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Children's Rights under the Burger Court: Concern for the Child But Deference to Authority

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"Children have a very special place in life which law should reflect."[1] Yet, despite this realization by Justice Frankfurter, the United States Supreme Court's attempt to define this "very special place" has posed two traditions in conflict. The family tradition, rooted in the common law, dictates that parents have primary responsibility for the care and custody of their children.[2] As a countervailing concern, the egalitarian movement has sensitized the public to the tragedies of child abuse and neglect.[3] This awareness has led many to classify children as a disadvantaged minority struggling for constitutional recognition.[4] The result has been a cry in the courts and the legislatures to increase children's rights.[5] The Burger Court has had to reconcile these two conflicting positions—family versus civil rights—in a number of different contexts involving the rights of children.

This note explores the Burger Court's impact on the constitutional rights of children. Part I emphasizes that the United States Constitution protects children. Part I accomplishes this by outlining six areas in which the Burger Court has been cognizant of the interests of children. Part II examines how the Burger Court has resolved situations where the interests of the child clash with the interests of the state. Next, Part III analyzes those decisions where the Burger Court has had to resolve its most difficult analytical con-

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1 May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

2 *See* notes 113-15 *infra* and accompanying text.

3 Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their Rights*, 1976 B.Y.U. L. REV. 605, 630-32.

4 *Id.* at 631.

5 *Id.* at 631-32. The article cites several examples of this position. *See, e.g.*, R. FARSON, BIRTHRIGHTS (1974):

> [A]sking what is good for children is beside the point. We will grant children rights for the same reasons we grant rights to adults, not because we are sure that children will then become better people, but more for ideological reasons, because we believe that expanding freedom as a way of life is worthwhile in itself. . . . If all this sounds too open and free, we must recognize that in this society . . . we are not likely to err in the direction of too much freedom.

Id. at 31, 153. *See also* Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343 (1972) ("[T]he arguments for and against perpetuation of [minority] status have a familiar ring. In good measure they are the same arguments that were advanced over the issues of slavery and the emancipation of married women."); Wald, *Making Sense Out of the Rights of Youth*, 4 HUM. RTS. 13, 15 (1974) ("The child's subjugated status was rooted in the same benevolent despotism that kings, husbands, and slave masters claimed as their moral right."); *cf.* In re Snyder, 85 Wash. 2d 182, 532 P.2d 278 (1975) (15-year-old girl who was antagonistic toward her parents asked a juvenile court to declare her incorrigible and place her in a foster home; the court complied with the request.).

flict: situations where the interests of the child clash with the interests of the *parent*. This note concludes that while the Burger Court has recognized that children have legitimate interests, the Court nonetheless has shown an increased willingness to defer to either parental or state authority at the expense of advancing children's rights.

I. The Child as an Individual

The Burger Court has noted that "[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights."[6] The Burger Court, however, has also stated that the constitutional rights of children cannot be equated with those of adults.[7] As Justice Powell suggested in *Bellotti v. Baird*, the peculiar vulnerability of the child is one reason for this inequality.[8]

Over its tenure, the Burger Court has demonstrated its sensitivity to the vulnerability of the child in many contexts. The Burger Court has reflected this sensitivity in considering the interests of children in the areas of juvenile justice, school desegregation, school discipline, custodial relations, pornography, and voluntary commitment. This section discusses these areas as examples of the Burger Court's cognizance of the constitutional plight of the child.

In the area of juvenile justice, the Burger Court has been sensitive to the unique position of the child.[9] The juvenile court structure is distinct from the adult criminal justice system and the Supreme Court has held that juvenile offenders may constitutionally be treated differently than adults.[10] In *In re Winship*, the Burger

6 *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976); Breed v. Jones, 421 U.S. 519 (1976); Goss v. Lopez, 419 U.S. 565 (1975); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); *In re* Gault, 387 U.S. 1 (1967).

7 Bellotti v. Baird, 443 U.S. 622, 634 (1979).

8 *Id.*

9 *See, e.g.*, New Jersey v. T.L.O., 105 S. Ct. 733 (1985); Breed v. Jones, 421 U.S. 519 (1975); McKeiver v. Pennsylvania, 403 U.S. 528 (1971); *In re* Winship, 397 U.S. 358 (1970).

10 McKeiver v. Pennsylvania, 403 U.S. at 533. This separate treatment is justified by the idea that the juvenile court is not geared toward a crime and punishment philosophy. Rather, its theoretical goal is treatment and rehabilitation; its procedures are clinical, not punitive. *In re* Gault, 387 U.S. 1, 15-16 (1967). *See also* Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 142-51 (1984). The article cites various interpretations of the development of the juvenile justice system. *See generally* J. INVERARITY, P. LAUDERDALE & B. FELD, LAW AND SOCIETY: SOCIOLOGICAL PERSPECTIVES ON CRIMINAL LAW (1983); A. PLATT, THE CHILDSAVERS: THE INVENTION OF DELINQUENCY (2d ed. 1977); D. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980); E. RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT (1978); S. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE 1825-1920 (1977); JUVENILE JUSTICE: THE PROGRESSIVE LEGACY AND CURRENT REFORMS (L. Empey ed. 1979); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

Chief Justice Burger has stated:

Court recognized that institutional confinement deprives the child of family and friends and subjects the child to the stigma of being a "law-breaker."[11] Thus, the Court held that the Constitution required proof beyond a reasonable doubt during the adjudicatory stage when the child is charged with an act that would constitute a crime if committed by an adult.[12] In *McKeiver v. Pennsylvania*, the Burger Court again considered the degree of constitutional protection owed juvenile offenders[13] in holding that a trial by jury is not required in the adjudication phase of a state juvenile court delinquency proceeding.[14] Justice Blackmun, writing for the Court, stated that compelling a jury trial would "remake the juvenile proceeding into a fully adversary process and [would] put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding."[15]

In the school desegregation area, the Burger Court has been particularly aware of the tangible effects of segregation on children.[16] In *Milliken v. Bradley II*, Chief Justice Burger recognized that one of the consequences of segregated schools is that children are educationally and culturally set apart from the larger community.[17] These children inevitably acquire habits of speech, conduct, and attitude that reflect their cultural isolation—habits which will inadequately serve them in the larger community.[18] Thus, the *Milliken* Court approved a desegregation remedy that authorized state-paid remedial education programs for children in the Detroit public schools.[19] According to the Court, this special training was a necessary component of the "compensatory education to be provided Negro students who have long been disadvantaged by the inequi-

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> The original concept of the juvenile court system was to provide a benevolent and less formal means than criminal courts could provide for dealing with the special and often sensitive problems of youthful offenders. . . . [This] compassionate treatment [is] intended to mitigate the rigors and trauma of exposing youthful offenders to a traditional criminal court. . . .

In re Winship, 397 U.S. 358, 376 (1970) (Burger, C.J., dissenting).

11 397 U.S. at 367.

12 *Id.* at 368.

13 403 U.S. 528 (1971).

14 *Id.* at 545.

15 *Id.* In dissent, Justice Douglas argued that providing a jury trial will leave the child feeling that he has been treated fairly. This, according to Justice Douglas, will make him a better prospect for rehabilitation. *Id.* at 562 (citing Judge DeCiantis of the Family Court of Providence, Rhode Island in *In the Matter of McCloud*, decided Jan. 15, 1971). Although disagreeing on the method, both sides in *McKeiver* saw a need to protect the child in the juvenile court setting. The juvenile justice decisions will be discussed more thoroughly in Part II of the note.

16 *See, e.g.*, Milliken v. Bradley, 433 U.S. 267 (1977); Swann v. Board of Educ., 402 U.S. 1 (1971).

17 433 U.S. 267, 287 (1977).

18 *Id.*

19 *Id.* at 290.

ties and discrimination inherent in the dual school system."[20]

In two school discipline cases, the Burger Court has explored the parameters of children's due process rights. In *Goss v. Lopez*[21] and *Ingraham v. Wright*,[22] the Court again recognized the unique position of the child in the school setting. In *Goss*, the Court held that a student must be given notice and an informal hearing before he could be suspended from school.[23] The Court believed that a student has a cognizable liberty interest in avoiding unfair and mistaken exclusion from school.[24] In addition, the Court noted that charges of misconduct could seriously damage the child's reputation in the community and therefore affect his future education and employment opportunities.[25] The informal hearing, according to the Court, would provide a meaningful hedge against erroneous action and its consequences.[26]

Unlike *Goss*, in *Ingraham* the Court held that due process did not require advance procedural safeguards before a school could administer corporal punishment to a child.[27] The Court recognized that a child has a liberty interest in procedural safeguards that could minimize the risk of wrongful punishment.[28] The Court, however, believed that due to the low incidence of abuse in administering corporal punishment and the availability of established state judicial remedies in the actual event of abuse, no further constitutional protections were necessary for the child.[29]

The Burger Court addressed the area of custodial relations in *Santosky v. Kramer*.[30] In *Santosky*, the Court held that clear and convincing evidence of neglect is required before the state can termi-

20 *Id.* at 284 (citing Plaquemines Parish School Bd. v. United States, 415 F.2d 817, 831 (1969)). Notably, in Swann v. Board of Educ., 402 U.S. 1, 29 (1971), another school desegregation case, the Court further expressed its concern for children by noting countervailing factors that may be involved in a desegregation remedy. Although it authorized bus transportation as a remedy, the Court recognized that busing may have adverse impacts on children depending on how the bus routes are chosen, where the children are picked up, and how much time is spent on the bus. Chief Justice Burger, writing for the Court, stated that "[a]n objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the education process." *Id.* at 30-31.

21 419 U.S. 565 (1975).

22 430 U.S. 651 (1977).

23 419 U.S. at 581 (1975).

24 *Id.* at 579.

25 *Id.* at 575.

26 *Id.* at 583.

27 430 U.S. at 682 (1977).

28 *Id.* at 676.

29 *Id.* at 677-78. Furthermore, the Court noted that the subsequent criminal and civil proceedings afforded substantially *greater* protection to the child than the informal conference mandated in *Goss*. *Id.* at 678 n.45; *see* notes 104-10 *infra* and accompanying text.

30 455 U.S. 745 (1982).

nate the rights of parents in their natural children.[31] Although primarily concerned with the impact of the decision on the parents, the Court recognized that terminating the rights of parents can also have dramatic effects upon the life of the child.[32] In particular, the child loses the opportunity for support and maintenance, the right to inherit, and all other benefits inherent in the parent-child relationship.[33] Because the private interests affected are severe and irreversible, the Court held that heightened procedural protections are constitutionally required before a parent's right to the companionship, care, custody, and management of his child can be severed.[34]

New York v. Ferber illustrates the Burger Court's desire to protect children from sexual exploitation.[35] In *Ferber*, the Court held that the New York legislature could, consistent with the first amendment, prohibit the dissemination of visual material which portrayed children engaged in sexual conduct, regardless of whether the material is obscene.[36] The Court based its decision upon the inherent dangers of child pornography. The Court noted both that the demand for child pornography gives adults an economic motive to exploit and abuse children[37] and that the distribution of child pornography is proportional to this exploitation and abuse.[38] Therefore, the Court held that the infringement on first amendment rights is offset by the state's compelling interest in prosecuting those who sexually exploit children.[39]

Finally, the Court has been cognizant of the interests of children when parents decide to voluntarily commit them to a mental institution. In *Parham v. J.R.*[40], the Court stated that the child has a protectible liberty interest in not being confined unnecessarily for medical treatment and in not being labeled erroneously by the community as mentally ill.[41]

These six areas illustrate the Burger Court's recognition that children merit some degree of constitutional protection. The Court has been particularly sensitive to the impact of its decisions on the life of the minor. Whether this sensitivity has contributed to

31 *Id.* at 769.
32 *Id.* at 760 n.11.
33 *Id.*
34 *Id.* at 761.
35 458 U.S. 747 (1982).
36 *Id.* at 764.
37 *Id.* at 761.
38 *Id.* at 759.
39 *Id.* at 757.
40 442 U.S. 584 (1979).
41 *Id.* at 601.

the actual level of constitutional protection given to the child is the focus of the next section.

II. Child Versus State

By the end of the 1960's the Warren Court had established that children have the right to equal protection of the law,[42] to certain procedural due process in a juvenile justice setting,[43] and to freedom of speech.[44] But while the Supreme Court had established these constitutional rights, the Court also had adhered to the principle that the state has somewhat broader authority to regulate the activity of a child than the conduct of a similarly situated adult. First enunciated in the *Prince v. Massachusetts* decision,[45] this principle has been affirmed by both the Warren[46] and Burger Courts.[47] In *Bellotti v. Baird*,[48] Justice Powell noted that the peculiar vulnerability of the child and also the inability of the child to make critical decisions in an informed, mature manner accounts for the Court's less-than-equal treatment of children, as compared to adults.[49] "[D]uring 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."[50] Because of this lesser capacity for mature, affirmative decisionmaking, the Court has long recognized that the state has somewhat broader authority to regulate the activity of children than of adults.[51]

Because the state has a somewhat freer hand in dealing with children, situations often arise where the interests of the child and the interests of the state clash.[52] The Burger Court has confronted

42 Brown v. Board of Educ., 347 U.S. 483 (1954).

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

44 Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

45 321 U.S. 158, 170 (1944).

46 *See* Ginsberg v. New York, 390 U.S. 629 (1968).

47 *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

48 443 U.S. 622 (1979).

49 *Id.* at 637 n.15.

50 *Id.* at 635.

51 *Id.* at 635-36.

52 The child's relationship with the state has been twofold. First, it is clear that in some contexts the state plays a parens patriae role and protects the child from the harmful acts of others. In particular, pre-Burger decisions have recognized that the state will protect the child from parental neglect, abuse, and abandonment if the parents' conduct falls below minimum standards. In rescuing the child from parental default, the state provides the custody to which the child is entitled. *See, e.g., In re* Gault, 387 U.S. 1, 17 (1967); Bennett, *Rights and Interests of Parent, Child, Family and State: A Critique of Development of the Law in Recent Supreme Court Cases and in the North Carolina Juvenile Code*, 4 CAMPBELL L. REV. 85, 97-99 (1981); Shears, *Legal Problems Peculiar to Children's Courts*, 48 A.B.A. J. 719, 720 (1962) ("The basic right of a juvenile is not to liberty but to custody. He has the right to have someone

this question most often in determining the scope of procedural due process owed to children in both the criminal and civil contexts.[53] While the Burger Court has provided children with a minimal level of due process in both contexts, the Court has shown an increased willingness to defer to the authority of the state to control and develop the child.

A. *Criminal Context*

In the juvenile justice context, Supreme Court decisions prior to the Burger Court have given the child some procedural protections against the state. In *Gallegos v. Colorado*[54] and *Haley v. Ohio*,[55] the Court established that minors are entitled to constitutional protection against coerced confessions. In *In re Gault*,[56] the Warren Court laid the basic procedural foundation for a state juvenile adjudication of delinquency. Recognizing that a juvenile would lose his liberty and be confined to an institution if adjudged delinquent, the Court stated that it would not tolerate unbridled discretion, however benevolent, in substitution for principle and procedure in the juvenile justice forum.[57] Accordingly, the Court held that due process requires that a minor be given adequate written notice of the issues, the right to be represented by counsel, the right to confront his accusers, and the right to cross-examine witnesses.[58]

The Burger Court has only slightly modified the Warren

take care of him, and if his parents do not afford him this custodial privilege, the law must do so.").

The Burger Court has maintained this special relationship. In Santosky v. Kramer, 455 U.S. 745, 769 (1982), the Court held that clear and convincing evidence of permanent neglect was required before a state could terminate, over parental objection, the rights of parents in their natural children. Justice Blackmun stated that this higher standard of proof was consistent with the state's parens patriae interest in preserving and promoting the welfare of the child. "The State's interest in finding the child an alternative permanent home arises only when it is *clear* that the natural parent cannot or will not provide a normal family home for the child." *Id.* at 767. Thus, the state shares the parent's interest in accurate and just fact-finding.

The second aspect of the child-state relationship occurs when the interests of the child and the interests of the state clash. The issue in this situation is how much protection children should be given.

53 *See, e.g.*, New Jersey v. T.L.O., 105 S. Ct. 733 (1985); Ingraham v. Wright, 430 U.S. 651 (1977); Breed v. Jones, 421 U.S. 519 (1975); Goss v. Lopez, 419 U.S. 565 (1975); McKeiver v. Pennsylvania, 403 U.S. 528 (1971); *In re* Winship, 397 U.S. 358 (1970).

54 370 U.S. 49 (1962).

55 332 U.S. 596 (1948).

56 387 U.S. 1 (1967).

57 *Id.* at 18. *Gault* determined that, to an extent, the informality, flexibility, and nonadversarial character of the juvenile procedure was inconsistent with due process. *See* Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 VAND. L. REV. 791, 823-28 (1982).

58 387 U.S. 1, 29-31 (1967). The minor must also be afforded the privilege against self-incrimination. *Id.* at 55.

Court's legacy in the juvenile justice area. In the early 1970's, the liberal strength of the Court contributed to one decision that advanced children's rights.[59] After this, however, the decisions have consistently deferred to the authority of the state.[60] Thus, the overall effect of the Burger Court's decisions has been to advance children's rights only minimally.

In the Burger Court's only decision expanding children's rights, *In re Winship*,[61] the Court held that if a child is charged with an act that would be a crime if committed by an adult, proof beyond a reasonable doubt is required to find the child guilty of the act.[62] The Court rejected the New York Family Court Act's preponderance standard.[63] The majority, which included Justices Brennan, Marshall, and Douglas, recognized the strong liberty interests of the child in avoiding erroneous confinement and the stigma of being labeled a delinquent.[64] Based on these interests, the majority concluded that the same considerations that demand extreme caution in fact-finding to protect the innocent adult apply as well to the innocent child.[65] Chief Justice Burger, then in the minority, disagreed.[66] Arguing that the juvenile court system "provide[s] a benevolent and less formal means than criminal courts could provide for dealing with the special and often sensitive problems of youthful offenders,"[67] Chief Justice Burger stated that it was *not* progress to transform juvenile courts into criminal courts.[68] Rather, the juvenile court's program of compassionate treatment is "intended to mitigate the rigors and trauma of exposing youthful offenders to a traditional criminal court"[69] and should not be "strait-jacketed" by mandating additional procedural protections for the child.[70]

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

60 *See* New Jersey v. T.L.O., 105 S. Ct. 733 (1985); Breed v. Jones, 421 U.S. 519 (1975); McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

61 397 U.S. 358 (1970).

62 *Id.* at 368.

63 *Id.* at 367-68.

64 *Id.* at 367.

65 *Id.* at 365.

66 *Id.* at 375.

67 *Id.* at 376.

68 *Id.*

69 *Id.*

70 *Id.* Nevertheless, in Addington v. Texas, 441 U.S. 418, 427-28 (1979), Chief Justice Burger equated criminal trials and delinquency proceedings by distinguishing them both from involuntary commitment proceedings, which require only clear and convincing evidence:

> The Court [in *Winship*] saw no controlling difference in loss of liberty and stigma between a conviction for an adult and a delinquency adjudication for a juvenile. *Winship* recognized that the basic issue—whether the individual in fact committed a criminal act—was the same in both proceedings. There being no meaningful distinctions between the two proceedings, we required the state to prove the juvenile's act and intent beyond a reasonable doubt. . . . *Unlike the delinquency*

The Chief Justice's philosophy found new support in *McKeiver v. Pennsylvania*.[71] In a plurality opinion, the Court held that a jury trial is not constitutionally required in the adjudicative phase of a state juvenile court delinquency proceeding.[72] Justice Blackmum, writing for Chief Justice Burger's new majority, reasoned that the jury is not a necessary component of accurate fact-finding.[73] In addition, Justice Blackmun feared that compelling a jury trial would "remake the juvenile proceeding into a fully adversary process and [would] put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding."[74]

Later, in *Breed v. Jones*,[75] the Burger Court unanimously held that the prohibition against double jeopardy applies to children.[76] Although this decision also favored the child in the same way as *Winship*, the Chief Justice was still concerned about the decision's impact on the flexibility and informality of the juvenile court proceeding.[77] He reemphasized his belief that the nonadversarial character of juvenile hearings promotes the cooperation which is "the hallmark of the juvenile justice system."[78]

In contrast to the Court's emphasis upon protecting the child by adding flexibility to the juvenile justice system, the Burger Court's deference to state authority colored its decision in *New Jersey v. T.L.O.*[79] In *T.L.O.*, the Court considered whether the fourth amendment protects children against school searches.[80] Although the Court held that schoolchildren have legitimate expectations of

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proceedings in Winship, *a civil commitment proceeding can in no sense be equated to a criminal prosecution.*

Id. (emphasis added).

71 403 U.S. 528 (1971).

72 *Id.* at 545, 553.

73 *Id.* at 543.

74 *Id.* at 545. Justice White, in a separate concurrence, remarked that the differences between a criminal and juvenile court justified the decision that a jury is not required in the latter. *Id.* at 553. In other cases, the Court has held that the confidentiality of juvenile proceedings must, in some circumstances, give way to other important interests. *See, e.g.*, Smith v. Daily Mail Publishing Co., 443 U.S. 97, 104 (1979) (freedom of the press in publishing lawfully obtained information prevails over the state's interest in protecting the juvenile's privacy); Davis v. Alaska, 415 U.S. 308, 319 (1974) (the defendant's right of confrontation in a criminal case prevails over the state's interest in preserving the confidentiality of a juvenile's record).

75 421 U.S. 519 (1975).

76 *Id.* at 541. The Court concluded that, with respect to the risks associated with double jeopardy, "we can find no persuasive distinction in that regard between the [juvenile] proceeding . . . and a criminal prosecution, each of which is designed to 'vindicate [the] very vital interest in enforcement of criminal laws.' " *Id.* at 531 (quoting United States v. Jorn, 400 U.S. 470, 479 (1971) (plurality opinion)).

77 421 U.S. at 535.

78 *Id.* at 540.

79 105 S. Ct. 733 (1985).

80 *Id.* at 739.

privacy, it also recognized the school's equally legitimate need to maintain an environment in which learning can take place.[81] According to the Court, these competing interests required some easing of the restrictions normally applicable to searches by public authorities.[82] In particular, the Court removed the warrant requirement and waived the probable cause threshold when students are involved.[83] The result is that the child's fourth amendment rights are significantly eroded by the Supreme Court's willingness to favor the school's authority to discipline the child.[84]

The Burger Court's treatment of the child in the ambit of juvenile justice indicates that while some of the constitutional requirements attendant upon a state criminal trial have equal application to the adjudicative portions of a state juvenile proceeding,[85] not all constitutional rights are to be enforced in the juvenile justice context.[86] This limitation results from the Burger Court's belief that the state may adjust its legal system when dealing with children.[87] Essentially, the Burger Court has given the state a "right" to rehabilitate the child in an informal setting.[88] Thus, the Court defers to the state's parens patriae authority to correct the errant impulses of a delinquent when the parents fail to keep the child "above the law."[89] The Court feels it can accomplish this goal by preserving the informality and flexibility of the juvenile justice system.[90] Decisions like *McKeiver* and *T.L.O.* illustrate, however, that this deference often costs the child constitutional rights.

B. *Civil Context*

The Burger Court has recognized that children have liberty and property interests.[91] These interests include a child's interest in his reputation and standing in the community,[92] his interest in avoiding physical punishment,[93] and his interest in future educa-

81 *Id.* at 743.
82 *Id.*
83 *Id.*
84 *Id.* at 759 (Brennan, J., dissenting).
85 McKeiver v. Pennsylvania, 403 U.S. 528, 533 (1971).
86 *Id.*
87 *Id.* at 533-34 (citing Kent v. United States, 383 U.S. 541, 562 (1966); *In re* Gault, 387 U.S. 1, 30 (1967)). *See also* Breed v. Jones, 421 U.S. 519, 535 (1975); *In re* Winship, 397 U.S. 358, 375 (1970) (Burger, C.J., dissenting).
88 *See* New Jersey v. T.L.O., 105 S. Ct. 733, 743 (1985); Breed v. Jones, 421 U.S. 519, 535 (1975); McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971); *In re* Winship, 397 U.S. 358, 375-76 (1970) (Burger, C.J., dissenting).
89 *See* note 84 *supra* and accompanying text.
90 *See* notes 74, 77, 83 *supra* and accompanying text.
91 *See, e.g.*, New Jersey v. T.L.O., 105 S. Ct. 733 (1985); Ingraham v. Wright, 430 U.S. 651 (1977); Goss v. Lopez, 419 U.S. 565 (1975).
92 Goss v. Lopez, 419 U.S. 565, 574-75 (1975).
93 Ingraham v. Wright, 430 U.S. 651, 673-74 (1977).

tional and employment opportunities.[94] Despite this recognition, the Court has given children only a minimal level of due process to protect these interests in the civil context. While the Constitution's language unconditionally grants due process individuals,[95] the Court has made it clear that it will confer upon children protective rights against the state only after balancing the child's interests against the state's interests.

This balancing approach has been resolved in favor of the child on one occasion. The result, however, only minimally advanced children's procedural due process rights. In *Goss v. Lopez*,[96] the Court held that an informal hearing was constitutionally required prior to a school suspension in order that a student may have an opportunity to explain his conduct.[97] In reaching this result, the Court balanced the student's interest in avoiding unfair, mistaken exclusion from school against the state's interest in dealing with the matter efficiently and without disruption.[98] The Court resolved the balance by requiring an informal procedure.[99] This "informal give and take" still affords the state wide latitude in dealing with the child.[100] Notably, the four dissenting Justices argued that the child's interests were not sufficiently important to require an informal proceeding.[101] Chief Justice Burger, and Justices Blackmun, Powell, and Rehnquist felt that schools need broad discretionary authority to maintain discipline and good order.[102] In their opinion, providing due process in "routine" disciplinary problems would interfere with the daily functioning of schools, thus actually disserving the student in the long run.[103]

While the child won the balancing test in *Goss*, the child lost in later Burger Court decisions as the four-person *Goss* dissent—joined by Justice Stewart—gained majority status.[104] In *Ingraham v. Wright*, the Court ruled against giving Florida schoolchildren additional procedural safeguards before inflicting disciplinary corporal

94 *Goss*, 419 U.S. at 575. The Court also held that based upon the state constitution, Ohio schoolchildren had a right to a public education. 419 U.S. at 567.

95 U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any *person* of life, liberty, or property, without due process of law . . . .") (emphasis added).

96 419 U.S. 565 (1975).

97 *Id.* at 584. The Ohio public high school students were suspended for periods not longer than 10 days. *Id.* at 568.

98 *Id.* at 579-80.

99 *Id.* at 584.

100 *Id.* at 583.

101 *Id.* at 595.

102 *Id.* at 589-90.

103 *Id.* at 591-94.

104 *See, e.g.*, New Jersey v. T.L.O., 105 S. Ct. 733 (1985); Ingraham v. Wright, 430 U.S. 651 (1977).

punishment.[105] In *Ingraham*, the Florida statutory scheme allowed corporal punishment for disciplinary reasons;[106] nevertheless, if the punishment was excessive, the student could sue under a common law cause of action for monetary or criminal penalties.[107] The Court felt that this scheme adequately protected the child against unjust corporal punishment.[108] Accordingly, the majority was concerned with the impact of granting children additional rights against the authority of the state.[109] They believed that the time costs, diversion of attention from normal school pursuits, and the extra personnel required to implement mandatory procedural safeguards would outweigh the "incremental benefits" of additional procedural protections.[110]

Ingraham thus provides some indication of the Burger Court's future course regarding children's due process rights in the civil context. After initially recognizing that children have certain liberty or property interests, the Court will likely defer to the authority that can best protect the child's interests in the civil context: the state.[111] Granting the child additional procedural safeguards would

105 430 U.S. at 683.

106 *Id.* at 676-77.

107 *Id.* at 678.

108 *Id.*

109 *Id.* at 680.

110 *Id.* Justices Brennan and Marshall, who advocated the advance in due process for children in *Goss*, joined Justices Stevens and White in dissent:

> There is, in short, no basis in logic or authority for the majority's suggestion that an action to recover damages for excessive corporal punishment affords substantially greater protection to the child than the informal conference mandated by *Goss*. The majority purports to follow the settled principle that what process is due depends on the risk of an erroneous deprivation of [the protected] interest . . . and the probable value, if any, of additional or substitute procedural safeguards; it recognizes, as did *Goss*, the risk of error in the school disciplinary process and concedes that "the child has a strong interest in procedural safeguards that minimize the risk of wrongful punishment . . .," but it somehow concludes that this risk is adequately reduced by a damages remedy that never has been recognized by a Florida court, that leaves unprotected the innocent student punished by mistake, and that allows the state to punish first and hear the student's version of events later. I cannot agree.

Id. at 699-700 (White, J., dissenting).

Although not a due process decision, *New Jersey v. T.L.O.*, 105 S.Ct. 733 (1985), is another example of the balancing approach the Burger Court has used when children's rights are involved. In *T.L.O.*, the Court, per Justice White, held that the search of a student is justified where there are reasonable grounds for suspecting that the student has violated either the law or the rules of the school. The Court balanced the schoolchildren's legitimate expectations of privacy against the school's equally legitimate need to maintain a suitable learning environment. After referring to the interests of the child, the balance was struck in favor of the state by easing some of the restrictions which normally apply to searches by public authorities. The Court felt that any other standard "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *Id.* at 743. Again, Justices Brennan and Marshall were in the minority.

111 The Burger Court has also vested the child with a right of privacy which the state

interfere with the broad discretionary authority the state needs to maintain discipline and good order.[112]

III. Child Versus Parent

With respect to children's rights, the Burger Court has had significant analytical difficulty resolving the clash between the interests of children and the interests of parents. The Burger Court has not consistently resolved this conflict in favor of either. For example, while the Burger Court has deferred to the traditional authority of the parent regarding voluntary decisions to commit a child for mental treatment, the Court has shifted the right of guardianship in the abortion context from the parent to a position of shared parent-state power. As a result of this inconsistency, children's rights have been only minimally advanced.

A. *The Traditional Framework*

The traditional view, long recognized by the Supreme Court, is that "the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[113] In *Wisconsin v. Yoder*,[114] the Burger Court embraced this principle by noting that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[115] Contrary to this traditional view,

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cannot take away. In Carey v. Population Servs. Int'l, 431 U.S. 678, 694 (1977), the Court voided a New York law preventing distribution of contraceptives to persons under 16. Justice Brennan stated that the right to privacy in connection with decisions affecting procreation extends to minors as well as adults. *Id.* at 693. Similarly, in Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976), the Court held that mandatory parental consent as a precondition for a minor obtaining an abortion is unconstitutional. However, to impinge upon that right, the Burger Court has only required the state to show a *significant*—not compelling—interest. *Id.* at 75. *See also* Carey v. Population Servs. Int'l, 431 U.S. 678, 693 (1977). Justice Powell feels that this lesser scrutiny is appropriate for two reasons. First, the state has traditionally had great latitude in regulating the conduct of the child. Secondly, the right of privacy implicates important decisions which minors are less capable of making. *Bellotti*, 443 U.S. at 634. Again, the Burger Court has given the child some rights, but has vested the state with broad discretionary power to regulate. Part III analyzes this deference to authority.

112 *See* New Jersey v. T.L.O., 105 S. Ct. 733, 745 (1985); Ingraham v. Wright, 430 U.S. 651, 680 (1977).

113 Prince v. Massachusetts, 321 U.S. 158, 166 (1944). *See also* Parham v. J.R., 442 U.S. 584, 621 (1979) (Stewart, J., concurring); 1 W. BLACKSTONE, COMMENTARIES *452-53; G. FIELD, THE LEGAL RELATIONS OF INFANTS 63-80 (1888); 2 J. KENT, COMMENTARIES ON AMERICAN LAW *203-06; J. SCHOULER, A TREATISE ON THE LAW OF DOMESTIC RELATIONS 335-53 (3d ed. 1882).

114 406 U.S. 205 (1972).

115 *Id.* at 232. In Bellotti v. Baird, 443 U.S. 622, 633-39 (1979), the Court recognized

however, the Court has warned that if parents fail to give their children the necessary care, support, and attention, the state may exercise its parens patriae power to intervene or even deprive the parents of all further authority over the children.[116] As Chief Justice Burger stated in *Yoder*, a state may restrict a parent's control "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."[117] The Burger Court has addressed these conflicting principles in the areas of voluntary commitment and abortion.

B. *Voluntary Commitment: Deferring to the Parent*

The Burger Court upheld the traditional parenting role in *Parham v. J.R.*[118] In *Parham*, the Court considered whether due process requires a preconfinement hearing when parents voluntarily seek institutional mental health care for their children.[119] In this setting, the child's interest in remaining free of institutional commitment clashes with the parent's interest in seeking help and guidance for the child. To resolve this conflict, the Court held that notwithstanding the child's liberty interest, parents retain a *substantial if not dominant* role in the commitment decision, absent a finding

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that parents have an important "guiding role" to play in the upbringing of their children. In Parham v. J.R., 442 U.S. 584, 621 (1979), Justice Stewart remarked: "For centuries it has been a canon of the common law that parents speak for their minor children. So deeply imbedded in our traditions is this principle of law that the Constitution itself may compel a state to respect it."

In addition to this common law canon that vests primary responsibility for the upbringing of children in the parents, Justice Powell suggested in *Bellotti* that a line of cases developed a constitutional right in the parent against undue, adverse interference by the state. 443 U.S. 622, 639 n.18 (1979). The cases cited to support this proposition are as follows: Wisconsin v. Yoder, 406 U.S. 205 (1972); Ginsberg v. New York, 390 U.S. 629 (1968); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); *see also* Smith v. Organization of Foster Families, 431 U.S. 816, 842-44 (1977); Carey v. Population Servs. Int'l, 431 U.S. 678, 708 (1977) (opinion of Powell, J.); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); *cf.* Parham v. J.R., 442 U.S. 584, 602 (1979).

This supposed right is based upon the presumption that "natural bonds of affection lead parents to act in the best interest of their children." *Parham*, 442 U.S. at 602. This presumption, however, is rebuttable. If the parent does not provide the requisite degree of care, support, and attention to the children, the parent can be stripped of his or her authority over the child. *See* notes 116-17 *infra* and accompanying text; *cf.* Santosky v. Kramer, 455 U.S. 745 (1982); Smith v. Organization of Foster Families, 431 U.S. 816 (1977).

116 *See* Parham v. J.R., 442 U.S. 584, 603 (1979); Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972).

117 406 U.S. at 234. Chief Justice Burger maintained the same conviction in *Parham v. J.R.*. "[W]e have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." 442 U.S. at 603 (citing Wisconsin v. Yoder, 406 U.S. 205, 230 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

118 442 U.S. 584 (1979).

119 *Id.* at 587.

of neglect or abuse.[120] The Court presumed that parents possess what the child lacks in maturity, experience, and capacity for judgment.[121] In addition, the majority believed that natural affection leads parents to act in the child's best interests.[122] The Court, however, made one accommodation. To protect the child's liberty interest in not being erroneously confined, the Burger Court required that a neutral factfinder[123] determine whether the minimum statutory requirements for commitment have been met.[124] This, in the Chief Justice's opinion, would give the child adequate protection without unduly trenching on traditional parental authority.[125]

Therefore, in *Parham*, the Burger Court substantially affirmed the common law notion of parental authority. Assuming an absence of neglect or abuse, the Court only limited the common law notion by the neutral factfinder requirement.[126] Thus, when the interests of the parent and child clash, *Parham* positioned the child's interest as subservient to traditional parental authority. "The fact that a child may balk at hospitalization . . . does not diminish the parent's authority to decide what is best for the child."[127]

C. *Abortion: The Child is Given a Choice*

When considering abortion, the Burger Court has not upheld the traditional rights of the parent. Rather, in balancing the parent's interests against those of the child, the Court has given the child a significant right against her parents: the right to go to the state for counseling and assistance in obtaining an abortion. Thus, by allowing the child to decide to whom she will turn for advice—the parent or the state—the Court has vested children with a "right of choice."[128]

The case law supporting this investiture began with the Court's 1975 decision in *Planned Parenthood v. Danforth*.[129] In *Danforth*, the Burger Court struck down Missouri's abortion statute as unconstitutional. The Court based its decision, in part, upon Missouri's parental consent provision which required a minor woman to receive the written consent of a parent before an abortion unless a physi-

120 *Id.* at 604.
121 *Id.* at 602.
122 *Id.*
123 The neutral factfinder does not have to be a judicial or administrative officer. *Id.* at 607.
124 *Id.* at 606-07.
125 *Id.* at 606.
126 *Id.*
127 *Id.* at 604.
128 *See* Hafen, *supra* note 3, at 644-58.
129 428 U.S. 52 (1976).

cian certified that the abortion was necessary to preserve the life of the mother.[130] The Court believed that the state had no significant interest in conditioning an abortion on the consent of a parent.[131] The Court went further in *Bellotti v. Baird*[132] where it struck down a similar Massachusetts abortion statute which required parental consent before a minor could obtain an abortion.[133] Justice Powell, writing for a plurality of the Court, argued that if the state imposes a parental consent requirement as a condition to an unwed minor's abortion, the state must also provide an alternate procedure for obtaining authorization.[134] The Justices believed that the minor is entitled to show to a court either 1) that she is sufficiently mature and well informed to make her abortion decision in consultation with her physician, independent of her parents' interests, or 2) that the desired abortion would be in her best interest.[135] Accordingly, *Bellotti* gave the minor the right to go directly to the state, through the courts, without consulting or notifying her parents.[136]

These two decisions indicate that the Court has shifted the right of guardianship in the abortion context from the parent to a position of shared parent-state power. The traditional view would demand that the abortion decision be made strictly in the family context.[137] In *Bellotti*, four Justices would allow the state to assume control over the child without any showing of default, abuse, or negligence.[138] This constitutes an expansion of the state's parens patriae role, traditionally reserved for cases in which the parent's degree of care falls below a minimum level.[139]

The Burger Court has interjected the government into the family context, with the attendant risk of polarizing parents and children, because it believes that in some circumstances the state is a better guardian of the child.[140] Professor Robert A. Burt explains the trend in terms of a "power" theory.[141] Burt feels that the only authority that commands constitutional respect from the conservative justices is authority which is backed by sufficient force to prom-

130 *Id.* at 74.
131 *Id.* at 75.
132 443 U.S. 622 (1979).
133 *Id.* at 651-52.
134 *Id.* at 651.
135 *Id.* at 643-44.
136 *Id.* at 647.
137 *See* notes 113-15 *supra* and accompanying text.
138 *See* Bennett, *Rights and Interests of Parent, Child, Family, and State: A Critique of Development of the Law in Recent Supreme Court Cases and in the North Carolina Juvenile Code*, 4 CAMPBELL L. REV. 85, 88 (1981).
139 *See* notes 116-17 *supra* and accompanying text.
140 *See, e.g.*, Bellotti v. Baird, 443 U.S. 622 (1979).
141 Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329, 322-45.

ise effective control over a child's disruptive impulses.[142] Parental authority only occasionally employs such force.[143] Thus, a specific authoritarian *style* of parenting—not the *status* of being a parent—warrants constitutional deference.[144] Viewed in the *Bellotti* context, Burt would suggest that no honor is due parents who have failed to keep their daughter from becoming pregnant. Therefore, since the parents do not warrant constitutional deference, the burden falls on the state to correct the disruptive impulses of the child. The Court's response in *Bellotti* suppressed parent-child conflict by favoring that force of authority promising effective control over the development of the child.

The result has been, in theory, to advance the child's rights against her parents. By giving the child a new right of choice, the authority of the parent to control and nurture the child has been limited. Notably, this runs counter to the trend established in *Parham* which stressed the authority of the parent.[145] In reality, however, the child has no more rights against society as a whole than she had prior to *Bellotti*. In the end, the child still cannot act on her own; she merely can choose to whom she will talk. If she goes to her parents, they must consent before an abortion can be performed. If she decides to go to the state, the courts must determine either that she is mature enough to make the decision or that the abortion will be in her best interest.

In attempting to resolve the inconsistency in the area of parent-child conflict, the Burger Court retreated from *Bellotti* in *H.L. v. Matheson*.[146] In *Matheson*, the Court upheld a statute requiring a physician to notify the parents of a minor upon whom an abortion is to be performed.[147] Chief Justice Burger, writing for the majority, stated that abortion is a grave decision which a girl of tender years, under emotional stress, may be ill equipped to make without

142 *Id.* at 328.

143 *Id.*

144 *Id.* at 340. *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972). Writing for the Court, Chief Justice Burger stated:

> To be sure, 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. But in this case, the Amish have introduced persuasive evidence undermining the arguments the State has advanced to support its claims in terms of the welfare of the child and society as a whole. The record strongly indicates that accommodating the religious objections of the Amish [parents] . . . will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.

Id. at 233-34.

145 *Parham*, 442 U.S. at 604.

146 450 U.S. 398 (1981).

147 *Id.* at 413.

mature support.[148] Thus, unlike his stance in *Bellotti*, the Chief Justice here argued that parents have an important guiding role to play in the upbringing of their children, and this guiding role presumptively includes counseling them on important decisions.[149] The Court thus held that the statute serves the important considerations of preserving family integrity and protecting adolescents.[150] Therefore, the Court has seemingly abandoned its position in *Bellotti* in favor of the more traditional deference to parental authority.

D. *The Result*

The Burger Court has wavered in its attempts to settle the conflicts between parents and children. In *Parham*, it deferred to the traditional notion of parental authority, limiting it slightly to accommodate minimally the interests of the child.[151] In *Bellotti*, however, four Justices favored giving the child a significant right of choice unprecedented in the family context.[152] As a result, the Burger Court has advanced the right of minor females in the abortion context by allowing them to seek state assistance. Yet by recognizing the guiding role of parents in *Matheson*, the Court may be signaling that it will return to the traditional *Parham* approach.

IV. Conclusion

The Burger Court has affirmed that minors are protected by the Constitution. It has also been cognizant in its dicta of the child's interests. It has not, however, transferred this recognition into tangible gains in children's rights. Where the child's interests clash with the interests of the state, the Burger Court has provided the child with a minimum level of due process in both the criminal and civil contexts. In later decisions, however, the Court has shown an increasing tendency to defer to the authority of the state. This, in the Court's opinion, will enable the state to rehabilitate the child in the criminal context or maintain discipline and order in the civil context. When the child's interests clash with those of the parent, the Court will defer to parental authority only to the extent that parents maintain control over the child's errant impulses. If they do not, the Court will defer to the state to control the child.

Thus, the Court has not significantly increased children's rights. It has merely decided who can best control or protect the child: the parent or the state. Given the increasingly conservative

148 *Id.* at 410 (citing Bellotti v. Baird, 443 U.S. 622, 640-41 (1979)).
149 *Id.*
150 *Id.* at 441.
151 *Parham*, 442 U.S. at 606.
152 *Bellotti*, 443 U.S. at 643-44.

tone of the decisions in the area of children's rights, the Court will likely continue to defer to the authority that can promise the best development of the child. While the concerns of the child will be recognized, the Court, in the end, will defer to the authority of either the parent or the state.

John D. Goetz