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CHILDREN'S RIGHTS: A MOVEMENT IN SEARCH OF MEANING

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The children's rights movement is a unique phenomenon among the various "rights" efforts today. Nonetheless, it shares some superficial similarities with the other anti-discrimination movements. Children's rights, like those of blacks and women, concern the role of an identifiable segment of our society which has traditionally been placed at a legal and social disadvantage. The children's rights movement also espouses the reallocation of legal power as a means to correct this perceived imbalance.[1] Further, it grew out of the same social currents, first apparent in the 1950's and 1960's, which produced the kindred civil rights efforts.[2]

But a closer examination of the children's rights phenomenon reveals differences which are much more fundamental. Of most importance is the fact that the children's rights movement was largely created by and remains under the control of adults, a group not directly affected by the injustices sought to be corrected. The major organizations in the country which put themselves forward as the advocates for children function without any meaningful control exercised by youth. Thus, the Children's Defense Fund, the National Juvenile Law Center, the Children's Rights Project of the American Civil Liberties Union, and the Child Welfare League of America, for example, all function under the exclusive control of adults. Comparatively, can one seriously perceive the National Association for Advancement of Colored People (NAACP) or similar civil rights groups functioning with exclusively white boards and staffs? Where would civil rights be today if Martin Luther King, Jr. had been white?

A closely related factor differentiating children's rights is the limited and mostly conflicting goals sought within the movement. None

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1. *See, e.g.*, Foster and Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343 (1972).

2. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to their Rights*, B.Y.U. L. REV. 605, 630-32 (1967).

of the current child advocates has seriously suggested that children should be treated on an equal basis with adults. John Holt, perhaps the leading figure in advocating children's "liberation" from the legal strictures of minority, would still allow children the choice of remaining within the bounds of traditional childhood.[3] Only if and to the extent chosen by individual children themselves would Holt grant them the rights of adults. On the other end of the spectrum are those who would seek to retain and even strengthen the traditional legal restraints upon children.[4]

This gross divergence of opinion and goals within the movement is not surprising. Since children themselves play no substantial role in the movement, there is no common basis of experience from which the leaders can draw to formulate their goals. Collective social experiences form the basis for all group decisions and, ultimately, for all law.[5] While the adults within the children's rights movement share with all of us a personal past which includes childhood, such is inadequate to the task of formulating policy responsive to the "rights" of children. It lacks the emotional immediacy and social cohesiveness necessary for effective group decision making. The civil rights demonstrations of the 1950's and 1960's, for example, were more than a political vehicle towards the ultimate goal of equality. Rather, they were a means for black people collectively to define both the specific injuries caused by racism and the common goals of the affected black communities. Without similar collective involvement by children, the movement for enlargement of their "rights" will remain a contradictory and patchwork effort.

This of course has enormous impact upon the development of the law affecting children. The law has great difficulty accommodating any social change. The largely unexamined confusion within the child advocacy movement exacerbates the natural sluggishness of the law in responding to the demands for change placed upon it. Also created is a great danger for inconsistent and mistaken decision making.

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3. J. HOLT, ESCAPE FROM CHILDHOOD (1974).

4. *See, e.g.*, Hafen, *supra* note 2.

5. *See* Lasswell and McDougal, *The Relation of Law to Social Process: Trends in Theories About Law*, 37 U. PITT. L. REV. 465 (1976).

The purpose of this article is to analyze how the confusion over children's rights has affected recent court decisions dealing with juveniles. Of particular concern will be the relationship between the child advocate's own view of the weight to be given the child plaintiff's decisions and the eventual outcome of a given case. Recent cases dealing with foster care, mental commitment and abortions will be examined.

I

Under common law standards, it is contradictory to speak of children's rights, for childhood is by definition a status of legal disability.[6] Children have traditionally been denied the basic rights of democratic citizenship. While recent years have seen a multitude of changes in the legal status of youth, the essential character of the child's standing under the law remains unchanged. Children cannot choose where to live. Their parents, or some other appointed legal guardian, have the right to determine the child's place of residence.[7] Children are greatly restricted in the types of work they may seek and cannot keep the wages of whatever employment they are able to secure. Child labor laws generally exclude children from many jobs.[8] In most states, the child's parents, as a reciprocal right under the duty to support, have the power to demand and keep any salary or other income received by the child.[9] Children are also functionally barred from most commercial transactions, since contracts entered into by children are generally voidable.[10] Perhaps most importantly, children are denied most political rights. While children retain certain free speech rights,[11] they are denied the more basic rights to vote and hold public office.[12] Thus, children are functionally excluded from the political process which might serve as an avenue to the alteration of their legal status.

6. *See, e.g.*, VA. CODE ANN. § 1-13.42(2) (Repl. Vol. 1979).

7. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944); *In re* Jewish Child Care Assn., 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959).

8. *See, e.g.*, VA. CODE ANN. §§ 40.1-78 *et seq.* (Repl. Vol. 1976).

9. *See, e.g.*, Cook v. Virginian Ry., 97 W. Va. 420, 125 S.E. 106, 109 (1924).

10. 2 WILLISTON ON CONTRACTS, Ch. 9 (3d ed., 1959).

11. *See, e.g.*, Tinker v. Des Moines Ind. Community School District, 393 U.S. 503 (1969).

12. *See, e.g.*, U.S. CONST., art. I, § 2, cl. 2, § 3, cl. 2; art. II, § 1, cl. 5.

This is not to say that any of this is per se wrong or unjust. The reality is that children, for at least part of their childhood, are in fact incapable of independently exercising the rights of citizenship.[13] Children are born in a largely helpless condition and are dependent upon others for most aspects of their existence. The normal process of childhood is, of course, the gradual development of adult physical and psychological characteristics and capabilities such that the infant dependencies are eventually rejected. The age of majority, now generally set at eighteen is designed to correspond with the time of life when children are prepared for adulthood.[14]

Two logically separate issues do, however, arise from this situation. First, does the legislatively established age of majority appropriately correspond with the emotional and physiological realities of childhood? In other words, do we delay childhood or certain aspects of childhood too long such that the burdens of minority become unjust? This question does not challenge the assumption that the legal status of minority should be placed upon all children for at least some portion of their lives. The second and more fundamental issue does not question the concept of minority either, but questions who should exercise power over the child's life during minority and in what fashion. Are parents to be given complete decision-making power over their children or should substantial decisional authority also be exercised by state officials? The first of these issues, at what age should children be "liberated" from childhood, is essentially an issue of children's rights. The second, dealing with the allocation of parenting power, is one of children's welfare. These two concepts, children's rights and welfare, are most often confused and distorted in meaning in both the literature and cases.

While there are an enormous number of variations of content one can give to the term "right", its essential meaning is the power of the individual to choose in any given area of life.[15] For adults in this society, this means the individual has, for example, the choice of

13. *See generally* A. Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Context*, 39 LAW & CONTEMP. PROB. 38 (Sum. 1975).

14. *See* Katz, Schroeder and Sidman, *Emancipating Our Children—Coming of Legal Age in America*, 7 FAM. L. Q. 211 (1973).

15. *See* Kaufman, *Protecting the Rights of Minors: On Juvenile Autonomy and the Limits of Law*, 52 N.Y.U. L. REV. 1015, 1019-21 (1977).

where to live, where to work, where to shop, and which candidate to vote for. While there is an enormous variety of life factors which limit the range of options available for an individual to choose from, the law in theory does not directly intrude upon the unfettered power of the individual to choose his own direction in those areas of life that are the subjects of his "rights." In essence then, a right is synonymous with the power of the individual to choose.

In the area of children and the law, the term "right" is often used in an entirely different context. Many within the children's movement do not intend to alter the child's status of legal disability, but still state that they intend to promote children's rights.[16] Persons within this school of thought, who have been described by one commentator as the "child savers,"[17] are not in reality promoting the "rights" of children. While they may speak of the child's "right" to some perceived benefit or service which they believe helpful to the child's development, they are really seeking to impose on children, and their parents, what they themselves view as beneficial to their welfare. For example, social workers involved in child neglect cases will often speak of the child's right to protection from harm. By this they do not mean that they want the child to have the option to choose a home suitable to his own notions of safety. Instead, what they are really saying is that they themselves have determined that the child's present home is inadequate and they have deemed it in the child's welfare to intervene in his homelife in some fashion regardless of the child's wishes. A number of organizations and individuals have issued statements of similar "rights" which detail the various aspects of life which they believe children should receive for proper development.[18] These often contain largely unenforceable generalities. For example, the United Nations Declaration of the Rights of the Child states: "The child . . . shall, wherever possible, grow up in the care and under the responsibility of his parents, and in any case, *in an atmosphere of affection and of moral and material security* . . . ."[19] Some such "rights" even explicitly reject the

16. *See, e.g.,* Foster and Freed, *supra* note 1.

17. A. PLATT, THE CHILD SAVERS (1969).

18. *See* Foster and Freed, *supra* note 1; *The Rights of Children—A Statement by Senator Walter F. Mondale,* 43 HARV. EDUC. REV. 483 (1973); R. FARSEN, BIRTHRIGHTS (1979); United Nations Declaration of the Rights of the Child, GAOR, 3rd Comm., Doc. 1386 (1959).

19. U.N. Declaration, *supra* note 18, Principle 6 (emphasis added).

power of the child to choose whether to exercise his right. The United Nations Declaration again states that the "child is entitled to receive education, which shall be free and *compulsory*."[20]

The error in this usage is not just semantic; it fundamentally obscures analysis of the underlying worth of the purported benefit to be gained by the child. It masks what is essentially propaganda in the form of legal principles. If the exercise of the "benefit-right" is not to be given to the affected child, it must be exercised by someone else. Since many such "rights," like the right to protection, in effect place obligations upon parents, the enforcer of the right must be someone outside the family. The logical supposition, and the actual underlying assumption of most such "benefit-rights" is that greater intervention into family life is necessary in order to promote some aspect of children's lives. Regardless of whether this is wise for children, it certainly cannot be said to promote their rights in the basic sense of the power to choose.

II

This confusion between children's rights and children's welfare, and the dangers it poses, is well illustrated by a review of the law of juveniles' standing in litigation. The general rule is that children lack legal capacity and cannot appear as parties to lawsuits on their own.[21] If sued as a defendant, the child generally must have a guardian ad litem appointed.[22] Otherwise the child will not be properly brought before the court. As a plaintiff, the child must sue either through a self-appointed next friend or a court-appointed guardian ad litem.[23] The child plaintiff or defendant is the real party in interest in these circumstances and any adjudication rendered will bind him just as it would bind any adult litigant.[24] The guardian ad litem or next friend, however, has control of the litigation and the authority to determine all positions advanced in the case, even where inconsistent with the wishes of the child.[25] The only check on the

20. *Id.*, Principle 7 (emphasis added).
21. Bank of the United States v. Ritchie, 33 U.S. (8 Pet.) 46, 50 (1834).
22. *See, e.g.*, Kavanaugh v. Shacklett's Adm'r, 111 Va. 423, 69 S.E. 335 (1910).
23. *See, e.g.*, Jackson v. Counts, 106 Va. 7, 11, 54 S.E. 870, 871 (1906).
24. *Id.*
25. *See, e.g.*, Kirby v. Gilliam, 182 Va. 111, 115-16, 28 S.E.2d 40, 42 (1943).

representative's power is the ability of the court to intervene and appoint another guardian ad litem or next friend where such is necessary to protect the child's best interests.[26]

This common law tradition principally arose in cases dealing with protection of the child's property or other financial interests.[27] In such cases, the guardian's determination of what position to advance in the litigation was a simple one: go for the bucks. Many of the cases arose following times of war where the estates of fallen soldiers, and the claims of their children, were before the courts for adjudication.[28] Such situations bear the potential for fraud and dishonesty and the courts acted to protect the financial interests of the affected juveniles. More difficult issues such as those presented in recent constitutional litigation were not even thought of. There was little controversy over the philosophical or political issues present in contemporary constitutional litigation and the power of the court to appoint a new guardian was designed largely to act as a check against financial dishonesty or waste of the minor's estate.

Against this simple but cogent background, the common law rules of standing have thus far proved wholly inadequate for the task of settling the procedural complexities which have arisen in recent cases dealing with the constitutional rights of children. Most illustrative is *Smith v. Organization of Foster Families For Equality & Reform.*[29] This case broadly dealt with the issue of what procedural protections if any, were constitutionally required for foster children and foster families prior to a state-enforced separation. The complaint named individual foster children and their foster parents, as well as the foster families' organization, as plaintiffs.[30] All were represented by the same counsel. In accord with common law notions of standing and Rule 17(c) of the Federal Rules of Civil Procedure, the complaint designated the foster parents as the "next friends" of the plaintiff children.[31] The plaintiffs sought a common relief, ask-

26. *Id.* at 116, 28 S.E.2d at 42.

27. *See, e.g.*, Womble v. Gunter, 198 Va. 522, 95 S.E.2d 213 (1956); Garland v. Norfolk Nat'l Bank of Commerce and Trusts, 156 Va. 653, 158 S.E. 88 (1931); Jackson v. Counts, 106 Va. 7, 54 S.E. 870 (1906).

28. *See, e.g.*, Wilson v. Smith, 63 Va. (22 Gratt.) 493 (1872).

29. 431 U.S. 816 (1977) (hereinafter referred to as *OFFER*).

30. *Id.* at 818-19.

31. Organization of Foster Families v. Dumpson, 418 F. Supp. 277, 278 (S.D.N.Y. 1976),

ing that New York welfare authorities be required to provide an adversary trial-type hearing prior to removing any foster child from its foster parents when they had lived together as a family for more than one year.[32] The lack of such a hearing was said to violate both the foster parents' and the foster children's rights to family integrity and due process.[33]

Responding to motions filed by the defendant welfare authorities, the district court early in the litigation appointed "independent counsel" to represent the plaintiff foster children "to forestall any possible conflict of interests."[34] Although the complaint in the action was apparently never amended from its original claims on behalf of the foster children, their appointed representative through the litigation took the position that the requested advance hearings were not constitutionally required and, in fact, were contrary to the children's best interest.

> Appointed counsel for the children . . . has consistently argued that the foster parents have no such [constitutionally protected] liberty interest independent of the interests of the foster children, and that the best interests of the children would not be served by procedural protections beyond those already provided by New York law.[35]

In fact, the children's appointed counsel appealed, along with the defendants, the district court's judgment granting the children relief.[36] Given common law rules of standing,[37] as well as the general evidentiary proposition that a party is bound to the admissions of his attorney,[38] this action would have seemingly precluded any relief in the action in favor of the foster children. Neither the district court nor the Supreme Court were deterred, however, from addressing and deciding the children's original claims to constitutional protection by their attorney's disavowel.

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rev'd, 431 U.S. 816 (1977).

32. 431 U.S. at 819-20.

33. *Id.* at 819-20, 842.

34. 418 F. Supp. at 278.

35. 431 U.S. at 839.

36. *Id.* at 823.

37. See argument of dissenting judge in the district court, 418 F. Supp. at 288.

38. *See, e.g.*, C. FRIEND, LAW OF EVIDENCE IN VIRGINIA § 255 (1977).

The district court held that

> before a foster child can be peremptorily transferred from the foster home in which he has been living, be it to another foster home or to the natural parents who initially placed him in foster care, he is entitled to a hearing at which all concerned parties may present any relevant information to the administrative decisionmaker charged with determining the future placement of the child.[39]

This pre-removal hearing was required "as a matter of course" regardless of whether requested by the foster parents, the child, or the natural parents.[40] "[I]t is required in all cases and cannot be made to depend upon the initiative of third persons."[41] This holding was based solely upon the foster child's independent right "to be heard before being 'condemned to suffer grievous loss.'"[42] The district court specifically declined to decide the question of whether the foster parents had a constitutionally protected right to the continuation of their foster family, akin to the protections against state interference enjoyed by natural parents. Rather than "reach[ing] out to decide such novel questions," the court found the children's rights to present "narrower grounds . . . to support our decision."[43]

The Supreme Court reversed, finding that existent New York procedures were sufficient to protect whatever liberty interests were enjoyed by the foster family. The Court did not specifically decide what liberty interest the foster parents and children enjoyed or, more fundamentally, whether the Constitution gave them any protection. Instead, the Court decided the case only on the "assumption" that the foster family has a constitutionally protected liberty interest.[44] Notwithstanding this somewhat artificial caveat, and the Court's judgment sustaining the New York procedure, the Court's opinion is very sympathetic to the interests of the foster parents and children. The Court first recognized the significant constitutional protections extended to the natural family by substantive due process. "There does exist a 'private realm of family life

39. 418 F. Supp. at 282.
40. *Id.* at 285.
41. *Id.*
42. *Id.* at 282.
43. *Id.*
44. 431 U.S. at 847.

which the state cannot enter' . . . that has been afforded both substantive and procedural protection."[45] While the foster family lacks the biological relationships which legally underlie the natural family, the Court said that constitutional protections are not solely limited to such blood relationships. "But biological relationships are not exclusive determination of the existence of a family."[46] Instead, the principal factors determinative of the existence of a "family," and presumably the constitutional protections which follow, are the emotional intimacy and commitment which flow from the parent-child and husband-wife relationships:

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promoting a way of life' through the instruction of children . . . , as well as from the fact of blood relationship.[47]

The Court further found that many foster families have the same degree of emotional attachment as that found in natural families.

> No one would seriously dispute that a deeply loving and interdependent relationship between an adult and child in his or her care may exist even in the absence of blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.[48]

While the Court did not delineate the constitutional significance of this degree of similarity with the natural family, it did state that "[f]or this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals."[49]

On the merits of the constitutionality of the existent New York procedure, the Court made several comments particularly relevant

45. *Id.* at 842 (citations omitted).
46. *Id.* at 843.
47. *Id.* at 844 (citations omitted).
48. *Id.*
49. *Id.* at 844-45.

here. Under state law, New York foster parents did, in fact, have a right to a pre-removal hearing in most cases where the foster child had been in their care for an extended period.[50] The district court had found the system deficient in a number of respects, but the most prominent deficiency was the failure of New York law to mandate a hearing regardless of whether any party had requested one.[51] The lower court was unwilling to allow hearings only when requested by the foster parents. "We decline to rest the rights of the foster children upon the shoulders of foster parents who, however well-meaning, have a personal involvement and perhaps a financial interest which may color their conduct."[52] In dismissing this rationale, the Supreme Court noted that the logic of the district court contradicted the very emotional values upon which any purported constitutional right would rest. The Court said the constitutional interest was to promote the "emotional cohesion of the family".[53]

> [T]he constitutional liberty, if any, sought to be protected by the New York procedures is a right of *family* privacy or autonomy, and the basis for recognition of any such interest in the foster family must be that close emotional ties analogous to those between parent and child are established when a child resides for a lengthy period with a foster family. If this is so, necessarily we should expect that the foster parents will seek to continue the relationship to preserve the stability of the family; if they do not request a hearing, it is difficult to see what right or interest of the foster child is protected by holding a hearing to determine whether removal would unduly impair his emotional attachments to a foster parent who does not care enough about the child to contest the removal.[54]

Thus, while the constitutional right was a joint one, extending to both the foster parents and children,[55] the very nature of the right requires that it be exercised by the parent on behalf of the entire family.

The question not effectively analyzed by either the district court

50. *Id.* at 832 n. 32, 849 n. 56, 853.
51. 418 F. Supp. at 284-85.
52. *Id.* at 285.
53. 431 U.S. at 850 n. 57.
54. *Id.* at 850 (emphasis in original).
55. *Id.* at 842 n. 45.

or the Supreme Court was whether the foster child should also be given the power to request a pre-removal hearing. Both courts assumed that the wishes of the child relative to any contemplated change of placement should not be given any controlling legal effect. Such a proposition was inherent in the district court's directive that hearings be held in every instance where a foster child is to be removed from an established foster family relationship. It did not trust the child to oppose an inappropriate change to a new foster family. In addition, the wishes of those children who either agree with or do not oppose a planned change of placement would be consistently ignored. The Supreme Court made an identical assumption but with different effect. Against the complaint that the Court's disposition would not allow effective avenues for the expression of the child's wishes, the Court said that "nothing in the New York City procedure prevents consultation of the child's wishes, directly or through an adult intermediary. We assume, moreover, that some such consultation would be among the first steps that a rational factfinder, inquiring into the child's best interests, would pursue."[56] This may be true in those instances where foster parents have requested a hearing, but in the event of their inaction the objecting child would be left with no avenue to express his desire to oppose a change in placement. In analyzing the nature of the constitutional rights at stake, and in concluding that the foster family's right to family integrity was effectively preserved by actions of the foster parents alone, the Court seemed to assume that the only alternatives available were the automatic hearings imposed by the district court or its own alternative of hearings only on the request of the foster parent. It failed to directly address the question of whether the objecting child should be given greater authority on his own.

This omission is logically inconsistent with a proper conception of the children's rights in the generic sense discussed earlier.[57] Although not clearly expressed, it is apparent that the Supreme Court, like the district court, assumed that "the child is unable to request a hearing on his own" by reason of immaturity.[58] While this ultimate

56. 431 U.S. at 850.
57. *See supra* notes 15-20 and accompanying text.
58. 431 U.S. at 850.

conclusion may have been correct, the issue still deserved explicit consideration and analysis. Less apparent, but perhaps more relevant here, is the impact which the child plaintiffs' standing may have had on this omission. Given the number of parties in the case that purported to speak for the affected foster children, it is quite surprising that the wishes of the named plaintiffs are never presented in either opinion. Both the district court and the Supreme Court detail the living arrangements of the foster children who were named plaintiffs[59] but neither opinion sets forth expicitly either the children's wishes in regard to their present foster placements or the procedural protections necessary to prevent inappropriate changes in placement.[60] Almost all of the named plaintiffs were teenagers or just a few years short of that age[61] so they certainly would have been capable of formulating and expressing preferences on these issues.

But the children really never had a means to express their desires. While the child plaintiffs were named parties and their legal interests were conclusively adjudicated, they were never represented by a legal advocate who pressed their decisional rights. The court-appointed counsel was clearly functioning in the capacity of a traditional guardian ad litem, ignoring the wishes of the children in order to present what she herself perceived to be the welfare of the children.[62] The Supreme Court described her position as that of "an independent advocate for the *welfare* of the children."[63] Her position of opposing any additional hearing rights for foster parents or foster children was premised on her own view that "the best interests of the children would not be served by procedural protections beyond those already provided by New York law."[64] The children's attorney thus advocated this allegedly "independent" position rather than the wishes of her clients.

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59. *Id.* at 818 n. 1; 418 F. Supp. at 279-80.

60. The familial situations of the child plaintiffs suggest that they would have wanted to remain with their foster parents. All had remained in their foster homes for some time and were likely to be quite attached to their foster parents. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973). In fact, the record in a related state proceeding confirms that several of the children had strong desires to remain in their foster homes. State *ex rel.* Wallace v. Shotan, 51 A.D.2d 252, 380 N.Y.S.2d 250 (1976).

61. 431 U.S. at 818 n. 1.

62. *Id.* at 839.

63. *Id.* at 841 n. 44 (emphasis added).

64. *Id.* at 839.

The anomaly of this role is that the case was already filled with welfare officials who were certainly capable of determining and articulating the children's "welfare." Defendants in the case included welfare officials from the state, two local and one private child welfare agency and all argued the same position as the children's appointed counsel.[65] Given the fact that attorneys generally lack any formal training in child welfare and have no familial commitment to their child clients, it is hard to perceive what gain there was in having an attorney in this corner. An attorney is usually the party *least* capable of correctly determining the welfare of a child. The one element the case lacked was someone to speak for the wishes of the children alone.

To the extent that this role was filled in the case, it fell upon the foster parents and their attorney. Both the district court and the Supreme Court allowed the foster parents standing to argue the legal claims raised on behalf of the children.[66] Both the district court's holding based on the children's due process rights and the Supreme Court's generally sympathetic description of the plight[67] and legal interests[68] of the New York foster child resulted from the foster parents' arguments. It can also be inferred that the foster parents were probably acting in accord with the named children's wishes in attempting to keep them in their existent placements. All of the children seemed content and emotionally established with their foster parents, at least at the time of the district court proceedings, and would likely have wished to continue there.[69] But the broader arguments of the foster parents on class relief also sought to promote their own perceptions of the children's welfare rather than their decisional rights. They sought the automatic hearing requirement in order to remedy the glaring weaknesses and arbitrariness of the New York foster care system.[70] As discussed earlier, this remedy is designed to function without regard to the wishes of the affected children and assumes their incapability to act to protect their own interest. The foster parents sought to replace the existing

65. *Id.* at 819 n. 2.
66. *Id.* at 841-42 n. 44, 842 n. 45.
67. *Id.* at 833-38.
68. *Id.* at 842-47.
69. *See supra* note 58.
70. *See* 431 U.S. at 838-39; 418 F. Supp. at 279.

procedural system which functioned without children exercising decisional power with a different system which also failed to give children decisional rights.

The irony of the case is that the Supreme Court's reasoning in rejecting a greater role for children in the New York hearing system is belied in the very case before it. In refusing to extend to the foster child the right to request a hearing before a change in placement, the Court said that consultation with the foster child as to his wishes "would be among the first steps that a rational factfinder, inquiring into the child's best interests, would pursue."[71] It is not explained, however, how the very case before the court was adjudicated without any such consultation.

III

The Supreme Court's recent companion decisions in *Parham v. J.L.*[72] and *Secretary of Public Welfare of Pennsylvania v. Institutionalized Juveniles*[73] reflect a similar confusion in analysis which assumes that the transfer of greater power to the child necessarily requires greater authority in state officials. These decisions were rendered, however, without the added complexities of the standing issues present in *OFFER*. Both cases dealt with the issue of what due process procedures were required when parental and state custodians seek the admission of their children to state hospitals for the mentally ill or mentally retarded. *Parham* dealt with a Georgia statute, common to many states, which allowed the parent or guardian to admit a child "voluntarily" based on the parent's consent alone, without regard to the child's wishes and without any preadmission or later judicial hearing.[74] *Institutionalized Juveniles* dealt with a similar system of substituted parental consent but which also provided for a post-commitment judicial hearing in certain circumstances where either requested or initiated by the child.[75] In both cases the Supreme Court reversed lower court judgments finding the state procedures unconstitutional and granting some-

71. 431 U.S. at 852.
72. 99 S. Ct. 2493 (1979).
73. 99 S. Ct. 2523 (1979).
74. GA. CODE §§ 88-503.1, 88-503.2 (1979).
75. 99 S. Ct. at 2524-25.

what differing injunctive relief to the states' institutionalized children.[76]

The Supreme Court's principal analysis of the constitutional issues was set forth in *Parham*, in an opinion by Chief Justice Burger. The Court accepted the proposition that admission to a state hospital, although usually at the initiative of the private parent, constitutes state action under the Fourteenth Amendment.[77] The Court also agreed, although not uncritically, that the restraints on freedom and "social ostracism" caused by an admission to a mental hospital mean that "a child, in common with adults, has a substantial liberty interest" protected by the due process clause.[78] The existent Georgia procedure, however, was found sufficient in providing all process which was due. Looking to a record which was barren "of even a single instance of bad faith by any parent," the Court said "that our precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of abuse or neglect, and that the traditional presumption that the parents act in the best interests of their child should apply."[79] The Court did believe that "the risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a 'neutral factfinder' to determine whether the statutory requirements for admission are satisfied."[80] Further, the child had to be given an appearance before this "factfinder."[81] "Of course, the review must also include an interview with the child."[82] The Court found that the traditional, medical decision-making process, already in use, met these requirements.

> It is not necessary that the deciding physician conduct a formal or quasi-formal hearing. A state is free to require such a hearing, but due

76. J. L. v. Parham, 412 F. Supp. 112 (M.D. Ga. 1976), *rev'd and remanded sub nom.*, Parham v. J. R., 99 S. Ct. 2493 (1979); Institutionalized Juveniles v. Secretary of Public Welfare, 459 F. Supp. 30 (E.D. Pa.), *vacated*, 431 U.S. 119 (1977).

77. 99 S. Ct. at 2503.

78. *Id.*

79. *Id.* at 2505.

80. *Id.* at 2506.

81. *Id.*

82. *Id.*

> process is not violated by use of informal, traditional medical investigative techniques . . . What is best for a child is an individual medical decision that must be left to the judgment of physicians in each case. We do no more than emphasize that the decision should represent an independent judgment of what the child requires and that all sources of information that are traditionally relied on by physicians and behavioral specialists should be consulted.[83]

Although there is little depth of analysis, the opinion correctly identifies the interests underlying the deference given parental desires: the usual immaturity of children and the parental responsibility fostered by the emotional bonds in the parent-child relationship.

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has been recognized that natural bonds of affection lead parents to act in the best interests of their children.[84]

The substantial error in analysis is the Court's assumption that the only alternative to parental deference is additional governmental oversight. Completely ignored, as in *OFFER,* is the alternative of giving greater decisional authority to the affected children themselves. Chief Justice Burger posits greater governmental intervention in family life as the only means sought by the child plaintiffs to deal with those parents who "may at time be acting against the interests of the child."[85]

> The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect their children is repugnant to the American tradition.
> . . . Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. . . . Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions,

83. *Id.* at 2507.
84. *Id.* at 2504.
85. *Id.* (quoting Bartley v. Kremens, 402 F. Supp. 1039, 1047-48 (E.D. Pa. 1975), *vacated,* 431 U.S. 119 (1977)).

> including their need for medical care or treatment. Parents can and must make those judgments. . . . Neither state officials nor federal courts are equipped to review such parental decisions.[86]

For the Court to reject the alternative of giving children themselves greater control over the decision of whether to be admitted to a state mental hospital would not have been surprising or even unwise as a matter of constitutional policy. As will be discussed below,[87] Chief Justice Burger is substantially correct in relying on the family to be responsive to the child's needs and wishes. But to fail to even mention or discuss the possibility in a case purporting to decide the rights of children is an omission of major significance. Part of the explanation for this lies in the general perspective of the Court's analysis. The Court assumes uncritically that the overall goal to be sought in defining a constitutionally acceptable admission system is to provide procedures which will best insure that the child placed in a hospital "*needs* institutional care."[88] The phrases "child's need" and the child's "best interests" are used throughout the opinion.[89] This perspective would never be applied in a case dealing with the liberty interests of adults. The adult is not subject to mental commitment whenever he is in "need" of it. Rather, the adult, even if mentally deficient in some respect, is usually given the decisional authority to choose whether to enter a mental hospital on his own.[90] Only if his condition reaches the level of dangerousness to himself or others can the state, or any other third party, intervene and involuntarily secure hospitalization.[91] This is true even in the great bulk of such situations, like that in *Parham*, where the request for involuntary hospitalization comes from a close family member.

This anomoly grows even more curious when one considers the dissenting and lower court opinions, none of which argued for giving a substantial measure of decisional power to the child. Justice Bren-

86. *Id.* at 2504-05 (emphasis in original).

87. *See infra* notes 149-52 and accompanying text.

88. 99 S. Ct. at 2504.

89. *See, e.g.*, 99 S. Ct. at 2502-11.

90. *See generally* Note, *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974).

91. O'Connor v. Donaldson, 422 U.S. 563 (1975).

nan, joined by Justices Marshall and Stevens, filed a dissenting opinion in both *Parham* and *Institutionalized Juveniles.*[92] In both it is readily apparent that Justice Brennan shares Chief Justice Burger's assumption that the protection of the children's rights requires that the government intervene on behalf of the child. In *Parham,* Justice Brennan says his guiding proposition is that "parental rights are limited by the legitimate rights and interests of their children."[93] He argues that it is unrealistic "to assume blindly that parents act in their children's best interests when making commitment decisions and when waiving their children's due process rights."[94] He agrees with the Chief Justice that a preadmission judicial-type hearing might unnecessarily intrude upon family autonomy and functioning but says that requiring a post-admission hearing "is unlikely to deter parents from seeking medical attention for their children and . . . is unlikely to so traumatize parent and child as to make the child's eventual return to the family impracticable."[95] Accordingly, he would require "the right to at least one post-admission hearing."[96] Much of his dissent is a point-by-point rebuttal and he does not directly spell out the circumstances under which the post-admission hearing would be required and, more importantly, the decisional role to be given to children. In concluding, however, Justice Brennan makes the point strongly that he does not expect the children to play a key role in the process. Rather, the weight of this obligation would fall to a largely undefined "champion."

> Children incarcerated in public mental institutions . . . are entitled to some champion who can speak on their behalf and who stands ready to oppose a wrongful commitment. Georgia should not be permitted to deny that opportunity and that champion simply because the children's parents or guardians wish them to be confined without a hearing . . . . And fairness demands that children abandoned by their supposed protectors to the rigors of institutional confinement be given the help of some separate voice.[97]

92. 99 S. Ct. at 2515-22, 2528-29 (Brennan, J. dissenting).
93. *Id.* at 2518.
94. *Id.* at 2519.
95. *Id.* at 2521.
96. *Id.* at 2516.
97. *Id.* at 2522.

The provision of such a "champion", presumably the child's attorney, does not explicitly call for greater governmental power, but it is implicit that this role would have to be funded, if not administered, by the state. Similarly, it is not explicit but still implied that Justice Brennan wishes this individual to oppose "wrongful" commitments in the sense of those which are contrary to the child's "best interests" rather than those which are unwished.

These implicit conclusions are somewhat more directly set forth by Justice Brennan in his dissent in *Institutionalized Juveniles.*[98] The Pennsylvania procedures at issue allow certain children admitted on the consent of their parents to request a post-admission, judicial hearing. Mentally retarded children over 13 years of age and all children labelled mentally ill must be notified of their right to a hearing and given the telephone number of an attorney within twenty-four hours of their admission. Justice Brennan finds these procedures inadequate to meet his post-commitment hearing requirement because "the burden of contacting counsel and the burden of initiating proceedings is placed upon the child."[99] Children would not be capable of acting on their own to assert their rights.

> Many of the institutionalized children are unable to read, write, comprehend the formal explanation of their rights or use the telephone. Few, as a consequence, will be able to take the initiative necessary for them to secure the advice and assistance of a trained representative . . . Pennsylvania must assign each institutionalized child a representative obliged to initiate contact with the child and ensure that the child's constitutional rights are fully protected. *Otherwise it is inevitable that the children's due process rights will be lost through inadvertence, inaction, or incapacity.*[100]

What Justice Brennan is really setting forth is the argument that children, or at least institutionalized children, are not capable of properly exercising decisional power over the course of their lives. He is, then, arguing against an extension of children's rights in the generic sense discussed earlier. He, like Chief Justice Burger, looks to a third party to protect the child. His only difference is that his

98. 99 S. Ct. 2528-29 (Brennan, J. dissenting).
99. *Id.* at 2529.
100. *Id.* (citations omitted) (emphasis added).

"champion" would operate within the legal model rather than the Chief Justice's reliance upon a combination of traditional medical techniques and a general deference to parental choice.

Justice Brennan's dissent in *Institutionalized Juveniles* concludes with a citation to the lower court opinions[101] and much of his analysis is given more explicit treatment there. The district court found that "due process rights are violated in the absence of an *automatic* post-commitment hearing, to be scheduled within a reasonable time, and the presence of counsel to speak solely for the child's interests."[102] The Court said it would allow the child to waive the right to a hearing and related procedural rights but not the right to notice and counsel.[103] But the required "unbiased tribunal" would be allowed to accept the waiver only "upon approval by the child's counsel and upon a finding that the child understands his rights and is competent to waive them."[104] In other words, a hearing would have to be held to determine whether the child would be allowed to waive his right to a hearing. Every child, even those agreeing with their admission, would then be required to appear in court and participate in some form of hearing. Thus, the hearings are not only automatic but required, in some form, in all cases, regardless of the child's wishes.

That the child's desires are not controlling is given greater emphasis in the district court's discussion of the role and nature of the "advocate" to be appointed for each child. This individual should advance the child's "best interests," not his wishes.

> It may not always be necessary to appoint a lawyer so long as a substitute procedure adequately protects the child's interest. For example, it may be sufficient to appoint a guardian, trained in the mental health field, who would advocate the child's interests or alternatively, have the power to retain a lawyer to do so. *The important*

101. *Id.*

102. Institutionalized Juveniles v. Secretary of Public Welfare, 459 F. Supp. at 46 (emphasis added).

103. Id. at 44 n. 48 *citing* Bartley v. Kremens, 402 F. Supp. 1039, 1053-54 n. 26 (E.D. Pa. 1975).

104. Bartley v. Kremens, 402 F. Supp. at 1053-54 n. 26.

> *point is that the child must have a capable advocate who has the sole responsibility of advancing the child's best interests.*[105]

Given the authority of the advocate to decide independently where the child's best interests lie, this individual is given powers not unlike that of the parent under the challenged statute. Similar thinking appears in the lower court decision in *Parham*.[106]

The *Parham* and *Institutionalized Juveniles* cases were thus decided without any judicial discussion at any stage of the proceedings seriously considering a clear expansion of children's rights in the true, decisional sense. This gross omission must, at least partly, be explained by the positions advocated on behalf of the child plaintiffs by their attorneys. Courts, after all, grant only that relief requested in the litigation and the *Parham* and *Institutionalized Juveniles* district courts granted judgment for the child plaintiffs. While there is no clear answer in the reported opinions, it must be presumed that the relief contained in these judgments was that requested by the children's lawyers. Since that relief fails to advance the decisional power of their clients, it follows that the attorneys acted in a role of "champion" designed to further their own perception of the children's best interests rather than expand the true rights of the children. And given the fact that these cases proceeded without the confusion over questions of legal standing present in *OFFER,* this result cannot be blamed upon a lack of clear responsibility on the part of counsel to represent their child clients.

IV.

In the recent abortion cases, the Supreme Court has more directly confronted the role of the child's decisional power in another area

105. 459 F. Supp. at 44 n. 47.

106. The district court in *Parham* did not set forth its remedy in any great detail, leaving such to be devised in the first instance by state authorities. 412 F. Supp. at 139-40. The court did, however, order that all children already held in hospitals under the parental consent statute be recommitted under existent juvenile court procedures or released. *Id.* at 140. The operative statute under the state juvenile code allows a child to be committed only upon "evidence" and a required "study and report" proving that the child requires hospitalization. GA. CODE, § 24A-2601 (1976). Thus, the district court's order, like that in *Institutionalized Juveniles,* seems to require an automatic hearing without regard to whether the child wishes this to occur.

of medical treatment. In *Planned Parenthood of Missouri v. Danforth*[107] and separate 1976 and 1979 decisions in *Bellotti v. Baird,*[108] the Court was presented with challenges to state laws restricting minors' access to abortion procedures. Traditionally, minors' abortions, to the extent legal, were treated as any other medical procedure for the purpose of consent.[109] In most situations, the parent had authority to give consent to treatment on behalf of the child.[110] Logically, this was largely the same situation as in *Parham* and *Institutionalized Juveniles*; children challenged the law's deference to parental authority.

The abortion cases present results inconsistent with 1979's mental commitment cases. *Danforth* dealt with Missouri statutes which regulated abortions in a number of respects and the Court's decision with respect to the parental consent requirement formed only a relatively short portion of an otherwise lengthy opinion.[111] The statute at issue with respect to minors "impose[d] a blanket provision . . . requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy."[112] The state defendants argued that this provision properly reflected the state's general deference to "[p]arental discretion" and "the State's duty to protect the welfare of minors."[113]

Given the constitutional weight generally attached to these interests, the Court's disposition is notable principally in its brevity, rejecting the state's interests in a single paragraph. The Court said that the challenged parental veto would not advance family functioning.

> It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patients' pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power

107. 428 U.S. 52 (1976).
108. 428 U.S. 132 (1976); 99 S. Ct. 3035 (1979).
109. *Cf.* Lacey v. Laird, 166 Ohio St. 12, 139 N.E.2d 25 (1956).
110. *Id.*
111. 428 U.S. at 72-75.
112. *Id.* at 74.
113. *Id.* at 73.

> will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.[114]

The inconsistency comes in the fact that a parent's decision to involuntarily admit a child to a state mental hospital has "fractured the family structure" in a dramatically more substantial fashion. Justice Brennan cogently made this argument in *Parham.*

> [A]s in *Danforth,* the parent-child dispute at issue here cannot be characterized as involving only a routine child-rearing decision made within the context of an ongoing family relationship. Indeed, *Danforth* involved only a potential dispute between parent and child, whereas here a break in family autonomy has actually resulted in the parents' decision to surrender custody of their child to a state mental institution. In my view, a child who has been ousted from his family has even greater need for an independent advocate.[115]

Similarly, Chief Justice Burger's response in *Parham* would seem to fit as well in *Danforth.* He argues simply that children are immature and the exercise of parental authority often requires that the child's wishes be ignored:

> Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents . . . . The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child.[116]

He distinguishes the contrary result in *Danforth* solely on the basis of the parent there having "an absolute parental veto over the child's ability to obtain an abortion."[117] "Parents in Georgia in no

114. *Id.* at 75.
115. 99 S. Ct. at 2519 (Brennan, J. dissenting).
116. 99 S. Ct. at 2504-05.
117. *Id.*

sense have an absolute right to commit their children to state mental hospitals; the statute requires the superintendent of each regional hospital to exercise independent judgment as to the child's need for confinement."[118]

This distinction is more artificial than real and certainly cannot serve to explain adequately the contrary results in *Parham* and *Danforth.* A better, but still incomplete explanation was offered in the 1979 decision in *Bellotti v. Baird,*[119] delivered two weeks after *Parham.* The case dealt with a Massachusetts statute which generally required minors seeking abortions to obtain the consent of their parents, but which also allowed them to bypass their parents in certain circumstances and secure judicial approval for the abortion.[120] The case was first presented to the Supreme Court in 1976 and the Court, in a decision decided with *Danforth,* directed that the district court abstain until a decision could be reached in the state courts on the circumstances under which a minor could avoid a parental veto by resort to judicial approval. The Court believed that the challenged statute might be interpreted in such a fashion as "would avoid or substantially modify the federal constitutional challenge to the statute."[121]

Following further proceedings in the state courts and the federal district court, the case returned to the Supreme Court for decision in the 1979 term. As interpreted by the state court, the challenged statute permitted a court to authorize an abortion contrary to parental wishes only if the judge finds that the abortion is consistent with the child's best interests and only if the parents are given notice of the judicial proceedings.[122] The Supreme Court found this system to interfere unconstitutionally with the minor's abortion rights but failed to provide any opinion supported by a majority of the Court. Justice Powell, joined by Chief Justice Burger and Justices Stewart and Rehnquist, delivered a plurality opinion.[123] Justice

118. *Id.*
119. 99 S. Ct. 3035 (1979).
120. MASS. GEN. LAWS ANN. ch. 112, § 12S (West Cum. Supp. 1978).
121. 428 U.S. at 148.
122. 99 S. Ct. at 3049.
123. *Id.* at 3035.

Stevens, joined by Justices Brennan, Marshall and Blackmun, filed a separate concurring opinion.[124]

Justice Powell's plurality opinion states that "if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained."[125] This alternative procedure must allow the child to seek the non-parental authorization in anonymity and without notice to parents.[126] Further, the judge or administrative officer designated for this purpose must authorize the abortion if the child demonstrates either that she is sufficiently mature to make her own abortion decision or even if she is immature, that "the desired abortion would be in her best interests."[127] Justice Stevens' concurring opinion states that the statute was improper simply because it allowed the state, through either parents or a state court judge, to retain a veto over the mature minor's abortion decision. In his view, the statute retained "an absolute third-party veto" and *Danforth* was controlling.[128] He found it unnecessary to consider the other aspects of the statute or the "hypothetical questions Mr. Justice Powell has elected to address."[129]

Justice Powell was not opposed by Justice Stevens, however, in articulating what he describes as the "unique" character of the constitutional right at stake, which he says formed the basis for the *Danforth* decision.[130] Justice Powell reasons that the "severe detriment" resulting from the birth of an unwanted child presents unusually burdensome consequences for the unmarried minor.[131] Most importantly, the decision to abort, and thereby to avoid these "grave and indelible" consequences, cannot be postponed until the child reaches majority.

124. *Id.* at 3053 (Stevens, J. concurring). Justice White filed a separate dissenting opinion. *Id.* at 3055.

125. 99 S. Ct. at 3048 (footnote omitted).

126. *Id.* at 3048-49.

127. *Id.* at 3048.

128. *Id.* at 3053 (Stevens, J. concurring).

129. *Id.* at 3055 n. 4.

130. 99 S. Ct. at 3048.

131. *Id.*

> The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision. . . . A pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.
>
> . . . .
>
> [T]he abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences.[132]

This rationale does, in part, distinguish the abortion decision from that dealing with mental commitment.[133] But it does not satisfactorily explain the degree of deference given the child's right to choose an abortion when compared to the complete absence of explicit consideration of greater decisional power for the child in *Parham.* Perhaps part of the explanation may be that the affected children in the abortion cases have had their decisional rights fully articulated without compromise. The irony is that this has occurred in cases where children have had little or no actual role.

The first and principle case establishing minors' right to abortion, *Danforth,* was litigated without any child plaintiffs. The case's only plaintiffs were two physicians who performed abortions and Planned Parenthood of Central Missouri.[134] The Court allowed the physicians standing to argue the rights of their patients seeking abortions, including juveniles.[135] The case dealt not only with the abortion rights of minors. Rather, the case dealt broadly with a Missouri statute passed in 1974 in response to a court decision finding its previous statutes unconstitutional under *Roe v. Wade*[136] and *Doe v. Bolton.*[137] The new law regulated abortions in a broad fashion, imposing a number of generally restrictive procedural and substantive requirements.[138] The plaintiffs filed their suit only three

132. *Id.* at 3047-48.

133. It should be noted, however, that this explanation was never presented in *Danforth.* Only three years later in *Bellotti II* was this more satisfactory rationale articulated.

134. 428 U.S. at 56-57.

135. *Id.* at 62.

136. 410 U.S. 113 (1973).

137. 410 U.S. 179 (1973).

138. 428 U.S. at 58-59.

days after the new law became effective.[139] The case presented an obvious contest between pro- and anti-abortion forces. The plaintiffs' principal role lay thus not in expanding the rights of minors generally but in expanding the availability of abortions. It does not require great insight to perceive that juveniles might be deterred from seeking and obtaining abortions if their parents retain substantial power over the abortion decision, as provided in the Missouri law. The plaintiffs thus were forced to vigorously challenge the parents' authority, and strongly advocate the decisional rights of children, in order to reap the greater goal of expanded availability of abortions.

The *Bellotti* cases present a similar picture. While the case did have a child plaintiff and the state law at issue was limited in application to juveniles,[140] similar forces were involved. The original action was filed only a few days before a new Massachusetts statute restricting minors' abortion rights took effect.[141] Aside from an anonymous girl who desired an abortion without parental involvement, the original plaintiffs included an abortion clinic, its director, and a physician who regularly performed abortions.[142] Planned Parenthood of Massachusetts and another family planning clinic were later allowed to intervene.[143] The case was certified as a class action and both the physician and institutional parties played a significant role in advocating the interests of the juvenile class members.[144] The case thus presented another confrontation between forces on either side of the abortion question, with advocacy of greater decisional power for children in the abortion area as the abortion advocates' means of securing their ultimate goal. Despite the somewhat colored motives of the adult plaintiffs in *Danforth* and *Bellotti*, they must have vigorously presented the rights of the child patients, else the Supreme Court would not have acted as it did.

Another possible reason distinguishing the result in the abortion area may have been the Court's perception of the wishes of the

139. *Id.* at 56.
140. 99 S. Ct. at 3039-40.
141. *Id.* at 3039.
142. *Id.*
143. *Id.* at 3040.
144. *Id.*

affected children. The question of abortion affects only older children who the Court would undoubtedly consider more capable of decision-making generally. Moreover, it would be expected that significant numbers of pregnant girls would independently want to secure an abortion without having to go through their parents. In fact, the district court in *Bellotti* made just these findings.[145] But the fact that the evidence necessary for the court to so find was presented again hinged on the willingness and ability of the children's advocate to fully present the case for their decisional rights.

V.

In these three areas, foster care, mental commitments, and abortions, the Supreme Court has announced largely inconsistent and contradictory decisions. The *OFFER* and *Parham* decisions gave little, if any consideration to the child's right to choose. *OFFER* relied on the foster parents to assert the child's interest in avoiding a wrongful change in foster care placement. *Parham* similarly relied on the natural parent as the principal agent to insure that the child is not erroneously placed in a mental hospital. *Danforth* and *Bellotti,* however, announced completely different results, relying upon children's decisional choices and largely rejecting parental authority. The cases held that "mature" minors can obtain abortions based upon their wishes alone without any parental involvement whatsoever.

A possible, although largely speculative explanation for this inconsistency in the Supreme Court's treatment of children's asserted rights to choose may have been the varying roles played by the children's attorneys and other lawyers speaking on their behalf. As any trial attorney knows, judicial decision-making hardly happens in a vacuum and a complex of actions by a party's counsel can influence a case's eventual result. More fundamentally, courts generally grant only those things which a party asks for and the court looks to the lawyer to articulate the relief sought by his client. Perhaps the Supreme Court has been providing no more to children than what their attorneys have asked for.

145. Baird v. Bellotti, 393 F. Supp. 847, 854-55 (D. Mass. 1975); Baird v. Bellotti, 450 F. Supp. 997, 1001-02 (D. Mass. 1978).

The district court in *OFFER* had required a hearing in every instance when a child was to be moved from his established foster home, even when not requested by the foster parent or the child. While the district court in *Parham* did not fully detail the procedures it thought necessary, its companion in *Institutionalized Juveniles* was not so restrained. Similar to *OFFER*, the district court there ordered that a hearing be held automatically in every instance where a child is placed in a mental institution, whether requested or not. Thus, in both instances neither the lower courts granting relief to the child plaintiffs nor the Supreme Court decisions reversing these judgments in fact relied on the child's right to choose.

Perhaps the conclusion to be drawn is that the children's attorneys and those asserting their rights in the foster care and mental commitment cases never really sought an increase in decisional power for children. While using the mantel of children's rights, they may have been seeking to secure for their clients a "welfare" which they, the adult advocates, thought helpful or necessary. While the Court reached a contrary result in *Danforth* and *Bellotti*, these decisions can be similarly viewed since the granting of decisional power to the pregnant minor may have been a goal secondary to the adult's desire to secure wider provision of abortions.

All three sets of decisions may be explained by the child advocates' own view of the worth of the substantive benefit or service at issue. In *OFFER*, and in the *Parham* and *Institutionalized Juveniles* cases, the foster care and public mental hospital systems were portrayed as quite bleak. Justice Brennan in *OFFER* devoted an entire section to the child advocates' indictment of the New York foster care system.[146] Similarly, the district courts in *Parham* and *Institutionalized Juveniles* detailed the plaintiffs' evidence that the Georgia and Pennsylvania state mental hospitals provided scant treatment for child inmates and served largely as custodial warehouses.[147] On the contrary, in *Danforth* and *Bellotti*, abortion was presented as a valid and sometimes necessary alternative for minors to avoid the consequences of improvident sexual acts.

146. 431 U.S. at 833-38.

147. 412 F. Supp. at 119-28; 402 F. Supp. at 1043-45; 459 F. Supp. at 36-40.

Thus, in all three sets of cases, children's rights may have been the mere vehicle for adult "child savers" to criticize or promote substantive systems serving youth. Robert Burt has convincingly argued that much of the Supreme Court's decisional law dealing with children reflects the claims of adults rather than the affected children.[148] "The battle between state and parent in these cases seems remarkably like typical divorce custody disputes, in which neither adult seems incontentably correct, and each seems locked in a power struggle with the other, using the child as weapon and trophy while ignoring his needs."[149]

The obvious danger is that the courts' attention is mistakenly diverted from the actual legal issue decided. In *Institutionalized Juveniles,* for example, Chief Justice Burger referred to the district court's remedy as an "overdose" of due process.[150] To the extent that this observation was accurate, such was the result of the failure of the children's attorneys to rely upon the decisional rights of their clients in their requested relief. If the purported right asserted is the child's right to liberty, it is contradictory to suggest relief where children must have a hearing prior to a hospital admission whether they want one or not. By denying the capability of their clients to exercise the choice of whether to consent or object to their admission, the children's lawyers substantially undermined their own arguments that juveniles require the same due process model as is used for adults. Had they instead sought a less cumbersome remedy giving children expanded decisional authority, like that for adults, it is possible that the decision might have been different.[151]

148. Burt, *Developing Constitutional Rights Of, In, and For Children,* 39 LAW & CONTEMP. PROB. 118 (1976).

149. *Id.* at 121-22.

150. 99 S. Ct. 2526 n. 7 (quoting the district court's dissenting opinion, 459 F. Supp. at 53).

151. The position of the plaintiff's attorneys may have also particularly prejudiced the legal position of foster children. The court allowed their state custodians the same authority to commit given natural parents. 99 S. Ct. at 2512. Given the frequent arbitrariness existent within the foster care system, *OFFER,* 431 U.S. 833-38, and the lack of emotional bonds between the foster child and his state custodian, *see* discussion *infra* at notes 45-47, this result is particularly disturbing. The Court substantially based its holding on the fact that "neither the District Court nor the *appellees* has suggested that wards of the State should receive any constitutional treatment different from children with natural parents." 99 S. Ct. at 2512. (emphasis added). The Court also cited the plaintiffs' failure to prove that state foster care custodians acted or would act arbitrarily in admitting children to mental hospitals. *Id.*

The question also arises as to what the children's attorneys would have won for their clients in *OFFER* and *Parham* had they prevailed in the Supreme Court. The automatic hearing remedy sought in both cases would have simply replaced the child's dependency upon natural parents in *Parham* and foster parents in *OFFER* with a new judicial model administered by the state. The decisional power would simply have been substantially transferred from a parent figure to a state official. The child would have remained largely powerless.

Moreover, there is substantial reason to believe that the parent figure would be more responsive to the wishes of the child and that the imposition of the automatic judicial model would result in an actual decrease of power for the child. The parent or established foster parent normally has a substantial emotional bond with the child.[152] There is psychological evidence that the parent-child bond requires that the parent normally be responsive to the child's needs, but one does not need psychological expertise to understand the child's ability to successfully influence parental decision-making. For example, even a newborn baby can voice his desires by crying and see that the parent gratifies his wishes to be fed, held and changed. Children, of course, often fail to get their parents to conform to their wishes but the parent-child bond at least gives them a substantial avenue of influence. The daily contact and emotional intimacy of family life gives the child a great deal of power, most of which would be lost in a routinized judicial model.

There is also no reason to expect the state-run judicial model to function any more appropriately than the state-run foster care and mental-health systems they were expected to scrutinize. The juvenile court, after all, was supposed to play the very same advocate's role but it certainly has never lived up to this expectation.[154] A civil servant wearing the hat of an administrative or judicial hearing officer is subject to the same bureaucratic distance and unresponsiveness as his first cousins, the social worker and state psychiatrist.[155] There is simply no reason to expect that Justice Brennan's wished-

152. J. GOLDSTEIN, A. FREUD AND A SOLNIT, *supra* note 60.
153. *Id.*
154. A. PLATT, *supra* note 17.
155. *See Parham*, 99 S. Ct. 2508.

for "champion" will be anything other than a rehash of the present cast of government officials.

If we wish to promote children's rights, we should make sure that children gain greater, not less, power over their lives. If we wish instead to give them a "champion," let us look to the only individual with the emotional bond and commitment necessary for this arduous task, the parent.