

1-1981

A Chance to be Heard: An Application of *Bellotti v. Baird* to the Civil Commitment of Minors

Katharine A. Butler

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

Katharine A. Butler, *A Chance to be Heard: An Application of Bellotti v. Baird to the Civil Commitment of Minors*, 32 HASTINGS L.J. 1285 (1981).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol32/iss5/9

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

Notes and Comments

A Chance to be Heard: An Application of *Bellotti v. Baird* to the Civil Commitment of Minors

By Katharine A. Butler*

Parents have virtually an unlimited right to compel their children¹ to undergo treatment for mental disorders, but children, regardless of their maturity, have virtually no legal right to contest such action. In contrast, mature minor women are legally able to consent to a major surgical procedure without parental approval and without threat of parental interference in the decision. This state of seemingly contradictory legal affairs—minors with adequate capacity having important decisionmaking power in one case and almost no such power in the other—is the result of two recent United States Supreme Court decisions.

In *Parham v. J.R.*,² the Court held that Georgia's statutory scheme allowing parents voluntarily to commit³ a child under

* B.A., 1977, Whitman College. Member, Third Year Class.

1. As used throughout this Note, the terms "child" and "minor" refer to a person eighteen years of age or younger.

2. 442 U.S. 584 (1979).

3. An adult who voluntarily seeks admission to a mental institution may be admitted without intervention of another person, whereas in most states the decision voluntarily to commit a minor is controlled by the parents and hospital staff. Generally, a minor can be "voluntarily" admitted despite his or her objection. This difference in treatment of adults and minors makes the term "voluntarily" as applied to minors a misnomer. Lessem, *On the Voluntary Admission of Minors*, 8 J.L. REF. 189, 190-91 (1974). See generally Tiano, *Parham v. J.R.: "Voluntary" Commitment of Minors to Mental Institutions*, 6 AM. J. LAW & MED. 125, 128 (1980). State statutes that allow a parent to commit a child under 18 years of age without that child's consent include: ARK. STAT. ANN. § 59-1403 (Supp. 1979); D.C. CODE ENCYD. § 21-511 (West 1973); IND. CODE ANN. § 16-14-9.1-2 (Supp. 1980); MISS. CODE ANN. § 41-21-103 (Supp. 1980); NEV. REV. STAT. § 433A. 540 (1979); N.Y. MENTAL HYG. LAW § 9.13 (McKinney 1978) (minor 16 years of age may consent to own admission); N.D. CENT.

eighteen years of age to a mental institution did not violate a minor's rights under the due process clause of the fourteenth amendment. Two weeks later, in *Bellotti v. Baird*,⁴ the Court struck down as violative of a minor's constitutional right to privacy⁵ a Massa-

CODE § 25-03.1-04 (Supp. 1979); OHIO REV. CODE ANN. § 5122.02 (Page Supp. 1979); OKLA. STAT. ANN. tit. 43A, § 54.4 (West Supp. 1980); ORE. REV. STAT. § 426.220 (1979); W. VA. CODE § 24-7-1 (Supp. 1979) (admission of minor 12 years of age or older is conditioned upon consent of that minor). Some states also allow a minor 14 years of age or older to commit himself or herself. See FLA. STAT. § 384.465 (1)(a) (Supp. 1979); KAN. STAT. ANN. § 59-2905 (Supp. 1980); PA. STAT. ANN. tit. 50, § 7201 (Purdon Supp. 1979). Other state statutes allow a parent to commit a child if he or she is under 16 years of age, including: ILL. REV. STAT. ch. 91½ §§ 3-502-505 (Supp. 1979) (minor 12 years of age or older may object to admission); LA. REV. STAT. ANN. § 28:57 (West 1980); S.C. CODE § 44-17-310 (1977); TENN. CODE ANN. § 33-601 (1977); UTAH CODE ANN. § 64-7-29 (1978). See also Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CALIF. L. REV. 840 (1974) (excellent discussion of the uniquely restrictive nature of the child's position in voluntary commitment).

4. 443 U.S. 622 (1979). *Bellotti* was a plurality opinion with Justice Powell delivering the judgment of the Court, in which Chief Justice Burger and Justices Stewart and Rehnquist joined. Justice Stevens filed an opinion concurring in the judgment in which Justices Brennan, Marshall, and Blackmun joined. Justice White dissented. For purposes of this Note, unless otherwise indicated, a reference to *Bellotti* is to the judgment announced by Justice Powell.

5. The right implicated in *Bellotti* is "the constitutional right of a woman, in consultation with her physician, to choose to terminate her pregnancy as established by *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973) . . ." 443 U.S. at 639. This right is a specific application of the more general constitutional right of individuals to make certain important decisions involving their personal welfare. In *Roe*, the Court determined that "[t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. In *Roe*, the Court invalidated a Texas statute which prohibited an abortion except when necessary to save the mother's life. In so holding, the Court noted that this privacy right is not absolute and could be limited by compelling state interests. The state's interest in safeguarding health, maintaining medical standards, and protecting life would be compelling after the first trimester and upon viability of the fetus. In *Foe v. Vanderhoof*, 389 F. Supp. 947 (D. Colo. 1975), this personal right to privacy as developed in *Roe* and *Doe* was extended to minors. The district court, invalidating a statute that conditioned a minor's obtaining an abortion on parental consent, recognized that the state does have an interest in protecting the minor, providing for her welfare, and fostering parental control, but held that these interests do not justify the blanket requirement of parental consent. *Id.* at 955-56. Quoting from *Coe v. Gerstein*, 376 F. Supp. 695, 697 (D. Fla. 1973), *appeal dismissed*, 417 U.S. 279 (1974), the court stated: "'We are persuaded that if the State cannot interfere to protect the fetus' interest in potential life until the compelling point of viability is reached, neither can it interfere on behalf of husbands or *parents* to protect their interests in that potential life until the fetus becomes viable. We are persuaded, also, that if the state cannot interfere to protect the pregnant woman's physical or mental health until approximately the end of the first trimester, neither can it interfere on behalf of husbands or *parents* to protect their interest in her health until that point is reached.'" 389 F. Supp. at 955 (emphasis

chusetts statute requiring parental consent before an abortion could be performed on an unmarried woman under the age of eighteen. In determining the validity of the respective statutes, the Court weighed the interests of the parent, the child, and the state. In *Bellotti*, the Court held that the Massachusetts abortion statute was unconstitutional because it burdened individual rights⁶ by failing to recognize that a minor with a certain level of maturity could make decisions independent of her parents. To withstand a due process challenge, the Court held that the statute must provide a minor with a mechanism to establish that she was mature⁷ enough to make a decision independent of her parents.⁸ In *Parham*, on the other hand, the Court did not determine that at some point a minor is capable of independent decisionmaking. Taken together, these two decisions present an inconsistent analysis of the constitutional rights of minors and the extent of legitimate parental authority.

This Note examines the inconsistency in the Court's analysis of the constitutional rights of minors. The Note first discusses the development of constitutional limitations upon parents' rights to make decisions regarding their children's welfare. It next compares the Court's reasoning in *Bellotti* and *Parham* and applies the *Bellotti* rule, which requires the states to provide a mechanism for mature minors to make independent decisions, to voluntary commitment proceedings. The Note suggests that, in voluntary commitment proceedings involving minors, courts should consider that a mature minor can make informed, independent decisions and that when there is a possibility that the interests of the parents

added). The Supreme Court has confirmed that this right to privacy extends to minors. *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (a state may not impose a blanket prohibition requiring the consent of the parent as a condition to allowing an abortion to be performed on an unmarried minor). *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693 (1977) (opinion of Brennan, J.) (prohibition on distribution of contraceptives to minors is prohibited). See, e.g., MASS. GEN. LAWS ANN. ch. 112, § 12S (West Supp. 1979).

6. For a discussion of the right to privacy, see note 5 *supra*.

7. In *Bellotti*, the Court states that it is difficult to define "maturity" and determines that a finding of maturity should be made on a case by case basis. 443 U.S. at 643 n.23. Although the Court does not attempt to provide a test for establishing maturity, it suggests that maturity implies the capacity to make a well-informed and intelligent decision independent of parental consent or consultation. *Id.* at 647. For purposes of this Note, the use of the word "mature" or "maturity" refers to the above-suggested definition. For a discussion of the concept of mature minors, see Tiano, *Parham v. J.R.: "Voluntary" Commitment of Minors to Mental Institutions*, 6 AM. J. LAW & MED. 125, 134-36 (1980).

8. 443 U.S. at 647-48. See text accompanying note 40 *infra*.

and a mature minor are incompatible, the right to make decisions should shift to the minor. The Note concludes that allowing a minor some decisionmaking power and thus limiting parental decisionmaking is appropriate to commitment decisions as well as to abortion decisions and that application of the *Bellotti* standard would provide a flexible and integrated view of the constitutional rights of minors, thereby eliminating the inconsistency.

Historical Background

The constitutional rights of parents to provide for and control their children historically have been determined by an allocation of power between parents and the state.⁹ Traditionally, the Supreme Court's analysis has involved situations in which the parent and state, rather than the parent and child,¹⁰ differ about how the child should be treated.¹¹ In the context of a parent-state conflict, the Supreme Court has recognized that parents have the duty to nurture and to care for their children and that coextensive with that duty is the right to control and make autonomous decisions for them.¹² This recognition was originally based on the belief that

9. "The rights of parents result from their duties. As they are bound to maintain and educate their children, the law has given them a right to such authority; and in the support of that authority, a right to the exercise of such discipline as may be requisite for the discharge of their sacred trust." 2 J. KENT, COMMENTARIES ON AMERICAN LAW 203. (12th ed., O.W. Holmes ed. 1873).

10. Only within the last 10 years has the Supreme Court been confronted with parent-child conflicts. See, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979); *Parham v. J.R.*, 442 U.S. 584 (1979); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). A possible conflict was suggested in *Wisconsin v. Yoder*, 406 U.S. 205, 244-45 (1972) (Douglas, J., dissenting).

11. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (where parents provide an alternative education program that meets the overall objectives of the state's program, the state cannot compel parents to send their children to public school); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (state can prevent parents or guardians from allowing children to distribute religious literature to protect child's welfare); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (state can require compulsory education but parent may choose the school); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state prohibition against the teaching of foreign languages to children below eighth grade exceeds state's authority and interferes with parents' duty to educate their children).

12. See, e.g., *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). In 1921, the Virginia Supreme Court expressed the traditional view that "[p]arents have and exercise such authority of necessity over their children of tender years. It is not only the right, but the duty, of parents to provide for the proper care and nursing of their very young children, and if need be to provide for surgical operations upon them, or hospital treatment, or both. In these matters the wishes of young children are not consulted, nor their consent asked when

children are the property of their parents.¹³ It was later supported by judicial acknowledgment that the state's institutions are not competent to prepare children for future responsibilities¹⁴ and by the belief that courts should respect the privacy of family life.¹⁵ The philosophy that "custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparations for obligations the state can neither supply nor hinder"¹⁶ has made the Court hesitant to interfere with parental authority.¹⁷

Despite the Court's substantial deference to parental decision-making,¹⁸ the rights of parenthood are not absolute.¹⁹ Under the *parens patriae* doctrine,²⁰ states can exercise control over children

they are old enough to give expression thereto. The will of the parents is controlling." *Weston's Adm'x v. Hospital of St. Vincent of Paul*, 131 Va. 587, 592, 107 S.E. 785, 786 (1921). An analysis of the philosophical basis of the relationship between parents, children, and the state is found in Kleinfeld, *The Balance of Power Among Infants, Their Parents and the State* (pt. 3), 5 FAM. L.Q. 64 (1971).

13. See Lessem, *On the Voluntary Admission of Minors*, 8 J.L. REF. 189, 192 (1974). See Rossman, *Parens Patriae*, 4 ORE. L. REV. 233, 245-46 (1925).

14. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

15. See, e.g., *id.*; *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

16. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The Court in *Pierce* observed that under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390 (1923), parental liberty to direct their children may not be unreasonably interfered with by the state. 268 U.S. at 534.

17. The Court's unwillingness to challenge parental authority is seen in this statement: "Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is 'the mere creature of the State' and, on the contrary, asserted that parents generally 'have the right, coupled with the high duty, to recognize and prepare their children for additional obligations.'" *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)).

18. The great respect for parental authority is reflected in the often-quoted statement: "Parental power probably cannot be defined except as a residue of all power not lodged elsewhere by the law . . . Much authority of this sort supports the general proposition that except where there is some authoritatively expressed public policy to the contrary, parental power extends to all areas of a child's life." Kleinfeld, *The Balance of Power Among Infants, their Parents and the State* (pt. 2), 4 FAM. L.Q. 410, 413 (1970).

19. *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) (state has legitimate interest in protecting the child's moral, emotional, mental, and physical welfare); *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (parents have primary function in rearing children but state has extensive power to limit parental freedom); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (right to bring up children can be interfered with by the exercise of reasonable police power). See *State v. Koome*, 84 Wash. 2d 901, 907, 530 P.2d 260, 264 (1975) (parents' pre-ogative must yield to the fundamental rights of children or interest of the state).

20. "*Parens patriae* originates from the English common law where the King had the royal prerogative to act as guardian to persons with legal disabilities such as infants . . . In the United States, the *parens patriae* function belongs with the states." BLACK'S LAW

when necessary to protect the child's general welfare or society as a whole.²¹ The *parens patriae* power, when exercised to protect the child,²² justifies a court's interference with a parent's decision. Such power to limit parental authority has been recognized even when the parents' decision is based on a religious conviction.²³ The Court has reasoned that "the power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."²⁴

Judicial consideration of the rights of children is dependent on this analysis of parental authority.²⁵ Only after finding a reason to regulate the parents' decision will a court look to the child's sepa-

DICTIONARY 1003 (5th ed. 1979). "The *parens patriae* doctrine was originated to deny liberty to parents, but has sometimes been applied, as in the juvenile court movement, to take liberty from infants. Where the infant is a very young child, the argument may be made that (1) liberty implies a process of making choices for one's self, (2) a young child cannot comprehend most of the decisions, which he would have to make were he treated as an adult, (3) therefore, the young child cannot because of his incapacity to perform the activities of liberty enjoy liberty in more than name. But this argument cannot be applied to youths who have attained most or all of their intellectual and judgmental maturity, and persons generally reach their adult levels of abstract intelligence and moral development long before the termination of infancy" Kleinfeld, *The Balance of Power Among Infants, Their Parents and the State* (pt. 3), 5 FAM. L.Q. 64, 69 (1971).

21. See *Ginsberg v. New York*, 390 U.S. 629, 639-641 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 166-70 (1944).

22. See generally Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 896-99 (1975); Rossman, *Parens Patriae*, 4 ORE. L. REV. 233, 238-39 (1925) (power originally applied only to delinquent children was extended to dependent and neglected children). See also Rolfe & MacClintock, *The Due Process Rights of Minors Voluntarily Admitted to Mental Institutions*, 4 J. PSYCH. & L. 333, 338 (1976) (author suggests the risk of the consequences upon the child of a bad decision as a reason for court intervention in parental decisionmaking).

23. See *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944); *State v. Pericone*, 37 N.J. 463, 181 A.2d 751, cert. denied, 371 U.S. 890 (1962) (right to practice religion does not include liberty to expose child to disease or death).

24. *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972). See also *Baker v. Owen*, 395 F. Supp. 294 (M.D.N.C.), aff'd mem., 423 U.S. 907 (1975) (state may corporally punish child if compelling interest outweighs parental objection); *In re Green*, 448 Pa. 338, 292 A.2d 387 (1972) (state does not have sufficient interest to outweigh parent's religious belief when child's life is not in immediate peril). Cf. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (conduct prompted by religious belief has been regulated where it posed a substantial threat to public safety, peace, or order).

25. See, e.g., *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977) (natural parent has the right to the return of a child placed in a foster home; by implication, interest of the child subsequently will be weighed against that right).

rate interests.²⁶ In assessing the extent of the child's interest, the Supreme Court has provided that the guarantees of the fourteenth amendment apply to children and that portions of the Bill of Rights guarantee rights to children.²⁷ The Court reaffirmed this position recently, stating that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."²⁸ At the same time, however, the Court has maintained that the state's authority over children is broader than that over adults.²⁹ Because the state is independently interested in helping children grow to be productive citizens and in

26. A significant body of opinion supports the belief that there is greater need to consider the minor's interests. This philosophy has developed because "[t]he spirit of *In re Gault*, 387 U.S. 1 (1967) is that we must have regard for reality—for pragmatic consequences—and pious hopes or good intentions are not good enough. The child's point of view, what's fair to him, not merely the *mens rea* of the one who wields the rod, must be taken into account." Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 345 (1972). See also Bricker, *Children's Rights: A Movement in Search of Meaning*, 13 U. RICH. L. REV. 661 (1978).

27. *In re Gault*, 387 U.S. 1, 13 (1967). In *Gault*, the Supreme Court determined that the due process guarantees of the fourteenth amendment apply to a juvenile who because of his or her delinquent conduct faces the possibility of institutionalization. The Court in *Gault* thus found that a minor is entitled to the essential standards of due process and fair treatment, which include: (1) timely and adequate notice of specific charges; (2) the right to counsel; (3) the privilege against self-incrimination; and (4) the opportunity for confrontation and cross-examination. *Id.* at 33-57. See also *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (citing *Gault* for the proposition that children are not beyond the protection of the Constitution); *Breed v. Jones*, 421 U.S. 519 (1975) (prosecution of minor as an adult after an adjudicatory hearing in juvenile court violated double jeopardy clause of fifth amendment); *Goss v. Lopez*, 419 U.S. 565 (1975) (students facing suspension from school have property and liberty interests that qualify for protection under the fourteenth amendment); *In re Winship*, 397 U.S. 358 (1970) (procedural safeguards contained in the sixth amendment apply to minor charged with act that is a crime for an adult); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (student has a first amendment right to wear an armband to school in silent protest against American involvement in Vietnam). *But see* *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (jury trial is not constitutionally required in juvenile court system).

28. *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

29. In *Bellotti*, the Court stated: "We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children, their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern . . . sympathy, and . . . paternal attention.'" 443 U.S. at 634-35 (quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971)). See *Ginsberg v. New York*, 390 U.S. 629, 638-39 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (emphasizing that state authority over children is especially strong in public activities and employment).

keeping them safe from abuse,³⁰ it may exercise a greater degree of control over the activities of children than of adults. The assumption that children are immature³¹ and lack the capacity to make meaningful decisions³² is a significant factor in justifying the state's exercise of greater control over children.

In resolving parent-state conflicts, the Court's analysis generally has assumed that the interests of the child are identical to those of the parents or of the state.³³ That a child might have an independent interest that ought to be weighed was first suggested by Justice Douglas' dissent in *Wisconsin v. Yoder*.³⁴ Justice Douglas argued that imposing the parents' view of the child's interest upon the child invades the child's rights in circumstances in which a child is mature enough to express a possibly conflicting opinion.³⁵

30. See *Ginsberg v. New York*, 390 U.S. 629, 638-41 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 165-67 (1944). In *Bellotti*, the Court summarized its prior rulings by concluding: "[T]he Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." 443 U.S. at 635.

31. Justice Stewart described the basis of this assumption in his concurring opinion in *Ginsberg*: "I think a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults." *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) (footnotes omitted). See also *Bonner v. Moran*, 126 F.2d 121, 122 (D.C. Cir. 1941) (it is generally recognized that persons because of their youth are incapable of intelligent decisionmaking).

32. *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976) (regardless of age, not every minor may consent to termination of pregnancy); *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (state may enact laws on the basis of minors' lesser capacity to make mature choices); *Bonner v. Moran*, 126 F.2d 121, 122 (D.C. Cir. 1941). For a discussion of the relationship between parental consent and the capacity of a child to make decisions regarding medical treatment, see Bennett, *Allocation of Child Medical Care Decision-Making Authority: A Suggested Interest Analysis*, 62 VA. L. REV. 285 (1976) [hereinafter cited as Bennett]; Garvey, *Child, Parent, State and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769 (1978).

33. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("historically it has been recognized that . . . parents . . . act in the best interests of their children").

34. 406 U.S. 205, 241 (1972) (Douglas, J., dissenting).

35. *Id.* at 241-49. See also Bennett, *supra* note 32 (author suggests that maturity is a factor in allowing children to make medical decisions). *But see* Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U.L. REV. 605.

Generally, however, the Court is reluctant to abandon the assumption that parents act in the child's best interest,³⁶ using the *parens patriae* power only to assure that children are protected by either the parents' or the state's decision for the child, rather than using it to enable children to make independent choices.³⁷ The deference traditionally accorded parents has proved problematic, however, when the Court is faced not with a conflict between parent and state, but with a situation in which it cannot be assumed that the parents' and child's interests are the same.³⁸

The question of a minor's right to have an abortion without notifying or consulting her parents recently provided the Court with an opportunity to address directly a parent-child conflict and to reassess its analysis of the right of parents to control their child's decision when a fundamental constitutional right of the child is involved.³⁹ In discussing this highly controversial issue,⁴⁰ the Court concluded that there is a possibility of conflict between parent and child, and that complete adherence to the parents' wants unduly burdens a minor's rights guaranteed under the fourteenth amendment.⁴¹ The Court indicated what constituted too much parental control, holding in *Planned Parenthood v. Danforth*⁴² that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary veto

36. The Supreme Court in *Yoder* adhered to the assumption that parents act in their children's best interests when it rejected the state's argument that allowing Amish parents to withdraw their children from school before the age of sixteen infringed upon the child's right to secondary education. "The State's argument proceeds without reliance on any actual conflict between the wishes of parents and children. It appears to rest on the potential that exemption of Amish parents from the requirements of the compulsory-education law might allow some parents to act contrary to the best interests of their children by foreclosing their opportunity to make an intelligent choice between the Amish way of life and that of the outside world." 406 U.S. at 232.

37. See notes 16-20 & accompanying text *supra*.

38. See note 10 *supra*.

39. See *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

40. "With the exception of . . . Watergate . . . and . . . Viet Nam . . . [no] issue has divided the country and its government officials more dramatically than the debate over the propriety of physicians' performing procedures to induce the termination of pregnancies, or, as they are commonly referred to, abortions. The sparks of this controversy have fallen on all levels of government . . . and the relations among the state, the family, and the family's individual members." *Baird v. Bellotti*, 450 F. Supp. 997, 999 (D. Mass. 1978), *aff'd*, 443 U.S. 622 (1979).

41. *Bellotti v. Baird*, 443 U.S. 622, 647 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74-75 (1976).

42. 428 U.S. 52 (1976).

. . . .”⁴³ In *Planned Parenthood*, the Court reviewed a statute requiring a parent’s written consent before an abortion could be performed on an unmarried woman under the age of eighteen. The Court held that this blanket consent requirement was unconstitutional because it imposed a consent provision exercisable by someone other than the woman and her doctor.⁴⁴ Parental control thus does not extend to the point at which parental approval or consent is the ultimate determinant in a decision regarding the personal rights of a minor.

In *Bellotti v. Baird*,⁴⁵ the Court addressed the unresolved question of what type of nonabsolute parental control is constitutionally permissible. Examining a Massachusetts statute similar to the Missouri statute contested in *Planned Parenthood*,⁴⁶ the Court distinguished the Massachusetts statute, stating that it did not give parents an “absolute, and possibly arbitrary, veto” because it provided for judicial override of the parents’ decision.⁴⁷ The Court determined, however, that the Massachusetts approach still burdened a minor’s constitutional right to obtain an abortion. To ensure that the minor’s rights are not encumbered, the Court stated that when a state requires parental consent it must also allow the minor the alternative of demonstrating that she is mature and capable of making an independent decision or, if she cannot establish maturity, that it is in her best interest to have the abortion.⁴⁸ In either case, the abortion decision may be made without parental involvement.⁴⁹

The procedure established in *Bellotti* does not undermine the traditional deference to parental decisionmaking and noninterference in family life; rather, it supports the tradition only when a child’s immaturity and incapacity justify such deference. The decision still enables the state to exert its *parens patriae* power to protect a minor from parental abuse. What the *Bellotti* decision adds to the constitutional analysis is the recognition that when a possible parent-child conflict exists, an additional factor—the child’s ability to make knowing decisions—must be considered. In es-

43. *Id.* at 74.

44. *Id.* at 75.

45. 443 U.S. 622 (1979).

46. See notes 42-44 & accompanying text *supra*.

47. 443 U.S. at 639-40 (1979).

48. *Id.* at 643-44.

49. *Id.* at 647.

sence, the Court in *Bellotti* adopted a more individualized approach to the parent-child problem. The Court has not obliterated traditional assumptions regarding the similarity of parents' and children's interests, but has realized that these assumptions must be tested against a minor's ability to make decisions and act independently. A child's rights thus will not be relegated to a secondary status. Traditional assumptions must not be followed if they would impinge upon the mature minor's rights.

As with abortion decisions, a decision by parents "voluntarily" to commit their child to a mental institution involves potential parent-child conflicts.⁵⁰ Recently, in *Parham v. J.R.*,⁵¹ the Court upheld the constitutionality of a Georgia statute that allowed parents "voluntarily" to commit a child under eighteen years of age to a mental institution.⁵² Some lower courts previously had held that permitting parents to commit their child without notice and a hearing was a deprivation of due process.⁵³ In *Bartley v. Kremens*,⁵⁴ a federal district court listed the procedures to which a committed minor is entitled: (1) a probable cause hearing within seventy-two hours; (2) a post-commitment hearing within two weeks of initial detention; (3) written notice of the hearing; (4) the right to counsel; (5) the right to be present, confront, and cross-examine witnesses; (6) clear and convincing proof of the need for institutionalization; and (7) the right to offer evidence.⁵⁵ Although

50. In *Bartley v. Kremens*, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated as moot*, 431 U.S. 119 (1977), the court listed reasons why parents have committed children to mental hospitals. These reasons included: (1) the child had difficulty relating to parents; (2) the home situation was poor; (3) the family wanted a vacation without the child; (4) the child interfered with family routine; (5) the child overdosed on drugs; (6) the child had physical problems. 402 F. Supp. at 1044. All suggest that a potential or real parent-child conflict existed. See also Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW. 133, 139-43 (1972) (an analysis of the conflict of interest between a parent who is ready to commit a child and the child).

51. 442 U.S. 584 (1979).

52. *Id.* at 620. The statute is set forth in relevant part at note 89 & accompanying text *infra*.

53. See, e.g., *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 459 F. Supp. 30, 44 (E.D. Pa. 1978), *rev'd*, 442 U.S. 640 (1979); *J.L. v. Parham*, 412 F. Supp. 112, 137 (M.D. Ga. 1976), *rev'd sub nom.* *Parham v. J.R.*, 442 U.S. 584 (1979); *Bartley v. Kremens*, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated as moot*, 431 U.S. 119 (1977) (enactment of 1976 Mental Health Act gave juveniles age 14 or older essentially the same rights as adults, thereby mooting the claims of named plaintiffs who were all age 14 or older).

54. 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated as moot*, 431 U.S. 119 (1977).

55. *Id.* at 1053. See also *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 459 F. Supp. 30, 44 (E.D. Pa. 1978), *rev'd*, 442 U.S. 640 (1979). Both cases noted that not all

Bartley held that no precommitment hearing was necessary, several courts have required precommitment hearings.⁵⁶ Other courts have determined that an older minor is entitled to greater procedural protections than is a younger minor.⁵⁷

In determining the procedural safeguards that must be accorded to voluntary commitment proceedings involving a minor, the lower courts have balanced the minor's right to liberty—the right to be free from erroneous confinement⁵⁸ and to have one's good reputation protected⁵⁹—against the interests of the parents and the state. The recognition of a minor's right to liberty⁶⁰ under

these procedures are required in each instance of commitment. The rights listed, except the right to counsel and notice, may be waived by the child who understands the rights and is competent to waive them or by his or her attorney. *Bartley v. Kremens*, 402 F. Supp. 1039, 1053 n.26 (E.D. Pa. 1975), *vacated as moot*, 431 U.S. 119 (1977); *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 459 F. Supp. 30, 44 n.48 (E.D. Pa. 1978), *rev'd*, 442 U.S. 640 (1979).

56. See *Kidd v. Schmidt*, 399 F. Supp. 301 (E.D. Wis. 1975); *In re Roger S.*, 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977) (applies to minors age 14 and older).

57. *E.g.*, *In re Roger S.*, 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977). That there should be a difference in treatment of older minors and younger minors was suggested in *Kremens v. Bartley*, 431 U.S. 119, 135-36 (1974) (Court cautioned that attention should be paid to the different interests of older and younger children). See also *Secretary of Pub. Welfare v. Institutionalized Juveniles*, 442 U.S. 640 (1979) (minors age 14 and older treated much like adults for the purpose of commitment).

58. The lower court in *J.L. v. Parham*, 412 F. Supp. 112 (M.D. Ga. 1976), stated that the commitment decision raises the important question of children's constitutional rights to liberty. This liberty, the court noted, includes not only the liberty to be free from bodily restraint, "but also the liberty . . . of an ordinary, every-day child in these United States of America—the freedom to live with mothers, fathers, brothers and sisters in whatever the family abode may be; the freedom to be loved and to be spanked; the freedom to go in and out the door, to run and play, to laugh and cry, to fight and fuss, to stand up and fall down, to play childish games; the freedom to go to school and to frolic with school-mates; the freedom to go to Sunday school and church; the freedom to watch and listen or not to watch and listen to television; the freedom to buy candy at the corner store; the freedom to be a normal child in a normal household cared for by normal parents." *Id.* at 136.

59. See, *e.g.*, *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 459 F. Supp. 30, 43 (E.D. Pa. 1978), *rev'd*, 442 U.S. 640 (1979) (reputation is protected because of the stigma attached to commitment); *Bartley v. Kremens*, 402 F. Supp. 1039, 1046 n.8 (E.D. Pa. 1975), *vacated as moot*, 431 U.S. 119 (1977).

60. See *Bartley v. Kremens*, 402 F. Supp. 1039, 1046-47 (E.D. Pa. 1975), *vacated as moot*, 431 U.S. 119 (1977). See also *In re Ballay*, 482 F.2d 648, 669 (D.C. Cir. 1973). In determining whether the interest of the party is within the liberty interest that is guaranteed by the fourteenth amendment "[i]t matters not whether the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration—whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent—which commands observance of the constitutional safeguards of due process." *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968).

the fourteenth amendment reflects the lower courts' acknowledgment that because of the stigma attached to commitment,⁶¹ the potential for conflict between parent and child,⁶² and the high risk of mistaken diagnosis,⁶³ the child's independent interests should be protected. At the same time, the courts recognized that due process is flexible⁶⁴ and that the formal constitutional safeguards depend on a balancing of the governmental and private interests involved and the risk of an erroneous deprivation of liberty.⁶⁵ As a result, the courts adopted due process procedures that bore a relationship to the nature and purpose of commitment, while accommodating the child's interest in not being arbitrarily institutionalized, the parents' right to control their child, and the state's interest in fostering the child's mental health, preserving the family unit, and maintaining parental authority.⁶⁶ The courts con-

61. See, e.g., *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 459 F. Supp. 30, 39 (E.D. Pa. 1978), *rev'd*, 442 U.S. 640 (1979) (stigma involved is of two kinds—obstacles created by the community and damage to a juvenile's self-image); *Bartley v. Kremens*, 402 F. Supp. 1039, 1046 n.8 (E.D. Pa. 1975), *vacated as moot*, 431 U.S. 119 (1977); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 293-95 (E.D. Pa. 1972). See also *In re Ballay*, 482 F.2d 648, 668 (D.C. Cir. 1973).

62. See, e.g., *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 459 F. Supp. 30, 39 (E.D. Pa. 1978), *vacated as moot*, 431 U.S. 119 (1977) (conflicts between the interests of the parent and the interests of the child exist in the commitment of a child by a parent because of the parent's inability to cope, pressures from home, and lack of awareness regarding alternatives to commitment); *Bartley v. Kremens*, 402 F. Supp. 1039, 1047-48 (E.D. Pa. 1975), *vacated as moot*, 431 U.S. 119 (1977).

63. See *In re Roger S.*, 19 Cal. 3d 921, 929, 569 P.2d 1286, 1291, 141 Cal. Rptr. 298, 303 (1977). See also *O'Connor v. Donaldson*, 422 U.S. 563, 579 (1975) (Burger, J., concurring).

64. See generally *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (procedure needed depends on demands of the situation); *Goldberg v. Kelley*, 397 U.S. 254, 268-69 (1970) (courts tailor procedures to fit the circumstances and capacities of persons involved); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961) (due process is not a technical concept); *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring).

65. The factors to be balanced under a due process claim are: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Smith v. Organization of Foster Families*, 431 U.S. 816, 847-48 (1977). See also *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

66. See *Bartley v. Kremens*, 402 F. Supp. 1039, 1048 (E.D. Pa. 1975), *vacated as moot*, 431 U.S. 119 (1977). See also *In re Roger S.*, 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977) (holding that the state had a substantial interest in recognizing the child's right to avoid erroneous commitment).

cluded that the due process safeguards⁶⁷ were necessary to consider fairly the child's interests. The courts thus determined, as they had in the abortion decisions, that when the family relationship is fragmented,⁶⁸ the child's interest entitled him or her to procedural safeguards to prevent erroneous deprivation of liberty.⁶⁹

In *Parham*, the Supreme Court appears to have reversed the lower courts' trend towards providing greater due process protections to minors involved in commitment proceedings.⁷⁰ The *Parham* Court used the traditional approach developed in cases involving a parent-state conflict to analyze a potential parent-child conflict and as a result failed to exercise its *parens patriae* power to protect the children from a harmful decision by the parents.⁷¹ The approach taken in *Parham* is fundamentally inconsistent with that taken in *Bellotti*. The following comparison of *Bellotti* and *Parham* demonstrates that the decisions are not distinguishable because of different rights involved. Rather, the recognition that minors of adequate capacity can make certain decisions must be applied in the commitment process to ensure that the constitutional rights of children are adequately protected.

Analysis and Comparison of *Bellotti v. Baird* and *Parham v. J.R.*

In *Bellotti*, Mary Moe, sixteen years old and pregnant, wanted to obtain an abortion. She had not told her parents of her pregnancy or her plans to obtain an abortion because she was afraid of her father's reaction.⁷² A Massachusetts statute, however, required an unmarried woman under eighteen to obtain her parents' consent before an abortion could be performed.⁷³ A class action was filed to have the statute declared unconstitutional. The trial court found that Mary was competent to understand the nature of the

67. See note 55 & accompanying text *supra*.

68. See note 91 & accompanying text *infra*.

69. See note 53 *supra*. See also *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 762 (E.D.N.Y. 1973) (parents may not waive constitutional rights of children to precommitment hearings).

70. 442 U.S. at 620.

71. See notes 16-17 & accompanying text *supra*.

72. *Baird v. Bellotti*, 393 F. Supp. 847, 850 (D. Mass. 1973), *vacated*, 428 U.S. 132 (1976).

73. MASS. GEN. LAWS ANN. ch. 112, § 12S (West Supp. 1980).

action and to make the decision independent of her parents.⁷⁴ It held that the statute unduly burdened her right to do so,⁷⁵ and the Supreme Court affirmed.⁷⁶

In *Parham*, J.L. and J.R.⁷⁷ had been committed to Central State Hospital in Georgia at the ages of six and seven respectively. After spending half of their lives in a mental institution,⁷⁸ a class action suit⁷⁹ was filed by them to have the Georgia commitment statute declared unconstitutional.⁸⁰ The trial court held the statute unconstitutional because it did not provide adequate due process safeguards.⁸¹ The Supreme Court reversed,⁸² recognizing that, although admission procedures varied from hospital to hospital,⁸³

74. The lower court found that Mary was of average intelligence and awareness and capable of making a competent decision. 393 F. Supp. at 850 n.5. Justice Julian, in his dissent, argued that it must be shown that she has a higher degree of intelligence than the average adolescent. *Id.* at 858 n.3 (Julian, J., dissenting).

75. *Id.* at 857.

76. 443 U.S. 622, 650 (1979). The Supreme Court had initially vacated the trial court's decision in *Bellotti v. Baird*, 428 U.S. 132, 148 (1976), concluding that the court should have certified to the Supreme Judicial Court of Massachusetts certain questions regarding the meaning of the statute. On remand, the court certified nine questions. The answers appear in *Baird v. Attorney General*, 371 Mass. 741, 360 N.E.2d 288 (1977).

77. J.L. died in the mental institution while the review of the trial court's decision was pending. Although his claim was thus moot, the facts of his claim were included because they formed, in part, the basis for the trial court's decision. 442 U.S. at 587 n.1.

78. J.L. was admitted in 1970 at the age of 6 to Central State Regional Hospital in Milledgeville, Georgia, and was 11 at the time the suit was originally filed. He spent a total of 5 years and 5 months in the hospital out of a life of 12 years and 1 month. J.R. was also admitted in 1970 to the same hospital at the age of 7 and was 12 at the time the suit was filed. At the time the trial court decision was handed down, he had spent 5 years and 4 months out of his 13 years and 2 months in the hospital. *J.L. v. Parham*, 412 F. Supp. 112, 116-17 (M.D. Ga. 1976), *rev'd sub nom. Parham v. J.R.*, 442 U.S. 584 (1979).

79. See 412 F. Supp. at 117. The certified class consisted "of all persons younger than 18 years of age now or hereafter received by any defendant for observation and diagnosis and/or detained for care and treatment at any 'facility' within the State of Georgia" pursuant to GA. CODE § 88-503.1 (1979). 412 F. Supp. at 117. For the relevant portion of § 88-503.1, see note 89 & accompanying text *infra*. The suit was based on 42 U.S.C. § 1983 (1976) which provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

80. The plaintiffs alleged that Georgia's commitment scheme deprived them of liberty without due process of law in violation of the fourteenth amendment. They sought a declaratory judgment and an injunction against further enforcement of the commitment procedures. 412 F. Supp. at 118.

81. *Id.* at 139.

82. 443 U.S. 584 (1979).

83. The Court noted that Georgia had not published any statewide regulations

the fact that the hospital superintendent must decide that a child is mentally ill before a parent's request can be approved⁸⁴ safeguarded the child's due process rights.⁸⁵

Both *Bellotti* and *Parham* involved statutes that conditioned a child's treatment on the consent of his or her parents. The Massachusetts statute in *Bellotti* provided:

If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required.

If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary.⁸⁶

In discussing the purpose of the statute, the trial court rejected the suggestion that the statute existed to protect a minor from her immaturity.⁸⁷ The language of the statute itself indicated that a minor was capable of consenting because it required her consent, yet the statute made no provision for mature minors to act without parental permission. The statute granted parents rights independent of and superior to the rights of their daughters. This effect, the trial court recognized, burdened the minor's rights.⁸⁸ The statute was therefore held unconstitutional.

In comparison, the statute at issue in *Parham* provides:

The chief medical officer of any facility may receive for observation and diagnosis any patient 12 years of age, or older, making application therefore, and any patient under 18 years of age for whom such application is made by his parent or guardian . . .

Provided, however, that the parents or guardian of a minor child must give written consent to such treatment.⁸⁹

Like the abortion statute in *Bellotti*, this statute is designed to assist parents in exercising their duty to care for their child.⁹⁰ It ap-

describing specific procedures that each hospital must utilize. The standards for admission vary among the institutions. Hospitals will admit minors if: (1) a minor has been treated by a community clinic and is referred by that clinic; or (2) a minor is a threat to himself or herself or to others; or (3) there is no appropriate alternative measure; or (4) a minor needs hospitalization; or (5) hospitalization is the last resort. *Id.* at 591-96.

84. GA. CODE § 88-503.1 (1979) provides that the superintendent of a facility may admit a minor. This statute has been interpreted to include hospital staff. 442 U.S. at 591-96.

85. 442 U.S. at 606-13.

86. MASS. GEN. LAWS ANN. ch. 112, § 12S (West Supp. 1980).

87. 393 F. Supp. at 856.

88. *Id.* at 855-56.

89. GA. CODE § 88-503.1 (1979).

90. The state has a significant interest in helping parents care for the mental health of their children by not imposing unnecessary obstacles in their attempts to obtain psychiatric assistance for their children. *Parham v. J.R.*, 442 U.S. 584, 605 (1979).

plies equally to all children, giving no consideration to a child's capacity, despite the fact that allowing an older minor to admit himself or herself suggests that some children are capable of making their own decisions. A major distinction between the two statutes is that the commitment statute does not provide for judicial review. However, the requirement that admission to an institution be predicated upon a physician's judgment was found by the Supreme Court to be substantially the same as an inquiry by a neutral factfinder.⁹¹

The commitment statute in *Parham* was held to be constitutional and the abortion statute in *Bellotti* was not. In *Bellotti*, the Court required that for a parental consent statute to be constitutional, an alternative method to obtain treatment without parental knowledge or consent must be established. The Court concluded:

[U]nder state regulation such as that undertaken by Massachusetts, every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature enough and well informed enough to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion.⁹²

A comparison of the decisions in *Bellotti* and *Parham* raises the question whether allowing parents to commit their child to a state mental hospital without notice or a hearing is consistent with the *Bellotti* approach. The decision in *Parham* suggests that *Bellotti* is distinguishable from voluntary commitment proceedings involving mature minors because: (1) the constitutional rights involved and the impact on these rights are different; (2) the plaintiffs in *Parham* were immature minors; (3) the requirement of a physician's permission safeguards the child; and (4) commitment involves a situation in which parents consent to rather than oppose

91. *Id.* at 606. The Court recognized that the same type of inquiry must be made by a "neutral factfinder" in order to protect the child. It noted that "neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments" and concluded that "a staff physician will suffice, so long as he or she is free to evaluate independently the child's mental and emotional condition and need for treatment." *Id.* at 607.

92. 443 U.S. at 647-48.

treatment. The following examination of those factors will illustrate that they do not support a difference in result and that to be consistent the Court should distinguish between mature and immature minors in determining the procedural safeguards necessary to satisfy due process in voluntary commitment proceedings.

Constitutional Right and Impact on the Right

In *Parham* and *Bellotti*, the Court was concerned with determining whether the statutory procedures involved adequately protected a minor's fundamental right.⁹³ In both cases, the substantive right implicated was derived from the due process clause of the fourteenth amendment.⁹⁴

In *Bellotti*, great emphasis was placed on the fact that a personal right of constitutional dimension was implicated.⁹⁵ The need to protect the right to choose whether or not to have an abortion was a decisive factor in the *Bellotti* holding.⁹⁶ The Court in *Parham* also recognized that a child's personal substantive right was involved,⁹⁷ but did not focus, as did the Court in *Bellotti*, on the preservation of that right. Instead, the Court merged the child's interest with the parents' interests and focused on the procedures necessary to protect this combined interest.⁹⁸

The Court's failure in *Parham* to separate the constitutional right of minors from the interests of their parents enabled the Court to distinguish *Parham* from *Planned Parenthood*.⁹⁹ The Court stated:

Appellees [plaintiffs] place particular reliance on *Planned Parenthood*, arguing that its holding indicates how little deference to parents is appropriate when the child is exercising a constitutional right. The basic situation in that case, however, was very different; *Planned Parenthood* involved an absolute parental veto over the child's ability to obtain an abortion. Parents in

93. *Bellotti v. Baird*, 443 U.S. 622, 650 (1979) (right to privacy); *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (right to liberty). *But see* 442 U.S. at 623 n.6 (Stewart, J., concurring) (the fundamental difference between the abortion decision and the commitment decision is that the mother's right to decide upon an abortion is a personal substantive constitutional right whereas the right not to be hospitalized for psychiatric treatment is not).

94. See notes 5, 60 *supra*.

95. See 443 U.S. at 642-43.

96. *Id.*

97. 442 U.S. at 600.

98. *Id.* at 600-01.

99. *Id.* at 603-04.

Georgia in no sense have an absolute right to commit their children to state mental hospitals; the statute requires the superintendent of each regional hospital to exercise independent judgment as to the child's need for confinement.¹⁰⁰

Although the Court's interpretation of the Georgia commitment statute as different from a statute allowing for a parental veto is arguably valid, its analysis of the statute's constitutionality should not have stopped with *Planned Parenthood*. In *Bellotti*, the Court also determined that the Massachusetts statute could be read as "fundamentally different" from a statute that provided parents with complete control over their child's decisions.¹⁰¹ However, the Court further analyzed the statute in light of the burden it placed on a minor's protected right to seek an abortion.¹⁰² Because *Parham* equated the minor's interest with the parents' interest, the Court did not address the issue of whether the procedure burdened a minor's right not to be institutionalized unnecessarily.

Justice Brennan's dissent in *Parham* suggests that the Court erred in not discussing the effect of the commitment statute in terms of the constitutional right of the child.¹⁰³ Recognizing that "notions of parental authority and family autonomy cannot stand as absolute and invariable barriers to the assertion of constitutional rights by children,"¹⁰⁴ Justice Brennan acknowledged, "[t]his case is governed by the rule of [*Planned Parenthood*]. The right to be free from wrongful incarceration, physical intrusion, and stigmatization has significance for the individual surely as great as the right to an abortion."¹⁰⁵

By not emphasizing the child's substantive constitutional liberty right, the Court in *Parham* was able procedurally to distinguish the Georgia commitment statute from the *Planned Parenthood* abortion statute. However, *Parham*, like *Bellotti*, involved a substantive right protected under the fourteenth amendment, and the need to protect that right justifies application of the *Bellotti* approach.

Another important aspect of the *Bellotti* holding was the

100. *Id.* at 604.

101. 443 U.S. at 640.

102. *Id.*

103. 442 U.S. at 630-32. (Brennan, J., concurring in part and dissenting in part).

104. *Id.* at 631.

105. *Id.*

"unique nature" of the abortion decision.¹⁰⁶ A decision with such "grave and indelible" consequences, the Court noted, "simply cannot be postponed, or it will be made by default."¹⁰⁷ The commitment decision is of an equally "unique nature."¹⁰⁸ The consequences of such a decision also are harsh and often include "adverse social consequences."¹⁰⁹ Like the stigma of being an unwed mother, the stigma of being labeled mentally ill is a severe burden to bear.¹¹⁰ Furthermore, this burden is not lessened by the fact that the individual is a minor.¹¹¹

In justifying its departure from the traditional requirement of parental consent, the Court in *Bellotti* recognized that the abortion decision differed greatly from other decisions a minor makes.¹¹² This distinction, however, was based on a comparison of the decision to abort with the decision to marry.¹¹³ No analysis was

106. See 443 U.S. at 642-43.

107. *Id.* at 643.

108. See *Matthews v. Hardy*, 420 F.2d 607, 611 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970) (person mistakenly judged mentally ill may suffer psychological harm).

109. 442 U.S. at 600. See also *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 459 F. Supp. 30, 40 (E.D. Pa. 1978), *rev'd*, 442 U.S. 640 (1979) (institutions prevent exposure to normal conditions and hamper the chance for individual growth); *Bartley v. Kremens*, 402 F. Supp. 1039, 1046 (E.D. Pa. 1975), *vacated as moot*, 431 U.S. 199 (1977) (civil commitment is a greater intrusion on freedom than criminal commitment); *Kidd v. Schmidt*, 399 F. Supp. 301, 304 (E.D. Wis. 1975) (irreparable harm results from commitment).

110. 442 U.S. at 600-601. The Court acknowledged that a child may be "labeled" because of having received psychiatric treatment; however, the Court noted that it is not the state's procedures that label a child, but the public's reaction. Furthermore, the Court stated that greater stigmatization might result from not treating a child. *Id. Cf. Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (due process requires notice and opportunity to be heard prior to posting in public place that a certain person is an excessive drinker; excessive drinking, although a serious illness, is a stigma to some).

111. 442 U.S. at 628-29 (Brennan, J., concurring in part and dissenting in part). See also *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 459 F. Supp. 30, 40 (E.D. Pa. 1978), *rev'd*, 442 U.S. 640 (1979) (minors are harmed greatly by stigma and classification of being mentally ill because it is thereafter difficult to adjust to normal life). In *Parham*, the trial court, quoting from the 1973 report of the Study Commission on Mental Health Services for Children, stated: "Children learn from their environment and adapt themselves to it. Such adaptation usually becomes an integral part of the child's personality. A child institutionalized for long periods of time may learn and assimilate "institutionally appropriate" behavior which in turn is an additional handicap if he is to return to his normal environment." 412 F. Supp. at 121-22. It might be argued that minors bear an even greater burden because childhood is a vulnerable time and children are frequently institutionalized for a long period of time. See 442 U.S. at 628-29. (Brennan, J., concurring in part and dissenting in part).

112. 443 U.S. at 642.

113. *Id.* But see Hafen, *Children's Liberation and the New Egalitarianism: Some*

made of decisions that had the same type of bearing and impact upon the life of a minor as the abortion question. The Court's silence with regard to choices with similar types of consequences suggests that when a minor is involved in a decision with consequences of the magnitude of an abortion decision, courts should have the power to limit parental involvement.¹¹⁴ Thus, for any decision with a potentially great impact on a minor's life, including a "voluntary" commitment decision under which a minor may have to submit to treatment for mental disorders at his or her parents' discretion, the *Bellotti* procedure should be followed.¹¹⁵

Parham Involved Immature Minors

Arguably, *Parham* can be limited to its facts; because the case involved two boys who had been committed at ages six and seven the Court addressed only the rights of immature minors.¹¹⁶ The Court, however, was concerned with the constitutionality of a statute that, like the statute in *Bellotti*, applied to all children.¹¹⁷ On this fact alone, the argument that commitment decisions involve

Reservations About Abandoning Youth to Their "Rights", 1976 B.Y.U.L. REV. 605, 648 (author suggests that the capacity required to evaluate the psychological implications necessarily weighed in the abortion decision does not differ from that necessary to evaluate the consequences of voting or marriage).

114. This inference is supported by the lower courts' recognition that a mature minor generally can consent to medical treatment without parental consent and that the decision to have an abortion should not be treated differently. *See, e.g.*, *Baird v. Bellotti*, 450 F. Supp. 997, 1003-04 (D. Mass. 1978), *aff'd*, 443 U.S. 622 (1979) (distinguishing between abortions and other medical procedures is an undue burden on due process and equal protection); *Baird v. Bellotti*, 393 F. Supp. 850, 852 (D. Mass. 1973), *vacated*, 428 U.S. 132 (1976) (consent required for an abortion is no different from the consent required for other medical or surgical treatments). *See also* *Foe v. Vanderhoof*, 389 F. Supp. 947, 956 (D. Colo. 1975) (the state's interest in protecting minors and providing for them is no different in the case of abortions than for other medical procedures); Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U.L. REV. 605, 648-49 (author asserts that if the rule requiring parental consent in an abortion decision is overturned, a precedent for limiting parental involvement in a wide range of minor's choices is established).

115. In *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 459 F. Supp. at 43 (E.D. Pa. 1978), *rev'd*, 442 U.S. 640 (1979), the lower court indicated that courts should recognize that the commitment decision, because of the stigma attached to those who have been institutionalized and the possibility of error in deciding that commitment is in the child's best interests presents a situation unlike everyday decisions where parents should not have the ability to waive their child's rights.

116. This assumption, however, ignores the fact that at the time J.L. and J.R. were seeking release they were arguably "mature minors."

117. See notes 86-91 & accompanying text *supra*.

only immature minors fails.

The Court in *Parham* recognized that the statute applied to both young children and adolescents; however, it did not recognize, as it did in *Bellotti*, that the statute will affect children of differing decisionmaking capabilities. It appears that underlying the *Parham* decision is the assumption that children adjudged by their parents to need medical treatment could not have the capacity to make intelligent decisions. The Court stated that, "[m]ost children, even in adolescence, simply are not able to make sound judgments."¹¹⁸ This reasoning seems to contradict the lower court's recognition in *Bellotti* that there is "no factual magic" to the time at which a minor can make a mature choice.¹¹⁹ The Court's failure to distinguish between mature and immature minors suggests that the Court presupposed that all the children affected by the statute would be mentally ill and thus incapable of rational decisionmaking. The repeated reference to the children that parents are attempting to commit as "disturbed"¹²⁰ and the Court's emphasis on maintaining a commitment procedure that does not "exacerbate whatever tensions already exist between the child and the parent"¹²¹ supports this interpretation.¹²²

The Court's assumption regarding the capacity of all children being committed enabled the Court to ignore the fact that some minors can make well-informed and rational decisions. The Court's assumption that all minors whose parents are attempting to commit them to mental institutions are incapable of decisionmaking is obviously erroneous in light of the standards for commitment of adults. With respect to adult commitments, the Court has required involuntary commitment procedures to determine the necessity of treatment where an adult has not voluntarily decided to commit

118. 442 U.S. at 603.

119. *Baird v. Bellotti*, 393 F. Supp. 850, 854-55 (D. Mass. 1973), *vacated*, 428 U.S. 132 (1976) (expert testimony indicated that there is no specific time at which every minor can make a competent decision).

120. *See* 442 U.S. at 610.

121. *Id.*

122. *See In re Ballay*, 482 F.2d 648, 644 (D.C. Cir. 1973) (the argument that efforts to ensure added due process guarantees will produce trauma presupposes that the person facing commitment is mentally ill). *See also* *Bartley v. Kremens*, 402 F. Supp. 1039, 1050 (E.D. Pa. 1975), *vacated as moot*, 431 U.S. 119 (1977) (court noted that the argument that providing due process guarantees will disrupt family life presupposes that the child is dangerous to others and comes from a harmonious family environment).

himself or herself.¹²³ If the presupposition that a person thought to need mental treatment lacks capacity to decide whether in fact such treatment is needed were true, then there would be no reason to mandate, as the Court has done, that an adult cannot be admitted by a third party without an opportunity to be heard in the commitment decision.¹²⁴

The Physician's Judgment as a Protection of the Child's Interest

The statutes in both *Bellotti* and *Parham* are distinguishable from the absolute parental veto statute earlier held to be invalid in *Planned Parenthood*.¹²⁵ The parents' consent was restricted in each case by an independent third party: in *Bellotti* the limitation was provided by judicial review,¹²⁶ while in *Parham* the physician's judgment controlled the parent's decision.¹²⁷

Because the requirement that a minor's admission to a mental institution be predicated on a physician's judgment limited parental discretion to commit minor children, the Court in *Parham* distinguished *Planned Parenthood*, and held that the statute was constitutional. The Court did not consider, as it did in *Bellotti*,¹²⁸ whether this independent judgment placed an impermissible burden on the minor. Instead, the Court in *Parham* stated that such inquiry "would require us to assume that the physicians, psychologists and mental health professionals who participate in the admission decision and who review each other's conclusions as to the continuing validity of the initial decision are either oblivious or indifferent to the child's welfare—or that they are incompetent."¹²⁹

123. The Court has recognized that adults are entitled to notice and an evidentiary hearing before commitment. *Humphrey v. Cady*, 405 U.S. 504 (1972). See also *Specht v. Patterson*, 386 U.S. 605 (1967) (due process protections practically identical to those provided for in criminal commitments are guaranteed adults facing involuntary civil commitment).

124. See 18 DUQ. L. REV. 969, 977-78 (1980) (author suggests that current voluntary commitment procedures deprive minors of a choice in the commitment decision and are therefore inconsistent with protections granted adults).

125. See *Bellotti v. Baird*, 443 U.S. 622, 639-40 (1979) (statute fundamentally different); *Parham v. J.R.*, 442 U.S. 584, 604 (1979) (basic fact setting very different). But see *id.* at 631 (Brennan, J., concurring in part and dissenting in part) (*Parham* is governed by *Planned Parenthood*).

126. 443 U.S. at 640.

127. 442 U.S. at 604.

128. 443 U.S. at 640.

129. 442 U.S. at 615. But see Rosenhan, *On Being Sane in Insane Places*, 179 SCIENCE

This deference to the quality of medical care acts to protect the physician and ignores the central reason for having an independent decisionmaker, which is to determine the best interests of the child. The Court's deference, furthermore, is inconsistent with the reasoning in *Bellotti*. Although the Court in *Bellotti* considered the competency and availability of physicians with regard to young women seeking abortions,¹³⁰ the Court focused on the major issue of a mature minor's right to determine the necessity of obtaining an abortion. The Court realized that it is the rights and interests of the minor that must be protected and that, to provide for adequate protection, the doctor's determination may be overruled by a court.

If the Court in *Bellotti* had adopted the *Parham* policy that medical personnel should be protected from inquiry by a court because they are better equipped than a court to counsel the minor and make the final determination concerning the minor's best interest, the Court would have had no reason to allow any parental or judicial intervention in the minor's decision to seek an abortion. The Court, however, recognized that "blanket control" by physicians would not always provide a result that was in the child's best interest.

That ultimate control by a physician in deciding how a minor should be treated may not result in the best choice for the minor is more true in mental commitment proceedings than in abortion decisions. In a commitment proceeding, unlike an abortion decision, the physician generally is not initially consulted by the minor but is contacted by the child's parents. The doctor's concern thus is with the interests of both the parents and the child, and the possibility of conflict between these interests may force a compromise

250 (1973). Professor Rosenhan conducted an investigation to discover how long it would take a hospital staff to determine that medical professionals who, as part of his investigation, had applied for admission were not in need of inpatient care. It took from 7 to 52 days for such a determination, at which time they were released as "schizophrenics in remission." In line with a large body of opinion, the author concluded that psychiatrists could not objectively and consistently label persons "sane" or "insane," and that labeling persons "mentally ill" is therefore of little value. *Id.* at 254. Justice Brennan also recognized in *Parham* that psychiatric decisions are fraught with uncertainties that are increased by the Georgia commitment procedure and the economic separation between physician and child. 442 U.S. at 629 (Brennan, J., concurring part and dissenting in part).

130. 443 U.S. at 641 n.21. *See also* Baird v. Bellotti, 417 F. Supp. 138 (citing *Doe v. Bolton*, 410 U.S. 179 (1973)) (a doctor's license is assurance that the doctor possesses the requisite qualifications and will use them in the best interest of his or her patient).

decision rather than a decision in the minor's best interests.¹³¹ To ignore the possibility that the doctor will decide, motivated by interests independent of and in possible conflict with the child's interests,¹³² gives the superintendent of hospitals greater decision-making authority than that of the parents and places an undue burden on the minor's right to liberty.

Imposition of Treatment versus Opposition to Treatment

In *Parham*, the minors were opposing treatment desired by their parents, whereas in *Bellotti*, the minor desired treatment opposed by her parents. This difference should not account for the inconsistent results. If the minor in *Bellotti* had been attempting to prevent her parents from forcing her to have an abortion, dicta in *Bellotti* suggest that the same requirement that allows a mature minor to make the abortion decision by herself would have been applied.¹³³

The inconsistent reasoning in *Parham* and *Bellotti* thus results not from the form of the treatment but from the assumptions the Court has adopted regarding the treatments involved. The Court in *Parham* seems to regard mental commitment as beneficial, while in *Bellotti* no such assumption is made about abortion. In fact, in *Bellotti* there is some inference that society disfavors abortion in the case of an unwanted pregnancy. Because the Court in *Parham* assumed that commitment is beneficial to the minor, the Court did not have to exercise its *parens patriae* power to protect the child from an adverse decision by his or her parents.

It appears that the overriding policy consideration in both *Parham* and *Bellotti* was to support parental authority and con-

131. "Experts on mental illness in juveniles repeatedly emphasized that the problems of the juvenile are often closely intertwined with mental and emotional problems of other family members. Irrespective of this fact, the juvenile is often the person isolated as having the mental problem." *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 459 F. Supp. 30, 39 (E.D. Pa. 1978), *rev'd*, 442 U.S. 640 (1979). See also 442 U.S. at 629 (Brennan, J., concurring in part and dissenting in part) (psychiatrists often err on the side of caution and commit children not needing commitment). T. SZAZ, *LAW, LIBERTY & PSYCHIATRY* 154 (1963) (decision to treat involves a choice between competing values); Vogel & Bell, *The Emotionally Disturbed Child as the Family Scapegoat*, in *A MODERN INTRODUCTION TO THE FAMILY* 412-27 (rev. ed., N. Bell & E. Vogel eds. 1968).

132. See generally Bennett, *supra* note 32.

133. 443 U.S. at 642-43. See also *Planned Parenthood v. Danforth*, 392 F. Supp. 1362, 1376 (E.D. Mo. 1975) (Webster, J., concurring in part and dissenting in part) *citing In re Smith*, 16 Md. App. 209, 295 A.2d 238 (1972).

currently to make a decision in the child's best interest. In each case, the Court was concerned with whether the respective statutes abridged any recognized rights of the parents or of the children.¹³⁴ To determine whether the statute abridged any of these rights, the Court balanced the private interests affected with the asserted state interest.¹³⁵ The opinions differed in their definitions of the child's interests. In *Bellotti*, the Court recognized that a child's interest shifts as he or she gains maturity, whereas in *Parham* the Court failed to realize that a child can make a mature decision. The following discussion of how the Court described and evaluated the interests involved examines the Court's reasoning in limiting parental consent in the abortion decision but not in the commitment decision.

The Parents' Interest

In both *Parham*¹³⁶ and *Bellotti*,¹³⁷ the Court maintained that parents should have substantial authority over their child in order to exercise their responsibilities adequately. The Court further asserted that most parents act in the child's best interest.¹³⁸ Parental involvement was recognized as desirable in both cases, but the Court also recognized that there are some instances in which parents do not act in their child's best interest.¹³⁹ In essence, in both cases a similar description of the rights and duties of parents was adopted.

The Court made different assumptions, however, in evaluating the requirement of parental consent in the respective statutes. In *Parham*, the Court analyzed the statute by focusing on the assumption that most parents act in their child's best interest. As a result, the Court could positively state that the minor's constitutional right to due process was adequately protected by requiring parental consent. In contrast, the Court in *Bellotti* declined to ad-

134. See notes 9-17, 93-94 & accompanying text *supra*.

135. See note 65 *supra*.

136. 442 U.S. at 602.

137. 443 U.S. at 638.

138. 442 U.S. at 602-03. See also *Baird v. Bellotti*, 393 F. Supp. 850, 853 (D. Mass. 1973), *vacated*, 428 U.S. 132 (1976) (most parents would wish to know of their daughter's pregnancy and would be supportive).

139. 443 U.S. at 647; 442 U.S. at 602-03. See also *Baird v. Bellotti*, 393 F. Supp. 850, 853-54 (D. Mass. 1973), *vacated*, 428 U.S. 132 (1976) (some parents insist on the mother carrying the baby to term to punish her or teach her a lesson).

here to the traditional assumption that all parents act in their child's best interest, and thus answered negatively the question of whether the minor's right to obtain an abortion could in all cases depend on parental consent. Clearly, the interests of the parents are given much greater weight in *Parham* than in *Bellotti*, although the difference in weight may be inadvertent simply because of the way in which the Court presumed parental discretion would be exercised.

The Court in *Parham* should have adopted the same focus it later applied in testing the statute in *Bellotti*. In both cases, expert testimony had been presented that indicated that some parents act in ways antithetical to their child's interest.¹⁴⁰ The Court in *Parham*, although acknowledging that there are cases of parental abuse and neglect, dismissed such experience as "hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests."¹⁴¹ It thus ignored the assumption in *Bellotti* that it is the child, not the parents, whom the statute primarily must protect.¹⁴² When, as in *Parham* and *Bellotti*, a statute is designed for the child's protection, the child's interest should be given greater weight. The purpose of the statute otherwise is easily circumvented.

The assumption that parental interest coincides with the child's interest has no basis in the commitment area. Like the abortion decision, the commitment decision involves factors such as the use of the institution as a dumping ground, existing family disharmony, and stigmatization that mandate a statute that allows for parental authority to be superseded.¹⁴³ Yet the Court seems to ignore these factors. As Justice Brennan indicated, the assumption that parents are acting in their child's best interest is inapplicable when the family unit is disrupted.¹⁴⁴ Furthermore, the Court's as-

140. In *Parham*, the lower court heard testimony of Dr. John P. Filley, Director of Child & Adolescent Mental Health, that many people treat mental hospitals as "dumping grounds." The term "dumping" refers to the placing of minors in an institution not for therapeutic reasons, but because the minor's presence at home is inconvenient or an annoyance to the family. 412 F. Supp. at 133. The Supreme Court noted that the testimony referred to "dumping" by juvenile court judges and child welfare agencies, not parents. 442 U.S. at 597 n.8.

141. 442 U.S. at 602-03.

142. 443 U.S. at 647.

143. See notes 93-115 & accompanying text *supra*.

144. 442 U.S. at 631-32 (Brennan, J., concurring in part and dissenting in part). Justice Brennan recognized that the assumption that parents act in their child's best interest is

sumption enables the parents to make the initial decision regarding the type of treatment a child should receive without providing the child with an adequate mechanism with which to challenge that decision. Justice Brennan suggested that parents thus are not only presumed to act in the child's best interests, but they are also presumed to be mental health experts.¹⁴⁵

As a result of its focus, the decision in *Parham* has enabled the parents "to make martyrs of their children"¹⁴⁶ and to direct their children's lives in ways not beneficial to the children. Additionally, it allows a parental decision to circumvent a child's right to be heard at a meaningful time and in a meaningful manner.¹⁴⁷ Both of these actions have been previously held by the Court to be an illegitimate use of parental power.¹⁴⁸

In *Parham*, the Court analyzed the validity of the statute under the assumption that the parental interest coincides with that of the child. This assumption, however, applies only where the interests of the minor and the parent are compatible.¹⁴⁹ When there is a potential parent-child conflict, the interests of the child would be severely jeopardized under the *Parham* analysis, and the

inapplicable when family autonomy is broken by surrendering custody of the child to a mental institution. *Id.* at 631. A significant body of medical opinion adds further support to Justice Brennan's contention. "Psychiatrists agree that 'it's by now a truism in child psychiatry, a truism built over maybe fifty years of clinical experience in a wide variety of settings, that the pathology of children is inextricably related to the pathology of the family. . . .' More often than not the parents as well as the child may need psychiatric help." J.L. v. *Parham*, 412 F. Supp. 112, 133 (M.D. Ga. 1976), *rev'd*, 442 U.S. 584 (1979). See also Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW. 133, 139-43 (1972).

145. 442 U.S. at 632 (Brennan, J., concurring in part and dissenting in part). Justice Brennan suggests that parents lack the expertise to evaluate the advantages of different treatments and that to waive hearings where the various options could be explored ignores reality. *Id.* Professor Bennett has reasoned that once a parent seeks medical advice his or her own role in the decision regarding treatment is minimal. Bennett, *supra* note 27, at 312.

146. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

147. "'Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.'" *Id.*

148. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944).

149. See notes 34-54 & accompanying text *supra*. See also *Foe v. Vanderhoof*, 389 F. Supp. 947 (D. Colo. 1975). In *Vanderhoof*, the court, referring to *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Prince v. Massachusetts*, 321 U.S. 158 (1944), *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), asserted that "[c]ases which have upheld parental control have not involved a situation where the parent and child differ and the state is imposing the parents' views on the minor." 389 F. Supp. at 956.

Bellotti approach should be utilized. Otherwise, the statute not only enables parents to obtain needed medical treatment for children who merit such treatment, but also may provide parents with a legitimate means with which to restrict unilaterally their child's liberty when treatment is not warranted.

The Child's Interest

In both *Parham* and *Bellotti*, the child's interest was found to be the same as that of the parents and of the state acting as *parens patriae*.¹⁵⁰ The matching of the child's interest with the parents' interest was based on the traditional American concept of parental authority and family unity.¹⁵¹ The Court acknowledged that the parents' natural desire¹⁵² and legally established duty¹⁵³ to provide for their child mandate that parents have a large measure of authority over their child.¹⁵⁴ As long as the parents, in exercising this authority, do not physically or mentally abuse their child, the Court will presume that the parents are acting in the child's best interest and that the child's interest is coextensive with the parents' interest. The child's interest thus is defined by the parents' interest in protecting that child.

Neither *Bellotti* nor *Parham* challenged the validity of the

150. For an explanation of *parens patriae*, see notes 20-26 & accompanying text *supra*. The Court in the companion case to *Parham*, *Secretary of Pub. Welfare v. Institutionalized Juveniles*, 442 U.S. 640, 646 (1979), reaffirmed this position stating: "The . . . interest of the parents and the . . . interest of the children and the . . . interests of the State are the same."

151. See 443 U.S. at 637-39; 442 U.S. at 602. Justice Stewart, concurring in *Parham*, stated: "For centuries it has been a canon of the common law that parents speak for their minor children. So deeply inbedded in our tradition is this principle of law that the Constitution itself may compel a State to respect it." *Id.* at 621 (Stewart, J., concurring) (footnote omitted).

152. W. BLACKSTONE, *BLACKSTONE'S COMMENTARIES* 194-201 (B. Gavit ed. 1941) discusses the parental duty to provide for a child that results from the principle of natural law. Blackstone states: "Providence has implanted in the breast of all parents that natural affection for their offspring which the ingratitude of a child can never totally suppress." *Id.* at 194. See generally 2 J. KENT, *COMMENTARIES ON AMERICAN LAW* 189-95 (12th ed., O.W. Holmes ed. 1873).

153. See notes 12-17 & accompanying text *supra*.

154. "Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." 443 U.S. at 638-39 (footnote omitted).

common law assumption.¹⁵⁵ The Court in *Bellotti*, however, did examine the rationale underlying the law's historical treatment of children in order to determine if the assumption was applicable in the situation at issue. The Court advanced three criteria needed to justify equating the child's interests with those of the parents. The reasons offered were: children's vulnerability; children's inability to make critical decisions; and the societal need to support the parental role.¹⁵⁶ In the absence of these criteria, adherence to the common law presumption is unwarranted and the Court must assess the minor's interests independently from those of the parents.¹⁵⁷

In *Parham*, the Court stated: "[W]e must consider first the child's interest in not being committed. Normally, however, since this interest is inextricably linked with the parents' interest in . . . the welfare and health of the child, the private interest at stake is a combination of the child's and parents' concerns."¹⁵⁸ The Court in *Parham* did not examine the reasons for combining a child's interest with his or her parents' interest. Just as the Court supported its view of parents by referring to the common law assumptions about them, it defended its view of the child's position by stating: "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience and capacity for judgment required for making life's difficult decisions."¹⁵⁹ The Court's failure to examine the reasons for making a child's interest dependent on his or her parents resulted in the fixed adherence to the assumption that parents act in the best interest of their child¹⁶⁰—an incorrect assumption in light of *Bellotti*.

155. The Court adhered to the long-recognized principle that "[c]hildren have a very special place in life which law should reflect." *Id.* at 633 (quoting *May v. Anderson*, 345 U.S. 528, 536 (1953) (Jackson, J., dissenting)).

156. 443 U.S. at 634.

157. See *Baird v. Bellotti*, 450 F. Supp. 999, 1004 (D. Mass. 1978), *aff'd*, 443 U.S. 622 (1979) (when a factual finding of maturity is made, there is no reasonable basis to distinguish between a minor and an adult). The Court in *Bellotti* suggests this conclusion in recognizing that children can be deprived of rights because of society's interest in providing for their welfare and in giving them "'opportunities for growth into free and independent well-developed men and citizens . . .'" 443 U.S. at 636 n.14 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 162 (1944)). Once a minor's need for protection is diminished, the reason for limiting his or her rights is also diminished.

158. 442 U.S. at 600.

159. *Id.* at 602.

160. "The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." *Id.* at 603.

The Court in *Bellotti* examined the reasons for the common law assumptions to determine whether the statute advanced or went beyond those reasons. The Court found that the statute was too broad because it applied to minors capable of making "mature choices." The Court in effect rejected the common law assumption that *all* children are immature and incapable of making intelligent decisions and choices by recognizing that some minors are capable, and found that to require parental agreement for a mature minor's decision would burden that juvenile's interests.

The Court in *Parham*, on the other hand, accepted the common law assumption that all children are immature and incapable of making intelligent decisions. The Court did not consider whether the statute was overbroad because it apparently did not recognize that a mature child's interests are different from those of an immature child. Although the needs of an immature child and his or her opportunity to interact with others are defined to a great extent by those around the child, particularly the parents, a mature child, almost by definition of the term "maturity," is capable of defining his or her own needs. A mature child's interest, therefore, is in being permitted to make independently those choices that allow his or her needs to be met, free from the unreasonable restrictions of parents or the state. An immature child, who cannot determine and thus cannot meet his or her own needs, has an interest in developing to maturity with the guidance of the parents and the state. The interests of a mature and immature minor thus are distinct.¹⁶¹

The inconsistent results—that in one instance a child is subject to the decision of his or her parents and in another a child is able to make her own decision—cannot be supported by the specious reasoning that the cases are different in nature. It has been suggested that the decisions are inconsistent because the Court, instead of interpreting the Constitution based its analysis on what it thought best for the family, in essence attempting to construct a "model of an ideal family" in these two situations.¹⁶² The decisions were made within two weeks of each other, by the same Court, and

161. See generally Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 783 (1978) (author suggests that the protection afforded by constitutional rights should vary with the child's stage of growth).

162. See Annas, *Parents, Children and the Supreme Court*, 9 THE HASTINGS CENTER REPORT, 21, 23 (1979).

it is doubtful that the Court's view of what is best for the family changed within that time. Further, the Court has presented two separate pictures of the family unit, not one ideal description of family life.

Although the concept of the family clearly influenced the Court's action, the Court has reached irreconcilable results when a parent-child conflict is perceived. In *Bellotti*, the Court realized that total acceptance of the common law assumptions about parents and children burdens the constitutional rights of children who are not immature or whose parents do not act in their best interests. In contrast, the Court in *Parham* adopted the common law assumptions without questioning why they had developed. The *Bellotti* opinion suggests that when a child's constitutional rights are at stake and there is a possibility of parent-child conflict, a child must be provided with the opportunity to challenge these presumptions. It is only by allowing this challenge that children's and parents' rights will be determined by an interpretation of the constitutional rights involved rather than by the Court's definition of family.

Conclusion

The degree of deference allowed a minor in choosing to have an abortion compared with the absence of decisional power in mental commitment cannot satisfactorily be reconciled by an examination of the nature of the constitutional rights involved or the balancing of the interests at stake.¹⁶³ The Court in *Parham* relied on cases involving litigation between parents and state to define the scope of parental authority.¹⁶⁴ It ignored the requirement that a sufficient justification must be provided in order for a state to restrict a child's liberty interest.¹⁶⁵ Furthermore, the Court incor-

163. See notes 9-71 & accompanying text *supra*. *Accord*, Bricker, *Children's Rights: A Movement in Search of Meaning*, 13 U. RICH. L. REV. 661, 682-93 (1980) (author suggests that the difference in results between abortion and mental commitment decisions may be attributable to the varying roles played by the childrens' attorneys and other counsel speaking on the childrens' behalf).

164. 442 U.S. at 602 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972), *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), and *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923)). See Note, *Institutionalization of Juveniles: What Process is Due?*, 59 NEB. L. REV. 191, 196-97 (1980).

165. "The fault with the statute is that it imposes a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's

rectly assumed that all children involved were immature and failed to assess, as the Court did with the statute in *Bellotti*, whether the Georgia statute impinged upon the rights of mature minors. Consideration of a child's maturity would have altered the procedures required by due process for mental commitment proceedings. The Court should have struck down Georgia's statute and developed a model statute that provides for an alternate procedure for the commitment of mature minors. To be consistent with the analysis set forth in *Bellotti*, a model statute must serve to promote parental authority and protect the child's welfare when the child does not have the "maturity, experience and capacity for judgment required for making life's difficult decisions."¹⁶⁶ At the same time, the statute should acknowledge that the state, as in the case of an adult, cannot unduly burden the liberty interest of a minor capable of independently making an informed decision.¹⁶⁷ The following proposal is suggested as a mechanism by which to achieve these objectives:

Voluntary Commitment Proposal:

1. A parent or guardian of a minor under eighteen years of age may file a petition for admission of his or her child to a state mental institution. The petition shall include the following information:
 1. Name and address of petitioner;
 2. Name, age, and address of minor;
 3. A statement that there is reasonable cause to believe that the minor is suffering from mental illness and that he or she will benefit from inpatient treatment;
 4. Reasons for this belief.¹⁶⁸

termination of her pregnancy and does so without a sufficient justification for the restriction." *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976).

166. 442 U.S. at 602.

167. "In the absence of a voluntary, knowing and intelligent waiver, adults facing commitment to mental institutions are entitled to full and fair adversary hearings in which the necessity for their commitment is established to the satisfaction of a mental tribunal. At such hearings they must be accorded the right to 'be present with counsel, have an opportunity to be heard, be confronted with witnesses against them, have the right to cross-examine, and to offer evidence of their own.'" 443 U.S. at 627 (Brennan, J., concurring in part and dissenting in part) (quoting *Specht v. Patterson*, 386 U.S. 605, 610 (1967)). It has been argued that these principles should also govern the commitment of minors. See 443 U.S. at 627 (Brennan, J., concurring in part and dissenting in part).

168. See, e.g., DIVISION OF MENTAL HEALTH, STATE OF NEW HAMPSHIRE, *Involuntary*

2. Upon application by the parent or guardian, the superintendent of the hospital shall interview the child and evaluate the application for admission. At the interview, the superintendent shall inform the child in plain and simple language of the nature and consequences of the application and determine if the child has the capacity to understand and make an informed decision regarding commitment.¹⁶⁹ If the child is found not to have the capacity to understand, the superintendent shall proceed to evaluate the application for admission.¹⁷⁰ If the child is determined to have the ability to make an informed decision, involuntary commitment procedures¹⁷¹ must be initiated unless the minor waives the involuntary process and voluntarily admits himself or herself.

The proposal outlined above recognizes and allows parental involvement when the minor's immaturity demands such involvement. When the minor is deemed mature, however, the proposal protects his or her independent liberty interest by acknowledging that civil commitment constitutes a substantial denial of liberty, requiring a hearing before an impartial tribunal.

Emergency Hospitalization, Forms and Procedures.

169. The common law mature minor doctrine requires "an analysis of the nature of the operation, its likely benefit and the capacity of the particular minor to understand the medical procedures involved . . . Judicial intervention is not required." *Baird v. Attorney General*, 371 Mass. 741, 752, 360 N.E.2d 288, 295 (1977) (citation omitted). *See, e.g., MASS. GEN. LAWS ANN. ch. 112, § 12S* (West Supp. 1980).

170. The evaluation for admission shall include (1) a physical examination, (2) a mental examination, and (3) consideration of the social history of the child. If, as a result of these examinations, a determination that the child is mentally ill and would benefit from inpatient treatment is made, the child may be accepted for admission. Information including: (1) the names and qualifications of persons assisting with the examination, (2) an evaluation of the family situation, (3) a psychological evaluation, (4) appropriate medical evaluations, (5) an evaluation of school function, (6) a preliminary diagnosis type of mental illness, and (7) a recommendation for treatment shall be reported in the findings. *See, e.g., DIVISION OF MENTAL HEALTH, STATE OF NEW HAMPSHIRE, Procedure for Admission of Minors to State Mental Health Facilities. See also N.H. REV. STAT. ANN. § 135-B:11* (1977).

171. The involuntary procedure must provide the minor the same due process safeguards afforded an adult under *Specht v. Patterson*, 386 U.S. 605, 610 (1967). *See* 442 U.S. at 627 (Brennan, J., concurring in part and dissenting in part). *Cf. In re Gault*, 387 U.S. 1 (1967) (requiring adequate notice, right to counsel retained or appointed, right against self-incrimination, and right to confront and cross-examine witnesses in juvenile criminal proceedings). At the hearing, the fact that the minor is dangerous to him or herself or to others must be established in order to commit the minor.