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How Are You Going to Keep Them Down on the (Collective) Farm After They've Seen Chicago?— A Minor's Right to Political Asylum Against His Parents' Wishes

MICHAEL G. HILLINGER*

INTRODUCTION

On July 30, 1980, an all-too-common drama played itself out in a Chicago juvenile courtroom.¹ Judge Mooney decided the case of a twelve-year-old boy who had run away from home because he objected to his parents' decision to move out of state. Judge Mooney heard testimony from the boy, his older sister (with whom he had run away), his parents and several psychiatrists. On August 4, Judge Mooney announced his decision: he found the boy's running away sufficient to support a finding that he was beyond his parents' control. The judge therefore declared the boy to be a minor in need of supervision (MINS)² and made him a ward of the court. Pending a dispositional hearing to determine the boy's ultimate fate, he was placed in the temporary care of foster parents. Taking advantage of a procedural technicality, the boy's parents appealed on the day that the dispositional hearing was to have taken place. On December 30, 1981, a three judge panel of the First District of the Appellate Court of Illinois reversed Judge Mooney's decision.³ In a narrowly written

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1. For a general background to the case, see *In re Polovchak*, 97 Ill. 2d 212, 454 N.E.2d 258 (1983); *In re Polovchak*, 104 Ill. App. 3d 203, 432 N.E.2d 873 (1981); Brief for Minor-Respondent, *In re Polovchak*, 104 Ill. App. 3d 203, 432 N.E.2d 873 (1981) [hereinafter cited as *Polovchak Brief*]. The case has also been extensively covered in the N.Y. Times and Washington Post. For a recent, surprisingly balanced summary see Thorne, *The Littlest Defector*, 35 NAT'L REV. 314 (1983).

2. As defined in ILL. REV. STAT. ch. 37, § 702-3 (1981) (amended 1983).

3. *In re Polovchak*, 104 Ill. App. 3d 203, 432 N.E.2d 873 (1981).

opinion, the appellate court held that a single instance of running away was insufficient evidence to support a finding that the boy was beyond his parents' control and therefore a MINS.⁴ The Illinois Supreme Court affirmed this decision.⁵

Based on the bare recitation of its facts, this case seems little more than another example of the increasingly common spectacle of families turning to the courts to resolve seemingly intractable conflicts. In fact, this case raises complex questions of federalism and foreign power.⁶ Its ultimate resolution will depend on the extent of judicial willingness to recognize that children have rights beyond those their parents deign to give them and that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."⁷ Understanding why such a basically simple case has been featured on the *CBS News*, in the *New York Times* and the *Washington Post*, and has involved at least five lawyers from the Illinois Civil Liberties Union representing the parents, requires some background information.

In January, 1980, Mikhail and Anna Polovchak and their three children, Natasha (Natalie), Vladimir (Walter) and Mikhail arrived in the United States.⁸ Ukrainians and devout Christians, the Polovchaks had long wanted to leave the Soviet Union, but had been unable to receive exit visas. No Soviet citizen may travel abroad without one. Late in 1979, Soviet authorities finally granted the Polovchaks permission to leave their home in the western Ukraine and to emigrate

4. *Id.* at 211, 432 N.E.2d at 880. This holding can best be described as surreal. The court based its decision almost entirely on the testimony of the parents' expert witness, a psychiatrist who admitted that he had never talked to Walter and did not know the background of the Polovchak family relationships, yet was willing to state dogmatically that "no twelve year old has the intellectual or emotional capacity to decide whether he should live with his parents." *Id.* at 205-06, 432 N.E.2d at 875-77. The court dealt with none of the substantive issues raised in a year and a half of litigation. It merely told Walter to run away at least one more time. The dissent argued that the majority had misconstrued Illinois law and had misapplied it to the facts in this case. *Id.* at 211-13, 432 N.E.2d at 880-81 (McNamara, J., dissenting). Justice McNamara felt that there was ample evidence to support a finding that Walter was beyond his parents' control and that the lower court's judgment should have been affirmed.

5. *In re Polovchak*, 97 Ill. 2d 212, 226, 454 N.E.2d 258, 264 (1983).

6. For some recent scholarly examinations of the issue of federal preemption, see J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 292-96 (2d ed. 1983); Shiply, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 CORNELL L. REV. 673 (1981); Comment, *Pre-empting State Action Taken Pursuant to the Twenty-First Amendment*, 53 TEMP. L.Q. 590, 595-601 (1980).

7. *In re Gault*, 387 U.S. 1, 13 (1967).

8. *In re Polovchak*, 97 Ill. 2d at 215, 454 N.E.2d at 259.

to the United States. The Polovchaks settled in a large Ukrainian community in Chicago. They shared an apartment there with Mikhail's nephew, Walter Polovchak.

The Polovchaks were part of a recent upsurge of Soviet immigrants to the United States.⁹ During the mid-1970's, due in part to the Jackson-Vanik Amendment¹⁰ and the Helsinki Accord,¹¹ the Soviet Union significantly liberalized its emigration policies. Since 1974, it has allowed over 40,000 Soviet citizens to emigrate to the United States. Although this stream of Soviet immigration is miniscule compared to the arrival into the United States of three million legal immigrants during the same period,¹² several aspects of this immigration have caught media attention. The media, especially television, have focused on Jewish dissidents and Russian intellectuals, artists, athletes, and musicians: on writers such as Aleksandr Solzhenitsyn, ballet dancers such as Mikhail Baryshnikov, musicians such as Mstislav Rostropovich and skaters such as the Protopoviches. Yet most of the Soviet emigration was made up of more ordinary people, often members of minorities: Ukrainians, Lithuanians and Armenians as well as Jews.¹³ The Polovchaks, neither intellectuals nor famous, were more typical of the 40,000 immigrants than was Rudolf Nureyev.

Mr. Polovchak had been a bus driver in Lviv.¹⁴ When the Polov-

9. See UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1980, at 94 (1980) [hereinafter cited as STATISTICAL ABSTRACT].

10. The Jackson-Vanik Amendment linked any future United States trade concessions to the Soviet Union to a public Soviet commitment to liberalize its emigration policies, especially for Jews. Although the Soviets never accepted the Amendment formally, they did liberalize their emigration policies until 1979. The growing chill in U.S.-Soviet relations that resulted from the Soviet invasion of Afghanistan and the American reaction to it significantly affected Soviet willingness to allow large numbers of Soviet citizens to emigrate. See P. STERN, *WATER'S EDGE: DOMESTIC POLICY AND THE MAKING OF AMERICAN FOREIGN POLICY* (1979) for a recent study on the impact of the issue of Soviet emigration on U.S.-Soviet relations.

11. The Helsinki Accord essentially recognizes the territorial status quo resulting from the Communist takeovers in Central Europe between 1945 and 1948. Part of the price the Soviets paid for this Western acceptance of the Soviet Bloc was the so-called "Basket III" of Helsinki, committing the signatories to the protection of such basic rights as the right to enter and leave the country of one's birth at will. See generally Turack, *Freedom of Transnational Movement: The Helsinki Accord and Beyond*, 11 VAND. J. TRANSNAT'L L. 585 (1978); *Human Rights and the Helsinki Accord—A Five-Year Road to Madrid*, 13 VAND. J. TRANSNAT'L L. 249 (1980).

12. STATISTICAL ABSTRACT, *supra* note 9.

13. Immigration law gives a strong preference to close relatives of American citizens (8 U.S.C. § 1153(a)(5) (1965)) and since those four nationalities comprise the bulk of Americans whose ancestors came from what is now the Soviet Union, it is likely that most recent Soviet immigrants to the U.S. also come from those groups.

14. N.Y. Times, Aug. 14, 1981, at A3, col. 1.

chaks arrived in the United States, they could find only menial employment. Both Polovchak parents worked as janitors, but on different shifts, the father from 3 P.M. to midnight and the mother from 7 A.M. to 3 P.M. The father was home only when the children were asleep or getting ready to go to school. Only the mother was able to spend significant amounts of time with the children. According to Walter's testimony at trial, his parents went away on weekends, frequently leaving their three children with cousin Walter.¹⁵

It would be hard to overestimate the tensions and dislocations of the Polovchaks' life style in the United States. They had become a fairly typical working-class immigrant family.¹⁶ The parents worked at low-paying, physically draining jobs which left little opportunity to gain an understanding or liking of American life. Their children, on the other hand, were becoming Americanized and probably increasingly estranged from their parents. Walter and Natalie's increasing closeness to their "American" cousin, Walter, also exacerbated the situation. Unlike his Ukrainian cousins, Walter was not a member of the Ukrainian Catholic Church,¹⁷ but a Baptist.¹⁸ Natalie and young Walter increasingly attended the neighborhood Ukrainian Baptist Church with their cousin. The older Polovchak children repeatedly fought with their father on the few occasions that they saw him. Some of the arguments concerned religion, but many centered around young Walter's taste in music.

15. Polovchak Brief, *supra* note 1, at 26.

16. See UNITED STATES COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS OF EURO-ETHNIC AMERICANS IN THE UNITED STATES: OPPORTUNITIES AND CHALLENGES (1979), especially at 396-488 for an indication that even native Americans of southern and eastern European extraction tend to be represented disproportionately in unskilled and semi-skilled occupations.

17. The Ukrainian Catholic Church is part of a larger movement known as Eastern Rite Catholicism or the Uniates. Like other Uniates, Ukrainian Catholics follow the same liturgy and theology as the majority Ukrainian Orthodox; unlike the Orthodox, the Uniates also acknowledge the supremacy of the Pope. The Ukrainian Uniates are strongest in the western Ukraine, especially in areas which became Soviet only after 1945. The Soviet government dissolved the Uniate Church in the Ukraine after 1945, but an underground Uniate movement still exists. For a recent survey pointing out the continued importance of the Uniates in Ukrainian nationalism, see Bociurkiw, *Religion and Nationalism in the Contemporary Ukraine*, in NATIONALISM IN THE USSR & EASTERN EUROPE IN THE ERA OF BREZHNEV & KOSYGIN 81-96 (G. Simmonds ed. 1977).

18. The Ukrainian Baptist Church seems in large part to have originated among the underground Uniates. *Id.* at 87. In spite of (or perhaps because of) this common origin, relations between Uniates and Baptists are often poor. In fact, Walter's father put much of the blame for Walter's defection on Baptists. Richmond Times-Dispatch, April 29, 1982, at A8, col. 6.

The Polovchak's residence with cousin Walter heightened the tensions in the Polovchak family. Cousin Walter supported young Walter in many of his arguments with his father. Mikhail Polovchak began to regret having left the Soviet Union and, in early July, he started to talk seriously about returning.¹⁹ This intention caused even more arguments with his older children.

The crisis in the Polovchak family came to a head in mid-July. On July 12, cousin Walter moved into his own apartment. On July 13, Natalie and Walter went to church with their cousin and spent the night at his new apartment. The following day they left their apartment with their belongings, refusing to tell their mother where they were going. By July 18, the police had tracked Walter and Natalie down. Judge Mooney held a preliminary hearing on Walter's case the next day, appointing temporary foster parents²⁰ pending adjudication of Walter's status.

At this point, the already complex case began to resemble a three-ring circus. The Illinois Civil Liberties Union entered on the parents' side. Young Walter acquired two lawyers, one, a guardian *ad litem* appointed by the court, the other, Julian Kulas, a leader in Chicago's Ukrainian community.²¹ The Soviet Embassy in Washington also became involved, muttering darkly about drugging and kidnapping plots and explaining the whole incident as an attempt to wreck what was left of detente.²² Even the Reagan Administration got into the drama, granting Walter's request for political asylum with almost indecent haste.²³ Walter had requested asylum on the day of the preliminary hearing and the State Department granted it two days later, two weeks before Judge Mooney decided Walter's MINS status.²⁴

By early August, many of the participants in the drama and much of the commentary were ignoring the human question of a family torn apart by forces beyond their control. The parents especially seemed hurt, angry and bewildered. At the trial, Mrs. Polovchak asked: " 'Do we lose our rights as parents because we came to the United States?' " ²⁵ Two weeks earlier, upon hearing that the State Department had granted his son political asylum, Mr. Polovchak asked: " 'Am I a drunkard?

19. Washington Post, Aug. 10, 1980, at A1, col. 5.

20. These temporary parents were Walter's aunt and uncle, cousin Walter's parents. Polovchak Brief, *supra* note 1, at 29-30.

21. N.Y. Times, July 22, 1980, at A12, col. 1.

22. *Id.*, Aug. 13, 1980, at A13, col. 1.

23. *Id.*, July 22, 1980, at A12, col. 1.

24. Polovchak Brief, *supra* note 1, at 18.

25. N.Y. Times, July 31, 1980, at A12, col. 3.

I am not. Do I starve my children? I do not. Have I broken any laws? I have not. So who is the government to take away my child?' ”²⁶

Mr. Polovchak's last question forms the crux of his case and his lawyers' arguments. Most people, especially parents, would probably answer his question by denying the government's legal or moral right to take away his child. As is frequently the case, however, the answer one gives depends in large part on the question that is asked. Had Walter Polovchak been interviewed by the same reporter, he might have asked a very different question: "Who is my father to force me to go back to a country where I will be unhappy, unable to get higher education and perhaps even be sent to a prison camp?" Walter deserves an answer just as much as his father does. This article focuses on which question, Walter's or his father's, is the one the courts should address.

PARENTAL AUTONOMY AND CHILDREN'S RIGHTS

"Children's rights" is a nebulous phrase subsuming two very different issues: the extent to which children can assert the same rights against the state as adults, and the extent to which the state can limit a parent's power over his child.²⁷ In cases involving the issue of children's rights, the Supreme Court has defined those rights in a relatively restrictive fashion. On the one hand, the Supreme Court has recognized that children have constitutional rights independent of those enjoyed by their parents.²⁸ On the other hand, it has frequently held those rights to be either less than those afforded to adults or subordinate to the rights of the parents.²⁹ A recent opinion listed

26. *Id.*, July 22, 1980, at A12, col. 1.

27. See generally Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1 (1980); *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980); Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383 (1974).

28. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 574-75 (1975) (public high school students facing temporary suspension have liberty and property interests protectable under due process clause of fourteenth amendment); *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 506 (1969) (school children have first amendment rights of freedom of speech and expression); *In re Gault*, 387 U.S. 1, 30-31 (1967) (minor in juvenile delinquency hearing has fourteenth amendment procedural due process rights).

29. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (child's liberty interest in not being institutionalized by his parents in a state mental hospital "is inextricably linked with the parents' interest in and obligation for the welfare and health of the child, [so] the private interest at stake is a combination of the child's and parents'").

three reasons why children could not enjoy the same constitutional rights as adults: children's "peculiar vulnerability . . . ; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."³⁰ To the extent that the courts have recognized children's rights, they generally have done so within the context of a parental right to "family autonomy."

FAMILY AUTONOMY—THE CASE-LAW BASIS

Family autonomy evolved from the turn-of-the-century doctrine of substantive due process, generally associated with *Lochner v. New York*.³¹ The United States Supreme Court read certain substantive rights into the due process clause of the fourteenth amendment and struck down a number of state regulatory statutes because they infringed upon these rights.³² By the end of the 1930's, however, the Court had largely repudiated substantive due process, once again allowing states to enforce minimum wages for women or regulate the working hours of bakers.³³

The Court's repudiation of *Lochner* did not affect several lines of cases which held that the fourteenth amendment's due process clause imposed an obligation on the states to respect certain *non-economic* rights of their citizens.³⁴ Two opinions in one of these lines provided the foundation upon which the Supreme Court later constructed a theory of family autonomy.

concerns"); *Ingraham v. Wright*, 430 U.S. 651 (1977) (eighth amendment right to be free from cruel and unusual punishment does not apply to disciplinary corporal punishment in public schools, *id.* at 669-71; post-deprivation, common law remedies adequately protect child's fourteenth amendment due process interests, *id.* at 677-80); *Prince v. Massachusetts*, 321 U.S. 158, 167-71 (1944) (child's first amendment free exercise right subject to greater state restriction than that of adult).

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

31. 198 U.S. 45 (1905) (invalidated a state law limiting the number of hours a baker could work). This case represented the classic incorporation of the free enterprise ideology of the Chamber of Commerce into the fourteenth amendment.

32. For a discussion of the origins and evolution of substantive due process, see J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 6, at 425-43.

33. In *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), the Court sustained the constitutionality of a Washington state minimum wage statute for women, marking the end of substantive due process in the area of state regulation designed to limit business freedom.

34. See, e.g., *Nixon v. Herndon*, 273 U.S. 536 (1927) (invalidating Texas "white primary" statute as violating fourteenth amendment); *Gitlow v. New York*, 268 U.S. 652 (1925) (applying first amendment freedom of speech protection to the states via incorporation into the fourteenth amendment).

*Meyer v. Nebraska*³⁵ and *Pierce v. Society of Sisters*³⁶ arose in the context of an extreme reaction against foreigners, Jews, Catholics and radicals during and shortly after World War I.³⁷ Many "Native Americans" (primarily those of British Protestant extraction) feared that they would be swamped by an ever-increasing horde of foreigners.³⁸ Congress reacted to this fear in part by imposing severely restrictive immigration quotas.³⁹ Many states passed statutes intended to strengthen the traditional role of the public schools as assimilator and Americanizer of immigrant children.⁴⁰ In 1919, Nebraska, like many other states, prohibited the teaching of foreign languages to children before high school.⁴¹ Meyer, a teacher in a Lutheran parochial school, violated the statute and was prosecuted and convicted. The Nebraska Supreme Court affirmed the conviction.⁴²

On appeal, the United States Supreme Court reversed, striking down the statute for violating Meyer's fourteenth amendment right to carry on his chosen profession.⁴³ Two years later, the Court in *Pierce* struck down an Oregon statute which mandated public school

35. 262 U.S. 390 (1923).

36. 268 U.S. 510 (1925).

37. 2 O. HANDLIN, THE HISTORY OF THE UNITED STATES, 339-40 (1968). Handlin includes an excerpt from a Des Moines, Iowa, newspaper decrying the "insidious German propaganda that has been woven into our whole educational system" and calling, *inter alia*, for the purification of American music from German influences. *Id.* at 339.

38. *Id.* at 354-57.

39. See *id.* at 357 for charts showing the impact of the new immigration quotas on immigration into the United States.

40. The anti-immigrant animus of the statutes struck down in *Meyer* and *Pierce* becomes clear from reading the lower court opinions. Both majority and dissent in *Meyer* agreed on the legislature's motive. "The legislature had seen the baneful effects of permitting foreigners . . . to rear and educate their children in the language of their native land." *Meyer v. State*, 107 Neb. 657, 661, 187 N.W. 100, 102 (1922), *rev'd*, 262 U.S. 390 (1923). "It is patent, obvious, and a matter of common knowledge that this restriction was . . . a product of passions engendered by the World War, which had not [yet] had time to cool." *Id.* at 669, 187 N.W. at 104-05 (Letton, J., dissenting). Similarly, the three judge federal panel whose opinion the Supreme Court affirmed in *Pierce* noted (and dismissed) Oregon's argument that the state had a valid interest in banning private schools in order to keep them from hindering the assimilation of immigrants' children. *Society of Sisters v. Pierce*, 296 F. 928, 938 (D. Or. 1924), *aff'd*, 268 U.S. 510 (1925).

41. See *Meyer v. Nebraska*, 262 U.S. 390, 395 (1923) (partial list of states with such statutes).

42. *Meyer v. State*, 107 Neb. 657, 187 N.W. 100 (1922), *rev'd*, 262 U.S. 390 (1923).

43. *Meyer v. Nebraska*, 262 U.S. 390 (1923). In a companion case, the Court overturned an Iowa law forbidding the teaching of foreign languages. *Bartels v. Iowa*, 262 U.S. 404 (1923).

attendance for all children aged eight to sixteen who had not yet finished the eighth grade.⁴⁴ As in *Meyer*, the Court found that the statute violated the appellants' right to carry on their business.

Although both *Meyer* and *Pierce* were decided strictly on substantive due process grounds,⁴⁵ each contained a wealth of dictum supporting a constitutional guarantee of parental rights. In *Meyer*, the Court suggested that the fourteenth amendment embraced the right to "marry, establish a home and bring up children [which are] essential to the ordered pursuit of liberty."⁴⁶ In *Pierce*, the Court rejected the notion that a child was "the mere creation of the State"⁴⁷ and asserted the parents' fourteenth amendment right "to direct the upbringing and education of children under their control."⁴⁸

For four decades, the Court largely ignored the language in *Meyer* and *Pierce* giving constitutional protection to parental rights. The two cases were cited infrequently and almost never for their language on parental rights.⁴⁹ In 1965, the Supreme Court revived substantive due

44. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The last of the cases invalidating statutes restricting or prohibiting private schools was *Farrington v. Tokushige*, 273 U.S. 284 (1926). *Tokushige* invalidated a territorial statute of Hawaii for violating the fifth amendment's due process clause. The Hawaii statute essentially banned private schools which used Japanese, Chinese and other foreign languages.

45. The importance of substantive due process in deciding these cases is clearest in *Pierce*, where the district court liberally quoted from *Meyer v. Nebraska* yet made no mention at all of the parents' (or the children's) rights or interests. The cases focused exclusively on the teacher's right to teach (*Meyer v. State*) and the private school's right to carry on its business (*Society of Sisters v. Pierce*).

46. *Meyer*, 262 U.S. at 399.

47. *Pierce*, 268 U.S. at 535.

48. *Id.* at 534-35.

49. Before *Lochner* was overruled in 1937, *Meyer* and *Pierce* were cited most often in string cites upholding the validity of the *Lochner* doctrine. See, e.g., *Seattle Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928); *Liggett Co. v. Baldrige*, 278 U.S. 105, 113 (1928); *Whitney v. California*, 274 U.S. 357, 372-73 (1926) (Brandeis, J., concurring); *Farrington v. Tokushige*, 273 U.S. 284, 298-99 (1926); *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 526-27 (1926). The cases also were cited occasionally in support of the incorporation of the first amendment into the fourteenth. See, e.g., *Poe v. Ullman*, 367 U.S. 497, 544 (1960) (Harlan, J., dissenting); *Thomas v. Collins*, 323 U.S. 516, 531 (1944); *Prince v. Massachusetts*, 321 U.S. 158, 164 (1943). After 1937, *Meyer* and *Pierce* were most frequently cited in dissenting opinions calling for the revival of the *Lochner* doctrine. See, e.g., *Poe v. Ullman*, 367 U.S. 497, 517 (1960) (Douglas, J., dissenting); *id.* at 543-44 (Harlan, J., dissenting); *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 606 (1939) (Stone, J., dissenting). Only one Supreme Court decision issued between 1926 and the 1960's cites *Meyer* or *Pierce* for parental rights and family autonomy. *Prince v. Massachusetts*, 321 U.S. 158 (1944), cites both *Pierce* and *Meyer*, but does so in a decision that significantly narrows parental rights and family autonomy. See *infra* text accompanying notes 93-115.

process. *Griswold v. Connecticut*⁵⁰ began a line of cases invalidating state restrictions on contraception and abortion. Since *Griswold*, the Supreme Court has handed down a number of opinions delineating the boundaries of parental autonomy.⁵¹

Two recent cases exemplify current Supreme Court doctrine regarding the rights and legal relationships which exist within the autonomous family. Both decisions were written by Chief Justice Burger, both rely heavily on *Pierce* and *Meyer*, and both clearly subordinate the rights of the child to those of his parents within the family.

In *Wisconsin v. Yoder*,⁵² members of an Amish sect had been convicted of violating a Wisconsin statute which required school attendance until age sixteen. Amish parents only allowed their children to attend school through the eighth grade. The Amish refused to send their children to high school because they believed that exposing teenagers to a secular education, especially in consolidated schools with a high proportion of non-Amish pupils, would endanger the salvation of parents and children alike.⁵³

The Amish argued, and the Court agreed, that the first amendment right to the free exercise of religion included the right to the continued existence of their sect.⁵⁴ The Court found that the very existence of the Amish depended upon their ability to keep their children out of secular high schools.⁵⁵ The Court therefore held that the right of the Amish parents to guide their children's development and to maintain their community substantially outweighed the state's interest in requiring one or two additional years of education for the Amish children.⁵⁶

The Court dismissed the contention that the first amendment free exercise rights of the *children* were being subordinated to those of the parents.⁵⁷ It noted that there was no evidence suggesting that the children opposed their parents on this issue; however, even had such evidence existed, the Court indicated it would have reached the same

50. 381 U.S. 479 (1965).

51. See, e.g., *Parham v. J.R.*, 442 U.S. 584 (1979); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

52. 406 U.S. 205 (1972).

53. *State v. Yoder*, 49 Wis. 2d 430, 435-37, 182 N.W.2d 539, 541 (1971), *aff'd*, 406 U.S. 205 (1972).

54. *Yoder*, 406 U.S. at 218-19.

55. *Id.* at 211.

56. *Id.* at 222.

57. *Id.* at 229-31.

decision.⁵⁸ The majority opinion stated that any consideration of the children's rights of free exercise would be "an intrusion" into a hitherto protected area of family life which would give rise to "grave questions of religious freedom" and "call into question traditional concepts of parental control over the religious upbringing and education of their minor children."⁵⁹

Chief Justice Burger used strikingly similar language in the majority opinion in *Parham v. J.R.*⁶⁰ *Parham* concerned the constitutionality of a Georgia statute which allowed children to be committed as "voluntary patients" upon the application of a parent or guardian and a finding of mental illness by the superintendent of the state hospital to which they were committed.⁶¹ The statute did not provide for a pre-commitment hearing before an impartial tribunal. The Court held that the statute did not violate the due process rights of the committed children.⁶²

In terms of the development of the theory of family autonomy, *Parham's* significance lies not so much in its holding as in some of the language Chief Justice Burger used to justify it.⁶³ Much of the opinion centers around a supposed, historically deep-rooted concept of the family "as a unit with broad parental authority over minor children" in Western society, based on a "presumption that parents possess what a child lacks in maturity, experience and capacity for judgment required for making life's difficult decisions."⁶⁴

Taken in tandem, *Yoder* and *Parham* illustrate why the *Lochner* doctrine fell on hard times during the 1930's. With little constitutional⁶⁵ or historical⁶⁶ basis, the Court used these cases as an opportunity to

58. *Id.* at 230-32.

59. *Id.* at 231.

60. 442 U.S. 584 (1979).

61. *Id.* at 588 n.3.

62. *Id.* at 620-21.

63. Although three justices (Justices Brennan, Marshall and Stevens) joined in a partial dissent, they agreed with the majority that no pre-commitment hearing was needed for children whose *parents* sought to commit them to state hospitals. They felt, however, that the Georgia statute insufficiently protected those children who were already wards of the state at the time of the commitment. *Id.* at 635-39 (Brennan, J., concurring in part and dissenting in part).

64. *Id.* at 602.

65. Although the majority opinion also cites *Yoder*, *Meyer* and *Pierce* form the constitutional basis for the Chief Justice's theory of parental rights. Yet, plentiful dictum to the contrary, *Meyer* and *Pierce* are substantive due process cases or, at most, cases standing for the partial incorporation of the Bill of Rights into the fourteenth amendment.

66. Characteristically, the Chief Justice cites Blackstone rather than historians

enshrine in the Constitution two highly controversial presumptions about the parent-child relationship: an adult acts more wisely than a child, and a parent always acts in his child's best interest because ultimately the best interests of the parents are the best interests of the child. The opinions also contain an unstated third presumption: children differ qualitatively rather than quantitatively from adults in maturity and judgment. In the reality mirrored in these opinions, a child achieves maturity suddenly at age eighteen instead of growing gradually into it. One gets no sense of variation among children, and no sense that a typical fifteen year old is probably more "adult" than a typical ten year old.

The most important flaw is the assumption that a child's best interests necessarily coincide with those of his parent. One need not presume a parent unfit to acknowledge that the older a child becomes, the more his actual and perceived interests will diverge from those of his parents. Despite their rhetoric, neither *Yoder* nor *Parham* demonstrates an understanding of the real-life complexity of parent-child relations. The opinions evoke an idealized and probably mythical family, strikingly reminiscent of the plantations described by apologists for the ante-bellum South.⁶⁷

In deciding cases involving family issues, the Burger Court has been reluctant to establish any broad constitutional principles for the lower courts to apply.⁶⁸ It seemingly has preferred *ad hoc* opinions replete with sweeping dictum about family autonomy and/or the parent's right to control his child's development regardless of the child's desires.

to support his views. *Parham*, 442 U.S. at 602. This is not the place for an extended discussion of the last two millennia of the Western family, but two general points need to be made. First, as late as the early nineteenth century, children joined the work force, as adults, between the ages of seven and thirteen. Indeed, historians generally agree with the pathbreaking Phillippe Aries that pre-industrial society had no separate concept of childhood; children as young as seven or eight were treated in most respects as adults. P. ARIES, *CENTURIES OF CHILDHOOD* (1962). Moreover, even if Chief Justice Burger's picture of history were correct, appeals to historical tradition are tricky at best. Slavery was, after all, an integral part of the American historical tradition for over two centuries, and race prejudice for centuries more.

67. See, e.g., C. SYDNOR, *SLAVERY IN MISSISSIPPI* (1935).

68. One commentator has attributed the narrowness of the Burger Court's family-oriented decisions (including abortion and women's rights) to the middle class values held by the Court's majority. Tushnet, " . . . And Only Wealth Will Buy You Justice"—Some Notes on the Supreme Court. 1972 Term, 1974 WIS. L. REV. 177. Tushnet argues that most decisions focus on issues "that particularly concerned their wives and friends." *Id.* at 181.

FAMILY AUTONOMY—SCHOLARLY SUPPORT

Many commentators share the Burger Court's belief that children's rights should be subordinated to family autonomy.⁶⁹ Over the past decade, scholarly attacks on both the propriety and the efficacy of most state intervention to resolve intra-family disputes have been increasing.⁷⁰ This disenchantment with the role of the state is not limited to family issues, but is linked to the important, if amorphous, movement generally known as "neo-conservatism."⁷¹

Leading the charge against state intervention in family life is the team of Joseph Goldstein, Anna Freud and Albert J. Solnit.⁷² Three factors explain the widespread impact of their work. First, unlike many other scholars, they present a single, comprehensive theory to govern the relationship between parents, their children and the state. Scholars and judges alike have been forced to deal with their theory because it provides such a seductively simple solution to seemingly intractable legal and social problems. Second, the three are not just law professors who have retained some psychological patter from dimly remembered undergraduate encounters with Sigmund Freud. All are trained psychiatrists or psychoanalysts, and one is a lawyer as well.⁷³ In addition to their impressive credentials and the monolithic scope of their work, the breath-taking extremism of many of their posi-

69. See, e.g., E. SCHUR, *RADICAL NON-INTERVENTION* (1973). Although Schur primarily focuses on the juvenile justice system, especially status offenses, his analysis leads logically to a position of opposition to state intervention in family life.

70. See, e.g., Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 *LAW & CONTEMP. PROBS.* 226, 265-68 (1975). Mnookin argues essentially that only recognition of the primacy of the family and de-emphasis on the role of the state will lead to better child custody decisions.

71. At its most basic, "neo-conservatism" (or perhaps more accurately, "neo-liberalism") stems from a growing disenchantment among liberals with the statist policies that liberalism has championed since the New Deal. One persistent neo-conservative theme (found throughout E. SCHUR, *supra* note 69) is that liberal policies have created a host of new problems in the process of trying, often ineffectually, to solve old ones. For an insightful analysis of the impact of neo-conservatism on the development of a theory of parental rights, see Dickens, *The Modern Function and Limits of Parental Rights*, 97 *LAW Q. REV.* 462 (1981).

72. The seminal works by these authors are J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (2d ed. 1979) [hereinafter cited as *BEYOND*] and its sequel, J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* (1979) [hereinafter cited as *BEFORE*].

73. Anna Freud is the director of a child therapy clinic in the United Kingdom and is the daughter of Sigmund Freud. Joseph Goldstein is a law professor at Yale University and a psychoanalyst. Albert J. Solnit is a professor of medicine, also at Yale, and is both a physician and a psychoanalyst. *BEFORE*, *supra* note 72, at 287-88.

tions attracts attention. For example, the trio argues that custody determination should extinguish completely the legal relationship between the non-custodial parent and his child.⁷⁴

The theoretical foundations of Goldstein, Freud and Solnit's theories emerge most clearly in the so-called "Hampstead-Haven Child Placement Code."⁷⁵ This "Code" contains the essence of the authors' views concerning the proper relationships between parent, child and state, views strikingly similar to those of the Burger Court.

The Code begins by defining such crucial terms as "Child," "Adult," "Parent," and "Parental Autonomy." A close examination of these definitions reveals three central postulates: a rigid separation between the concepts of adult and child; a presumption of total identity of the interests of children and parents; and an assumption that state involvement impermissibly violates family integrity in all but the rarest cases.

For these commentators, "Adult" and "Child" constitute two mutually exclusive categories. "[B]ecause he is 18 years or older" the law should presume an adult "to be independent and capable of making decisions for himself."⁷⁶ Conversely, "because he is less than 18 years of age" the law should presume a child to be "incapable of making decisions for himself."⁷⁷ It is clear from the context of their work that the group treats these presumptions as all but irrefutable.⁷⁸

The rest of their theory flows inexorably from these two definitions and a deep, almost implacable, hostility toward the state. At the core of their theory is "Parental Autonomy," that being "the right of Parents to raise their Children as they think best, in accordance with their own notions of child rearing."⁷⁹ Parental Autonomy, in turn, forms the basis for the authors' ultimate goal of "Family Integrity" which combines "the Parents' right to Autonomy, a Child's right to Autonomous Parents, and family privacy."⁸⁰

74. BEYOND, *supra* note 72, at 38.

75. *Id.* at 97-101; BEFORE, *supra* note 72, at 187-96.

76. BEFORE, *supra* note 72, at 188 (emphasis added).

77. *Id.* (emphasis added).

78. See, e.g., *id.* at 127: "Children by definition cannot be free of an adult's control." (emphasis added). Goldstein, Freud and Solnit seem oddly silent on the rights of parents under 18. Paragraph 10.4 of the Code defines "Parents" as "Adults who have the rights and responsibility . . . to make decisions for their Child." *Id.* at 188 (emphasis added). It seems only logical that minor parents *cannot* be "Parents" according to their definition, which in turn leads to a host of conceptual and practical problems.

79. *Id.* at 189.

80. *Id.*

Goldstein, Freud and Solnit give to children only one discernible right, the right to autonomous parents, that is, the right to be raised by their parents without state interference. They label state intervention into the autonomous family as "Child Abuse"⁸¹ unless the parents have committed an act falling into one of their narrowly defined "Grounds for Intervention"⁸² which authorize state intrusion. Even this notable group concedes that the state has a right to intervene if parents abandon their children, inflict "serious bodily injury" on them, or abuse them sexually.⁸³ In the case of sexual abuse, they would authorize no state intervention until the parent's conviction or acquittal by reason of insanity.⁸⁴ Even in these extreme situations, these scholars are reluctant to sanction state intervention. When parents physically maltreat or sexually abuse their children, "intrusion" by the state "may make a bad situation worse; indeed, it may turn a tolerable or even a good situation into a bad one."⁸⁵

Goldstein, Freud and Solnit develop their theory of family autonomy from a series of hypotheses about the early psychological development of children. Their pivotal hypothesis centers on the extreme psychological vulnerability of small children.⁸⁶ This vulnerability creates a primary and critical need for continuity of care by one or more psychological parents.⁸⁷ Any interruption in this continuity of

81. *Id.* at 191.

82. *Id.* at 193-96. Indeed, the trio would allow a family to decide without outside participation the question of whether a healthy sibling should donate an organ to another sibling in need of a transplant. *Id.* at 104-09. Although they limit this parental discretion to situations where one sibling will certainly die, their refusal to breach the wall of family autonomy in this situation leaves a *medical* determination (the chances of death without a transplant) to lay parents. This policy is enshrined in paragraph 30.8 of the Code which allows state intervention into a parental decision concerning medical care for a child only where medical experts agree that the treatment is appropriate, withholding the treatment "will result in the child's death" and the treatment will result in a chance for the child to have "normal healthy growth or a life worth leading." *Id.* at 194 (emphasis added). Here again, the writers bar intervention unless facts exist which cannot be brought out unless the state intervenes in a forbidden manner.

83. *Id.* at 193-94.

84. *Id.* at 194. This fails to deal with the problem of what to do with a sexually abusing parent who cannot be convicted because of (1) the insufficiency of evidence, (2) the unwillingness or inability of the child to testify, or of the other parent to make him or her testify, (3) plea bargaining which leads to the parent pleading guilty to a lesser offense, or (4) any of the other ways in which our less-than-perfect criminal justice system allows the apparently guilty to escape conviction.

85. *Id.* at 13.

86. BEYOND, *supra* note 72, at 9-28.

87. *Id.* at 31-52.

care is potentially damaging, especially to a young child, who is seldom resilient enough to deal with a major trauma.⁸⁸

Thus stated, the basic theory seems reasonable, although many psychologists would prefer to begin with a contrary premise, postulating the resilience of most children.⁸⁹ The extremism of Goldstein, Freud and Solnit flows from their position that *any* state intervention is an interruption in the affected child's continuity of care. "When family integrity is broken or weakened by state intrusion, [the child's] needs are thwarted and his belief that his parents are omniscient and all-powerful is shaken prematurely. The effect on the child's developmental progress is *invariably* detrimental."⁹⁰

Evaluating their theory requires a fundamental inquiry into the correctness of their stark and unambiguous condemnation of state intervention into the family. A postulate that state intervention into the family invariably harms children presupposes the scientific validity of the trio's psychoanalytic theory.⁹¹ To date there has been no scientific validation of their hypothesis.⁹²

LIMITS ON PARENTAL AUTHORITY

Although the concept of parental autonomy vis-a-vis the state has become dominant, the Supreme Court has failed to articulate a constitutional theory delineating the relationship between parent, child and state. This failure leaves undefined the precise circumstances under which a court may properly limit parental authority. Any attempt to identify the boundaries of parental autonomy must begin with *Prince v. Massachusetts*.⁹³ Although it is unclear to what degree *Prince* survives *Yoder*,⁹⁴ courts continue to cite *Prince* for the proposition that parental power over children may be limited by an overriding state interest in protecting the health and welfare of minor children.⁹⁵

88. *Id.* at 32-34.

89. In a long and characteristically *ad hominem* footnote, Goldstein, Freud and Solnit acknowledge that a number of psychologists disagree with many of their basic premises but dismiss the work of these critics as "simplistic" and "reductionist." BEFORE, *supra* note 72, at 199-202 n.10.

90. *Id.* at 9 (emphasis added).

91. See *supra* note 89.

92. For a devastating attack on the use of psychological evidence in custody cases and on the scientific validity of psychological theory in general, see Okpaku, *Psychology: Impediment or Aid in Child Custody Cases*, 29 RUTGERS L. REV. 1117 (1976), especially at 1149-53.

93. 321 U.S. 158 (1944).

94. See *infra* notes 107-11 and accompanying text.

95. *Yoder* cited *Prince* as establishing the outer limits of parental autonomy. *Yoder*, 406 U.S. 205, 229-31 (1972).

Prince arose in the context of widespread hostility toward Jehovah's Witnesses during the 1940's.⁹⁶ Mrs. Prince, a Jehovah's Witness, was in the habit of selling various religious tracts on the public streets of Brockton, Massachusetts.⁹⁷ Her two sons and her nine-year-old niece frequently joined her in this task.⁹⁸ Unfortunately for Mrs. Prince, Massachusetts law prohibited boys under twelve or girls under eighteen from selling or offering to sell newspapers or other periodicals in a public place.⁹⁹ Under the statute, both the supplier of the periodicals and the parent or guardian of the child could be prosecuted if they knew that the child intended to sell the material.¹⁰⁰

Mrs. Prince was convicted of furnishing her niece with the periodicals and of permitting her to violate the state's child labor laws.¹⁰¹ The Supreme Judicial Court of Massachusetts affirmed the conviction, holding that the state did not abridge the first amendment rights of either the child or her aunt.¹⁰² Mrs. Prince appealed to the United States Supreme Court, arguing that the statute violated both her first amendment right to the free exercise of her religion and her fourteenth amendment due process right of parental authority.¹⁰³ The Supreme Court rejected her argument, holding that both those rights, although important, had to be balanced against the state's important interest in protecting the health and welfare of minor children.¹⁰⁴ "[N]either rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control . . . in many . . . ways."¹⁰⁵ The opinion contains a wealth of similar language stressing the legitimate, far-reaching power of the state to limit parental autonomy.¹⁰⁶

Nevertheless, closer examination both of the case itself and of its subsequent use by the Supreme Court reveals the aberrant nature of *Prince*, at least with respect to the delineation of parental autonomy.

96. This point, all but ignored by the majority, is brought out forcefully in the dissents. *E.g.*, *Prince*, 321 U.S. at 174-76 (Murphy, J., dissenting).

97. *Id.* at 161-62.

98. *Id.* at 159, 161-62.

99. The pertinent statutes are quoted *id.* at 160.

100. *Id.* at 161.

101. *Id.* at 160.

102. *Commonwealth v. Prince*, 313 Mass. 223, 46 N.E.2d 755 (1943), *aff'd*, 321 U.S. 158 (1944).

103. *Prince*, 321 U.S. at 164.

104. *Id.* at 165-66.

105. *Id.* at 166 (footnotes omitted).

106. *Id.* at 166-70.

Two factors limit the present day applicability of *Prince*. *Prince* is, first of all, a case reflecting the Court's repudiation of substantive due process as it applied to state regulation of social and economic matters. The majority focused much of its attention on the fact that the challenged statute regulated child labor, one of the classic targets of the Court during the *Lochner* era.¹⁰⁷

The second factor minimizing the present authority of *Prince* is its ultimate subject matter: Jehovah's Witnesses. During the 1940's, the Court had been inundated by a series of cases arising from a growing clash between militant Witnesses and members of more traditional denominations.¹⁰⁸ The Witnesses won several of these cases, but the Court's patience seems to have been exhausted by the time *Prince* came before it. The tone of the opinion was one of "here we go again." The Court recited the facts in an almost jocular fashion and offhandedly affirmed the Massachusetts decision.¹⁰⁹ Only the two dissenting opinions dealt with the real issues in *Prince*. Pointing out the majority's disregard of both the Constitution and recent precedent, Justice Murphy expressed his fear that Massachusetts was using a facially neutral statute as "an instrument of oppression" against members of a "militant and unpopular sect."¹¹⁰ Justice Jackson agreed that the decision lacked a constitutional basis and derided the majority's contention that the primary issue in *Prince* was state regulation of child labor.¹¹¹

Perhaps because of its unique circumstances, most opinions citing *Prince* either have narrowed its holding significantly or have relegated it to string cites, often for contradictory propositions. More than any

107. Among evils most appropriate for such action are the crippling effects of child employment, most especially in public places It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action.

Id. at 168-69.

108. These decisions focused on two major controversies. The first was the persistent refusal of Jehovah's Witnesses to salute the flag. Focusing on freedom of speech rather than on freedom of religion, the Supreme Court held that no one could be forced to salute the flag. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940)). The other series of Jehovah's Witnesses cases, like *Prince*, are solicitation cases and no consistent pattern emerged from these. *See, e.g.*, *Follett v. McCormick*, 321 U.S. 573 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Largent v. Texas*, 318 U.S. 418 (1943); *Jones v. Opelika*, 316 U.S. 584 (1942).

109. *Prince*, 321 U.S. at 161-62.

110. *Id.* at 176 (Murphy, J., dissenting).

111. *Id.* at 176-77 (Jackson, J., dissenting).

other case, *Wisconsin v. Yoder*¹¹² calls into question the continued viability of *Prince*. In preparing their briefs, both sides in *Yoder* viewed *Prince* as the heart of the state's case. In fact, Wisconsin cited *Prince* as controlling precedent in its petition for certiorari.¹¹³ It cited the case six times in its brief, primarily for the proposition that a parent's free exercise right had to give way to the state's significant interest in the welfare and education of minor children.¹¹⁴ The attorneys for the Amish, of course, tried to ignore *Prince*. The respondent's brief cited it only once, characterizing it as involving "the use of a child to hawk magazines on city streets at night."¹¹⁵

The Court probably flabbergasted both sides by ruling for the Amish *without* overruling *Prince*. It acknowledged that some might interpret *Prince* as supporting Wisconsin's right to intervene to guarantee the Amish children a right to an education adequate for the modern world.¹¹⁶ The Court rejected this view of *Prince*, characterizing it as simply a child labor case.¹¹⁷

The Chief Justice noted that the Supreme Court had already narrowed the scope of *Prince* significantly.¹¹⁸ In *Sherbert v. Verner*,¹¹⁹ the Court had reversed a South Carolina decision denying unemployment benefits to a Seventh Day Adventist who had refused to work on Saturday. In doing so, the Court rejected South Carolina's argument that Sherbert's right to exercise her religion freely had to give way to the state's interest in maintaining an effective unemployment insurance system.¹²⁰ Any other outcome, the state argued, would violate the first amendment by establishing Seventh Day Adventism in South Carolina.¹²¹

The Court held that a two-part balancing test applies to cases like *Sherbert*.¹²² The plaintiff must show that the statute or state action imposes a substantial burden on a free exercise right. If such a burden exists, only a compelling state interest can outweigh the plaintiff's first amendment right. The majority cited *Prince* as holding that where

112. 406 U.S. 205 (1972).

113. Petition for Writ of Certiorari at 9, *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

114. *Id.* at 22-24.

115. Brief for Respondents in Opposition to Writ of Certiorari at 30, *Yoder*, 406 U.S. 205 (1972).

116. *Yoder*, 406 U.S. at 229.

117. *Id.* at 230.

118. *Id.*

119. 374 U.S. 398 (1963).

120. *Id.* at 407-08.

121. *Id.* at 409.

122. *Id.* at 403-09.

first amendment rights are concerned, a state interest could be compelling only when the religious observance posed "some substantial threat to public safety, peace or order."¹²³

The Court's reliance on *Sherbert* in *Yoder* raises two questions which the majority opinion never resolved satisfactorily. First, unlike *Sherbert* but like *Prince*, *Yoder* was not really concerned with the state's power to regulate the religious practices of adults. *Prince* and *Yoder* dealt with the right of parents to impose on their children not only their religious beliefs, but also a way of life which flows from those beliefs. Secondly, *Yoder* failed to address the extent to which the state has a compelling interest in mandating secondary education for minor children.

Yet *Prince* still survived, albeit in attenuated form. *Yoder* acknowledged that "the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child."¹²⁴ Moreover, Supreme Court opinions still cite *Prince*, although all too frequently for contradictory propositions and in string cites.¹²⁵

Notwithstanding *Yoder's* limitation of *Prince*, some cracks are beginning to appear in the facade of the doctrine of parental autonomy. The case of Phillip Becker represents one of the most striking recent examples of judicial rejection of parental autonomy in favor of the child's best interest. Phillip is a fourteen-year-old boy suffering from Down's Syndrome.¹²⁶ His parents institutionalized him at

123. *Id.* at 403. It is hard to see poor Mrs. Prince's activities in this light. The chief inapplicability of *Prince* to *Sherbert* seems, however, to stem from the fact that the real thrust of *Prince* was the ability of the state to limit *children's* first amendment rights in situations where the rights of adults would clearly be protected. "Concededly a statute or ordinance identical in terms with § 69, except that it would be applicable to adults . . . would be invalid." *Prince*, 321 U.S. at 167.

124. *Yoder*, 406 U.S. at 233-34.

125. Compare, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 385 (1978), and *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) (personal decisions of individuals relating to family relationships are to be made without unjustified government interference) with *Hurrah Indep. School Dist. v. Martin*, 440 U.S. 194, 198 (1979) (per curiam), and *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (there is a "presumption of legislative validity [for] state choices designed to promote . . . aims within the cognizance of the State's police power"). Perhaps the oddest of these cites is in *Mobile v. Bolden*, 446 U.S. 55 (1979) (a voting rights case), where Justice Marshall used *Prince* in a string cite to show the existence of a constitutionally protected right of privacy. *Id.* at 114 n.9 (Marshall, J., dissenting).

126. For the factual background to the *Becker* case, see *In re Phillip B.*, 92 Cal. App. 3d 796, 156 Cal. Rptr. 48 (1979), cert. denied sub nom. *Bothman v. Warren B.*, 445 U.S. 949 (1980); *In re Becker*, 7 FAM. L. REP. (BNA) 2647 (Super.

birth. Phillip also suffers from a congenital heart defect which, if not corrected, will cause progressive physical deterioration and Phillip's eventual slow and painful death.

Physicians first diagnosed Phillip's condition when he was six, but his parents consistently refused to authorize corrective surgery. The California courts have been involved with Phillip's situation since 1979. Their involvement began with an unsuccessful petition seeking to declare Phillip a "dependent child of the court."¹²⁷ It ended two years later in a successful suit which removed Phillip from the custody of his biological parents and placed him in the custody of the Heaths, a couple that the trial court found to be Phillip's psychological parents.¹²⁸

Phillip's journey through the courts began with a characteristic paean to the doctrine of parental autonomy. Faced with the prospect that Phillip would die a slow and lingering death without surgery, social service agencies sought a court order for treatment.¹²⁹ The trial court dismissed the petition on the ground that there was "no clear and convincing evidence to sustain this petition."¹³⁰ The California Court of Appeals affirmed, holding that the constitutionally protected right to family autonomy gave parents, in all but the most extreme cases, discretion to determine the appropriateness of medical treatment for their children.¹³¹

In re Phillip B. may represent the high water mark of the extreme version of the parental rights doctrine. The court's ruling allowed parents who had institutionalized their child at birth to wield a veto power over attempts to improve the child's life. The decision exalted parental autonomy to the point that parents had the right to con-

Ct. Aug. 7, 1981); *Heath v. Becker*, 8 FAM. L. REP. (BNA) 2017 (Cal. App. Oct. 19, 1981); Will, *A Trip Toward Death*, NEWSWEEK, Aug. 31, 1981, at 72; Will, *The Case of Phillip B.*, NEWSWEEK, April 14, 1980, at 112.

127. *In re Phillip B.*, 92 Cal. App. 3d at 799, 156 Cal. Rptr. at 49-50.

128. *Heath*, 8 FAM. L. REP. (BNA) 2017 (Cal. App. Oct. 19, 1981).

129. *In re Phillip B.*, 92 Cal. App. 3d at 799, 156 Cal. Rptr. at 49-50.

130. *Id.* at 803, 156 Cal. Rptr. at 50.

131. *Id.* at 801, 156 Cal. Rptr. at 50. The court supported this contention with a string cite going on to the next page. Leading off the cite was a case protecting the private possession of pornography (*United States v. Orito*, 413 U.S. 139 (1973)), another making restrictions on abortions unconstitutional during the first trimester of pregnancy (*Roe v. Wade*, 410 U.S. 113 (1973)), as well as several other cases dealing with contraception in one form or another. The court also cited the usual panoply of "family autonomy" cases, including *Yoder*, *Pierce* and *Meyer*. It also included *Prince*, which one would think would be the last case a court would use in sanctioning a parent's right to condemn his child to slow death. *In re Phillip B.*, 92 Cal. App. 3d at 801, 156 Cal. Rptr. at 50-51.

demn their child to a painful and drawn out death. Unsettling as this position might be, it is fully consistent with the non-interventionism preached by Goldstein, Freud and Solnit.¹³²

Luckily for Phillip, his advocates did not give up hope. Two years later, another court sat to decide whether Phillip's parents could limit the duration and quality of his remaining years.¹³³ This time, the trial judge ruled that they could not. He held that the Beckers had so damaged Phillip as to forfeit their right to custody.¹³⁴ He also held that another couple, Warren and Patricia Heath, had become Phillip's psychological parents. The Heaths had known Phillip since he was five. They visited him weekly, regularly took him to their home for overnight visits and generally gave him the love that his biological parents were reluctant or unable to give him.¹³⁵

There is a fitting irony in the judge's use of Goldstein, Freud and Solnit's concept of psychological parenthood to limit the doctrine of parental autonomy. The chief problem with the decision is that, faced with a Solomonic choice, the judge *did* cut the baby in half. The Heaths will be glorified foster parents, the Beckers will remain Phillip's legal parents, and a court order will still be necessary before Phillip can have any corrective surgery. Neither the trial court nor the court of appeals addressed the issue of the legal rights of the biological parents should the Heaths raise the issue of corrective surgery for Phillip.

132. In what may be the most controversial section of *BEFORE*, *supra* note 72, Goldstein, Freud and Solnit suggest that state intervention compelling unwilling parents to give their children medical care is justified only when: (1) the procedure is safe and effective; (2) the child would certainly die without the treatment; and (3) the treatment will give the child "normal healthy growth, a life worth living." *Id.* at 91-92. Even here, however, the noted authors try to cast doubt on the state's right to intervene, both by making the grounds for intervention as narrow as possible and by disparaging their opponents' motives. They dismiss those who advocate state intervention to protect the lives and health of children as physicians with an "unqualified value preference for life" (*id.* at 96) or "health department doctors" with "rescue fantasies." *Id.* at 105. If the proposed medical procedure cannot meet all three criteria and especially if it will not ensure the affected child "a life worth living," Goldstein, Freud and Solnit would deny to anyone but the parents the moral right to choose life rather than death for the child. All of this is in the name of protecting the parents' right to autonomy and the child's right to autonomous parents. It is hard to imagine how upholding a parental sentence of death will promote family autonomy, or how intervening to keep Phillip Becker from dying a painful and useless death could constitute "Child Abuse" by the state. *Id.* at 191.

133. *In re Becker*, 7 FAM. L. REP. (BNA) 2647 (Super. Ct. Aug. 7, 1981).

134. *Id.* at 2648.

135. *Id.* at 2647-48.

A very different challenge to the doctrine of parental autonomy has developed out of what might be called "transnational custody disputes." Increasing numbers of Americans have married foreign spouses and many of these marriages have ended in divorce. No unusual problems are likely to arise if there are no children, the American spouse gets custody, or the non-American custodial spouse remains in the United States. A significant new issue does arise if the custodial spouse wants to return to his or her homeland with the children.

Under such circumstances, either the child or the non-custodial parent is likely to oppose the move and challenge it, hoping to force the custodial parent either to relinquish custody or remain in the United States. Courts confronted with this situation must choose between the presumptive right of the custodial spouse to choose his or her domicile and the less well-established right of the child to choose to remain in the United States.

A two-step analysis provides the best solution to this problem. The court must first determine whether a child has the right, constitutional or not, to override the custodial parent's decision to move to another country. To the extent that the court finds such a right to exist, it must then decide whether the particular child is sufficiently mature to merit judicial recognition of his preferences. Two such cases arose recently with strikingly similar facts and diametrically opposed results. Analysis of the opinions shows the most important variable to be judicial willingness to consider seriously whether the child could make a thoughtful, intelligent choice of which parent should have custody and in what country.

In *Bergstrom v. Bergstrom*,¹³⁶ the father was an American Foreign Service officer, the mother a Norwegian. Their daughter, Ida, was born in Addis Ababa, Ethiopia, in 1971. In 1979, a court in the District of Columbia granted the couple a divorce and awarded the mother custody of Ida.¹³⁷ The father immediately filed lawsuits in North Dakota. He went into United States district court to enjoin enforcement of the District of Columbia decree.¹³⁸ He also filed suit in state court, seeking to overturn the District of Columbia decree and asking for custody of Ida.¹³⁹

The district court granted the father's decree based on its find-

136. 478 F. Supp. 434 (D.N.D. 1979), *vacated and remanded*, 623 F.2d 517 (8th Cir. 1980); 296 N.W.2d 490 (N.D. 1980).

137. *Bergstrom*, 296 N.W.2d at 492.

138. *Bergstrom*, 478 F. Supp. at 436. The suit was filed in Ida's name by a guardian *ad litem*.

139. *Bergstrom*, 296 N.W.2d at 492-93.

ing that the father was likely to prevail on the merits in state court and irreparable harm was likely to ensue were no injunction to issue.¹⁴⁰ The court based its decision largely on its conclusion that eight-year-old Ida was "of sufficient age, discretion and intelligence to exercise an intelligent preference" for life in the United States with her father.¹⁴¹ The Eighth Circuit vacated the opinion on the ground that the father's failure to exhaust state remedies left the federal courts without jurisdiction.¹⁴²

The drama was winding to a close in the state courts at the same time. A North Dakota trial judge agreed that the District of Columbia court had decided correctly the issue of custody.¹⁴³ He held that Ida's interests would be served best by giving her mother sole custody. He also held that, given Ida's youth, her right to live in the United States necessarily had to be subordinate to her mother's right to live where *she* chose.¹⁴⁴

The Supreme Court of North Dakota reversed.¹⁴⁵ It awarded joint custody to the parents on two conditions: that the mother remain in the United States and that Ida get psychological counselling.¹⁴⁶ The court held that Ida was fully capable of deciding her own best interests in spite of her young age. In reaching this conclusion, the court focused on two factors: Ida's above-average intelligence and maturity, and her wide experience in living in different parts of the world.¹⁴⁷ She had lived both in Norway and the United States. She therefore had an intelligent basis upon which to make a decision.

Faced with substantially similar facts, the Seventh Circuit reached a wholly opposite result. In *Schleiffer v. Meyers*,¹⁴⁸ an American had also married a Scandinavian, this time a Swede. Their child, Harald, was born in Sweden, the couple's marital domicile. By 1976, the marriage was troubled. It had fallen apart by early 1978, despite at least one reconciliation attempt. Four separate divorce suits were instituted.¹⁴⁹ The only clearly valid one was a Swedish decree of February, 1979, which granted a divorce and gave the wife custody

140. *Bergstrom*, 478 F. Supp. at 436.

141. *Id.* at 439.

142. *Bergstrom*, 623 F.2d at 520-21.

143. *Bergstrom*, 296 N.W.2d at 492-93.

144. *Id.* at 493.

145. *Id.* at 490.

146. *Id.* at 491-92.

147. *Id.* at 496-97.

148. 644 F.2d 656 (7th Cir.), *cert. denied*, 454 U.S. 823 (1981).

149. *Schleiffer*, 644 F.2d at 658-59. One of these was an *ex parte* Dominican divorce decree of which the mother learned two years after the fact.

of Harald. The father had taken Harald to the United States in 1978 where he remained.¹⁵⁰

The case came into the federal courts when Harald's guardian *ad litem* sought to enjoin Indiana enforcement of the Swedish custody decree. The United States District Court for the Northern District of Indiana dismissed the petition and the Seventh Circuit affirmed, both on procedural and substantive grounds.¹⁵¹ Like the Eighth Circuit in *Bergstrom*, the Seventh Circuit noted that the plaintiff had not exhausted his state remedies and therefore, federal action was not ripe.¹⁵² In dictum, the court also delivered a scathing attack on the notion that an eleven-year-old child should have any right to decide where he should live.¹⁵³

At the core of the opinion was the court's assertion that a child is unable "to make critical decisions in an informed mature manner."¹⁵⁴ This assertion might have been palatable had it been less broad, or supported by meaningful evidence. The Supreme Court has recognized that minors can make some critical decisions in holding that a minor has the right to get an abortion without her parents' consent.¹⁵⁵ The Seventh Circuit's most disturbing conclusion is that it would be improper even to ask Harald about his preferences. Citing *Parham v. J.R.*,¹⁵⁶ the court held that "it would be even more traumatic for Harald to be brought before the court in a formalized fact finding hearing, or even before the federal district judge in chambers, to determine his actual preference as between his parents."¹⁵⁷ This quote from *Schleiffer* brings into focus many of the problems generated by the parental rights doctrine. The *Schleiffer* opinion is conclusory, extreme in its language and, in the final analysis, unwilling even to consider the possibility that a child may have a valid opinion as to his or her "best interests."

DECIDING *IN RE POLOVCHAK*—A SUGGESTED SUBSTANTIVE BASIS

To the extent that the Supreme Court has expressed a coherent justification for limiting children's constitutional rights, it has done

150. *Id.* at 659.

151. *Id.* at 656-67.

152. *Id.* at 665.

153. *Id.* at 661-62.

154. *Id.* at 661.

155. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

156. 442 U.S. 584 (1979).

157. *Schleiffer*, 644 F.2d at 662 (emphasis added).

so in *Bellotti v. Baird*.¹⁵⁸ *Bellotti* set forth three reasons why children's constitutional rights may validly be limited: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."¹⁵⁹ Although all three are relevant to a proper disposition of Walter's case, any justification of Walter's right to defy his parents' decision to return to the Soviet Union turns on the resolution of two basic issues. First, is Walter, like Ida Bergstrom, more capable than the average American child his age of rationally deciding in which country he prefers to live? Second, have his parents forfeited their normal parental right to choose where the family will live if, by enforcement of that choice, Walter will be exposed to significant danger?

Most who advocate subordinating a child's rights to those of his parents focus on the child's putative inability to make a rational determination of his own interests. Although perhaps true with respect to late-twentieth century America, the generalization does not hold true historically and is not necessarily true in all societies today. History is replete with thirteen and fourteen year olds, "children" by today's terminology, who took charge of their own lives.¹⁶⁰ Moreover, even today, many societies expose their youth to the "real world" and require them to assume responsibilities at a much earlier age than does the United States.

The United States and the Soviet Union differ in many significant respects. For a Soviet youth, perhaps the most salient difference is in the treatment of children in the two societies, especially in the area of education. As is true of other areas of Soviet life, education is highly politicized. Political indoctrination begins in the day care centers and kindergartens which most Soviet children attend between the ages of three and seven.¹⁶¹ This indoctrination continues and in-

158. 443 U.S. 622 (1979).

159. *Id.* at 634.

160. Up until the nineteenth century, British naval officers (and those of other countries as well) generally began their careers as 12- and 13-year-old midshipmen, with promotion to lieutenant often coming by age 17. Perhaps the classic example of the independent "child" was Jenghiz Khan who was expelled from his tribe along with his mother and younger brothers when his father died. He had attained the ripe old age of 13. By the time he was 20, he was a powerful war leader well on the way to creating an empire which included half of Asia. See R. GROSSET, *THE EMPIRE OF THE STEPPES* 199-200 (1970).

161. H. SMITH, *THE RUSSIANS* 159 (1976). Hedrick Smith spent several years in the Soviet Union as the Moscow correspondent of the New York Times in the early 1970's. Unlike most Westerners in the Soviet Union, he enrolled his children in Soviet schools and thus had a unique opportunity to examine their operation.

tensifies throughout a child's compulsory ten years of education.¹⁶²

American observers have also noted the extreme rigidity of Soviet schools as compared to the openness of even the most "traditional" American schools. In Soviet schools, typically, there is only one correct way to do something and children are expected to master it. The teaching of art is perhaps the best example of this.¹⁶³ In general, Soviet schools seek to accomplish two purposes: to create ideologically sound citizens and to cram their students with a maximum of information.¹⁶⁴ The schools emphatically do not seek to create independent, critical thinkers.

The stress on ideology, discipline and order is not just confined to school hours; it also pervades children's after-school activities. Depending on their ages, all children are expected to belong either to the Octobrists or the Young Pioneers.¹⁶⁵ These organizations have no exact counterparts in the United States, but their overall effect is to combine heavy doses of propaganda with more "fun" types of children's activities.

At fourteen, membership in the party youth becomes more voluntary, but also more onerous. Membership in the Komsomols is essential for those wanting a higher education and for university students who want good jobs upon graduation.¹⁶⁶ Walter's awareness of the Komsomols was apparent at his hearing because he cited their absence in the United States as one of the most positive differences between the two societies.¹⁶⁷ Deciding whether or not to join the Komsomols would have been especially acute for Walter had he stayed in the Soviet Union. Walter's Christianity is incompatible with membership

162. *Id.* at 153.

163. In one kindergarten Smith observed, student art was judged by the degree to which a student was able to make an identical copy of the model the teacher had furnished. The student had to reproduce as exactly as possible both the drawing and the colors of the original. *Id.* at 160.

164. *Id.* at 186.

165. *Id.* at 161-62. The Octobrists enroll children under the age of 10, the Young Pioneers children 10 to 14, those in the fourth to the seventh grade. Twenty-five million children belonged to the Pioneer organization in 1974, "nearly all" those of the inclusive age groups. J. HOUGH & M. FAINSOD, *HOW THE SOVIET UNION IS GOVERNED* 299 (1979).

166. Upon graduation from the Young Pioneers, a 14 year old is eligible to join the Komsomols (Communist Union of Youth) until he is 25; he is also eligible for full party membership at 18. Approximately 60% of eligible Soviet youth belong to the Komsomols. J. HOUGH & M. FAINSOD, *supra* note 165, at 300. Much higher percentages of students belong: 76% of those in regular secondary schools, 87% of those in specialized secondary schools and 94% of those in higher education. *Id.* at 620 n.87.

167. Polovchak Brief, *supra* note 1, at 27.

in the Komsomols. He would have been forced to choose one over the other.¹⁶⁸

To some extent, the issues of Walter's Komsomol membership and his ability to get higher education may be moot. In large measure, Soviet working class children from small provincial schools do not have access to higher education today, even in the absence of Walter's twin disabilities of being a Christian and a western Ukrainian.¹⁶⁹ Without higher education, social mobility in the Soviet Union is almost impossible. On the other hand, American society's almost limitless opportunity for higher education immediately strikes immigrants. Moreover, political tests do not limit its availability.

Walter had spent six months in the United States before running away from his parents to avoid a return to the Soviet Union. Although a short time absolutely, it was more than enough time for Walter to be able to choose rationally between his available options. Even a twelve-year-old Soviet citizen has the political sophistication to evaluate the Soviet and American systems and to decide where he wants to live. Certainly Walter had at least the same ability to make a rational decision as the North Dakota Supreme Court imputed to Ida Bergstrom.¹⁷⁰

So too, Walter arguably was in a better position to compare Soviet and American life than either of his parents. Unlike a Soviet school child, a Soviet adult has the ability to insulate himself from all but the most pressing political and ideological pressures. This is especially true if the adult is a worker possessing no career ambitions. Mikhail Polovchak could expect few rewards in the Soviet Union. He seems not to have sought them anyway.

Moreover, Mr. and Mrs. Polovchak's peculiar background makes it unlikely that they, as youths, experienced political indoctrination comparable to that to which their children were subjected. Mikhail Polovchak was born in 1938, his wife Anna in 1940. They grew up in the western Ukraine, an area that had been Polish until 1939, under Soviet occupation from 1939 to 1941 and then under German occupa-

168. As branches of the Communist Party, youth groups are avowedly atheist and combat religiosity among their members. As an extreme example, *Pravda* reported in 1962 that a mother had lost custody of her children because she interfered with their membership in the Young Pioneers and forced them to learn prayers. H. GEIGER, *THE FAMILY IN SOVIET RUSSIA* 266 (1968).

169. Now that the Soviet intelligentsia has become large enough to replenish itself, higher education in the Soviet Union has become increasingly class stratified, with most slots in the universities going to children of the intelligentsia rather than to working class children. H. SMITH, *supra* note 161, at 157-58.

170. *Bergstrom v. Bergstrom*, 296 N.W.2d 490, 496-97 (N.D. 1980).

tion until 1945.¹⁷¹ Following that, the western Ukraine was the center of an anti-Soviet guerilla struggle which lasted until about 1950.¹⁷² Therefore, the elder Polovchaks grew up at a time and in a place where Soviet control either did not exist or was shaky at best. As a consequence, they have escaped much of the systematic indoctrination endemic in the Soviet Union today. It would therefore be hard for the Polovchaks to understand their children's reluctance to return to an environment which, although materially more prosperous than the Polovchaks had experienced here, was also more regimented.

Walter also probably has a better understanding of the American system than his parents. The Polovchaks' six months in the United States were spent working at menial, physically demanding jobs. They spoke little or no English. They lived in a closed Ukrainian community which had little contact with the wider American society. In short, they experienced all the adjustment problems that immigrants typically have in coming to the United States, along with the extra disadvantage of coming from the Soviet Union.¹⁷³ Walter, on the other hand, attended American schools, learned English and has begun to assimilate to American society. At this point, Walter is probably better able than his parents to compare the two systems and decide rationally in which he wants to live.

Moreover, should his parents prevail, forcing him to return to the Soviet Union, Walter would be in some danger. By his statements and actions, Walter has certainly violated article 70 of the Criminal Code, which addresses anti-Soviet agitation and propaganda.¹⁷⁴ A number of recent cases establish that statements like Walter's, causing embarrassment to the Soviet government, are more than enough to sustain a conviction under article 70.¹⁷⁵ Moreover, article 5 of the

171. See Bociurkiw, *supra* note 17, at 82.

172. *Id.* at 89.

173. For a general discussion of some of the difficulties faced by immigrants to the United States, see UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 16, at 1-126.

174. Article 70 defines "anti-Soviet" in general terms as including "defaming" the Soviet Union with "slandorous fabrications." Criminal Code of the Russian Soviet Federated Socialist Republic (RSFSR), RSFSR CRIM. CODE art. 70 in SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES 180 (H. Berman, trans. ed. ann. 1966) [hereinafter cited as RSFSR CODES]. Both the Ukrainian (UKSSR) Criminal Code and the Soviet Union's Law on Criminal Responsibility for Crimes Against the State have identical provisions. UKSSR CRIM. CODE art. 62 in 1 W. BUTLER, COLLECTED LEGISLATION OF THE USSR AND CONSTITUENT REPUBLICS: UNION REPUBLIC LEGISLATION, VII-8 at 48 (1982); LAW ON CRIM. RESP. FOR CRIMES AGAINST THE STATE art. 7 in 4 W. BUTLER, COLLECTED LEGISLATION OF THE USSR AND CONSTITUENT REPUBLICS: USSR, VII-8 at 5 (1979).

175. See J. HOUGH & M. FAINSD, *supra* note 165, at 282-84 for recent examples

Criminal Code allows Soviet citizens to be tried for offenses they commit outside the country.¹⁷⁶

The effect of Walter's juvenile status on his criminal culpability is unclear. On the one hand, juveniles are not subject to criminal penalties for most acts committed before their sixteenth birthday.¹⁷⁷ But they are subject to "compulsory measures of an educational character" for those offenses.¹⁷⁸ A juvenile may be sent to a special labor camp for juveniles instead of a regular camp for adult offenders.¹⁷⁹ It would most likely be little consolation to Walter to know that he might be sent to an "educational" rather than a "punitive" camp.

It is also important to realize that Walter could be tried as an adult, even though the Code makes no provision for this in cases of violations of article 70.¹⁸⁰ Recent Soviet history has shown that the regime does not always abide by its own established rules. Punishments sometimes are imposed retroactively. This includes execution of an individual convicted of a crime that did not carry the death penalty at the time of its commission.¹⁸¹

Moreover, even if Walter is never formally convicted of violating article 70, he could be subject to a variety of unappealing (and unappealable) "non-criminal" sanctions. Walter could be exiled administratively. That is, like Andrei Sakharov, he could be sent to live in a particular location for as long as the government chose.¹⁸² By refusing to validate his internal passport, the regime could also bar

of prosecutions for violation of article 70 and other "anti-Soviet activity." Prosecutions seem most likely and punishments most severe when the image of the Soviet Union abroad is affected.

176. RSFSR CRIM. CODE art. 5, in RSFSR CODES, *supra* note 174, at 146.

177. RSFSR CRIM. CODE art. 10, in *id.* at 147-48, lists those specific acts for which persons between 14 and 16 may be subject to "criminal responsibility."

178. *Id.* at 148.

179. RSFSR CRIM. CODE art. 24, in *id.* at 152-53. The only concessions to juveniles in the Soviet criminal justice system are that their sentence may be reduced initially or after they have served at least one-third of their terms and their correction has been proved "by exemplary conduct and an honorable attitude toward labor and education." RSFSR CRIM. CODE art. 55, in *id.* at 172-73.

180. RSFSR CRIM. CODE art. 10, in *id.* at 147.

181. The subjects of a classic example of retroactivity were two currency speculators who were sentenced three times, the last time to death. Each of the latter two sentences was under legislation that post-dated their arrests. The retroactive death penalty seems to have resulted from the direct personal intervention of Nikita Khrushchev, then Chairman of the Communist Party. Sharlet, *The Communist Party and the Administration of Justice in the USSR*, in 3 SOVIET LAW AFTER STALIN 321, 359 (1979).

182. Sakharov, one of the founders of the Soviet nuclear program, has been active in the human rights movement in the Soviet Union. He was recently ad-

him from living in certain parts of the country, including most major cities.¹⁸³ In any event, Walter almost certainly would be barred from higher education.

Thus, if the Polovchaks succeed in forcing Walter to return with them to the Soviet Union, they would accomplish what the California courts refused to allow in *Heath v. Becker*.¹⁸⁴ A parent should not be allowed to abuse his parental discretion by denying his child the chance for a reasonably normal life, a life worth living.

CONCLUSION

If the case of *In re Polovchak* is ever decided on its merits, the courts will be forced to make a difficult and unpalatable choice. To rule for Walter's parents will be to validate a virtually unlimited parental right to make critical decisions against the wishes of a mature minor child, even if those decisions will cause the child serious harm. Perhaps unfortunately, the courts will probably be spared from making the ultimate decision.

The controversy over Walter's fate has already dragged on for over three years. Even though the Illinois Supreme Court has affirmed the decision of the court of appeals returning Walter to his parents' custody, it is inconceivable that Walter will be returned to the Soviet Union. Because his parents remain in the Soviet Union, he remains in the physical custody of the Cook County courts. Moreover, Walter's attorneys have not exhausted his legal remedies. They have filed a petition for a writ of certiorari in the United States Supreme Court.* Litigation concerning the validity of the government's grant of asylum to Walter is still pending in the federal courts. Even if Walter loses in both these fora, he need simply run away again, thus reopening the entire minor in need of supervision controversy and assuring himself of at least another year or two in the United States.

In any event, time is on Walter's side. Walter ratifies his original decision each day that he refuses to return to the Soviet Union. Now, of course, he makes that decision as a sixteen year old rather than as a twelve year old. Moreover, the longer the controversy drags on, the more certain and severe Soviet reprisals will be if Walter ever

ministratively exiled from Moscow to Gorky even though no criminal charges were ever filed. N.Y. Times, Jan. 23, 1980, at A1, col. 6.

183. Repeated violations of internal passport restrictions, including residence in an area without permission, is punishable by up to a year in a labor camp. RSFSR CRIM. CODE art. 198, in RSFSR CODES, *supra* note 174, at 22.

184. 8 FAM. L. REP. (BNA) 2017 (Cal. App. Oct. 19, 1981).

* The petition for a writ of certiorari was denied. 52 U.S.L.W. 3631 (U.S. Feb. 27, 1984) (No. 83-845).

returns to the Soviet Union. Any balance of the rights of parent and child in this case therefore inevitably must weigh more and more heavily in Walter's favor. In this case, the doctrine of parental autonomy must give way to Walter's right to live a full and free life where he chooses.