and, as a result, is depressed. She understands that eventually she will die from this disease in a few weeks, months, or years. To maximize her life span, however, Kathy must undergo an immediate operation. She has told her parents and the doctor that she does not want the operation. Her parents, on the other hand, insist that she have it. The doctor refuses to operate on Kathy without her consent. As a result, her parents seek a court order to compel the operation.

The court attempting to resolve this conflict must first recognize that Kathy's decision involves her fundamental right of privacy.²³⁵ The

also Note, *The Minor's Right of Privacy: Limitations On State Action After Danforth and Carey*, 77 COLUM. L. REV. 1216, 1238-39 (1977) (parental notification will not aid the child's decision, but instead will polarize the family).

233. See Dembitz, *supra* note 228, at 1257-58; Keiter, *supra* note 170, at 486; Note, *supra* note 232, at 1238.

234. This example is based upon an actual case. The real story concluded with the child's death following her and her parents' decision to refuse further treatment. See Goldstein, *supra* note 170, at 658-61.

235. Because her decision will result in her death, arguably she is not exercising her right to life, but rather her right to die. The Supreme Court has not addressed the question of one's right to die, or to refuse life-sustaining treatment. State courts, however, have addressed these questions not under the constitutional right to life, but under the right of privacy. See *infra* note 240. In either event, a fundamental right is at issue.

Essential to Kathy's right of privacy is her interest in making an independent choice whether to accept or reject medical treatment. See, e.g., *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (right of privacy includes "independence in making certain kinds of important decisions"); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 739, 370

conflict, therefore, is between Kathy and the state. The state's interest in the dispute is to protect and preserve Kathy's life.

In balancing Kathy's fundamental right against the state's interests, the court should analyze Kathy's dilemma using established legal principles as they apply to adults in similar circumstances. A competent adult in Kathy's situation would be allowed to refuse consent for the operation even though death would result.²³⁶

Accordingly, the court's starting point should be to decide whether Kathy is competent to make her own decision.²³⁷ The facts indicate that Kathy is competent: she appreciates the consequences of her decision to forego the operation. Moreover, her doctor supports her.²³⁸ Therefore, Kathy's decision should be respected.

If Kathy's parents did not want Kathy to have the operation, but Kathy did want it, the analysis would be the same. Because Kathy is competent to make the decision, she should have the operation.²³⁹ If Kathy were incompetent, either because she was comatose or otherwise lacked the mental capacity to make her own decision, then her parents, as next-of-kin, would become the decisionmakers. This procedure, known as substitute judgment, is followed in adult medical care situations.²⁴⁰

N.E.2d 417, 424 (1977) (right of privacy includes right of a patient to refuse "unwanted infringements of bodily integrity"); *In re Quinlan*, 70 N.J. 10, 40, 355 A.2d 647, 663 (right of privacy is broad enough to encompass patient's decision to decline medical treatment), *cert. denied*, 429 U.S. 922 (1976). In conflict with Kathy's interest is the state's interest in preserving life. See *Roe v. Wade*, 410 U.S. 113, 162 (1973) (state has "important and legitimate interest in protecting [even] the potentiality of life"). When a patient refuses life saving treatment, an additional state interest is to ensure that the patient is competent to make that choice. See *infra* notes 236-38 & accompanying text.

236. For a recent survey and discussion of the question whether adults, competent or incompetent, can refuse life-sustaining treatment, see Note, *Voluntary Active Euthanasia for the Terminally Ill and the Constitutional Right to Privacy*, 69 CORNELL L. REV. 363 (1984); Note, *Law and Medicine—Individual Rights—The Incompetent's Right to Refuse Life-Sustaining Treatment*, 51 TENN. L. REV. 145 (1983).

237. A child is considered competent to consent to have or to refuse medical treatment if the "nature, extent and probable consequences" of the treatment can be appreciated. RESTATEMENT (SECOND) OF TORTS § 892A(2) comment b (1979).

238. The fact that the doctor supports Kathy's decision is significant. The doctor has researched Kathy's disease and has informed her of the available treatment options. Moreover, the doctor has been treating Kathy for a number of years and is a professional, well qualified to assess Kathy's ability to understand the consequences of her choice.

239. Professor Goldstein would disagree with this conclusion. He believes that the parent should be able to decide for the child. See Goldstein, *supra* note 170, at 660.

240. See, e.g., *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 752-53, 370 N.E.2d 417, 431 (1977) (guardian of severely mentally retarded sixty-seven-year-old man could decide to withhold chemotherapy); *In re Quinlan*, 70 N.J. 10, 41-42, 44, 355 A.2d 647, 664, 666 (father/guardian of twenty-one-year-old comatose woman could decide to

Under the substitute judgment theory, Kathy's right is still the object of the decision. The parents are not free to impose their wishes and are constrained by the medical advice given to them to decide what is in Kathy's best interest. If they abuse their positions as substitute decisionmakers, the state, as *parens patriae*, can relieve them and appoint another guardian.²⁴¹

In sum, it is worthwhile to emphasize that the proposed methodology is concerned less with the particular answers to medical treatment decisions than with the process by which the answers are reached. People may disagree on the moral question: whether or not *anyone* should be allowed to refuse life-saving treatment. The proposed analytical scheme attempts to factor out the morality concerns by assuming that the procedure used for medical care decision making should be the same, regardless of the patient's age.

Non-Life-Threatening Cases

An example of a non-life-threatening situation is presented by the hypothetical involving fifteen-year-old Bud, a high school freshman. When Bud was eight years old, he suffered severe burns to his face and upper body as a result of playing with a chemistry set. His face is significantly disfigured. He has been ostracized and teased by his classmates since the accident. His teachers and psychologist report that Bud performs substantially below his capabilities because he is totally withdrawn, extremely depressed, and believes he does not "fit in." The family doctor has recommended that Bud have surgery to improve his physical appearance, which also should improve his self image. Bud wants to have the treatment, but his parents say that cosmetic surgery is out of the question and withhold their consent. The family physician seeks a court order authorizing the surgery.

A parent's decision to withhold non-life-threatening medical treatment does not implicate a fundamental right of the child.²⁴² Therefore,

discontinue procedure to sustain her life), *cert. denied*, 429 U.S. 922 (1976). Invocation of the substitute judgment theory should not undermine the reality of the situation: the fundamental right of privacy is Kathy's.

The primary concern in cases in which life-saving treatment is withdrawn from incompetent patients is that the decision will be erroneous. The decision would be erroneous only if the patient would not have elected to stop treatment had he or she been competent to make the choice. In reality, there is no way to avoid this possibility. Substitute judgment is premised upon the belief, however, that the relationship between the substitute decisionmaker and the patient minimizes the possibility of error.

241. See *infra* note 245.

242. The Supreme Court has not considered whether one has a fundamental right to medical treatment.

Bud's wishes are not controlling²⁴³ because this conflict is between the state and the parent. The parents' interest in this state-parent conflict are to control the upbringing of their child. Their reasons for withholding their consent to surgery are financial considerations. The state is interested in protecting Bud's welfare and preserving the family's integrity.

Weighing the parents' interest against that of the state leads to the conclusion that the parents' decision to refuse treatment that Bud wants should be respected.²⁴⁴ According to the first premise, the parent is the primary decisionmaker for the child in state-parent conflict dispute resolution. Both parties are concerned for Bud's welfare. To override the parents' decision, the physician should be required to convince the court that the parents have failed, through abuse or neglect, to protect Bud's welfare.²⁴⁵ If a physician is allowed to assume the parental role, without a showing of parental unfitness, family integrity will not be preserved and, in fact, will be seriously undermined.²⁴⁶

School Attendance

An additional parent-child conflict occurs when parents attempt to exercise their control over their children's education. For example, Bud's parents want him to quit school and join a minor league baseball team because he is not doing well in school and the family needs the extra income. Bud is unhappy with their decision, but he goes along with it. After he is absent from school for three weeks state officials intervene.

Although education is an important right, the Supreme Court has not elevated it to a fundamental right.²⁴⁷ Thus, the conflict is between Bud's parents and the state. His parents have an interest in controlling Bud's upbringing and in having Bud contribute to the family income. The state is interested in ensuring that Bud is capable of meaningful par-

243. In medical care decision making, it is difficult to discount the patient's wishes entirely even if that patient is a child. The success of treatment often depends upon the patient's willingness and cooperation to promote the healing process. See Goldstein, *supra* note 170, at 668 (child's unwillingness to have surgery indicates child's reluctance to participate in subsequent rehabilitation therapy). The child's attitude about the treatment should be adequately considered by the physician in making the recommendation to treat or not to treat the child.

244. Goldstein, *supra* note 170, at 664.

245. A finding of abuse or neglect should occur only in rare circumstances, given the importance of family autonomy in medical care decision making. See Goldstein, *supra* note 170, at 651.

246. *Id.* at 664.

247. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). The status of education as an important but not fundamental right was reaffirmed recently in *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

ticipation in society as an adult.²⁴⁸ To promote this interest the state requires that Bud attend school through a certain age or grade level. Furthermore, the state is interested in protecting Bud's welfare against the hazards of employment. The legitimacy of state action, in its sovereign capacity, to promote this interest is well established.²⁴⁹ In balancing the state's and the parents' interests in this example, the state's interests should control. Bud will return to school.

Suppose, however, that the parents, members of the Unification Church, assert that their reason for withdrawing Bud from school is to allow him to help the family contribute to the church by selling candy, puppets, and other sundries at the local airport. They believe this experience will be more beneficial to Bud's development than if he remained in school.

The analysis of this hypothetical is the same as in the previous example. The outcome, however, may be different as a result of balancing the interests involved. The Burger Court indicated in *Wisconsin v. Yoder*²⁵⁰ that a parent's decision to remove a child from school may override the state's interest if the parent's reason for taking the child out of school rested upon the parent's right to freedom of religion.²⁵¹ Even the *Yoder* decision, however, is quite narrow in scope. The parent's religion in that case, Amish, had been established for nearly three centuries and was a way of life.²⁵² Furthermore, the Court was convinced that the Amish children would continue to develop their education through their experiences in the Amish community.²⁵³

It is unlikely that the parents in the hypothetical case can successfully assert their interests based upon the precedent of *Yoder*. The Unification Church does not enjoy a history comparable to that of the Amish religion. Moreover, Bud's activity as a solicitor of church funds does not entail the extensive training in a way of life that the Amish children receive as farmers in their community. Consequently, the state's interests will prevail and Bud will return to school.²⁵⁴

248. *Board of Educ. v. Pico*, 457 U.S. 853, 868 (1982); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

249. See *supra* note 180 & accompanying text.

250. 406 U.S. 205 (1972).

251. *Id.* at 215.

252. *Id.* at 216-18.

253. *Id.* at 224.

254. Suppose, however, that Bud wants to quit school to become a member of the Amish community. His parents disagree with his decision, but their interests become irrelevant in light of his fundamental right to religious freedom. The state's interests remain the same as in the original example. Applying the integrationist approach in balancing Bud's fundamental right to religious freedom with the state's interests, the court will apply the same principles. If

Conclusion

The proposed methodology does not offer easy solutions to difficult problems. It will, however, simplify judicial review of children's rights cases and improve judicial analysis in four ways. First, the methodology recognizes children as individuals with fundamental rights worthy of constitutional protection. Second, it provides greater protection of the family unit by requiring the state to clearly define its authority for regulations that jeopardize family autonomy. Third, under the proposed methodology, children's rights are elevated into the mainstream of legal scholarship, thereby facilitating the establishment of applicable legal theories and principles that are as predictable and as accurate as the theories on adult's rights. Finally, the methodology limits courts to performing their proper functions as guardians, not of children, but of legal rights.

For example, in determining the constitutionality of pretrial detention of alleged juvenile delinquents in *Schall*, the Supreme Court might have reached a different conclusion. If it had applied the proposed methodology in *Schall*, it would have recognized the child's fundamental right to liberty and defined the adversaries in the conflict as the state and the child. The opinion, then, would have followed logical steps of analysis. Without the proposed methodology, the opinion of the Burger Court involved the irrelevant questions of the parent's role and the state's role, as *parens patriae*. By focusing on the child's fundamental right to liberty and the state's interests in protecting the youth and society, the Court would have had to find some reason other than the child's status for treating the child differently from the adult. Instead of assuming the role of social worker, the Court would have been required to assume its responsibility as protector of constitutional rights.

In summary, if the Burger Court and other courts adopt the proposed methodology, their opinions will be more consistent, predictable, and fair. Moreover, an understanding of the dynamics of state-parent-child conflict will be reflected in every decision. Finally, judicial opinions that apply the proposed methodology will directly address the question and scope of children's rights.

Bud can demonstrate that his conviction to the Amish way of life is as deep as that of the parents in *Yoder*, then his interests will outweigh the state's and his decision to quit school should be upheld.

