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Authority and Autonomy: The State, the Individual and the Family

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Authority and Autonomy: The State, the Individual and the Family†

M. DAVID GELFAND*

This commentary focuses primarily upon the views expressed by Justice Rehnquist in his de Hirsch Meyer lecture. The author argues that a corollary to Justice Rehnquist's view that the judiciary should defer to the authority of private institutions over the individual, to protect those institutions, would be to adopt a judicial attitude of supporting private institutions against legislative interference. An examination of Justice Rehnquist's judicial opinions in the area of constitutional family law reveals exactly the opposite position. The author concludes that Justice Rehnquist's position of judicial deference to legislative decisions over the family may lead to destruction of the institution rather than to preservation of the family and suggests ways of accommodating the interests of individual family members, the interest of the family as an institution and the legitimate police power and parens patriae regulations of the state.

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I. INTRODUCTION

This commentary will concentrate primarily upon Justice Rehnquist's view, as articulated in his de Hirsch Meyer lecture¹ and in several judicial opinions, that the judiciary should defer to the authority of government and private institutions over the putative rights of individuals living under the rule of that government and those institutions. It will be argued that this pro-authority, judicial-abdication approach has two basic flaws: (1) categorical judicial deference to institutional decisions prevents the full development of personal identity essential to exercising fundamental personal liberties; and (2) categorical judicial deference toward legislative interference with private institutions may undermine the ability of these institutions to mediate between atomized individuals and the state. An alternative normative model that gives prominence to the individual and the individual's interactions within primary groups will be proposed and evaluated. The implications of this modified libertarian analysis will be contrasted with Justice Rehnquist's pro-authority stance, first at the level of legal doctrine and then at the level of individual cases in the constitutional family law area. The family is chosen as the focus primarily because two of the de Hirsch Meyer lecturers (and the author) recognize its continuing validity as the basic form of group association in our society.² Moreover, recent cases in this field provide fertile ground for comparing Justice Rehnquist's categorical deference analysis of state-family-individual conflicts both with the more activist approach advocated by Professor Tribe³ and with the intermediate approach taken by an emerging majority of the Burger Court.

1. Rehnquist, *The Adversary Society: Keynote Address of the Third Annual Baron de Hirsch Meyer Lecture Series*, 33 U. MIAMI L. REV. 1 (1978).

2. *Id.* at 8, 9; Tribe, *Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 34-35 (1973).

3. Tribe, *Seven Pluralist Fallacies: In Defense of the Adversary Process—A Reply to Justice Rehnquist*, 33 U. MIAMI L. REV. 43 (1978). Professor Tribe's lecture described and refuted seven pluralist fallacies which "have induced exaggerated fears of adjudication and an understated appreciation of what it can contribute to the legitimacy of our system of government." *Id.* at 44. His views are further elaborated in L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978).

II. PHILOSOPHICAL BACKGROUND—CONFLICTS AMONG THE INDIVIDUAL, INSTITUTIONS AND THE STATE

A. *Justice Rehnquist and the Authority Model*

Justice Rehnquist began his de Hirsch Meyer lecture in what he called "a purely jurisprudential way,"⁴ and chose Edmund Burke⁵ and Edward Carr⁶ as his intellectual forefathers. He closed his lecture with an extensive quotation from Burke's attack upon the contractarian view of political obligation.⁷ Drawing upon this philosophical background and some case law, he asked (and answered) only one of the difficult questions raised by the complex relations among the state, private institutions and individuals: What should the judicial response be when putative individual rights come into conflict with institutional decisions and interests? He stated that his "hypothesis is not that an individual's claim for redress of wrong would be better vindicated in a nonadversarial system, but that in some situations it is best not vindicated at all"⁸ because crystallizing the differences among institutional members into adversary positions "may threaten the future of the [continuing] institutional relationship."⁹ This, he argued, is particularly true with respect to intrafamily disputes.¹⁰

Standing alone, this argument is an incomplete statement of Justice Rehnquist's views on the proper societal role of the family and the courts. These views can be flushed out only by posing a second question: What should the judicial response be when family decisions and interests come into conflict with legislative determinations? On the basis of his de Hirsch Meyer lecture, one

4. Rehnquist, *supra* note 1, at 2.

5. *Id.* at 19. For a commentary on Burke's views on the relationship between the state and the individual, see Parkin, *Burke and the Conservative Tradition*, in *POLITICAL IDEAS* 118 (D. Thompson ed. 1972).

6. Rehnquist, *supra* note 1, at 7.

7. *Id.* at 19 (quoting E. BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 93-94 (E. Rhus. ed. 1910)). A recent resuscitation of contractarian philosophy that has received substantial attention in legal and philosophical circles is J. RAWLS, *A THEORY OF JUSTICE* (1973). For interesting critiques, see B. BARRY, *THE LIBERAL THEORY OF JUSTICE* (1973); MacCormack, *Justice According to Rawls*, 89 *LAW Q. REV.* 393 (1973); Merritt, *Justice As Fairness: A Commentary on Rawls' New Theory of Justice*, 26 *VAND L. REV.* 665 (1973); Comment, *John Rawls'—a Theory of Justice*, 40 *U. CIN. L. REV.* 486 (1973).

8. Rehnquist, *supra* note 1, at 10.

9. *Id.* at 14. His reason for deferring to certain private institutional decisions appears to be based upon a calculus of social utility. While allowing adversarial conflict by institutional members might ensure "a 'better' decision in some objective sense, [it] can only disrupt ongoing relationships within the institution and thereby hamper the ability of the institution to serve its designated societal function." *Id.* at 2.

10. *Id.* at 12-13.

might have predicted that a corollary of Justice Rehnquist's opposition to judicial intervention into internal family affairs would be opposition to legislative intrusions into these affairs. Yet, a brief survey of his recent opinions in the family law area¹¹ reveals that he has consistently answered this second question by upholding the legislature, rather than the family, as the favored decisionmaker. In an earlier article¹² and in numerous judicial opinions,¹³ Justice Rehnquist attempts to justify this position on the basis of the judiciary's alleged lack of legitimacy and competence to overturn value choices made by legislatures in a pluralistic society. A general refutation of this reasoning has been provided by Professor Tribe, who characterizes it as the fallacy of "*undue modesty*."¹⁴ The other commentators in this issue argue as well that the legitimacy of active constitutional judicial review in defense of individual rights against legislative majorities is a well-established historical reality.¹⁵ I would add that the specific goal articulated by Justice Rehnquist of preserving ongoing family relationships demands more than the judicial deference to family decisions he advocates. Rather, active judicial protection of the family as an institution is necessary. If family relationships are too delicate and too important to be disturbed by adversary courtroom conflict,¹⁶ then surely they are too delicate and important to be impinged upon by intrusive legislative regulation. Thus, if family integrity means anything, it means that there are some substantive limits upon the regulatory power, not only of the courts, but of the state generally in its ability to define the composition, scope or content of family relationships.

This is by no means a novel position. It falls within a deep-rooted judicial tradition of protecting family interests against majoritarian regulations, traceable directly to *Meyer v. Nebraska*¹⁷ and *Pierce v. Society of Sisters*.¹⁸ These decisions, despite their reliance upon a substantive due process and natural law rationale, have been

11. See notes 192-208 *infra*.

12. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

13. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678, 717 (1977) (Rehnquist, J., dissenting); *Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting); *Roe v. Wade*, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 177 (1972) (Rehnquist, J., dissenting).

14. Tribe, *supra* note 3, at 52.

15. See Casebeer, *The Judging Glass*, 33 U. MIAMI L. REV. 59 (1978); Wisotsky, *Beyond Legitimacy*, 33 U. MIAMI L. REV. 173 (1978).

16. Rehnquist, *supra* note 1, at 12-13.

17. 262 U.S. 390 (1923) (invalidating a statute that prohibited teaching foreign languages to school children which the state claimed was justified by its interest in promoting patriotism).

18. 268 U.S. 510 (1925) (invalidating a requirement that all parents send their children to public schools).

repeatedly reaffirmed by the Supreme Court.¹⁹ The new development is the Burger Court's gradual recognition that both courts and legislatures must employ policy (or principle)²⁰ analysis that adequately accounts for the impact of legislative and executive actions upon the complicated interrelations among children, parents and the state.²¹ The "role allocation"²² issue, therefore, is not simply whether the court or the legislature should make a particular decision, but whether the individual or the state should make it. Indeed, where family legal problems are involved, the question becomes *which* individual should decide: husband, wife, parent, child or some combination of these individuals with guidance and direction by the state. Categorical deference to the legislature or the family is an inadequate substitute for this kind of complex analysis.

Justice Rehnquist's answers to these questions reflect his preference for the consensus-building operations of institutions exercising authority, as opposed to the conflict-ridden assertion of individual rights in the adversary atmosphere of the courtroom. More simply, he favors virtual judicial impotence in the face of legislative and family initiatives. He is prepared to accept the substitution of authority figures such as union leaders, church officials or family heads for state authority, but when the legislature lifts the delegation of authority, this decision must be respected by the courts. Thus, like Burke, Justice Rehnquist views anarchy as the only alter-

19. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977); *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

20. Ronald Dworkin, who succeeded H.L.A. Hart as the Oxford Professor of Jurisprudence, makes the distinction between arguments of "principle" which "justify a political decision by showing that the decision respects or secures some individual or group right," Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1059 (1975), and arguments of "policy" which "justify a political decision by showing that the decision advances or protects some collective [economic, political or social] goal of the community as a whole." *Id.* It is part of his attack upon the inadequacy of Professor Hart's definition of law as a "system of rules." See H.L.A. HART, *CONCEPT OF LAW* (1961). Dworkin goes on to argue that legislatures can rely upon both principle and policy arguments, but court decisions are, and should be, generated solely by arguments of principle. Dworkin, *supra*, at 1059-61. See also R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

Professor Kent Greenawalt has argued that courts characteristically do, and should, rely upon principle and policy arguments to justify their decisions in hard cases. Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991 (1977). See also, Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359 (1975) (attacking Dworkin's theory of judicial discretion). Dworkin responds that many of the examples of judicial policymaking which Greenawalt has isolated really rest upon "consequentialist" arguments of principle. Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1203-23 (1977) [hereinafter cited as Dworkin Response].

21. See notes 183-277 and accompanying text *infra*.

22. Tribe, *supra* note 2, at 10-15.

native to authority²³ and does not permit the interrelation of semi-autonomous institutions and individuals.

B. *The Libertarian Model*

In order to appreciate the full theoretical and practical implications of Justice Rehnquist's pro-authority construct, an alternative analytical model premised at least partly upon the radical individualism advocated by John Stuart Mill and by his modern libertarian followers must be examined. More than a century ago, Mill articulated "one very simple principle" to regulate the relations between the individual and society:

[T]he sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is self protection [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.²⁴

Just as Justice Rehnquist recognized the limitations of Burke's philosophy when applied to contemporary American society,²⁵ one must also acknowledge the shortcomings of Mill's principle.²⁶ Yet, despite

23. Rehnquist, *supra* note 1, at 18-20.

24. Mill, *On Liberty*, in *ESSENTIAL WORKS OF JOHN STUART MILL* 263 (M. Lerner ed. 1965). Mill then distinguished two spheres of human conduct. The first involves "such actions as are prejudicial to the interests of others." *Id.* at 340. For this conduct, "the individual is accountable and may be subjected either to social or to legal punishments." *Id.* The second sphere involves "self-regarding" conduct, which may not be regulated by society. In this sphere, the individual's "independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign." *Id.* at 263.

25. Rehnquist, *supra* note 1, at 18-19.

26. Professor Tribe argues that Mill's "self-regarding" category, as well as the definitions of "privacy" attempted by contemporary authors, *see* notes 35-36 *infra*, are underinclusive for two reasons. First, they focus upon the "inward-looking face of privacy," thereby excluding "outward-looking aspects of self that are expressed less through demanding secrecy, sanctuary, or seclusion than through seeking to project one identity rather than another upon the public world." L. TRIBE, *supra* note 3, at 887-88. He argues that an adequate conception of selfhood must include the freedom to have an impact upon others through projecting a public identity, and therefore the right of personhood should include the "affirmative duties of government" as well as "its obligations to refrain from certain forms of control." He admits, however, that too broad a definition of privacy runs the risk of becoming a meaningless concept, and that his approach to the social and solitary aspects of personhood must draw upon a variety of claimed and established rights. *Id.* at 888-89. The right of personhood does prove to be a useful conceptualization for organizing chapters of his constitutional treatise, but it may have less utility as a basis for asserting or establishing a constitutional right of privacy in a particular case.

Professor Tribe's second attack upon Mill's "self-regarding" category is that "virtually any action has non-trivial consequences beyond any perimeter defined in advance." *Id.* at 888. Thus, because of the interdependence of modern society, the third-party harms approach

its limitations, many modern libertarians believe that Mill's principle (as expounded and clarified in his *Essay on Liberty*) "at least offers the outlines of a coherent limitation upon government's ability to intervene in the private conduct of its citizens"²⁷ and may even provide "a reasonable frame of reference for evaluating the constitutional validity of criminal laws."²⁸ The principal advantage of this analysis is that it begins from the individual as the basic unit of society and builds upward, basing the justification for interference with personal liberty upon third-party harms rather than upon aggregative social benefits. It thus serves as a useful starting point for this commentary.

The libertarian analysis will answer differently the first question raised above, which pits individual interests against institutional interests. The notion is that governmental abridgement of freedom must be justified by some permissible governmental goal,

(see notes 27-29 and accompanying text *infra*) is seen as an inadequate basis for analysis. Yet, Tribe admits that his own analysis must be restricted to the relationship between government and the individual (based upon "little beyond a profession of faith"), thus excluding much of the social interrelations of private life. *Id.* at 890.

While this author has slightly more faith in the utility of third-party harms analysis than does Professor Tribe, the treatment of police power, *parens patriae* and legal paternalism contained herein is not inconsistent with Tribe's attempt to make a substantive judgment as to the "illegitimate or insufficient" purposes of government based upon "the nature of the right being asserted and the way in which it is brought into play." *Id.* at 891.

Other contemporary philosophers and legal theorists, while subscribing to much of Mill's critical philosophy, believe that he stated his "one very simple principle" in terms that are both unnecessarily absolute and overly general. They restate Mill's "absolute right" to liberty as a strong (but rebuttable) presumption in favor of freedom of action and apply his abstract and formal defense of liberty to specific instances of state interference with self-regarding actions. S. BENN & R. PETERS, *SOCIAL PRINCIPLES AND THE DEMOCRATIC STATE* 221 (1959); Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 107 (Wasserstrom ed. 1971).

A 1970 survey of American court opinions dealing with statutory regulation of personal conduct found very few that specifically mentioned Mill, either with approval or disapproval. 37 U. CHI. L. REV. 605 (1970) [hereinafter cited as *Judicial Reaction*]. The author suggested three possible explanations:

Mill's influence . . . probably had an impact on the legislative process, thus effectively screening out those measures most obnoxious to Mill's principle and to the legislators' concern with individual freedom. A second explanation lies in the decline of substantive due process and the consequent narrowing of judicial willingness to limit the state's exercise of the police power Thirdly, since there is no specific constitutional provision embodying Mill's principle . . . courts may be reticent to strike down such legislation in the absence of a more explicit constitutional mandate.

Id. at 606 (footnotes omitted).

27. Lister, *The Right to Control the Use of One's Body*, in *THE RIGHTS OF AMERICANS* 348, 355 (N. Dorsen ed. 1972).

28. Hindes, *Morality Enforcement Through the Criminal Law and the Modern Doctrine of Substantive Due Process*, 126 U. PA. L. REV. 344, 377 n.143 (1977). Sartorius also contends that Mill was "arguing on something like the Constitutional level." Sartorius, *The Enforcement of Morality*, 81 YALE L.J. 891, 902 (1972).

and this analysis argues that appropriate goals can be discerned on the basis of third-party effects. In addition, the libertarian model at least suggests a different approach to the second question of institutional decisions versus state decisions. The reason is that the libertarian values primary institutions because they further individual interests and train their members in the exercise of democratic rights, while the supporter of the authority model values institutions because they are socially useful and teach their members to respect authority.²⁹ Nevertheless, although the libertarian model can serve as a touchstone and basis for a critique of the implications of the authority model, it too has its limitations in suggesting the proper judicial resolution of certain conflicts between individual members of a family.

III. FROM PHILOSOPHY TO LEGAL DOCTRINE—INDIVIDUAL INTERESTS AND STATE INTERESTS

While not attempting to outline a comprehensive theory of judicial or legislative activity with respect to matters of individual liberty and family integrity, this commentary will try to suggest some of the problems, from a libertarian perspective, generated by current legal doctrines that are generally accepted as the proper articulation of the state's interest in these particular fields.

A. *Individual Liberty in Constitutional Terms*

There are a number of ways in which a libertarian might frame a constitutional claim to be free from majoritarian interference in the "self-regarding" sphere. For example, the free exercise clause of the first amendment³⁰ might be invoked as the basis for an asserted right to use psychoactive drugs³¹ or to refuse blood transfusions,³²

29. See note 9 *supra*. In *Moose Lodge v. Irisv*, 407 U.S. 163 (1972), Justice Rehnquist, in writing for the majority, concluded that the equal protection clause of the 14th amendment did not apply to the guest policies of a private club, but his differences with the dissent appear to be based upon a different conception of the facts about liquor licenses. *Cf.* *California v. LaRue*, 409 U.S. 109 (1972) (Rehnquist, J.) (Justice Rehnquist concluded that the state's authority under the 21st amendment permitted it to regulate activities that were within the limits of the 1st and 14th amendments' protection of freedom of expression). One finds no homily to private institutions and associational rights against the state, such as that presented by Douglas' dissent in *Moose Lodge*, 407 U.S. at 207.

30. "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I.

31. Compare *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 691 (1964) (statutory ban upon peyote unconstitutional as applied to Indian tribe, which had valid free exercise claim), with *Leary v. United States*, 383 F.2d 851, 861 (5th Cir. 1967) (denying such exemption for marijuana possession where drug not central to religious ceremony and practice), *rev'd on other grounds*, 395 U.S. 6 (1969).

32. See cases cited in note 248 *infra*.

and the equal protection clause³³ might be invoked as the basis for a right of unmarried adults to purchase contraceptives.³⁴ In recent years, however, constitutional attacks upon civil and criminal statutes that interfere with fundamental personal decisions have usually been framed in terms of the "right of privacy,"³⁵ reformulated by scholars as the "right of autonomy,"³⁶ the "lifestyle right"³⁷ or the "personal question doctrine."³⁸ Justice Rehnquist,³⁹ among others,⁴⁰ has criticized this approach as reintroducing discredited substantive due process⁴¹ under another name. Basically, the criti-

33. "[N]or [shall any state] deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

34. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

35. See, e.g., *Whalen v. Roe*, 429 U.S. 589 (1977); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Ravin v. State*, 537 P.2d 494 (Alas. 1975); *People v. Sinclair*, 387 Mich. 91, 194 N.W.2d 878, 896 (1972) (Kavanaugh, J., concurring); A. WESTIN, *PRIVACY AND FREEDOM* (1967); Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977); Greenawalt, *The Right of Privacy*, in *THE RIGHTS OF AMERICANS* (N. Dorsen ed. 1972); Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Marshall, *The Right to Privacy: A Skeptical View*, 21 MCGILL L.J. 242 (1975); 26 STAN. L. REV. 1161 (1974) [hereinafter cited as *Privacy*].

36. Several authors have attempted to provide a coherent analysis of the extensive body of law surrounding the concept of "privacy" by distinguishing two primary meanings: (1) selective disclosure or freedom from governmental intrusion, and (2) autonomy or freedom from governmental regulation. The "selective disclosure" meaning of privacy is "the claim of individuals, groups, and institutions to determine for themselves when, how and to what extent information about them is communicated to others." A. WESTIN, *supra* note 35, at 7. This right rests upon the 4th amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Wolf v. Colorado*, 338 U.S. 25 (1949). In general, it is only peripherally involved in the issues discussed in this commentary. The second meaning of privacy has been designated "autonomy," which is the right of individuals "to perform certain acts or undergo certain experiences." *Privacy*, *supra* note 35, at 1163; see Gerety, *supra* note 35; Greenawalt, *supra* note 35, at 323 n.3; Henkin, *supra* note 35.

While it is important, for analytic purposes, to separate these two meanings, it is worth noting that the main reason people wish to avoid disclosure is that societal judgments are harsh. Hence, from the layman's perspective there may be a close relationship between the selective disclosure and the autonomy sense of privacy. See *Whalen v. Roe*, 429 U.S. 589 (1977), in which the appellants claimed both types of privacy were violated by a New York State law that required the recording and central storage of prescriptions for certain drugs that had both legal and illegal uses.

37. Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563 (1977).

38. Tribe, *supra* note 2, at 32. This doctrine was later developed by Professor Tribe into the "right of personhood." L. TRIBE, *supra* note 3, at §§ 15-1 to -20; see note 26 *supra*.

39. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 718-19 (1977) (Rehnquist, J., dissenting); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 177 (1972) (Rehnquist, J., dissenting); Rehnquist, *The Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement*, 23 KAN. L. REV. 1 (1974).

40. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 511 (1965) (Black, J., dissenting).

41. The "old" substantive due process involved judicial attempts to defend property rights against state-imposed economic regulations by invoking the due process clause. See,

cism asks why the due process clause⁴² does not protect property rights against redistributive legislation⁴³ but does protect personal liberty against the state's enforcement of conventional morality.⁴⁴ Professor Tribe has answered that it protects both personal liberty and economic liberty against intrusive legislation.⁴⁵ In his de Hirsch Meyer lecture he adds that it is only the fallacy of "*institutionalism*" which leads us to believe that "excesses of judicial intervention, whether in the era of . . . *Lochner v. New York* or in some other period, demonstrate the unsuitability of courts as major institutions for social change,"⁴⁶ or somehow prove that "the court was in the wrong business."⁴⁷

Varying levels of judicial scrutiny have been applied to asserted claims of state interference with individual liberty. The traditional approach involves applying "strict scrutiny" when the interest infringed upon is deemed fundamental.⁴⁸ A minimal level of scrutiny,

e.g., *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Lochner v. New York*, 198 U.S. 45 (1915); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). *See also* G. GUNTHER, *CONSTITUTIONAL LAW* 548-49 (9th ed. 1975).

For cases that reject economic substantive due process, see *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *West Coast Hotel v. Parish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934).

An interesting question at this point is how Justice Rehnquist would rule if he were presented with the issues in *Allgeyer* and *Lochner* today. *See* National League of Cities v. Usery, 426 U.S. 833 (1976) (Rehnquist, J.) (ruling that "state sovereignty" prevented the application of wage and hour legislation to state and municipal employees); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (Justice Rehnquist joining in an opinion that upheld claims of bondholders against state mass transit statute on contract clause grounds).

42. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." *Id.* amend. XIV, § 1.

43. *See* notes 65-67 and accompanying text *infra*.

44. *See* notes 68-110 and accompanying text *infra*.

45. What was wrong [with the *Lochner* line of cases] was simply that, as a picture of freedom in industrial society, the one painted by the Justices badly distorted the character and needs of the human condition and the reality of the economic situation. We may believe that judges will often get such things wrong. But so will other people, including legislators. To be sure, legislators are elected—but they cannot avoid distance from the people much more readily than judges can. And in any event, as long as judges are in the business of deciding cases—even garden-variety contract and property cases—they will be shaping the society even when they claim they are "only" deferring to others. In short, there is no escape from the difficult task of painting a better—a morally and economically truer—picture; to leave the canvas blank from time to time just hands the brushes over to other artists.

L. TRIBE, *supra* note 3, at 455 n.37.

46. Tribe, *supra* note 3, at 54.

47. *Id.* at 56.

48. *See, e.g.*, *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

or the "rational relationship test," is applied when that interest is not deemed fundamental.⁴⁹ There is a weaker version of the latter test which will uphold the statute whenever "any set of facts reasonably may be conceived to justify it."⁵⁰ This approach is still followed by Justice Rehnquist.⁵¹ Under "minimal scrutiny with bite," however, the Court requires that the means chosen by the regulation under attack substantially further the statutory objective, and it will not hypothesize conceivable state purposes against which to test the rationality of the means.⁵² Although the proposal that the Court adopt a "sliding scale" of review⁵³ has not yet been accepted by a majority, several Justices have begun to recognize the procrustean effects of choosing strict scrutiny which always results in invalidating the legislation or minimal scrutiny which always results in upholding it. There are indications of increasing acceptance of an intermediate level of scrutiny.⁵⁴

Despite their disagreement as to the level of scrutiny to be applied in particular cases or in a general class of cases, all of the current Justices appear to agree that the Court can and should examine the substantive ends of legislation as well as the means chosen. Even Justice Rehnquist, in dissenting from the majority's strict scrutiny of a Texas abortion statute in *Roe v. Wade*,⁵⁵ acknowledged that the due process clause "embraces more than the rights found in the Bill of Rights."⁵⁶ He added that if the "statute were to prohibit an abortion even where the mother's life is in jeopardy," there would be "little doubt that [it] . . . would lack a rational relation to a valid state objective."⁵⁷ Professor Tribe's analysis of this opinion is incisive:

49. See, e.g., *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (right to education).

50. *McGowen v. Maryland*, 366 U.S. 420, 426 (1961); see *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955).

51. *Zablocki v. Redhail*, 98 S. Ct. 673, 692 (1978) (Rehnquist, J., dissenting); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 717 n.1 (1976) (Rehnquist, J., dissenting); *Trimble v. Gordon*, 430 U.S. 762, 777, 784-86 (1976) (Rehnquist, J., dissenting); *Salyer Land Co. v. Tulare Water Dist.*, 410 U.S. 719, 730 (1973) (Rehnquist, J.).

52. See *McGinnis v. Roisiter*, 410 U.S. 263, 270 (1973); G. GUNTHER, *supra* note 41, at 661-63.

53. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting); Gunther, *Foreward—In Search of Evolving Doctrin on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

54. See, e.g., *Zablocki v. Redhail*, 98 S. Ct. 673, 686 (1978) (Powell, J., concurring) (right to marry); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (right of family autonomy); *Craig v. Boren*, 429 U.S. 190, 197-99 (1976) (discrimination on the basis of gender).

55. 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting).

56. *Id.* at 173.

57. *Id.* at 173.

Concede this, and it's all over: judicial authority to reject a legislature's accommodation of conflicting values is no less substantive because its exercise is justified by "extreme" cases, or because it is invoked in the name of rationality. A judicial order that a mother's *life* is to be valued above that of a not-yet-viable fetus represents as much an imposition of a hierarchy of values upon the majority as does a judicial order that a mother's *liberty* is to be valued above that of a not-yet-viable fetus.⁵⁸

With this in mind, we venture forth into an examination of three classes of state power generally relied upon to justify interference with individual and family liberty.

B. *State Powers*

In order to achieve the analytic clarity that is often lost in both legislation and judicial opinions dealing with individual and family interests, it is necessary to distinguish three forms of state power. Police power is based largely upon third-party harms, though it tends to shade into regulation of morality involving third-party effects which are quite minimal. *Parens patriae* involves protection of persons who are deemed incapable of protecting themselves from either physical and socially mandated harms. Legal paternalism, the third form of state power, extends *parens patriae* notions to regulation of the behavior of competent adults, "for their own good." Although limitations of time and space prevent a full-scale critique, this commentary will test various exercises of each of these state powers (whether by the executive, the legislature or the judiciary) against the third-party harms analysis discussed above. This analysis makes it clear that police power regulations have gone too far by enforcing conventional morality, state actions premised upon *parens patriae* may be more restrictive than necessary to achieve their stated purpose, and legal paternalism, despite numerous attempts to establish it, has no libertarian roots.

C. *Police Power*

The vast majority of regulations that restrict personal liberty are exercises of the police power. This power, which is inherent in state government⁵⁹ sovereignty but must be derived from more spe-

58. Tribe, *supra* note 3, at 55-56; see also Tribe, *supra* note 2, at 5 n.26.

59. This article uses the term "state" to signify any and all forms of governmental activity—legislative, judicial and executive—at the federal, state and local levels. Where it is necessary to distinguish state from federal governmental activity, the term "state government" is used.

cific enumerated constitutional grants to the federal government,⁶⁰ is generally defined to include regulations to preserve and protect the public health, safety, welfare and morals.⁶¹ It includes a broad range of governmental activities such as zoning regulations to preserve community property values,⁶² traffic laws for the health and safety of motorists,⁶³ and laws against fornication aimed at preserving the moral fiber of the society.⁶⁴ We can take as our paradigm a statute that prevents *A* from doing *X* because it would "harm" *B* in some way. For example, a statute may make it a crime (or a nuisance) for *A* to release noxious fumes from her factory because they will cause physical damage to the lungs of *B*. This is the classic type of third-party harms situation in which Mill found state intervention appropriate.

There are some situations, however, in which police power regulations take on a redistributive character. Employer *A* is prevented from paying less than \$2.50 per hour in order to benefit employee *B* financially. With the growth of the mixed economy in nearly all Western nations, the state often intervenes in private contractual matters to redistribute opportunities or resources either by altering bargaining strength⁶⁵ or by removing certain issues from the bargaining process altogether.⁶⁶ This type of state intervention was the subject of the economic substantive due process cases in the 1920's and 1930's.⁶⁷

60. Usually the commerce clause, U.S. CONST. art. I, § 8, cl. 3, the taxing and spending clause, *id.* cl. 1, the necessary and proper clause, *id.* cl. 18, and § 5 of the 14th amendment are relied upon for the federal regulation of private conduct.

61. *See, e.g.,* *Mugler v. Kansas*, 123 U.S. 623 (1887).

62. *See, e.g.,* *Young v. American Mini Theaters*, 427 U.S. 50 (1976) (restriction upon location of adult theatres and bookstores); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1971) (restriction upon persons who could occupy one-family dwellings); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (restriction upon location of commercial and residential property).

63. For a discussion of traffic laws that go beyond third-party effects to encompass paternalistic concerns, see note 159 and accompanying text *infra*.

64. *See, e.g.,* FLA. STAT. § 798.03 (1977); N.Y. PENAL §§ 130.20, .38 (McKinney 1975). For a further discussion of such morality-oriented laws, see notes 69-103 and accompanying text *infra*.

65. For example, the Wagner Act, ch. 117, 46 Stat. 1084 (1931), regulates labor-management negotiations in a way that benefits unions, and the Copyright Act, 17 U.S.C.A. §§ 1-810 (1977), contains many provisions that provide bargaining advantages for authors over publishers. *See, e.g.,* LABOR RELATIONS AND THE LAW 48-61 (J. Williams ed. 1965). This type of legislation is sometimes wrongly described as being "paternalistic." *See* W. OBERER & H. HANSLOWE, LABOR RELATIONS, ch. 2 (1972).

66. Minimum wage, maximum hour and child labor legislation remove certain possibilities from the bargaining table. *See* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 206, 207, 212 (1970 & Supp. V 1975).

67. *See* note 41 *supra*.

1. ENFORCEMENT OF MORALITY—CRIMINAL IMPLICATIONS

Police power regulations that attempt to enforce society's conventional morality have received substantial attention in jurisprudential literature. If we forced this type of legislation into our paradigm, it would be described as the restriction of A's sexual liberty to protect society as a whole⁶⁸ (rather than to protect any individual B) from a "harm" in an extremely intangible and diffuse form.

The seminal debate on governmental regulation of consensual sexual activities remains that between Oxford Professor H.L.A. Hart⁶⁹ and Lord Patrick Devlin.⁷⁰ Professor Hart, as a follower of Mill, opposed governmental regulation that is directed toward the protection of the moral fabric of society or the maintenance of behavioral conformity. An individual's conduct, by their libertarian philosophy, can only be restricted when it violates "a distinct and assignable obligation of any person or persons . . . [w]henever, in short, there is a definite risk of damage."⁷¹ The third-party harms test requires that the state, before it can restrict A's consensual homosexual activities, prove that this conduct is likely to cause harm to the distinct interests of one or more B's.

In contrast, Lord Devlin contended that sodomy laws are necessary because "there are certain standards of behaviour or moral principles which society requires to be observed; and the breach of them is an offense not merely against the person who is injured but against society as a whole."⁷² He argued that "the true principle is

68. Adultery laws probably should not be placed in this category since they arguably prevent harm to the "distinct and assignable" interests of the spouse and children. See note 71 and accompanying text *infra*. Most states have repealed their adultery laws.

69. See H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963). Professor Hart made his initial remarks in support of the Wolfenden Committee's Report, which had proposed that private homosexual acts between consenting adults be decriminalized. The language of the Committee closely parallels that of Mill: "There must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business." WOLFENDEN REPORT—REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION ¶ 61 (1957), quoted in H.L.A. HART, *supra*, at 14-15.

70. Devlin, *Morals and the Criminal Law*, reprinted in P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965). Devlin also invoked the ghost of James Fitzjames Stephen, Mill's nineteenth century opponent, in an attempt to demonstrate the inadequacies of Hart's and Mill's libertarian perspective. Stephen, in his righteous Victorian manner, had argued: "[T]here are acts of wickedness so gross and outrageous that, self-protection apart, they must be prevented as far as possible at any cost to the offender, and punished, if they occur, with exemplary severity." J. STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 163 (1873). For further discussion of Stephen, see Wilkinson & White, *supra* note 37.

71. Mill, *supra* note 24, at 328-29. Clearly, the horror that some people may feel if they think that their neighbors are secretly engaging in deviate sexual practices cannot count as "a definite risk of damage." *Id.* See also L. TRUBE, *supra* note 3, at §§ 15-19; Gerety, *supra* note 35; Wilkinson & White, *supra* note 37.

72. P. DEVLIN, *supra* note 70, at 6-7.

that the law exists for the protection of society. It does not discharge its function by protecting the individual from injury . . . the law must protect also the institutions and the community of ideas, political and moral, without which people cannot live together."⁷³ Careful observers will note the striking similarity between Lord Devlin's society oriented position and that taken by Justice Rehnquist in his dissenting opinions⁷⁴ and his de Hirsch Meyer lecture.⁷⁵

Neither "societal education" nor "protection of the moral fiber"—the grounds traditionally asserted by Lord Devlin and others to justify morals legislation⁷⁶—can withstand close analysis. Many commentators⁷⁷ and some judges⁷⁸ believe that proscribing

73. *Id.* at 22. He adds that a common morality "is the mortar which binds a society together." *Id.* at 9. Since he also believes "any immorality is capable of affecting society injuriously," *id.* at 18, he contends that "[s]ociety cannot ignore the morality of the individual any more than it can his loyalty." *Id.* at 22. For further discussion of the Hart-Devlin debate, see Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 *YALE L.J.* 986 (1966); Frankel, *The Moral Environment of the Law*, 61 *MINN. L. REV.* 921 (1977); Sartorius, *supra* note 28.

74. For example, Justice Rehnquist has asserted it is "fundamental" to self-government to be able to "legislate in the interests of its concept of the public morality as it pertains to minors." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 719 (1976) (Rehnquist, J., dissenting); see *Roe v. Wade*, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting).

75. Rehnquist, *supra* note 1, at 2-3.

76. One court recently concluded that "18th Century American legislatures forbade sodomy to express moral outrage at the act itself and to prevent a general deterioration of the moral fiber of the populace." *United States v. Brewer*, 363 F. Supp. 605, 607 (M.D. Pa. 1973), *aff'd mem.*, 491 F.2d 751 (3d Cir. 1973), *cert. denied*, 416 U.S. 990 (1974). See also *Interview with Anita Bryant*, *PLAYBOY* 73 (May 1978) [hereinafter cited as Bryant].

77. Without a great deal of finesse, the [trial court in *Doe*, see note 93 *infra*] thus made an important and often neglected point: ascertaining and articulating the morality of its citizens is of vital concern to the state. All legislation, after all, is an embodiment of a collective social judgment as to what is right and wrong or fair and just. Food and drug laws or progressive income taxes, for example, codify certain moral decisions that people may make regarding the type of society they want. The state's duty is primarily to implement those choices. 1977 *B.Y.U. L. REV.* 170, 185; see Rostow, *The Enforcement of Morals*, 1960 *CAMBRIDGE L.J.* 174, 197-98. It is noteworthy that the justification of both authors for criminal enforcement of conventional sexual morality is based upon an analytic confusion that results from treating progressive income tax (clearly a form of redistribution) and food and drug laws (also a form of redistribution though with, arguably, some physical paternalism overtones) as a form of "morality enforcement." See also Letwin, *Morality and Law*, in 43 *ENCOUNTER* 35, 40 (Nov. 1974) (arguing for maintenance of the "pattern of civilization" through use of the criminal law); Wilkinson & White, *supra* note 37, at 591-600.

78. See J. STEPHEN, *supra* note 70; *Buchanan v. Batchelor*, 308 F. Supp. 729, 732 (M.D. Tex. 1970) (state has right to prohibit "what it considers immoral acts," such as sodomy, but that right does not extend to marital bedroom), *rev'd on other grounds sub nom.*, *Wade v. Buchanan*, 401 U.S. 989 (1971); cf. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 58-59 (1973) (obscenity laws further "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers," and maintenance of a "decent society"); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 718-19 (1977) (Rehnquist, J., dissenting).

the "infamous crime against nature"⁷⁹ is an appropriate means of educating citizens, especially youth, to society's indignation against certain acts (and those who practice them). The corollary is that repeal of the criminal sanction would be tantamount to condoning these acts. It is submitted that this approach fundamentally misunderstands the proper function of criminal punishment, which is to deter crime and (possibly) to rehabilitate the criminal.⁸⁰ Indeed, Professor Hart finds the "idea that we may punish offenders against a moral code . . . simply as a means of venting or emphatically expressing moral condemnation, is uncomfortably close to human sacrifice as an expression of religious worship."⁸¹ Moreover, the actual effect of the repeal of a criminal statute is not to grant the formerly proscribed activity state approval but merely to permit the activity to occur without incurring state-imposed penalties.⁸²

The second argument in favor of laws against sodomy is that they provide a means of preventing the moral decline of society in general and of children in particular.⁸³ This proposition rests upon two unproven assumptions: (1) that morality is a "seamless web" such that a threat to a part is a threat to the whole, and (2) that the removal of criminal sanctions will lead to an increase in deviant sexual practices.⁸⁴ With respect to sexual practices, it is extremely unlikely that lifting the criminal sanction will increase the behavior. Several Justices in *Carey v. Population Services International*⁸⁵ severely doubted that criminal statutes actually deterred sexual promiscuity by minors. This is probably more true with respect to homosexual practices, which cannot be controlled easily once the sexual preference has been established.⁸⁶ Turning more directly to societal concerns related to the family, one theory seems to be that

79. This language is used in many contemporary statutes. See, e.g., FLA. STAT. § 800.01-.02 (repealed 1974); GA. CODE ANN. § 26-2002 (1972); N.J. STAT. ANN. § 2A:143-1 to -2 (West 1969). See also statutes cited in 1977 B.Y.U. L. REV. 170, 171 n.5.

80. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4-13 (1968); Allen, *Legal Values and the Rehabilitative Ideal*, in L. RADZINOWICZ & M. WOLFGANG, THE CRIMINAL IN THE ARMS OF THE LAW 65 (1971); Andenaes, *The General Preventive Effects of Punishment*, in *id.* at 74; Walker, *Aims of Punishment*, in *id.* at 48.

81. H.L.A. HART, *supra* note 69, at 65-66.

82. For this reason it is later suggested that even if homosexual marriage activities were decriminalized, the approval of homosexual marriage would not necessarily follow. See note 105 *infra*. Nor need state-sponsored "pot" parties be the logical result of decriminalization of marijuana use.

83. P. DEVLIN, *supra* note 70, at 6-7, 22. See also J. STEPHEN, *supra* note 70, Bryant, *supra* note 76.

84. See Lister, *supra* note 27, at 353. The third-party harms analysis places the burden upon the body that would attempt to rebut the presumption in favor of liberty of action.

85. 431 U.S. 678, 694-95 (1977). See also 88 HARV. L. REV. 1001, 1011 (1975).

86. See sources cited in L. TRIBE, *supra* note 3, at 944-45 n.17.

decriminalization of homosexuality will lead to a breakdown of the family by tempting heterosexuals away from their spouses for alternative sexual lifestyles.⁸⁷ There is simply no empirical support for this assertion in societies that have legalized and condoned⁸⁸ homosexual behavior or in states that have simply decriminalized the practices.⁸⁹ Another concern is that homosexuals will molest young children. The empirical evidence is exactly the contrary with gay men and lesbian women being less likely to molest children than are their heterosexual counterparts.⁹⁰

The Supreme Court recently bypassed an opportunity to consider and evaluate these asserted individual, state and family interests with respect to criminal sodomy statutes. In *Doe v. Commonwealth's Attorney*,⁹¹ the Supreme Court, over the dissents of three Justices,⁹² summarily affirmed the denial by a three-judge district court⁹³ of declaratory and injunctive relief sought against the Virginia criminal sodomy statute.⁹⁴ Two male homosexuals brought a civil rights action claiming that prosecution under the statute (or threatened prosecution) would violate their due process, privacy and assorted other constitutional rights.⁹⁵ The district court ruled that the constitutional right of privacy did not extend to homosexual intimacy but was confined to marriage and family intimacy.⁹⁶ It went on to hold that the statute was rationally related to the state's interest in preventing "moral delinquency" and promoting "morality and decency,"⁹⁷ even though the state government had introduced no evidence as to the interests furthered by the law.⁹⁸

One group of constitutional scholars described the Court's disposition of *Doe* as "an egregious example of an unexplained sum-

87. See generally Wilkinson & White, *supra* note 37, at 595-96.

88. See generally note 80 and accompanying text *supra*.

89. E.C. BOGGAN, M. HAFT, C. LISTER, & J. RUPP, *THE RIGHTS OF GAY PEOPLE* 128, 138-40 (1975) [hereinafter cited as *GAY RIGHTS*].

90. *Id.*

91. 425 U.S. 901 (1976), *aff'g mem.*, 403 F. Supp. 1199 (E.D. Va. 1975).

92. *Id.* (Brennan, Marshall & Stevens, JJ., dissenting and noting probable jurisdiction).

93. *Doe v. Commonwealth's Attn'y*, 403 F. Supp. 1199 (E.D. Va. 1975) (two to one decision).

94. The same day, the Court denied the petition for certiorari of a criminal defendant who challenged the constitutionality of the North Carolina sodomy statute. *State v. Enslin*, 25 N.C. App. 662, 214 S.E.2d 318, *cert. denied*, *appeal dismissed*, 288 N.C. 245, 217 S.E.2d 669 (1975), *cert. denied*, 425 U.S. 903 (1976).

95. 403 F. Supp. at 1200.

96. *Id.* at 1201.

97. *Id.* at 1202.

98. L. TRIBE, *supra* note 3, at 942. Judge Merhige dissented, concluding that all private, consensual, sexual activities between adults were protected by the right of privacy under prior Supreme Court decisions. 403 F. Supp. at 1203-05 (Merhige, J., dissenting).

mary affirmance."⁹⁹ At a more general level, the Court missed the opportunity to do what Professor Tribe's *dé Hirsch Meyer* lecture argued judicial review should do—"articulate the underlying framework of rights" in the society and "provide an avenue of participation for those individuals and groups that have not yet been effectively absorbed into the mainstream coalitions of pluralist politics."¹⁰⁰ While a summary affirmance is a ruling on the merits that is binding upon lower courts,¹⁰¹ it has limited precedential value for the Supreme Court itself,¹⁰² and at least some members of the Court believe that *Doe* is not the last word on the regulation of consensual sexual conduct.¹⁰³

2. ENFORCEMENT OF MORALITY—CIVIL IMPLICATIONS

In addition to the threat of criminal sanction for engaging in their means of sexual expression, gays have also been subjected to a variety of civil disabilities.¹⁰⁴ The most serious, in terms of family

99. P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 112 n.1 (2d ed. Supp. 1977) [hereinafter cited as *HART & WECHSLER*]; see *Wilkinson & White*, *supra* note 37, at 591-600.

100. Tribe, *supra* note 3, at 45-46.

101. Lower courts have not read the case as upholding the application of sodomy statutes to heterosexuals. See *State v. Pilcher*, 242 N.W.2d 348, 360 (Iowa 1976) (dissent); cf. *Louis v. Slayton*, 539 F.2d 349, 351 (4th Cir. 1976) (habeas corpus petition of husband and wife serving prison terms for violation of a Virginia sodomy statute rejected on grounds that constitutional right to privacy dissolved on admittance of third party to view sexual acts).

102. See *Fusari v. Skinberg*, 419 U.S. 379, 390-92 (1975) (Burger, C.J., concurring); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *HART & WECHSLER*, *supra* note 99, at 277.

103. Justice Brennan's opinion in *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), stated: "We observe that the Court has not definitely answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual behavior] among adults." *Id.* at 688 n.5, 694 n.17. This language appears both in a portion of the opinion, 431 U.S. at 694 n.17, that was joined by Justices Stewart, Marshall, and Blackmun, and in a portion that was adopted as the opinion of the Court, 431 U.S. at 688 n.5, and joined by the above Justices plus Justice Stevens, 431 U.S. at 691 (Stevens, J., concurring in part and concurring in judgment) and Justice White, 431 U.S. at 702 (White, J., concurring in part and concurring in result in part). The statement drew no response from Justice Powell, who joined in another part of the opinion and concurred in result, 431 U.S. at 703 (Powell, J., concurring in part and concurring in judgment), or Chief Justice Burger, who dissented without an opinion. Justice Rehnquist, however, took violent exception: "While we have not ruled on every conceivable regulation affecting such conduct the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been 'definitely' established. *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976). See *Hicks v. Miranda*, 422 U.S. 332, 343-44 (1975)." 431 U.S. at 718 n.2 (Rehnquist, J., dissenting).

104. These disabilities usually involve restrictions imposed by administrative officials making security clearance, immigration, custody and bar admission decisions on the basis of a "fitness" standard. Though no arrests have yet occurred, the fact that the gay applicant may at some point in the future be convicted of sodomy is often treated as a basis for a finding of unfitness. See generally *Homosexuality and the Law—An Overview*, 17 N.Y.L.F. 273 (1971); 82 HARV. L. REV. 1738 (1969). Some of these unsubstantiated findings have been

concerns, is the potential loss of custody rights over their children.¹⁰⁵ Any restriction of parental rights, solely on the basis of sexual orientation, would seem to fly in the face of a long tradition that grants constitutional protection against state interference with a natural parent's rights of custody and control over his or her children.¹⁰⁶ The insistence upon procedural due process protections for parental custody rights in *Stanley v. Illinois*¹⁰⁷ and, more recently, in *Smith v. Organization of Foster Families for Equality and Reform*¹⁰⁸ seems to require a hearing with the full panoply of procedural protections before a lesbian mother or gay father can be deprived of his or her child. The primacy of the parental interest would seem to require the state to satisfy a very strict standard before intervening between parent and child. The child would only be removed from the home if the parent's sexual orientation rendered him or her so unfit as to be unable to raise the child.¹⁰⁹ Yet

successfully attacked. *See, e.g.*, *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969); *In re Labady*, 326 F. Supp. 924 (S.D.N.Y. 1971) (engaging in private consensual, homosexual conduct not a sufficient ground for denying naturalization application); *In re Eimers*, 358 So. 2d 7 (Fla. 1978) (homosexual orientation alone insufficient basis for denying bar admission); *In re Kimble*, 33 N.Y.2d 586, 301 N.E.2d 436, 347 N.Y.S.2d 453 (1973) (same). *But see* *Boutilier v. Immigration and Naturalization Serv.*, 387 U.S. 118 (1967) (statute excluding aliens "afflicted with psychopathic personality" held properly applied to homosexual).

105. The inability to obtain a state-recognized marriage might be added to the list of disabilities. Despite support from some commentators, *see generally* 82 *YALE L.J.* 573 (1973), the political climate simply is not ripe for legislative recognition of homosexual marriage, *see* *Wilkinson & White, supra* note 37, at 572, and it would be hard to argue that recognition of such a right was part of what Professor Tribe calls our "shared values." *L. TRIBE, supra* note 3, at 941-48.

106. *See* *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *May v. Anderson*, 345 U.S. 528 (1953); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). *See generally* 12 *SAN DIEGO L. REV.* 799 (1975).

107. 405 U.S. 645 (1972). This irrebuttable presumption case is relied upon by Professor Tribe in the formulation of his "structural due process" analysis. *See* *L. TRIBE, supra* note 3, at 987 & n.14, 1094 & n.16; *Tribe, Structural Due Process*, 10 *HARV. C.R.-C.L. L. REV.* 269 (1975). He has been criticized for this heavy reliance. *See* *Dixon, The Supreme Court and Equality: Legislative Classifications Desegregation, And Reverse Discrimination*, 62 *CORNELL L. REV.* 494, 519 n.132 (1977).

108. 431 U.S. 816 (1977) (suggesting that even foster families have procedural due process rights).

109. On this high standard for protecting the family against state intervention, *see* *Hafen, Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth To Their "Rights,"* 1976 *B.Y.U. L. REV.* 605 and 44 *BROOKLYN L. REV.* 63 (1977), both cited favorably by Justice Rehnquist in his de Hirsch Meyer lecture. *See* *Rehnquist, supra* note 1, at 8 n.17, 9 n.20. Indeed, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), suggests that parental decisionmaking should only be overruled by *parens patriae* restrictions, *see* notes 111-13 and accompanying text *infra*, to protect the child from physical or psychological harm but not from social harm—in that case, loss of a high school education. (*Yoder* thus limited the extent of state intervention permitted by *Prince v. Massachusetts*, 321 U.S. 158 (1944), which seemed to allow *parens patriae* restrictions for social reasons.) Under a very broad reading of *Yoder*, it might be argued that the sexual orientation of the parents cannot even be considered in a fitness hearing. *See* notes 135-37 and accompanying text *infra*.

only a few courts have responded favorably to the custody claims of gay parents.¹¹⁰

D. *Parens Patriae*

1. TRADITIONAL PARENS PATRIAE

The origins of *parens patriae* have been traced to the *De Praerogative Regis* statute,¹¹¹ which granted the Crown custody over the lands and persons of "lunatics and idiots" in the thirteenth or fourteenth century.¹¹² Eventually, this same power was exercised for "the best interest" of children who were without parental care in Britain¹¹³ and in the United States.¹¹⁴

Since regulations passed under the state governments'¹¹⁵ *parens patriae* power often involve the same concerns as police power regulations, courts sometimes confuse the two.¹¹⁶ The principal difference is that *parens patriae* legislation allows the state to act as the surrogate parent for one who is incapable of acting for himself or herself, usually a child or a mentally incompetent person.¹¹⁷ Thus, it involves a much narrower and more debatable exercise of state authority than does the general police power. In terms of our paradigm, an example of *parens patriae* legislation would be a statute

110. See, e.g., *Spence v. Durham*, 283 N.C. 671, 198 S.E.2d 537 (1973), cert. denied sub nom., *Spence v. Spence*, 415 U.S. 918 (1974); *People v. Brown*, 49 Mich. App. 358, 212 N.W.2d 55 (1973); *A. v. A.*, 15 Or. App. 353, 514 P.2d 358 (1973).

111. 17 Edw. 2, c. 9-10 (1324).

112. Compare S. BRAKEL & R. ROCK, *THE MENTALLY DISABLED AND THE LAW* 2 (1971) (citing the statute as 17 Edw. 1, c. 9 and giving its date between 1255 and 1290) with *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1207 n.40 (1974) (citing the statute as in note 111 supra) [hereinafter cited as *Developments*].

113. See *Eyre v. Countess of Shaftesbury*, 24 Eng. Rep. 659 (1725) (father's duty is paramount, so custody of infant Earl of Shaftesbury given to guardian named in father's will over mother, considered guardian only by nature and nurture); *Beverley's Case*, 4 Co. 123b, 76 Eng. Rep. 1118 (K.B. 1603); 3 W. BLACKSTONE, *COMMENTARIES** 426-27 (10th ed. 1787); S. BRAKEL & R. ROCK, supra note 112 at 1-b; *Hafen*, supra note 109, at 617 n.34; 44 BROOKLYN L. REV. 63, 69 (1977); 6 LINCOLN L. REV. 65, 66 (1970).

114. See 6 LINCOLN L. REV. 65, 67 (1970). See generally, *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972). For historical discussion of *parens patriae* for mental incompetents in the United States, see *In re Oakes*, 8 Law Rep. 122 (Mass. 1845); S. BRAKEL & R. ROCK, supra note 112; G. GROB, *MENTAL INSTITUTIONS IN AMERICA* 4 (1973); *Developments*, supra note 112, at 1209.

115. Some courts have ruled that the federal government does not possess *parens patriae* power, at least with respect to civil commitment. See, e.g., *Pigg v. Patterson*, 370 F.2d 101 (10th Cir. 1966); *Wells v. Attorney Gen.*, 201 F.2d 556 (10th Cir. 1953); *Higgins v. United States*, 205 F.2d 650 (9th Cir. 1953).

116. See, e.g., *United States v. Greene*, 497 F.2d 1068, 1087 n.1 (7th Cir. 1974) (Stevens, J., dissenting), and cases cited in note 115 supra.

117. "When the state acts under its *parens patriae* power, it is seeking to protect a citizen from abuse or harm which he is unable to avoid by himself." 48 U. COLO. L. REV. 235, 242 (1977). See also *O'Connor v. Donaldson*, 422 U.S. 563, 574 n.9 (1975).

that restricted the freedom of *A* (a competent adult) to contract with *B* (a minor) for the sale of a car or a bottle of brandy, *even if B wanted to make the purchase* because *B* must be protected from *A*'s possible exploitation. The emphasized language shows the paternalistic effects of *parens patriae* which are not present in ordinary police power regulations. *B*'s freedom of action as well as *A*'s is restricted for the purpose of protecting *B* from the excesses of his own immature faculties.¹¹⁸ In short, because of *B*'s status, his or her freedom to purchase, contract or otherwise act is restricted due to the presumption that certain activities, although not harmful to sane adults, might be harmful to *B*.

Parens patriae power has been exercised to prevent physical, psychological or social harms to (or to provide benefits for)¹¹⁹ children of incompetents. Physical *parens patriae* legislation would

118. The real focus of the regulation is on *B* as a *willing* victim. This differs from police power regulations which seek to prevent *B* from being injured by the noxious fumes from *A*'s factory against *B*'s will. Here, in order to make paternalistic protection of *B* effective, *A*'s liberty must also be restricted. Compare Dworkin, *supra* note 26, at 111, with Bayles, *Criminal Paternalism* in *THE LIMITS OF LAW* 174, 176-77 (Pennock & Chapman eds. 1974). For a discussion that distinguishes *parens patriae* regulation of *A*'s conduct from redistributive regulation of *A*'s conduct, see notes 150-55 and accompanying text *infra*.

119. My categorization, which depends upon the type of harm prevented, is not the only one. Some authors have found it useful to separate *parens patriae* (or legal paternalism) aimed at preventing harm from that aimed at providing benefits. Bayles defines positive and negative paternalism as follows:

Positive paternalism seeks to benefit or promote the welfare of an actor, for example, by requiring people to purchase retirement annuities through Social Security or to have blood transfusions. The point is that a person be better off after performing or omitting an action than he was before. Negative paternalism seeks to prevent injury to actors, for example, to prevent their committing suicide or becoming drug addicts. The purpose is not to increase the actor's well-being, but to prevent its diminution.

Bayles, *supra* note 118, at 176. His further distinction between strong and weak versions of paternalism is discussed in note 173 and the accompanying text *infra*. In general, physical and psychological *parens patriae* can be said to prevent self-injury, thus overlapping Bayles' negative paternalism category, but this is not always the case. For example, a law that required everyone to perform physical exercises every day or to obtain a certain amount of sleep every night would be a type of physical paternalism directed at benefit (Bayles' positive paternalism) rather than prevention of injury. Likewise, social *parens patriae* laws can be cast in terms of either prevention of injury or benefit.

The major difficulty with the positive-negative distinction is that the positive paternalism category ("benefit" to the coerced) tends to combine aspects of paternalism and redistribution. For example, in the above quotation, Bayles gives social security payments as an illustration of positive paternalism. I would treat them as a form of redistribution.

Feinberg also uses prevention-benefit in his categorization of liberty-limiting principles. He defines "legal paternalism" as a principle that attempts to prevent harm to the actor and "extreme paternalism" as one that seeks to benefit the actor. He has a category similar to my redistribution principle, see notes 65-67 *supra*, which he calls the "welfare principle"—seeking to benefit others. Feinberg, *Harmless Immoralities and Offensive Nuisances*, in *ISSUES IN LAW AND MORALITY* 83-84 (Care & Trelogan eds. 1973).

include statutes that permit social workers and family courts to intervene between parents and children in order to prevent what they define as "neglect," irrespective of the child's actual views on the subject,¹²⁰ and court decisions that require a child to accept blood transfusions in order to preserve life or health, despite objections by the parent and child.¹²¹ Laws that permit the involuntary civil commitment of a person who is not dangerous to others,¹²² but may be dangerous to himself, also fall into this category.¹²³

Laws against sexual intercourse with young children represent exercises of psychological *parens patriae*. They seek to prevent the mental and emotional problems that might be created by premature introduction to sexual experiences and exploitation of a child who is nominally "willing."¹²⁴ Those who believe that obscene material is harmful to the minds of its self-chosen readers or viewers¹²⁵ might

120. See, e.g., Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887 (1975); Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975).

121. See notes 247-53 and accompanying text *infra*.

122. If he or she were dangerous to others, the commitment would be on police power grounds, see notes 56-64 and accompanying text *supra*, and he or she would be entitled to full due process protections of counsel and a hearing.

123. The modern trend is to require that both the need for treatment (or protection) and incapacity to decide upon appropriate treatment be established through a hearing that involves adequate procedural protections. See, e.g., *O'Connor v. Donaldson*, 422 U.S. 563, 583 (1975) (Burger, C.J., concurring); *United States ex rel. Stachulak v. Coughlin*, 520 F.2d 931 (7th Cir. 1975), *cert. denied*, 424 U.S. 947 (1976); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); *Suzuki v. Quisenberry*, 411 F. Supp. 1113 (D. Hawaii 1976); *Coll v. Hyland*, 411 F. Supp. 905 (D.N.J. 1976); *Bartley v. Kremens*, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated*, 431 U.S. 119 (1976); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974), *on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 421 U.S. 957 (1975), *on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976); Zander, *Civil Commitment in Wisconsin: The Impact of Lessard v. Schmidt*, 1976 WIS. L. REV. 503; 52 NOTRE DAME LAW. 136 (1976).

124. B. MITCHELL, *LAW, MORALITY AND RELIGION IN A SECULAR SOCIETY* 57-58 (1967); cf. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 703 (1977) (Powell, J., concurring in part, concurring in the judgment). The rationale for restricting the sexual activities of adolescents is usually more social than psychological. See note 127 and accompanying text *infra*.

125. Because it deferred to the power of state legislatures to make "unprovable assumptions," *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 109 n.27 (1973), upheld obscenity regulation on a police power basis, simply ignoring the great wealth of empirical research that has found no causal connection between obscenity and sexual or other crimes:

In sum, empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults. The Commission cannot conclude that exposure to erotic materials is a factor in the causation of sex crime or sex delinquency.

Report of the President's Commission on Obscenity and Pornography 27 (1970), quoted in *Paris Adult Theater I*, at 108 n.26 (Brennan, J., dissenting). See also Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963).

argue that material that is not considered obscene for adults should be banned for minors on a *parens patriae* rationale.¹²⁶

The third type of *parens patriae* restricts liberty in order to protect against (or to promote benefit of) a social type. For example, students below a certain age may not quit school, children may not drink alcohol and adolescents may not consent to sexual intercourse. In all three examples, young persons are prevented by the law from forming patterns of conduct that would cause them harm in the future. They would be unhappy in the future because society frowns upon ignorance, sloth, drunkenness and promiscuity. *Parens patriae* regulations of the social variety are subject to severe abuse because the "harm" to be prevented is somewhat intangible and is socially mandated; that is, it is the direct result of social norms and pressures. Thus, a society that is intolerant of deviance could use *parens patriae* of the social variety to justify severe restrictions upon minors.¹²⁷

Similarly, the juvenile justice system was intended to limit the legal consequences of actions that are harmful to others when the actor is an immature person who may not comprehend the full significance of his offense.¹²⁸ For much the same reason, many states make it more difficult to prove that a minor is contributorily negligent or assumes a particular risk than is true in the case of an adult plaintiff.¹²⁹ Other examples of the social type of *parens patriae* are compulsory education, said to promote the development of the stu-

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

127. See B. MITCHELL, *supra* note 124, at 56-57; 7 HARV. C.R.-C.L. L. REV. 393, 408-09 (1972). The following summary of testimony from a child psychiatrist illustrates how far social *parens patriae* reasoning can be carried even in our own society:

For the population of children with bisexual tendencies, estimated at about 3%, it [adolescence] is a period of decision or choice. Convinced that a known homosexual teacher might serve as a model for such children, Dr. Lourie suggested that the removal of plaintiff [a gay teacher] would result in *freer choice*. An awareness that homosexuality may specifically cause mental and emotional problems in a culture which stigmatizes it underlies this assumption, and that of most experts, that prevention of homosexuality is a worthwhile goal.

Acanfora v. Board of Educ., 359 F. Supp. 843, 847 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir. 1974), *cert. denied*, 419 U.S. 836 (1974) (emphasis added).

The psychiatrist's use of the term "freer choice" in the second sentence seems rather strange, since he is really arguing for a limitation of adolescent (and teacher) freedom. In the third sentence, he attempts to justify this limitation of liberty by social *parens patriae*.

128. Hafen, *supra* note 109, at 646. It should be noted that juvenile justice statutes cover not only the matters dealt with by police power criminal statutes for adult offenders, but also certain special "status offenses" that apply only to juveniles. For a discussion of the changes in the juvenile justice system wrought by the judicial acceptance of constitutional rights for juveniles, see notes 232-43 and accompanying text *infra*.

129. See, e.g., *King v. Lennen*, 53 Cal. 2d 340, 348 P.2d 98, 1 Cal. Rptr. 665 (1959). See generally RESTATEMENT OF TORTS, § 339 (1966).

dent's ability to assume responsibility in the future,¹³⁰ and civil commitment, when used to provide treatment that will allow the mental patient to reenter society.¹³¹

2. THE FAMILY AND PARENS PATRIAE

The family may play two very different roles in legislative and judicial decisions about the exercise of *parens patriae* power. First, as noted above,¹³² *parens patriae* power has been exercised only to protect an individual where his natural parents or guardians cannot protect him or her, *i.e.*, the family has the first responsibility.¹³³ This has recently been acknowledged by the Supreme Court in the context of civil commitment.¹³⁴

The second type of family involvement is where a child needs state intervention in the form of *parens patriae*, not to protect the child from societal abuse, but from abuse or neglect by his or her parents. In *Wisconsin v. Yoder*,¹³⁵ the Supreme Court ruled that state intervention against parental wishes is only appropriate to prevent a substantial threat to "the physical or mental health of the child or to the public safety, peace, order, or welfare"¹³⁶ Thus, social *parens patriae* is not deemed an appropriate basis for overriding parental decisionmaking. Even with respect to intervention to prevent physical harm, many authors have suggested a very strict definition of child abuse so as to reduce state intervention based on "a contradictory assortment of socio-psychological theories, class prejudices, and subjective evaluation."¹³⁷ These authors argue that

130. Some extreme libertarians would also argue that the mandatory school laws are inappropriate exercises of *parens patriae*. See I. ILLICH, *DE SCHOOLING SOCIETY* (1971).

131. Commentators and courts have rightly criticized the so-called "new *parens patriae*" espoused by the Fifth Circuit in *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), and by various psychiatrists, which would make the availability of treatment alone a justifiable basis for involuntary commitment. See, *e.g.*, *O'Connor v. Donaldson*, 422 U.S. 563, 583-84 (1975) (Burger, C.J., concurring); DuBois, *Of the Parens Patriae Commitment Power and Drug Treatment of Schizophrenia: Do the Benefits to the Patient Justify Involuntary Treatment?* 60 MINN. L. REV. 1149 (1976).

Whether there is, or should be, a right to receive treatment is beyond the scope of this article.

132. See notes 111-14 and accompanying text *supra*.

133. S. BRAKEL & R. ROCK, *supra* note 112; G. GROB, *supra* note 114; 6 LINCOLN L. REV. 65, 67 (1970). Thus, the custody power of the state is solely a derivative one. See 44 BROOKLYN L. REV. 63, 69, 75 (1977) and the sources cited therein.

134. *O'Connor v. Donaldson*, 422 U.S. 563, 575 n.9 (1975).

135. 406 U.S. 205 (1972).

136. *Id.* at 230.

137. 44 BROOKLYN L. REV. 63, 64 (1977). Compare *id.* with Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 29-32 (1978) (Judge Friendly's attack on improper use of sociological data by appellate courts).

such intervention disrupts the family relationship only to place the child in an institution that may be worse than all but the most extreme family situations.¹³⁸

On the other hand, some courts have held, as a corollary to the *parens patriae* power, that a parent *qua* patient may not forego treatment that would prevent his or her death. The clearest statement of this position is the opinion of Judge J. Skelly Wright in *Application of President and Directors of Georgetown College, Inc.*:¹³⁹

The patient, 25 years old, was the mother of a seven-month-old child. The state, as *parens patriae*, will not allow this most ultimate of voluntary abandonments [the parent's refusal of a life-saving blood transfusion]. The patient had a responsibility to the community to care for the infant. Thus, the people had an interest in preserving the life of the mother.¹⁴⁰

Both *Georgetown College* and the cases that have followed it¹⁴¹ seem to identify two distinct state interests that would be promoted if life-saving treatment were forced upon an unwilling parent—emotional and psychological benefit for the children and prevention of the economic burden involved in public support of the surviving children.¹⁴²

While promotion of the emotional well-being of children is certainly a laudable goal, it is too speculative an interest to override a competent adult's claimed fundamental right to refuse treatment. How much more emotional support the particular parent would provide after recovery from the unwanted operation, than could be provided by a surviving parent or relative, is a difficult inquiry for a judge to conduct.¹⁴³ Indeed, it is the one type of inquiry that Justice Rehnquist¹⁴⁴ and Professor Tribe¹⁴⁵ agree is inappropriate for the courts to make.¹⁴⁶

138. See sources cited in note 120 and accompanying text *supra*.

139. 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964).

140. *Id.* at 1008.

141. *United States v. George*, 239 F. Supp. 752 (D. Conn. 1965) (blood transfusion ordered for a Jehovah's Witness who was father of four); *Powell v. Columbia-Presbyterian Med. Cntr.*, 49 Misc. 2d 215, 267 N.Y.S. 2d 450 (Sup. Ct. 1965) (transfusion ordered for mother of six).

142. Cantor, *A Patient's Decision to Decline Life-Saving Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228, 251-54 (1973).

143. *Id.* at 252-54.

144. Rehnquist, *supra* note 1, at 8-9.

145. Tribe, *supra* note 3, at 49-50, 57.

146. Moreover, if the courts were to accept prevention of emotional injury as a sufficient basis for overriding fundamental parental choices, several other decisions that affect children, such as divorce and voluntary adoption, could also theoretically be restricted by the state.

While the danger that surviving children will have to be supported by the state cannot be refuted simply on the basis of judicial competence, it can be answered by a substantive libertarian argument that such a state economic interest is insufficient to override what many view as a fundamental right to refuse treatment.¹⁴⁷ The possible effect upon public revenue would be *de minimis*, because it is highly unlikely that a parent would refuse life-saving (or disability-preventing)¹⁴⁸ treatment unless the refusal were motivated by a religious or other conscientious motive.¹⁴⁹

3. INDIVIDUAL OPPOSITION TO PARENS PATRIAE POWER

The tension between individual constitutional rights and state exercises of *parens patriae* power can be seen in two recent developments. First, many of the persons who were the supposed beneficiaries of *parens patriae* legislation have begun to assert individual constitutional rights, contending that the alleged "benefits" and "protections" cause harm. Women have achieved substantial judicial recognition of their individual rights in opposition to various forms of social *parens patriae* legislation,¹⁵⁰ but juveniles have had more limited successes.¹⁵¹ Many statutes that used gender as a fac-

147. Harm to the public fisc is also one of the asserted justifications for statutory restrictions on engaging in dangerous activities, such as riding a motorcycle without a helmet, and one that has been rejected by courts and commentators, including the present author, who take a libertarian approach to the issue. See note 159 *infra*. It might be argued that the probability that surviving dependents will become public charges is much greater in a treatment-refusal case than in a dangerous-activity case. In the latter, the motorcyclist (and any dependents he or she might have) will require state support only if an accident does occur and head injuries result that are so serious as to cause permanent disability or death. In a treatment-refusal case the probability of death or permanent injury can usually be more easily calculated in advance. The likelihood of public dependency, however, will still vary from case to case, depending upon the ability of a surviving parent or relative or of accumulated savings to provide the necessary economic support for the surviving children. See *In re Osborne*, 294 A.2d 372 (D.C. 1972) (patient permitted to refuse treatment where adequate provision had been made for surviving children).

148. The danger that economic dependency will result if a parent refuses life-saving treatment could also apply to the case of a nonparent who refuses treatment that would prevent permanent physical or mental disability.

149. Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 *FORDHAM L. REV.* 1, 25-26 (1975); Cantor, *supra* note 142, at 254. See generally *In re Brooks Estate*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965) (patient permitted to refuse treatment where husband and adult children consented). *Brooks* appears to be the trend of the law. See Byrn, *supra*, at 35-36.

150. See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973). But see *Kahn v. Shevin*, 416 U.S. 351 (1974); *Hoyt v. Florida*, 368 U.S. 57 (1961).

151. See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), and cases cited in notes 232-33 *supra*. But see *Ingraham v. Wright*, 429 U.S. 975 (1977); *Bellotti v. Baird*, 428 U.S. 132 (1976).

tor in determining legal rights, especially in the employment area, have been defended against equal protection attacks as benign favors for women, *i.e.* paternalistic protections and benefits.¹⁵² Feminists now argue that the real effect of this legislation has been to protect men's jobs and to quarter women off. That is, they view the legislation as a form of redistribution¹⁵³ toward men and away from women. In considering the tension between such legislation and the rights of women, Justice Brennan has acknowledged: "[T]here can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage."¹⁵⁴ In a similar vein, one author argues that "[t]he *parens patriae* power of the state has been the primary obstacle to recognizing children as 'persons' within the meaning of the Bill of Rights."¹⁵⁵

A contrary development is the attempt by legislatures and courts to extend the *parens patriae* power to cover sane adults who make what appear to be irrational decisions that may result in injury to their minds or bodies. Some theorists have attempted to justify this under the rubric of "legal paternalism." Professor Hart appears to be the first significant jurisprudential figure in the twentieth century to accept legal paternalism as a legitimate liberty-limiting principle. He shares Mill's repugnance for state restrictions upon personal activities that cause no definite or discernible harm, but he added during his debate with Lord Devlin, that an activity may be restricted if it causes harm to the actor himself.

E. *Legal Paternalism—State Restrictions to Protect Sane Adults from Themselves*

At the outset, it is necessary to understand the context in which legal paternalism was introduced into the discussion by Professor Hart. First, Lord Devlin pointed out that the criminal law has never admitted the consent of the victim as a defense, except for certain limited exceptions such as rape. He concluded: "There is only one explanation . . . [T]here are certain standards of behaviour or

152. See, *e.g.*, *Geosaert v. Cleary*, 335 U.S. 464 (1948) (sustaining a statute that provided that a woman could not obtain a bartender's license unless she were the wife or daughter of a male owner of licensed establishment); *Muller v. Oregon*, 208 U.S. 412 (1908) (sustaining a law that limited the number of hours women could be employed in factories or laundries, at a time when such legislation "could not be sustained for men").

153. See notes 65-67 and accompanying text *supra*.

154. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion); *accord*, *Weinberger v. Wisenfeld*, 420 U.S. 636 (1975). *But see* *Hoyt v. Florida*, 368 U.S. 57, 61-62 (1961).

155. 48 *Colo. L. Rev.* 235, 265 (1977).

moral principles which society requires to be observed."¹⁵⁶ Professor Hart retorted that the law has a paternalistic policy of protecting people against themselves, and he criticized Lord Devlin for not recognizing this fact.¹⁵⁷ He pointed to criminal laws against suicide, euthanasia¹⁵⁸ and masochism as illustrations. Laws forbidding motorcycle riding without a crash helmet,¹⁵⁹ drugs that cause psychol-

156. P. DEVLIN, *supra* note 70, at 6-7.

157. H.L.A. HART, *supra* note 69, at 30-31. He adds: "[T]he wane of laissez faire since Mill's day is one of the commonplaces of social history, and instances of paternalism now abound in our law, criminal and civil." *Id.* at 32.

158. For a detailed discussion of euthanasia and suicide, see notes 244-46 and accompanying text *infra*.

159. Motorcycle helmet laws have generated a substantial amount of litigation. Several courts have upheld the statutes as valid exercises of the police power. They perceived, despite the lack of evidence, a danger to public safety if a motorcyclist failed to wear a helmet. *See, e.g.,* Kingery v. Chapple, 504 P.2d 831 (Alas. 1972); State v. Also, 11 Ariz. App. 227, 229, 463 P.2d 122, 124 (1969); State v. Mele, 103 N.J. Super. 353, 247 A.2d 176 (1968); People v. Brilmeyer, 54 Misc. 2d 466, 282 N.Y.S.2d 797 (City Ct. 1967). Other courts, recognizing the lack of evidence of any direct effect, have nevertheless ruled that the statutes are valid because the cost of medical treatment for an injured cyclist and/or care for surviving families may ultimately fall upon the public. *See, e.g.,* Love v. Bell, 171 Colo. 27, 465 P.2d 118 (1970); State v. Lee, 51 Haw. 516, 521, 465 P.2d 573, 577 (1970); People v. Newhouse, 55 Misc. 2d 1064, 1065-66, 287 N.Y.S.2d 713, 715 (Ithaca City Ct. 1968); State v. Anderson, 3 N.C. App. 124, 127, 164 S.E.2d 48, 51 (1968), *aff'd*, 275 N.C. 168, 166 S.E.2d 49 (1969); *cf.* Ad Lim v. Territory, 1 Wash. 156, 24 P. 588 (1890) (upholding statute outlawing opium smoking and inhaling because of danger users would become public charges).

Surprisingly, Professor Tribe also takes this "indirect effects" argument seriously:

It is not only another's heart strings but also his pocketbook at which the self-mutilator tugs in the post-National Health insurance world. Thus the account of liberty generally associated with John Stuart Mill has become decreasingly useful for the definition of constitutional constraints and obligations in the modern state.

L. TRIBE, *supra* note 3, at 890.

Several courts have, however, shown that this argument, carried to its logical extreme, would justify almost any legislative regulation in a complex society:

If this argument were to decide questions such as presented by this [motorcycle helmet] case, then [a] hypothetical statute requiring people to go to bed early to preserve their health and productivity would be valid. But such an argument does not decide the question but merely poses one factor to be considered with other factors.

People v. Carmichael, 53 Misc. 2d 584, 588, 279 N.Y.S.2d 272, 277 (Ct. Spec. Sess. 1967), *rev'd*, 56 Misc. 2d 388, 288 N.Y.S.2d 931 (Genesee County Ct. 1968). A Michigan court made the same point in striking down a mandatory motorcycle helmet statute: "The Attorney General further contends that the State has an interest in the 'viability' of its citizens and can legislate to keep them healthy and self-supporting. This logic would lead to unlimited paternalism." American Motorcycle Ass'n v. Davis, 11 Mich. App. 351, 158 N.W. 2d 72, 75 (1968). *See also* People v. Fries, 42 Ill. 2d 446, 450, 250 N.E.2d 149, 151 (1969) (matter of personal safety not sufficient ground for exercise of police power); State v. Betts, 21 Ohio Misc. 175, 184, 252 N.E.2d 866, 872 (1969) ("Included in man's 'liberty' is the freedom to be foolish, foolhardy or reckless as he may wish, so long as others are not endangered thereby.").

A responsible libertarian position would be to oppose mandatory helmet laws as violations of individual liberty in the "self-regarding" sphere, but to take account of the indirect economic effects by accepting the failure to use a helmet as a valid ground both for reducing

ogical harm to their users¹⁶⁰ and abortions outside a hospital¹⁶¹ might be added. Lord Devlin aptly rebutted: "What, alas, I did not foresee was that some of the crew who sail under Mill's flag of liberty would mutiny and run paternalism up the mast."¹⁶² Professor Hart himself admitted that "Mill no doubt might have protested against a paternalistic policy . . . nearly as much as he protested against laws used . . . to enforce positive morality."¹⁶³ Lord Devlin was a bit stronger, arguing that "[t]his tears the heart out of . . . [Mill's] doctrine."¹⁶⁴ The main concern here, of course, is not Professor Hart's lack of loyalty to Mill, but rather the asserted justifications for and parameters of legal paternalism.

Paternalism can be defined as "the (coercive) interference with a person's liberty of action justified by (protective or beneficent) reasons referring exclusively to the welfare, good, happiness, needs, interest or values of the person being coerced."¹⁶⁵ Professor Hart and other "modified libertarians" seek justifications for legal paternalism that rest upon the coerced's own values rather than a societal (or institutional) justification for limiting liberty, such as that employed by Lord Devlin in his organic view of society.¹⁶⁶ Although he

an injured plaintiff's recovery and for imposing increased insurance premiums. For further discussion of motorcycle helmet laws, see 67 MICH. L. REV. 360 (1968); 30 OHIO ST. L.J. 355 (1969); 26 WASH. & LEE L. REV. 112 (1969); 85 YALE L.J. 826 (1976).

160. If it could be clearly proven that a particular drug consistently led to serious antisocial behavior, it could be outlawed under the police power to protect others. Cf. MILL, *supra* note 24, at 343 (acknowledging that drunkenness continually leading to crime can be punished by the state). If, however, the drug caused physical degeneration of its users, physical paternalism would be needed to justify prohibition. For a discussion of constitutional attacks upon laws against possession of marijuana, see Hindes, *supra* note 28, at 345-52.

161. After *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973), such restrictions can only be imposed after the first trimester of pregnancy.

162. P. DEVLIN, *supra* note 70, at 132.

163. H.L.A. HART, *supra* note 69, at 31.

164. P. DEVLIN, *supra* note 70, at 132. He may be correct, as can be seen by considering Mill's oft-quoted central tenet:

[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. *His own good, either physical or moral, is not a sufficient warrant.* He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.

Mill, *supra* note 24, at 263 (emphasis added). This language makes it clear that John Stuart Mill opposed nearly all state interferences in the self-regarding area, be they moralistic or paternalistic, though Hart may be correct that Mill did differentiate the two types of liberty limitations. See H.L.A. HART, *supra* note 69, at 31-32.

165. This is the definition developed by Gerald Dworkin, *supra* note 26, at 108 and modified, by the addition of the parentheticals, by Beauchamp, *Paternalism and Biobehavioral Control*, 60 MONIST 62, 67 (1977).

166. Devlin argues that there is no conceptual difference between criminal laws based upon physical (or legal) paternalism and the legal enforcement of conventional morality. He

did not spell out his position fully,¹⁶⁷ Professor Hart's justification for preventing sane adults from harming themselves physically seems to be a desire to preserve the individual's ability to make future choices. Some authors find support for the notion that paternalistic restrictions upon the liberty of sane adults are actually "freedom-maximizing" in Mill's own argument against slavery contracts¹⁶⁸ and by analogy to the notions beyond *parens patriae* regulations of children and incompetents.¹⁶⁹ They further contend that the "stable preferences" of an individual are not always "iden-

contends that a moral law, *i.e.* a "public morality," is a necessity for any type of paternalism, so that the society (and its lawmakers) can have a common basis for determining what is and what is not for a citizen's "own good." P. DEVLIN, *supra* note 70, at 136.

167. The footnotes to *Law, Liberty and Morality* contain some responses to Devlin's other criticisms, but nothing new on physical paternalism. See H.L.A. HART, *supra* note 69.

168. See Mill, *supra* note 24, at 348. Professor Regan attempts to go one step further: Now if Mill is right about this—if the principle of freedom does not require that a man should be free to destroy his freedom completely—it seems that the principle of freedom also does not require that a man should be free to destroy his freedom partially.

Regan, *Justifications for Paternalism*, in *THE LIMITS OF LAW* 189, 193 (Pennock & Chapman eds. 1974). He argues that this "freedom-maximizing" paternalism is a justifiable basis for laws that forbid cigarette smoking and require the wearing of seat belts. *Id.* at 193-94. See generally Dworkin, *supra* note 26. But see Professor Beauchamp's argument that the real justification for forbidding slavery contracts is not paternalistic, but is the potential for third party harms:

We do not allow [an individual] to barter himself because to do so would be to legalize an institution virtually certain to produce unpoliceable injuries. If all men were . . . like Kant's holy will, we might have no qualms about the institutionalization of slavery. But all men are *not* Some have severely restricted sympathies toward their fellow men; and we know that slavery at their hands would be inherently exploitative. Nor is it likely an exploitative arrangement could be distinguished from a free contract by some sort of voluntariness test. We refuse to legalize slavery, then, not for paternalistic reasons, and not because slavery agreements are in principle objectionable, but rather because we wish to prevent the injuries some will visit on others [W]e are justified in more than merely temporary intervention because of the need to protect *non-consenting* individuals who would be harmed by the institution.

Beauchamp, *supra* note 165, at 74.

169. See notes 119-23 and accompanying text *supra*. After observing that the law treats some persons as incapable of performing certain acts, Professor Sartorius goes on to argue: Clearly they are not ad hoc [exceptions to the principle of freedom], but are rather all instances of kinds of persons whose capacity to make choices which will lead to the satisfaction of their actual needs and desires is limited or not fully developed. In such instances, the utilitarian can justify interference in terms of either the individual's existing needs and desires as the individual himself perceives them, or else in terms of needs and desires which it can with great plausibility be argued that the individual will eventually come to recognize. Thus the familiar, but cogent, argument for compulsory education. But if such is the principle upon which such exceptions may be based, it would appear that it would license other forms of interference as well.

Sartorius, *supra* note 28, at 905.

tical with [his or her] choice behavior, and may consistently be argued to be out of kilter with it in specific instances."¹⁷⁰

Those who accept these justifications¹⁷¹ would favor legal restrictions upon an individual's choice to engage in activities that entail a substantial likelihood of severe self-harm,¹⁷² not only in those situations in which the actor is under duress, ignorance or legal incapacity,¹⁷³ but also where the individual has not adequately

170. *Id.*

171. Another attempted justification for legal paternalism, which purports to be faithful to Mill's third-party harms approach, also deserves a brief discussion here. It is first presented in Regan, *supra* note 168, and is further developed in 85 YALE L.J. 826 (1976) in the context of motorcycle helmet laws. Both authors rely upon Parfit's notion that an individual is composed of several different identities, one at each time segment. Parfit, *On "The Importance of Self Identity,"* 68 J. PHIL. 683 (1971); Parfit, *Later Selves and Moral Principles* in PHILOSOPHY AND PERSONAL RELATIONS 137 (A. Montefiore ed. 1973). Thus, the choice of one individual, for example to ride a motorcycle without a helmet, should not be binding upon another individual, the more prudent, post-crash motorcyclist. The original cyclist can be coerced to prevent harm to his future self—a person who is different in a relevant respect, he is no longer the sort of person who would ignore his future well-being for the sake of a small increment of present utility. Regan, *supra* note 168, at 203-05. This approach, if consistently applied, would raise a myriad of legal and philosophical problems. For example, it would not permit a person to make a contract for a future *intervivos* transfer of his property, because his future self may not choose the same disposition. Moreover, such a fluid concept could be used to justify extreme state restrictions upon virtually every form of conduct that has future consequences, but it cannot provide a basis for intervention to prevent suicide (because there would be no future self to be protected from the individual's current self-destructive act).

172. Gerald Dworkin suggests that the probability of self-harm should be balanced against its potential magnitude, in order to determine where the state should intervene in its paternalistic capacity. Dworkin, *supra* note 26. This calculus is not unknown in other parts of the law. See *Dennis v. United States*, 341 U.S. 494 (1951) (limitations upon freedom of speech); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (securities regulation). For magnitude, the relevant questions are: (1) whether the damage is intense and (2) whether the damage is irreversible (such as cutting off a finger). If both questions are answered in the negative, then a greater risk may be taken by the individual before state interference becomes necessary. With respect to the probability factor, the inquiry is: What is the likelihood that engaging in the particular activity will lead to harm? For example, will swimming on an unguarded beach often lead to drowning or will driving at 80 miles an hour frequently lead to accidents? The answer to both questions depends largely upon who the swimmer or driver is. If a skin diver is doing salvage work off a deserted beach or a driver is preparing for a future race on the Indianapolis 500 race track, the probability of harm is less than if a novice were engaging in the same activity. Hence, a professional-amateur distinction is a necessary part of the probability factor, since fewer safety restrictions need to be placed upon the professional.

173. While Feinberg calls intervention in these situations a form of "weak paternalism," even he is prepared to admit that it would not be paternalism in any interesting sense, because although the actor has given his consent, it is not informed consent. Feinberg, *supra* note 119, at 113. In these situations, a person is taking a risk that he does not know about. Like Mill's hypothetical of a man crossing an unsafe bridge, he does not need protection from himself but from some outside source. He should be detained and informed of the danger and then permitted to cross if he still so desires. The justification of this temporary intervention is referred to by Beauchamp as "Mill's Proviso" and is distinguished from legal paternalism. Beauchamp, *supra* note 165, at 67-68. See also Bayles, *supra* note 118, at 183. In other situations of incomplete information, even where another person rather than a natural danger

reflected on the results, has made "an incorrect weighing of values," or has pursued "transitory desires" because of "weakness of will."¹⁷⁴ The following passage summarizes this approach nicely:

If the members of the society are nearly unanimous that certain behavior is harmful to those who engage in it—"harm" being judged by standards accepted by the potential actors as well as others—and there is reason to believe that most people engage in the behavior only because temporary psychological aberration, extreme temptation, or a failure to consider probable consequences prevents a rational assessment of their long-term self-interest, then the state may properly try to prevent the behavior.¹⁷⁵

There are several reasons why these thoughtful attempts to justify paternalistic restrictions upon a sane adult's liberty to make "irrational decisions" should be rejected. First, it is rare in a pluralist society for people to be "nearly unanimous that certain behavior is harmful." Moreover, in a pluralistic society, it is nearly always problematic to determine an individual's "stable preferences." Thus, many persons who are restricted by paternalistic legislation "may not be choosing irrationally. They may simply have different values That is, fully rational persons with these different values would not think the consequences of the actions injurious or consent to the restrictions."¹⁷⁶ This argument is illustrated by the Jehovah's Witness who would rather die than accept a blood transfusion.¹⁷⁷ Also, other rational adults have value systems that accord great weight to engaging in high-risk activities, such as mountain climbing or white water canoeing.¹⁷⁸ Those with counter-cultural beliefs might also be making a rational decision, in terms of their value system, when they discount the risk of potential psychological harm caused by hallucinogenic drugs.¹⁷⁹ Thus, "voluntary actions of

is involved, Mill's proviso will again be appropriate. Thus, Gerald Dworkin points out that the truth in advertising legislation is not paternalistic at all, since the only consumer liberty being infringed is the "liberty" to apply for a loan without knowing the true rate of interest. Dworkin, *supra* note 26, at 110.

If the actor is a child or other person who generally lacks capacity to make decisions, state intervention would be on the basis of *parens patriae*, not legal paternalism.

174. The quoted phrases are taken from H.L.A. HART, *supra* note 69, at 33.

175. Greenawalt, *Criminal Law and Population Control*, 24 VAND. L. REV. 465, 470 n.21 (1971).

176. Bayles, *supra* note 118, at 181.

177. See notes 139-42 and accompanying text *supra*.

178. Regan acknowledges that "[s]uch people ought not necessarily to be restrained." Regan, *supra* note 168, at 200. He contends that the cigarette smoker has a much weaker claim, since one cannot build a lifestyle around smoking tobacco. The author suspects that many smokers, in the Humphrey Bogart or James Dean tradition, would disagree.

179. See note 31 *supra*.

rational, strong-willed people with uncommon values would be prohibited in order to compel people with ordinary values to do what they would do voluntarily if they were not weak-willed or irrational."¹⁸⁰ More generally, one author concludes that "paternalistic principles are too broad and hence justify too much."¹⁸¹ Particularly in total institutions, paternalism

gives prison wardens, psychosurgeons, and state officials a good reason for coercively using most any means in order to achieve ends they believe in the subject's best interest. It is demonstrable that allowing this latitude of judgment is dangerous and acutely uncontrollable. This is as true of Feinberg, Hart, and Dworkin's hard core cases in favor of paternalism as is it elsewhere.¹⁸²

This same risk of unlimited state intervention for the coerced's "own good" is also great even outside such institutions.¹⁸³

IV. STATE INTRUSIONS THAT DEFINE THE FAMILY RELATIONSHIP

With this analytic framework in mind, we turn to a series of cases developed by the Burger Court that evaluate state police power and *parens patriae* regulations that impact upon the family. A brief examination of Justice Rehnquist's opinions in these cases shows that he has consistently favored legislative authority over claims of family autonomy when the two come into conflict, and that his categorical deference to "family decisionmaking" may often result in state-sanctioned private oppression. These cases also show the limitations of libertarian philosophy when faced with a conflict between two sets of individual rights: husband versus wife or child versus parent.

At the threshold, state actions that define the membership composition of the family institution must be considered. They are restrictions upon marriage and divorce and upon those who will receive essential family benefits.

While the Supreme Court has often deferred to state government legislation in the field of domestic relations,¹⁸⁴ it has protected the right of adults to enter a monogamous marital relationship against unreasonable state barriers.¹⁸⁵ The principal case is *Loving*

180. Bayles, *supra* note 118, at 182.

181. Beauchamp, *supra* note 165, at 77.

182. *Id.* at 78.

183. *See id.*; Bayles, *supra* note 118; 14 U.C.L.A. L. Rev. 581 (1967).

184. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

185. The Court has, however, refused to interfere with state or federal restrictions on bigamous and polygamous marriages. For restrictions upon bigamous marriages imposed by state governments, see *Davis v. Beason*, 133 U.S. 333 (1890). For those imposed by the federal

v. Virginia,¹⁸⁶ holding that a state criminal anti-miscegenation law violated both the equal protection clause, because of its racial impact, and the due process clause, because "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."¹⁸⁷ More recently, *Zablocki v. Redhail*¹⁸⁸ ruled that a Wisconsin statute denying a marriage license on the basis of nonpayment (or inability to assure future payment) of previously incurred child support obligations violated the equal protection clause. The state asserted interests that can be characterized as social paternalism (counselling for the parent as to his responsibility), redistributive (reducing welfare dependency), and *parens patriae* (providing support for the children who were the product of the prior marriage or liaison). In finding these interests inadequate to justify the statute, the majority¹⁸⁹ relied upon the "fundamental importance of the right to marry,"¹⁹⁰ and the concurring opinions emphasized the effect of the statute upon indigents.¹⁹¹ It is noteworthy that Justice Rehnquist was the sole dissenter in the case, concluding that the statute was a "permissible exercise of the state's power to regulate family life and to assure the support of minor children."¹⁹² The opinion began:

I substantially agree with my Brother POWELL's reasons for rejecting the Court's conclusion that marriage is the sort of "fundamental right" which must invariably trigger the strictest judicial scrutiny. I disagree with his imposition of an "intermediate" standard of review . . . [and] with my Brother STEWART's conclusion that the statute is invalid for its failure to exempt those persons who "simply cannot afford to meet the statute's financial requirements." . . . I think that under the

government, see *Cleveland v. United States*, 329 U.S. 14 (1946); *Murphy v. Ramsey*, 114 U.S. 15 (1885); *Reynolds v. United States*, 98 U.S. 145 (1878). Such restrictions are likely to remain. See *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 68 n.15 (1973); H.L.A. HART, *supra* note 69, at 38-47; L. TRIBE, *supra* note 3, at 946 n.19A. Restrictions upon homosexual marriage, see, e.g., *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), are also likely to remain for the foreseeable future even should private homosexual conduct be decriminalized. See note 105 *supra*.

186. 388 U.S. 1 (1967).

187. *Id.* at 12.

188. 98 S. Ct. 673 (1978).

189. Only four justices joined directly in the opinion, but Justice Burger's concurring opinion reflected no qualification of any of the plurality's analysis.

190. 98 S. Ct. at 679-81.

191. Justices Stewart, Powell and Stevens relied upon these effects, and avoided the use of a strict scrutiny test for evaluating restrictions upon marriage. 98 S. Ct. at 683-86, 686-90, 690-94. See also *Califano v. Jobst*, 98 S. Ct. 95 (1977) (unanimously upholding a classification based upon marital status in the social security field).

192. 98 S. Ct. 673, 692 (1978) (Rehnquist, J., dissenting).

Equal Protection Clause the statute need pass only the "rational basis test," . . . and that under the Due Process Clause it need only be shown that it bears a rational relation to a constitutionally permissible objective.¹⁹³

In the area of divorce, the Court has generally deferred to the wide range of state systems, some allowing only marital misconduct as a ground and others making provisions for consensual dissolution. It has, however, ruled that divorce court filing fees deprived indigents of the right to equal protection by denying them the only effective means of resolving the dispute at hand.¹⁹⁴ On the other hand, the Court, per Justice Rehnquist, upheld a one-year residency requirement for Iowa divorce actions, emphasizing that its effect was not "total deprivation . . . but only delay."¹⁹⁵

In a number of cases involving illegitimate children, the Supreme Court has ruled that states will violate various constitutional rights of both parents and children if they unreasonably define "the family" so as to exclude biological progenitors or descendants where no marriage has taken place.¹⁹⁶ Justice Rehnquist vigorously resisted

193. *Id.* at 692. It is noteworthy that the woman that Redhail wanted to marry was pregnant at the time, 98 S. Ct. at 677. Thus, the statute not only impinged directly on the right to marry, it also contributed to the creation of a new family that would be outside the protection of the law. If Justice Rehnquist's approach to legislative restrictions upon illegitimates were to prevail, *see* notes 196-198 *infra*, this child would have no real rights against his or her parents. Hence, it is short-sighted to call this statute a "protection of children," when applied to the facts of the case before the Court. 98 S. Ct. at 692.

194. *Boddie v. Connecticut*, 401 U.S. 371 (1971). Later cases make it clear that strict scrutiny would apply to court filing fees only where the states government's monopolization of the only means of legal marriage dissolution was involved. *See Ortwein v. Schwab*, 410 U.S. 656 (1973) (filing fee for appeal from welfare agency upheld); *United States v. Kras*, 409 U.S. 434 (1973) (bankruptcy filing fee upheld).

195. *Sosna v. Iowa*, 419 U.S. 393, 410 (1975). Professor Tribe criticizes the quoted portion of the opinion for failure to recognize that "special judicial protection [should be triggered] the moment any penalty, even one conceded as not very severe, is occasioned by exercise of a right." L. TRIBE, *supra* note 3, at 1004-05. The infringed right was the right to travel, previously recognized in several Supreme Court cases. *See Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969). Professor Tribe adds: "It would indeed be an odd 'fundamental right' whose exercise government could penalize just a *bit* without any special justification." L. TRIBE, *supra* note 3, at 1005 n.18 (emphasis in original). Professor Shapiro is even more critical, arguing that the conceivable state justifications developed by the majority opinion of the "comprehensive nature" of divorce proceedings, the avoidance of "intermeddling" in the interests of other states, prevention of "divorce mill" status and protection of decrees from collateral attack are not sufficient to outweigh the individual interests. He concludes that "[d]evelopment by the courts of conceivable justifications for challenged legislation has itself been subject to criticism; requiring those who read an opinion to develop such justifications seems a serious abdication of judicial function." Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 315 (1976). *But see* Wilkinson & White, *supra* note 37, at 575.

196. *Stanley v. Illinois*, 405 U.S. 645 (1972) (equal protection and due process violation by denying unwed father custody without a hearing). A number of cases have held that

the most recent extension of this principle in a case striking down a portion of the Illinois Probate Act allowing children born out of wedlock to inherit by intestate succession only from their mothers.¹⁹⁷ He violently resisted the majority's attempt to act as "a school for legislators,"¹⁹⁸ basing his dissent upon what Professor Tribe has called the fallacy of "*undue modesty*."¹⁹⁹

*Moore v. City of East Cleveland*²⁰⁰ might be considered an extension of the principle in these illegitimacy cases that the state cannot unreasonably redefine the family's membership composition. *Moore* reviewed a zoning ordinance (passed under the city's police power) that restricted the residents of particular households in such a way that "a family" could not include a grandmother living with her two grandsons who were first cousins rather than brothers. The majority concluded that the ordinance unreasonably interfered with family autonomy, thereby placing stress upon an important societal institution.²⁰¹ Yet, Justice Rehnquist joined in a dissent with Justice Stewart that would have upheld this exercise of local governmental zoning power over the claims of family privacy and equal protection vindicated by the majority and concurring opinions.²⁰² Thus, unless Justice Rehnquist was speaking solely of the nuclear family, his concern about family unity comes second to his concern about furthering governmental authority.²⁰³

Justice Rehnquist again indicated his preference for state police power over family autonomy in *Carey v. Population Services International*.²⁰⁴ He dissented rather than follow Justice Powell who concurred on the ground that the restriction upon the sale of contraceptives to minors was unconstitutional because it "unjustifiably interfere[d] with parental interests in rearing their children."²⁰⁵ Also, if family autonomy were a serious concern, one might have expected Justice Rehnquist to join Justice Stewart's concurrence in

statutes that bar a mother from inheriting from her illegitimate child or bar the illegitimate from inheriting from his or her parents violate equal protection. See *Trimble v. Gordon*, 430 U.S. 762 (1977); *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968). But see *Labine v. Vincent*, 401 U.S. 532 (1971).

197. *Trimble v. Gordon*, 430 U.S. 762 (1977).

198. *Id.* at 777, (Rehnquist, J., dissenting). See also *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 177 (1972) (Rehnquist, J., dissenting).

199. Tribe, *supra* note 3, at 52.

200. 431 U.S. 494 (1977).

201. *Id.* at 498-500.

202. *Id.* at 531 (Stewart, J., dissenting).

203. See notes 5-7 and accompanying text *supra*.

204. 431 U.S. 678 (1977).

205. 431 U.S. at 707-08 (Powell, J., concurring). The statute made it a crime for "any person to sell or distribute any . . . article . . . for the prevention of conception to a minor under the age of sixteen years." 431 U.S. at 2014 n.1 (emphasis added).

Planned Parenthood of Central Missouri v. Danforth,²⁰⁶ rather than Justice White's partial dissent, since the former favored a parental consultation requirement similar to that discussed in *Bellotti v. Baird*²⁰⁷ prior to allowing a minor to consent to an abortion.

Despite his solicitous position with respect to the family in the de Hirsch Meyer Lecture, Justice Rehnquist's judicial opinions have found a rational basis for legislation that restricts the right to marry on the basis of wealth, restricts the ability to obtain a divorce, restricts the claims of illegitimates against the estates of their parents, restricts the membership of the family's home and interferes with parental decisions about child rearing.

V. POLICE POWER REGULATION OF ADULT SEXUAL CONDUCT

A. Regulation of Deviate Sexual Practices of Married Couples

Most criminal sodomy statutes apply not only to homosexuals, but to married, heterosexual couples as well.²⁰⁸ Prosecution of married persons for "deviate," consensual²⁰⁹ sexual practices performed in private²¹⁰ are, however, extremely rare.²¹¹ Such an application of sodomy statutes would appear to violate fundamental rights of marital privacy recognized by the *Griswold v. Connecticut*²¹² majority opinion,²¹³ the concurring opinion by Justice Goldberg,²¹⁴ and their

206. 428 U.S. 52, 89 (1976) (Stewart, J., concurring).

207. 428 U.S. 132 (1976).

208. See cases and statutes collected in 1977 B.Y.U. L. Rev. 152.

209. See *Towler v. Peyton*, 303 F. Supp. 581 (W.D. Va. 1969) (Virginia sodomy statute held constitutional as applied to husband who forced his wife to commit sodomy); cf. *Cotner v. Henry*, 394 F.2d 873, 876 (7th Cir.) (habeas petitioner's guilty plea to sodomy charge filed by wife vacated because he did not understand consent was defense required by right of marital privacy), cert. denied, 393 U.S. 847 (1968).

210. See *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir. 1976) (marital privacy defense to conviction of husband and wife of consensual sodomy deemed waived by admission of outsiders to marital intimacies); cf. *Raphael v. Hogan*, 305 F. Supp. 749 (S.D.N.Y. 1969) (application of sodomy statute to public acts on stage did not violate first amendment). For an interesting discussion of *Lovisi*, see *Wilkinson & White, supra* note 37, at 596-98.

211. *Buchanan v. Batchelor*, 308 F. Supp. 729, 731 (N.D. Tex. 1970), vacated and remanded sub nom., *Buchanan v. Wade*, 401 U.S. 989 (1971) ("There have been no prosecutions . . . of married persons for private acts of sodomy" in Texas); accord, *Dawson v. Vance*, 329 F. Supp. 1320, 1323 (S.D. Tex. 1971). See also W. BARNETT, *SEXUAL FREEDOM AND THE CONSTITUTION* 7 (1973); Project, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. Rev. 643, 689, 718 (1966).

212. 381 U.S. 479 (1965).

213. "We deal with a right of privacy older than the Bill of Rights . . . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Id.* at 486.

214. "The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected."

progeny.²¹⁵ Because of this potential application to consenting married couples, some courts have sustained attacks upon sodomy statutes that combine overbreadth, equal protection, and privacy claims.²¹⁶

B. Abortion Consent Requirements

Another form of state interference with sex-related activities of marital partners that has recently received attention is the statutory requirement that the consent of the husband be obtained before an abortion can be performed on his pregnant wife.²¹⁷ It is claimed that these laws differ from those that intervene in the marital bedroom, such as laws against sodomy and use of contraceptives,²¹⁸ because their purported purpose is to reinforce the marital relationship.²¹⁹ They appear to represent just the sort of subordination of individual interests to institutional authority that Justice Rehnquist advocated; that is, that the individual interest of the pregnant wife should not be vindicated, because to do so would disrupt the marital institution.²²⁰ As the majority in *Planned Parenthood of Central Missouri v. Danforth*²²¹ concluded in invalidating these spousal veto requirements,²²² such veto procedures do *not* ensure the strength of the marital or family institution.²²³ Indeed, placing a state-

Id. at 495 (Goldberg, J., concurring) (joined by Warren, C.J. & Brennan, J.). See also *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting).

215. See, e.g., *Zablocki v. Redhail*, 98 S. Ct. 673 (1978); *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (emphasizing the "basic position of the marriage relationship in this society's hierarchy of values"); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage is "fundamental to our very existence and survival").

216. See, e.g., *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976); *State v. Elliot*, 88 N.M. 187, 539 P.2d 207 (Ct. App. 1975), *rev'd* 89 N.M. 305, 551 P.2d 1352 (1976). But see *State v. Lair*, 62 N.J. 388, 301 A.2d 748 (1973). See generally Annot., 58 A.L.R.3d 636 (1974).

217. See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975), *aff'd*, 428 U.S. 901 (1976); *Wolfe v. Schroering*, 388 F. Supp. 631 (W.D. Ky. 1974); *Roe v. Rampton*, 366 F. Supp. 189 (D. Utah 1973), *aff'd*, 535 F.2d 1219 (10th Cir. 1976); Comment, *Abortion and the Husband's Consent*, 13 J. FAM. L. 311 (1974); 22 N.Y.L.F. 65 (1976).

218. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

219. This was the argument made by the State of Missouri in *Planned Parenthood v. Danforth*, 428 U.S. 52, 73-74 (1976). See generally articles cited in note 217 *supra*.

220. He does say that *Planned Parenthood v. Danforth*, 428 U.S. 52 (1977), and *Bellotti v. Baird*, 428 U.S. 132 (1977) are distinguishable from his central point, but he never explains why. Address by Justice Rehnquist, Third Annual Baron de Hirsch Meyer Lecture Series at 12 (Feb. 2, 1978) (transcript on file at the *University of Miami Law Review*).

221. 428 U.S. 52 (1977).

222. In striking down spousal veto and limiting parental veto requirements, *Danforth* merely explicated a "logical and anticipated corollary," 428 U.S. at 157, implicit in *Roe v. Wade*, 410 U.S. 113 (1973), that the abortion decision belongs to the pregnant woman in consultation with her physician and that, within the first trimester of pregnancy, no veto power rests in the hands of the husband or parent any more than in the hands of the state.

223. 428 U.S. at 71.

sanctioned absolute veto in the hands of a single institutional member will tend to weaken an institution such as the family, which is built upon trust and *mutual* affection.

At the same time, it should be noted that the libertarian model, which is useful in resolving state-parent conflicts such as that presented in *Roe v. Wade*,²²⁴ does not provide a clear answer to the role-allocation question²²⁵ of *which* potential parent should control the decision whether or not to have a child. Since this decision is a "zero-sum game," *i.e.* vindication of one potential parent's choice necessarily involves total rejection of the other's, removing the state sanction from the husband's veto effectively places the decision in the hands of his pregnant wife. While the *Danforth* majority justified this on the ground that "it is the woman who physically bears the child and who is more directly and immediately affected by the pregnancy,"²²⁶ the potential father's right to procreate should also be acknowledged. The most responsible suggestion is that the physician be required to notify the husband of the proposed abortion.²²⁷ This approach, even more than the parental consultation requirement discussed in *Bellotti v. Baird*,²²⁸ encourages participation by the husband in a difficult decision but leaves the ultimate choice in the hands of the pregnant woman.

VI. STATE REGULATION OF MINORS

Even Mill acknowledges that children and mentally ill persons do not have the same capacity to make choices as do sane adults.²²⁹ But this observation plus Justice Rehnquist's admonition against judicial interference with family unity²³⁰ and Professor Tribe's advocacy of unimpeded access to the adversarial system for disenfran-

224. 410 U.S. 113 (1973).

225. See note 22 and accompanying text *supra*.

226. 428 U.S. at 71. One might also add primary responsibility for raising the child, though this may be changing with emerging developments in shared parenthood.

227. See generally *Roe v. Rampton*, 394 F. Supp. 677, 681-82 (D. Utah 1975) (abstaining in constitutional challenge to statute that embodied such a spousal notification requirement), *aff'd*, 535 F.2d 1219 (10th Cir. 1976). But see 22 N.Y.L.S. L. REV. 65, 78 (1976) (arguing such a requirement unduly impinges upon the privacy of the pregnant wife). Another suggestion is that the state legislature might make an abortion performed without the husband's consent ground for divorce. See *Poe v. Gerstein*, 517 F.2d 787, 797 (5th Cir. 1975), *aff'd*, 428 U.S. 901 (1976). One author has even gone so far as to suggest that if no statutory ground is available for refusal to procreate, the husband may have a federal constitutional right to a divorce if his wife has contraceptive surgery or repeated abortions without his consent. See 23 N.Y.L.S. L. REV. 99, 112, 116 (1977).

228. 428 U.S. 132 (1976).

229. Mill, *supra* note 24, at 263. He, therefore, had no opposition to legal restrictions upon minors.

230. Rehnquist, *supra* note 1, at 9.

chised groups²³¹ offer only limited guidance for the resolution of difficult cases involving parent-child conflicts relating to sexual activities, medical care and civil commitment.

A. Regulation of Sexual Activities of Minors

State regulation of the behavior of minors has been extensive, drawing upon both police and *parens patriae* power. There is, however, a trend toward according to children certain constitutional rights previously held only by adults. Until recently, constitutional rights of minors were recognized almost exclusively in cases involving two arenas—public schools²³² and juvenile courts.²³³ Moreover, these cases did not involve conflicts between parents and children, but solely conflicts between the state and parents who claimed to be asserting both their own rights and the rights of their children. Recently, the Supreme Court has expanded the constitutional rights of minors in the area of sexual choice in two cases that involved a conflict between parental rights and rights of children. In *Planned Parenthood of Central Missouri v. Danforth*²³⁴ and *Bellotti v. Baird*,²³⁵ the Court considered the extent to which a state statute may permit parents to interfere with their pregnant child's decision whether to have an abortion. These cases, as well as *Carey v. Population Services International*,²³⁶ extended the constitutional rights of minors while reaffirming the principle of *Ginsburg v. New York*²³⁷ and *Prince v. Massachusetts*²³⁸ that the state has greater latitude in restricting the actions of minors than it does in restricting adults.

Justice Rehnquist acknowledges the current trend toward expanding the rights of children against their parents, but he warns of its possible destructive consequences.²³⁹ His dissenting votes in *Danforth* and *Carey* reflect his concern. The majority in those cases

231. Tribe, *supra* note 3, at 44-45.

232. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *West Va. Bd. of Educ. v. Barnett*, 319 U.S. 624 (1943). But see *Ingraham v. Wright*, 430 U.S. 651 (1977).

233. See, e.g., *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967).

234. 428 U.S. 52 (1976).

235. 428 U.S. 132 (1976).

236. 431 U.S. 678 (1977). *Carey* struck down a New York statute that forbade the sale of all contraceptives to anyone under 16, including as well as those that were nonprescription for adults. No direct parent-child conflict was involved in the case. In fact, the principal infirmity found by Justice Powell in his concurring opinion was the failure of the act to permit the distribution of nonprescription drugs by parents to their children. 431 U.S. at 707. In short, he saw the case as being like *In re Gault*, 387 U.S. 1 (1967), and *West Va. Bd. of Educ. v. Barnett*, 319 U.S. 624 (1943), where parents wanted to extend the child's rights.

237. 390 U.S. 629, 640 (1968).

238. 321 U.S. 158 (1944).

239. Rehnquist, *supra* note 1, at 8-14.

held that the state could not permit an absolute parental veto of a minor's right to decide whether to have an abortion and could not ban the purchase of contraceptives by a teenager. They ruled that the rights articulated in *Griswold*, *Roe* and *Eisenstadt* applied to a certain extent to minors, as well as to adults.

As with the spousal consent requirement discussed above,²⁴⁰ it can be argued that judicial invalidation of the restrictions, thus allowing the child to obtain contraceptives or possibly an abortion without parental consent, actually protects the family's integrity more than would the legislation approved by the dissenters. If an unwanted child were born to a minor daughter because her parents refused to consent to an abortion, the new child would stand as a constant reminder of the fundamental disagreement within the family throughout the entire period of pregnancy and nurturing, and would probably be the source of continuing tension among family members.²⁴¹ This tension could be reduced if the child were put up for adoption. But, if the parents' intent were to put the grandchild up for adoption, what would be the basis for their interest in forcing their daughter to carry an unwanted child to term? Their only possible interest would be promotion of their private morality, which is clearly not an action "for the best interest" of the child or grandchild. Judge Friendly aptly describes the psychological and physical harm and general distress experienced by adult mothers of unwanted children.²⁴² In addition, the young mother would suffer from the severe pressures imposed both by her original (nonconsenting) family and by her new, unstable one.

It is contended that allowing an absolute parental veto over abortion would deny fundamental rights to the pregnant daughter,²⁴³ and would create discord and instability in two families. Not only would the original family suffer from internal discord, but the new family—composed of either an unwed mother and an unwanted illegitimate child, or of teenagers forced into an early marriage because of their unwanted child—would be severely unstable.

240. See notes 217-23 and accompanying text *supra*.

241. Admittedly, an abortion obtained without the consent of the pregnant teenager's parents might also result in family debate, but at least a new human being would not be introduced into the scene to be the subject (and object) of criticism.

242. Friendly, *supra* note 137, at 32 (quoting *Roe v. Wade*, 410 U.S. 113, 153 (1973)).

243. She, too, was claiming the right of a (potential) parent to determine the destiny of her family. This, of course, includes the right to decide *not* to have a family. *Roe v. Wade*, 410 U.S. 113 (1973).

B. Choice of Medical Treatment by Children or Parents

We move now from the special case of parents blocking a child's choice of an abortion to other forms of medical treatment for minors, considering in particular state attempts to block treatment decisions made by either the child or the parent. Even the briefest search reveals that voluntary euthanasia²⁴⁴ and the incipient right to refuse treatment²⁴⁵ have generated substantial literature.²⁴⁶ Thus,

244. "Mercy killing" or "euthanasia," which means literally the "happy death," has been described as "a term with as many definitions as proponents." Raible, *The Right to Refuse Treatment and Natural Death Legislation*, 5 MEDICOLEGAL NEWS (Fall 1977). The lowest common denominator appears to be the deliberate termination by the affirmative act of a physician or other person of the life of a patient who is suffering from a painful or fatal disease. See, e.g., J. FLETCHER, *MORALS AND MEDICINE* 172 (1955). Involuntary euthanasia is the termination of an individual's life without his consent, while voluntary euthanasia is the termination of an individual's life in accordance with his wishes. Foreman, *The Physician's Criminal Liability for the Practice of Euthanasia*, 27 BAYLOR L. REV. 54 (1975).

The treatment of voluntary euthanasia as a form of homicide, see G. WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 318-19 (1957), is an illustration of Devlin's point that the criminal law does not admit the consent of the victim as a defense. See note 156 and accompanying text *supra*.

245. While euthanasia requires an affirmative act by someone other than the patient, e.g., the introduction of a death-producing agent such as an injection into the patient's body, see note 244 *supra*, refusal of treatment involves physician inaction at the request of the patient, with death being the result of normal, unaided bodily processes. There is no pretense that the line between passively withholding treatment and actively inducing death is always easy to draw, but, like many areas of law, line-drawing is both appropriate and necessary here. Professor Norman Cantor explains:

A patient's request to terminate further therapy should be honored, but affirmative acts (injections, etc.) to terminate patients' lives should not be condoned If affirmative medical conduct to end the patient's life . . . is prohibited, the patient is allowed maximum opportunity to change his mind and demand treatment. The patient declining treatment normally remains alive for a period and thereby receives some opportunity to articulate or demonstrate any change of mind or to eliminate any mistake on the physician's part in comprehending the patient's wishes. Authorization of affirmative acts of mercy killing would necessitate changes in state criminal law which might arguably constitute official recognition of the "worthlessness" of some life. A physician's deference to a patient's decision to refuse medical treatment is not currently criminal, and no statutory changes are needed to sustain refusals of treatment. The physician who respects the patient's choice, as required by the doctrine of informed consent, is not concurring in the dying patient's possible evaluation of his life as "worthless," as might be the case if the physician voluntarily administered fatal drugs.

Cantor, *supra* note 142, at 228. A number of prominent medical authorities also favor the termination of treatment at the request of a competent patient, while opposing voluntary euthanasia. See sources cited in Byrn, *supra* note 149, at 28 n.129.

The termination of artificial life support systems—generally referred to as "antidythanasia," see S. SHINDELL, *THE LAW IN MEDICAL PRACTICE* 118 (1966); Hyland & Baime, *In re Quinlan: A Synthesis of Law and Medical Technology*, 5 CRIM. JUST. Q. 1 (1977), when done at the request of a competent adult patient, is best classified as a form of treatment refusal rather than as a form of euthanasia. See Cantor, *supra* note 142, at 261-62 & n.167; Raible, *supra* note 244; cf. *In re Quinlan*, 70 N.J. 10, 344 A.2d 647 (1976) (distinguished between taking the life of another and disconnecting life-support machine, but allowed coma-

a full scale exploration of these and related subjects will not be possible here, but certain problem areas, as they affect the family, will be highlighted.

The restriction of a parent's right to refuse treatment because of the state's asserted *parens patriae* interest in the emotional and financial well-being of his or her child has been criticized above.²⁴⁷ Cases that employ *parens patriae* power to override parents' religious objections to life-saving blood transfusions for their children²⁴⁸ rest upon firmer ground. The state's *parens patriae* interest, however, is much weaker, and the parental and family rights much stronger, when the minor's condition is not fatal.²⁴⁹ More importantly, by analogy to the emerging right of adults to refuse treatment,²⁵⁰ the child should at least be asked for an opinion on the subject before the state steps in and requires treatment "for the child's benefit." Moreover, *Danforth* seems to require greater deference to that opinion as the minor approaches the age of majority.²⁵¹ The need to consult the child is more compelling when the surgery

tose patient's guardian to assert her "privacy right" to terminate treatment despite absence of probative evidence as to adult patient's actual desires). This is because the death-producing agent would still be natural body processes rather than an injected substance.

For the same reason, refusal of lifesaving treatment can be distinguished from suicide. When competent adults refuse treatment (or insist upon removal of support systems) they have not caused the fatal condition from which they suffer. Therefore, the essential elements of suicide, active causation and specific intent to end life, are not present.

By failing to acknowledge this crucial distinction, some courts have wrongly denied patients the right to refuse treatment. See Application of Pres. & Dirs. of Georgetown College, Inc., 331 F.2d 1000, 1009 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); John F. Kennedy Mem. Hosp. v. Heston, 58 N.J. 576, 581-82, 279 A.2d 670, 672-73 (1971). See also Byrn, *supra* note 149, at 16-18; Cantor, *supra* note 142, at 254-58.

246. See, e.g., Byrn, *supra* note 149; Cantor, *supra* note 142; Elkinton, *The Dying Patient, The Doctor, and the Law*, 13 VILL. L. REV. 740 (1968); Hyland & Baime, *supra* note 245; Kutner, *Due Process of Euthanasia: The Living Will, A Proposal*, 44 IND. L.J. 539 (1968); Panel, *Is There a Right to Die?*, 12 COLUM. J.L. & SOC. PROB. 489 (1976); Sharpe & Hargest, *Lifesaving Treatment for Unwilling Patients*, 36 FORDHAM L. REV. 695 (1968); Steele & Hill, *A Legislative Proposal for A Legal Right To Die*, 12 CRIM. L. BULL. 104 (1976); 53 CALIF. L. REV. 860 (1965); 65 KY. L.J. 823 (1976-77); 60 MONIST 136 (1977); 51 N.Y.U. L. REV. 285 (1976).

247. See notes 139-49 and accompanying text *supra*.

248. See, e.g., Morrison v. State, 252 S.W.2d 97 (Mo. Ct. App. 1952); see also State v. Perricone, 37 N.J. 463, 181 A.2d 751 (N.J.), *cert. denied*, 371 U.S. 890 (1962). The rule of Raleigh Fitken-Paul Morgan Mem. Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (N.J.), *cert. denied*, 377 U.S. 985 (1964), which required a pregnant woman (in her 32nd week) to accept a blood transfusion in order to protect the life of the fetus would seem to have no continuing validity with respect to mandated transfusions during the first two trimesters of pregnancy. See Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

249. *But see In re Sampson*, 29 N.Y.2d 900, 278 N.E.2d 918, 328 N.Y.S.2d 686 (1972) (operation ordered for 15 year old with disfiguring but nonfatal disease over mother's religious objections).

250. See note 245 *supra*.

251. 428 U.S. 52 (1976).

involved is not necessary to save his or her life,²⁵² or when it is intended to benefit someone else.²⁵³

Just as parents should not have an absolute veto over their child's decision to have an abortion,²⁵⁴ they should not be able to force her to have an abortion²⁵⁵ nor be able to force their children to be sterilized.²⁵⁶ Yet, *Stump v. Sparkman*,²⁵⁷ recently ruled that a judge who ordered such an involuntary sterilization at the request of the mother, but in the absence of specific statutory authority, was protected by judicial immunity from a subsequent suit by the sterilized daughter who had been told that she would receive only an appendectomy. Justices Stewart, Marshall and Powell dissented on the ground that such a decision was not within the power of either the parents or the judge, but was an administrative one that required the due process protections of notice and a hearing.²⁵⁸

The so-called "wrongful birth" cause of action is still in the early stages of development, so it may be somewhat early to make any serious predictions. Yet, since both Justice Rehnquist and Pro-

252. *In re Green*, 448 Pa. 338, 292 A.2d 387 (1972), involved a 16 year old with polio and a resulting curvature of the spine which would cause him to become bedridden without a spine fusion operation. Although his mother consented to this operation, she refused on religious grounds to permit the accompanying blood transfusions, making the operation impossible. The Supreme Court of Pennsylvania refused to order the operation over the mother's religious objections simply "to enhance the child's physical well-being when the child's life [was] in no immediate danger." 448 Pa. at 344-45, 292 A.2d at 390. The court remanded for an evidentiary hearing to allow the child to decide and reserved any decision as to a possible child-parent conflict. The son's decision against surgery avoided a conflict as both the parent's and the child's wishes were honored. See also *In re Seiferth*, 309 N.Y. 80, 127 N.E.2d 820, 148 N.Y.S.2d 45 (1955) (court deferred to negative decision of 14 year old inculcated with father's philosophical but not religious opposition to surgery for the boy's cleft palate). But see *In re Sampson*, 29 N.Y.2d 900, 278 N.E.2d 918, 328 N.Y.S.2d 686 (1972) (15 year old not consulted before the court ordered nonessential operation for his "benefit"). For a criticism that cases allowing children to make treatment decisions will undercut the nuclear family, see Miller & Burt, *Children's Rights on Entering Therapeutic Institutions*, 134 AM. J. PSYCH. 153, 154 (1973); Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOOD HALL L. J. 115 (1973).

253. See *Hart v. Brown*, 29 Conn. Supp. 368, 289 A.2d 386 (Conn. 1973) (allowing kidney transplant from seven year old, who was consulted, for benefit of her afflicted twin); *Howard v. Fulton-Dekalb Hosp. Auths.* 42 L.W. 2322 (Ga. Super. Ct. 1973) (permitting kidney transplant from "moderately mentally retarded" 15 year old for benefit of her mother, after daughter's consent).

254. See notes 234-43 and accompanying text *supra*.

255. See, e.g., *In re Smith*, 16 Md. App. 209, 295 A.2d 238 (1972) (16 year old cannot be compelled by mother to have an abortion).

256. See *A.L. v. G.R.H.*, 325 N.E.2d 501 (Ind. 3d Dist. 1975) (mother not permitted to have 15 year old retarded son, who was intelligent enough to understand the operation, sterilized in the absence of statutory or common law authority or lifesaving necessity).

257. 98 S. Ct. 1099 (1978).

258. *Id.* at 1109. For an example of the adverse public reaction to this decision, see Falk, *The Mandarins: Judges Seek Shield from Public*, Wall St. J., April 28, 1978 at 16, col. 3.

fessor Tribe agree (albeit for different reasons)²⁵⁹ that a cause of action of this type is, at the very least, unwise, some brief reflections by this commentator seem appropriate. One way to approach the subject is to recognize that several distinct causes of action travel under the rubric of "wrongful life." One author uses three general subcategories—"wrongful conception, unfortunate circumstances of life and emotional trauma resulting from stigma."²⁶⁰

The first category includes cases like *Sherlock v. Stillwater*,²⁶¹ referred to by the de Hirsch Meyer lecturers.²⁶² In this type of case, Justice Rehnquist is probably correct that the child may suffer emotional trauma upon finding out that his or her birth was attributable to a "doctor's negligence," and not his parents' desires.²⁶³ But, here again, one should not conclude too quickly that this possible emotional injury to the child is a sufficient reason to deny court access to the parents. Would not sealing the court records, as in foster care and juvenile proceedings, effectively prevent the child from knowing of the proceedings?²⁶⁴ Moreover, to deny the cause of action on the basis of possible emotional trauma to the child would have serious implications for other cases brought by parents, such as right to refuse treatment actions,²⁶⁵ paternity suits,²⁶⁶ or divorce and custody proceedings.

259. Justice Rehnquist opposes the judicial recognition of such a cause of action because of "the effect" the lawsuit would have "upon the relationship between these parents" who seek economic damages to cover the costs of raising the child, "from the time of his birth through the subsequent seventeen or eighteen years which he will, in the normal course of events, spend with his parents," "and this child," once he learns of the suit. Rehnquist, *supra* note 1, at 12.

Professor Tribe discusses the issue as an illustration of his fallacy of "institutionalism." At first, he says: "One may criticize the decision on its merits, as Justice Rehnquist has done." Tribe, *supra* note 3, at 56 n.59. He goes on, however, to argue that judicial recognition of such a cause of action is no more "foolish" than legislative recognition. He concludes: "[The] mistake is to ask *whether* the courts should decide various substantive issues, when the appropriate question is how those issues ought to be resolved." *Id.* at 56.

260. Kashi, *The Case of The Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409 (1977).

261. — Minn. 2d —, 260 N.W. 2d 169 (Minn. 1977).

262. Rehnquist, *supra* note 1, at 10-12; Tribe, *supra* note 3, at 56-57.

263. Rehnquist, *supra* note 1, at 12.

264. Given the abbreviated statute of limitations for medical malpractice cases in most states (California has a one year statute for all negligence actions, CAL. CIV. PROC. CODE § 340 (3) (West 1954), and New York recently lowered the period for medical malpractice to two and a half years, N.Y. CIV. PRAC. § 214-a (McKinney 1977)), the child would not be old enough to understand the proceedings at the time they were conducted.

265. See notes 139-49 and accompanying text *supra*.

266. Clearly, these suits make a public judicial record of the child's illegitimacy, but this has not been deemed a sufficient reason to allow the father to escape his support obligations

Once the records are sealed, the child need never know of the parents' ordinary tort claim for (at most) the cost of caring for the child until maturity. The arguments for placing this economic burden upon the doctor or hospital rather than upon the parents are even stronger where the action is for "unfortunate circumstances of life."²⁶⁷ In this type of case, the parents would want a child but not one who was mentally or physically deformed. The parents of such a child would sue the doctor for failing to apprise them of the danger of birth defects, and seek to recover the costs of maintenance and medical treatment.

In neither the "unfortunate circumstances" cases nor the "wrongful conception" cases should the parents be able to receive damages for the emotional trauma the birth may have caused them, but solely for the physical pain and medical expenses in connection with the pregnancy and possibly for the economic costs of raising the child.²⁶⁸ When limited to such an award, neither claim devalues the emotional aspects of family relationships²⁶⁹ any more than a wrongful death recovery by a parent or spouse that includes only loss of services and consortium and not emotional injuries.²⁷⁰ On the other hand, an independent action by a child for "wrongful birth" against his parents or the doctor probably should be rejected on the merits, whatever its label.²⁷¹

C. *Civil Commitment*

The open questions in the civil commitment field involve how much process will be due—what "kind of hearing"²⁷² will suffice—when a child is civilly committed. Some commentators have taken a position similar to Justice Rehnquist that according chil-

by denying the mother a cause of action. Why then should a third party to the family relationship—a doctor, hospital or pharmacist—be able to escape the consequences of his or her own negligence because of the possible emotional effects upon the child?

267. Kashi, *supra* note 260, at 1426-30.

268. *Rivera v. New York*, 404 N.Y.S.2d 950 (Ct. Cl. 1978).

269. One author would even go so far as to allow emotional damages for the parents of a deformed child, because "[r]ather than berating the child's worth, such damages would epitomize the high station he holds in his parents' hearts." Kashi, *supra* note 260, at 1432.

270. Assuming the parents can prove the substantive elements of their claim and the records are sealed, the only problem with judicial recognition of these causes of action would appear to be the terminology. Ordinary "medical malpractice" or even the subcategories of "wrongful conception" and "unfortunate life circumstances" seem to be far superior to the misleading umbrella term of "wrongful life," with its inaccurate (and contradictory) overtones that birth of a new life, in any form, is always an ultimate "good" and a "desired blessing" for everyone. See *Rivera v. New York*, 404 N.Y.S. 2d 950 (Ct. Cl. 1978); Kashi, *supra* note 260, at 1430.

271. Kashi, *supra* note 245, at 1419-26, 1431.

272. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975).

dren the right to have a voice in treatment and commitment decisions that affect them will "reinforce the likelihood of disintegration of the nuclear family."²⁷³ It should be clear, however, that claims of family autonomy are much stronger when both the child and the parents oppose commitment than in cases where the parents have initiated proceedings which, if successful, would disrupt the family by removing the child from home. The state will exercise its power to commit either on a police power basis, if the child is genuinely dangerous, or on a *parens patriae* basis of a psychological or social variety.²⁷⁴ In either case, the commitment process itself with its potential for severe, permanent intrusion into the life of the child, triggers the necessity for the due process protections of notice and a hearing.²⁷⁵ Since child commitment proceedings are usually initiated by parents rather than by state government agencies, the divergence of interests between parents and child has caused many courts to recognize the necessity for separate counsel for the child.²⁷⁶

Therefore, an adequate hearing on the civil commitment of a child should balance the child's liberty interest against both the state interest (police power and *parens patriae* protections) and the parental interest (preserving the family unit and maintaining rights of custody and care).²⁷⁷

VII. CONCLUSION

Through examination of various recent constitutional family law cases, this commentary has attempted to suggest ways of accommodating the interests of individual family members, the interest of the family as an institution and the legitimate police power and *parens patriae* regulations of the state. Thus the following have been explicated: the full effects of sodomy statutes upon individual gays as well as upon the family as an institution; the implications of regulations in *Zablocki* upon the plaintiff and the pregnant woman he wanted to marry, as well as the effects upon his original family; and the implications of parental and spousal veto require-

273. Miller & Burt, *supra* note 252, at 154; see T. SZASZ, LAW LIBERTY AND PSYCHIATRY (1963).

274. See notes 119-23 and accompanying text *supra*.

275. See *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968); *J.L. v. Parham*, 412 F. Supp. 112 (M.D. Ga. 1976), *prob. juris. noted*, 431 U.S. 936 (1977). See generally *Saville v. Treadway*, 404 F. Supp. 430 (M.D. Tenn. 1974); *Horacek v. Exon*, 357 F. Supp. 71 (D. Neb. 1973); *Application for the Certification of Anonymous*, 42 Misc. 2d 572, 278 N.Y.S.2d 608 (1964); *Zander*, *supra* note 123.

276. See, e.g., *In re Sippy*, 97 A.2d 455 (D.C. Mun. Ct. App. 1953).

277. See *Bartley v. Kremins*, 402 F. Supp. 1039 (E.D. Pa. 1975); 52 NOTRE DAME LAW. 136 (1976).

ments for the individuals, the new family and the old family. By thus taking account of the full implications of a judicial decision, the two extremes represented by Justice Rehnquist's and Judge Devlin's categorical deference to legislative or parental authority and by Mill's limited focus upon individual autonomy can be avoided. When applied to recent constitutional family law cases, this analysis reveals the indispensable role of the courts in defense of family autonomy. It also shows that judicial deference to statutes that simply give the leader of a private institution, such as the father of a family, an unreviewable veto over fundamental decisions by other family members will only foster institutional discord. In short, the courts have a clear duty not to lend their sanction to either public or private oppression that may end in the destruction of the family.