

William & Mary Law Review

Volume 23 (1981-1982)
Issue 3

Article 3

March 1982

The Rights of Adolescents

Robert Batey

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Family Law Commons](#)

Repository Citation

Robert Batey, *The Rights of Adolescents*, 23 Wm. & Mary L. Rev. 363 (1982),
<https://scholarship.law.wm.edu/wmlr/vol23/iss3/3>

Copyright c 1982 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmlr>

WILLIAM AND MARY LAW REVIEW

VOLUME 23

SPRING 1982

NUMBER 3

THE RIGHTS OF ADOLESCENTS*

ROBERT BATEY**

In *Parham v. J.R.*,¹ a June 1979 decision of the United States Supreme Court, Chief Justice Burger wrote: "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions Parents can and must make those judgments."² This remark includes both a statement of fact about a child's capacity for making choices, and a normative judgment derived from that factual assessment: parents must choose for the

* Several persons aided materially in the preparation of this article. Its central idea evolved from a conversation with my friend and teacher, Charles H. Whitebread, who also commented extensively on the article's first draft. Several of my colleagues at Stetson—Jon W. Bruce (now at Vanderbilt), Mary Greenwood (now in private practice), Elvin C. Lashbrooke, Jr. (now at Notre Dame), Thomas C. Marks, Jr., Howard L. Oleck (now retired), and Michael I. Swygert—participated in a vigorous discussion of the article's thesis at a faculty seminar; Elvin Lashbrooke and Mike Swygert were also kind enough to read and criticize various drafts. I hasten to add that none of these persons bears any responsibility for the ideas expressed in the article. In fact, I can say with some assurance that each of them is in fundamental disagreement with at least some part of it.

This article is dedicated to my mother Anne Deeb Batey and to my late father Whit B. Batey. Forced to deal with a contentious adolescent, they responded with generous love, and with a respect for my choices that I am only now beginning fully to appreciate.

** Associate Professor, Stetson University College of Law. B.A., Yale University; J.D., University of Virginia; LL.M., University of Illinois.

1. 442 U.S. 584 (1979).

2. *Id.* at 603.

child. Both the factual statement and the norm derived from it long have been major tenets of Western jurisprudence.³ This article questions their validity.

With regard to adolescents—categorized as those minors fourteen or older—the lack of decisionmaking capacity asserted by the Chief Justice and assumed by Anglo-American law simply does not exist. Part I of this article marshals scientific evidence showing that, when presented with difficult problems of moral reasoning, adolescents perform markedly better than younger children, and roughly on a par with adults. If Chief Justice Burger's factual statement is inaccurate as applied to adolescents, the legal norm derived from the factual statement also must be faulty. Accordingly, parents should not be allowed to make decisions for their competent adolescent children. The ramifications of this conclusion are explored in Part II of this article.

I

Evidence of the adolescent's capacity for moral reasoning has been a byproduct of modern psychology's interest in cognitive development, the process by which a child acquires the intellectual skills of an adult.⁴ The attainment of skill at moral reasoning has been one of the primary focuses of the study of cognitive development.

Jean Piaget, the pioneer in the field of cognitive development, postulated the existence of two stages of moral reasoning.⁵ At the first stage, which Piaget labeled the state of "heteronomous morality," external forces dictated the child's moral choices; the child's morality was a combination of the conceptions of good and bad

3. Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children 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.

Id. at 602; *see id.* at 621 (Stewart, J., concurring) ("For centuries it has been a canon of the common law that parents speak for their minor children.").

4. The author is indebted to Joan E. Hughes, B.S., Purdue University, Ph.D., University of Maine, J.D., Stetson University, for her assistance in the preparation of Part I. Ms. Hughes, however, bears no responsibility for any of the ideas expressed in this or any other part of the article.

5. *See generally* J. PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (1965).

behavior held by all individuals in positions to reward the child's good conduct or to punish bad conduct. From this stage, Piaget claimed, the child moved to the second stage of "autonomous morality," in which internalized concepts of right and wrong controlled the child's moral choices. Piaget theorized that the child developed a personal morality, and thus moved from first- to second-stage moral reasoning, at about age twelve or thirteen.

Piaget's generalities were particularized by Lawrence Kohlberg, who further divided Piaget's two stages into six stages.⁶ At Kohlberg's first and second stages, the child's moral choices were the product of his self-interested reaction to others; at stage one the child chose out of fear of punishment, and at stage two the child chose in hope of reward. At the third and fourth stages of Kohlberg's developmental process, social conventions ruled the child's moral choices—at stage three, the conventions of individuals immediately surrounding the child (the child's family or peer group), and at stage four, the conventions of society as a whole. At stages five and six moral reasoning had all the attributes of formal ethics: acting from belief in a social contract characterized the fifth stage, and action based on universal ethical principles marked the sixth. According to Kohlberg, very few adults—and far fewer children—reached the last two stages.⁷

In addition to further dividing Piaget's developmental stages, Kohlberg developed a means for testing his theory.⁸ Kohlberg and his associates assessed the moral reasoning stage of individuals by asking them to react to a short story⁹ involving a single moral

6. See generally Kohlberg, *The Development of Children's Orientation Toward a Moral Order: I. Sequence in the Development of Moral Thought*, 6 VITA HUMANA 11 (1963).

7. See Kohlberg, *The Implications of Moral Stages for Adult Education*, 72 RELIGIOUS EDUC. 183 (1977).

8. See R. BROWN & R. HERRNSTEIN, PSYCHOLOGY 310-12 (1973).

9. The following is typical of the stories used:

In Europe, a woman was near death from a special kind of cancer. There was one drug that the doctors thought might save her. It was a form of radium that a druggist in the same town had recently discovered. The drug was expensive to make, but the druggist was charging ten times what the drug cost him to make. He paid \$200 for the radium and charged \$2000 for a small dose of the drug. The sick woman's husband Heinz went to everyone he knew to borrow the money, but he could only get together about \$1000 which is half of what it cost. He told the druggist that his wife was dying, and asked the druggist to sell it cheaper or let him pay later. The druggist said, "No, I discovered the

choice. Although the experimenters asked each subject to indicate his approval or disapproval of the moral choice made in the story, the subject's stage of moral reasoning was determined not by the subject's answer, but by the reasons given by the subject for his approval or disapproval. The experimenter, armed with paradigmatic reasons for either opinion at all six stages,¹⁰ categorized the subject's response according to its similarity to one of the paradigms. After questioning the subject about several stories, an assessment of the subject's moral reasoning stage was made.

Although the experiments verified the descriptive utility of the six stages of moral reasoning Kohlberg had outlined, Kohlberg drew a far more sweeping conclusion from his data. According to Kohlberg, a person progressed in moral reasoning upward from stage one, never skipped a stage, and never fell below an attained stage.¹¹ Kohlberg's claim of unvarying sequential development has proved highly controversial, however, because the data supporting it is ambiguous.¹²

drug and I'm going to make money from it." Heinz got desperate and broke into the man's store to steal the drug for his wife. Should the husband have done that?

See note 8 *supra*.

10. Compare the paradigmatic disapproving response at stage one—

Heinz doesn't have any permission to take the drug. He can't just go and break through a window or break the door down. He'd be a bad criminal doing all that damage. The drug is worth a lot of money and stealing anything so expensive would really be a big crime.

—with the disapproving response at stage four—"It's a natural thing for Heinz to want to save his wife, but it's still always wrong to steal. You have to follow the rules regardless of how you feel or regardless of special circumstances." Each of these responses has a coordinate response of approval. The paradigmatic responses at the second stage show this result-neutral feature of the stages:

PRO: Heinz isn't really doing any harm to the druggist and he can always pay him back. If he doesn't want to lose his wife, he should take the drug because it's the only thing that will work.

CON: The druggist isn't wrong or bad, he just wants to make a profit like everyone else. That's what you're in business for, to make money. Business is business.

See note 8 *supra*.

11. Since first asserting his theory of sequential development, Kohlberg has redesigned his stages to accommodate potentially conflicting experimental data. See, e.g., Kohlberg & Kramer, *Continuities and Discontinuities in Childhood and Adult Moral Development*, 12 HUM. DEV. 93 (1969) (suggesting a stage 4B, in which moral reasoning resembled that of the second stage).

12. See generally R. BROWN & R. HERRNSTEIN, *supra* note 8, at 314-26.

The controversy over Kohlberg's theory of sequential development has sparked the interest of experimenters in the field and has resulted in much data. Although the data have not proved or disproved unvarying sequential development, the data have shed light on an issue more relevant to the rights of adolescents: the age at which most children acquire the moral reasoning capacity of adults.

Characterizing reasoning as "adult" at stages three and four—because the third stage marks the first appearance of an internalized morality and because few adults ever rise above the fourth stage¹³—the experimental results are remarkably consistent in indicating the attainment of an adult's capacity for moral reasoning at the onset of adolescence, around the fourteenth year.

In an early study, Kohlberg assessed the moral reasoning stage of four sets of children grouped according to age.¹⁴ Of the Age 7 group, ninety-four percent gave responses indicating moral thought at stages one or two. Fifty-eight percent of the Age 10 group also showed reasoning at these low levels. The Age 13 group, however, scored much better: only twenty-two percent of the thirteen-year-olds were reasoning at the first or second stages, and fully half of the Age 13 group employed moral reasoning skills at stage four or higher. The Age 16 group fared only slightly better than the thirteen-year-olds; about a sixth of the sixteen-year-olds showed a capacity for only first- or second-stage moral thought.

A later study by Kohlberg and an associate confirmed these earlier results, at least for children in modern societies.¹⁵ Once again, children were grouped by age and tested for the quality of their moral thought, and again the experimenters noted a major difference between the Age 10 group and the Age 13 group. Of a sample of urban middle-class ten-year-olds living in the United States, only thirty-two percent indicated moral thought at stage three or

13. See Gibbs, *Kohlberg's Stages of Moral Judgment: A Constructive Critique*, 47 HARV. EDUC. REV. 43 (1977).

14. Kohlberg, *supra* note 6. Kohlberg presented his results graphically; the figures used in the text are therefore estimates.

15. Kohlberg & Gilligan, *The Adolescent as a Philosopher: The Discovery of the Self in a Postconventional World*, 100 DAEDALUS 1051 (1971). As in Kohlberg's earlier work, see note 14 *supra*, the data in this study appeared in graph form, so the percentages used here are approximations.

higher although sixty-eight percent of the thirteen-year-olds with the same background displayed reasoning skills above stages one and two. As in Kohlberg's earlier study, the sixteen-year-old urban middle-class Americans scored marginally higher than the Age 13 group, with seventy-eight percent showing at least third-stage moral reasoning.

This later study is unique because Kohlberg and his associate also measured the moral reasoning aptitude of children from outside the United States. In addition to urban middle-class Americans, Kohlberg and his associate tested urban middle-class children in Taiwan, as well as children from isolated villages in Turkey and the Yucatan. The Taiwanese experiment showed the same trends as the American study. At age ten, seventy percent of the children were reasoning at stages one or two; at age thirteen, only thirty-seven percent were reasoning at those levels; at age sixteen, only twenty percent. The nonurban, non-middle-class children of Turkey and of the Yucatan, however, produced substantially different results. In the tests conducted in Turkey and the Yucatan, the onset of adolescence produced no major change in moral development. Sixty-two percent of the thirteen-year old Turks were still reasoning at stages one and two, and seventy percent of the Age 13 Yucatan group used reasoning characteristic of those stages. Even at age sixteen, over half of the children from each isolated village—fifty-eight percent of the Turkish sample and fifty-one percent of the Yucatan sample—displayed a capacity only for first- or second-stage moral thought. These results support the unsurprising conclusion that life in a modern society forces adolescents to rapidly develop skill at moral reasoning.

Other experimenters have noted the significance of the onset of adolescence in the moral development of children in a contemporary society. A 1976 study employed age groups broader and more nearly "contiguous" than those used by Kohlberg.¹⁶ One set of children tested ranged in age from 10.1 to 12.3 years; another, from 12.2 to 14.6; and a third, from 15.1 to 17.7. The experimenter

16. Turiel, *A Comparative Analysis of Moral Knowledge and Moral Judgment in Males and Females*, 44 J. PERSONALITY 195 (1976). Turiel concluded that girls reason at a slightly higher level than boys of the same age. The groups discussed above included both boys and girls.

found that forty-seven percent of the Age 10-12 group reasoned at stages one and two; however, only thirty-six percent of the 12-14 group displayed such a relatively low capacity for moral thought. Considering the slight difference in age between the two sets of children, the eleven percent difference in those reasoning at stage one or two is significant. The Age 15-17 group bettered the results of the Age 12-14 group by only eight percent—twenty-eight percent of the older group employed reasoning characteristic of the first or second stage—even though the 15-17 group included some relatively old, and presumably quite mature, children.

One other study is noteworthy if only because of its sponsorship by the American Bar Foundation.¹⁷ The study associated Kohlberg's stages with various attitudes toward law. Stages one and two were labeled "law obeying," stages three and four "law maintaining," and stages five and six "law making." Consistent with other results in the area, the experimenters found a shift from a law-obeying attitude to a law-maintaining one sometime during the onset of adolescence. Specifically, the ten-year-olds tested manifested predominantly stage-one moral reasoning, whereas the thirteen-year-olds primarily employed stage-three reasoning. The sixteen-year-olds tested most often displayed moral thought characteristic of Kohlberg's fourth stage.

Each of these studies indicates that most adolescents, unlike most preadolescent children, possess the moral reasoning skills of adults. The traditional view of the law, however, reflected in Chief Justice Burger's comment in *Parham v. J.R.*, is that a person does not acquire the skills of moral choice until the end of adolescence. Thus, as a factual statement about the capacities of a large majority of adolescents in modern society, the traditional view simply is wrong.

The law's traditional judgment of incapacity is accurate, of course, as applied to some adolescents. One study utilizing Kohlberg's stages of moral reasoning¹⁸ indicated that adolescents

17. Tapp & Kohlberg, *Developing Senses of Law and Legal Justice*, 27 J. Soc. ISSUES 65 (No. 2, 1971). See also Tapp & Levine, *Persuasion to Virtue*, 4 LAW & Soc'y REV. 565 (1970).

18. Jurkovic & Prentice, *Relation of Moral and Cognitive Development to Dimensions of Juvenile Delinquency*, 86 J. ABNORMAL PSYCH. 414 (1977). The average age of the children tested was 15.68 years.

properly labeled psychopathic, neurotic, or influenced by a deviant subculture reasoned at stage three or higher relatively infrequently. Nonetheless, the question remains: are the incapacities of some adequate reason to deny the rights of all?

II

From the assumption that adolescents lack the capacity to make moral choices affecting their own lives, Anglo-American jurisprudence has drawn the conclusion that the adolescent's parents have the right to make those choices. The conclusion that parents have the right to make the adolescent's moral choices must be rejected, however, because, as studies indicate, the law's underlying assumption that adolescents lack the capacity to make moral choices is incorrect. Because a large majority of adolescents do have the moral reasoning capacities of adults, the law should accord the considered choices of competent adolescents the same treatment it accords similar choices of adults. Section A of this part discusses the limited extent to which courts and legislatures already have adopted the view that competent minors should have the right to make moral decisions. Section B indicates what a thoroughgoing implementation of this principle would entail, and Section C describes some of the principle's limits.

A

Despite the traditional view that parents or some surrogate like the state must make decisions for adolescent children, isolated exceptions to this rule do exist. In the family law area, some legislatures have recognized the right of an adolescent to refuse to consent to adoption,¹⁹ and in divorce cases some courts have given great weight to an older child's preference between parents where child custody is contested.²⁰

In the context of constitutional law, the United States Supreme Court has recognized the adolescent's right to choose in one regard. In *Planned Parenthood v. Danforth*,²¹ a major issue was whether

19. See UNIFORM ADOPTION ACT § 5(a)(5) (adopted in Montana, New Mexico, North Dakota, Ohio, and Oklahoma).

20. See, e.g., *Barton v. Barton*, 230 Cal. App. 2d 43, 40 Cal. Rptr. 676 (1964).

21. 428 U.S. 52 (1976).

Missouri constitutionally could limit an unmarried minor's right to an abortion by requiring the consent of at least one of her parents. A five-man majority of the Supreme Court resolved this dispute in favor of the pregnant minor.

Justice Blackmun's opinion for the Court in *Planned Parenthood* determined that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision" to abort.²² Although "safeguarding . . . the family unit and . . . parental authority"²³ was a legitimate legislative end, pursuing this end could not justify infringement of "the right of privacy of the competent minor mature enough to have become pregnant."²⁴ Thus, the Court in *Planned Parenthood* implicitly recognized the right of a competent adolescent to make important moral choices regardless of the desires of the adolescent's parents.

The Court in *Planned Parenthood* noted that sexual maturity of the adolescent did not indicate necessarily that the adolescent was competent to exercise the right to an abortion,²⁵ as emphasized by the Court's first decision in *Bellotti v. Baird*,²⁶ the companion case to *Planned Parenthood*. In *Bellotti* a unanimous Court ruled that the federal judges who struck down Massachusetts' parental consent provision should have abstained in order to allow the state courts to interpret the provision in a way that might avoid the constitutional issue faced in *Planned Parenthood*.²⁷ Representatives of the state argued that the Massachusetts provision could be interpreted to require either parental consent or a judicial determination that the minor was mature enough to give competent consent.²⁸ Justice Blackmun's opinion for the Court in *Bellotti* strongly implied that the provision would be constitutional if interpreted in this way.²⁹

22. *Id.* at 74.

23. *Id.* at 75.

24. *Id.*

25. *Id.*

26. 428 U.S. 132 (1976).

27. *Id.* at 146-48.

28. *Id.* at 144-45. A third option, judicial consent to the abortion, also was offered as a possible means of satisfying the provision's requirements. *Id.* at 145.

29. "[S]uch an interpretation would avoid or substantially modify the federal constitutional challenge to the statute." *Id.* at 148. In *Planned Parenthood*, concurring Justices

Reading *Planned Parenthood* and *Bellotti* together indicates that if an adolescent seeks an abortion over the objections of her parents, the state may bar the operation only after first determining that the adolescent is not sufficiently competent to make the decision to abort. Thus, the adolescent's assertion of right is controlling if the adolescent is competent, regardless of the desires of the parent.³⁰

The extent of the divergence between this conclusion regarding the rights of competent adolescents and prevailing notions about the rights of adolescents is emphasized by the dissenting opinions in *Planned Parenthood*. Justice Stevens, after noting the many restraints on freedom of action that states impose in order to protect children,³¹ indicated his belief that Missouri's parental consent requirement was just another example of such restraints.³² Moreover, Justice Stevens asserted, the majority in *Planned Parenthood* had recognized the need for restraint if the pregnant minor was not competent to make the abortion decision herself. Given this acknowledgment, the legislature's choice of chronological age as the basis for determining competence, although "imprecise and perhaps even unjust in particular cases," was not unconstitutional.³³

Stewart and Powell expressed a similar opinion. 428 U.S. at 90-91 (Stewart, J., concurring).

30. Developments after remand in *Bellotti v. Baird* support this reading of the Supreme Court's decisions. The Supreme Judicial Court of Massachusetts held that the statutory provision in question allowed a court to bar an abortion even if "the minor is capable of making, and has made, an informed and reasonable decision to have an abortion." *Baird v. Attorney General*, 371 Mass. 741, 748, 360 N.E.2d 288, 293 (1977). The federal district court, responding to this interpretation of the statutory provision, reinstated its judgment that the statute was unconstitutional, *Baird v. Bellotti*, 450 F. Supp. 997 (D. Mass. 1978), and the Supreme Court affirmed on the basis of *Planned Parenthood*. 443 U.S. 622 (1979). In the Supreme Court's second decision in *Bellotti v. Baird*, four Justices indicated specifically that an abortion statute for minors that required parental (or judicial) consent would be constitutional if the consent requirement recognized an exception for competent pregnant minors. *Id.* at 642-44 (plurality opinion).

The Court's opinion in *H.L. v. Matheson*, 101 S. Ct. 1164 (1981), upholding a Utah statute requiring parental notification prior to a minor's abortion, reserved decision on whether the Constitution forbade application of this requirement to competent minors. *Id.* at 1169 ("We cannot assume that the statute, when challenged in a proper case, will not be construed . . . to exempt demonstrably mature minors."). Three members of the Court were prepared to reach this issue and would have invalidated the statute for its failure to exempt competent pregnant minors. *Id.* at 1192-94 (Marshall, J., dissenting).

31. 428 U.S. at 102 (Stevens, J., concurring in part and dissenting in part).

32. *Id.* at 103.

33. *Id.* at 104-05.

Justice White made similar arguments in his dissenting opinion and highlighted the use of chronological age as "the traditional way by which States have sought to protect children from their own immature and improvident decisions."³⁴

The Court's decision in *Planned Parenthood* is significant because it is such an anomaly. Even among recent constitutional decisions, *Planned Parenthood* denotes the exception rather than the rule with regard to adolescents' rights to make choices.³⁵ Given the evidence supporting the typical adolescent's skill at making moral choices, the principle underlying *Planned Parenthood*—that a competent adolescent has the right to make decisions for herself—should be applied more frequently. The following section indicates the legal changes that consistent application of this principle would achieve.

B

The thesis of this article can be stated simply: the law should accord the considered choices of competent adolescents the same treatment it accords similar choices of adults. Another way of phrasing the same principle is that in a situation in which the state would defer to the desires of an adult, the state can refuse to defer to the considered desires of an adolescent only upon a showing that the adolescent is not competent to make the decision.

The principle will change the current legal treatment of adolescents in two ways. First, adoption of this principle as a guideline for legal action will reduce drastically situations in which parents

34. *Id.* at 95 (White, J., concurring in part and dissenting in part).

35. In *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), plaintiffs challenged a New York statute prohibiting access by minors to contraceptives. Four Justices would have upheld the challenge on the basis of *Planned Parenthood*. *Id.* at 691-99 (plurality opinion). However, the fifth and sixth votes against the statute, Justices Powell and Stevens, refused to rely on *Planned Parenthood*, instead finding the statute unconstitutional largely because it prevented a parent from giving contraceptives to his child. *Id.* at 707-10 (Powell, J., concurring in part and concurring in the judgment); *id.* at 713-16 (Stevens, J., concurring in part and concurring in the judgment).

More recently, in *Parham v. J.R.*, 442 U.S. 584 (1979), minors challenged a Georgia statute that allowed parents to commit their children to state mental institutions without any prior hearing. Despite the dissent's protest that the case was controlled by *Planned Parenthood*, *id.* at 631 (Brennan, J., dissenting), the Court distinguished the 1976 case, *id.* at 604, and upheld the statute.

may enlist the assistance of the state in controlling adolescent children. Parent-induced state intervention in the life of an adolescent will be appropriate only if the parents can demonstrate the adolescent's inability to make an adult decision. Second, adhering to this principle will expand greatly circumstances in which an adolescent may obtain state assistance in enforcing his choice over the objections of his parents. If the adolescent can establish competence to make the choice involved, the choice will be effective, regardless of the parents' wishes and regardless of whether the adolescent is seeking to block or force parental action.

The first consequence of a full recognition of the adolescent's right to decide is virtually self-evident. If an adolescent is competent to choose, at the very least his making a given choice should not be a ground for state intervention in his life—unless, of course, he chooses to do something that is a ground for state intervention in anyone's life, such as committing a crime. Unfortunately, the state now frequently intervenes, even though the adolescent has done nothing criminal; the basis for the intervention is typically a claim by the adolescent's parents that the child is beyond their control.³⁶

State intervention in the life of an adolescent solely because his parents disapprove of choices the adolescent has made should be tolerated only if the adolescent is not capable of making mature choices. If the minor is competent to make the decisions, the parents' opposition to his chosen course, no matter how vigorous, should not be a ground for state action.

This limitation on state intervention can be better assessed in a concrete setting, such as that of a sexually active adolescent with disapproving parents.³⁷ For adolescent women, sexual activity is frequently the ground used to justify the finding that the adoles-

36. Virtually every American jurisdiction allows its courts to discipline juveniles who are either "beyond [parental] control" (28 states), "ungovernable" (24 jurisdictions), "incorrigible" (9 states), or "habitually disobedient" (31 jurisdictions). IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR, app. A (Tent. Draft 1977).

37. This context is suggested by Justice Stevens' query in *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (considering minors' rights of access to contraceptives), whether "a minor has the . . . right to put contraceptives to their intended use, notwithstanding the combined objection of both parents." *Id.* at 713 (Stevens, J., concurring in part and concurring in the judgment); see note 35 *supra*.

cent is beyond parental control.³⁸

Adoption of the principle that the state should intervene only if parents can establish the immaturity of their child's choice would alter radically any judicial inquiry instituted by parents who allege that their sexually precocious adolescent daughter is beyond their control. No longer could a judicial inquiry be based on the parents' showing that the daughter's sexual activity contradicted her parents' commands; the parents would have to demonstrate that the adolescent was not capable of making the moral decisions implicit in her conduct.

Although the fact of disobedience alone would not justify state intervention, the adolescent's disobedience would be helpful in demonstrating the adolescent's incapacity to decide because the disobedience would indicate a lack of concern for the moral norms of individuals apparently closest to the adolescent, her family. The implication of such disobedience would be that the daughter chose to become sexually active simply because the behavior was pleasurable, with no regard for social conventions about such activity.³⁹

To rebut this and other evidence of immature decisionmaking, the adolescent could testify to the process of thought that led her to decide to engage in sexual activity. If that thought process goes beyond pure self-interest—that is, if the adolescent relied in substantial part on the moral conventions of some entity—then her disobedience should not be a ground for judicial intervention. The entity providing the moral norms relied upon by the adolescent could be the daughter's peer group or the society as a whole.⁴⁰ In either case, the adolescent's disobedience would indicate only nor-

38. [The] assistant commonwealth attorney . . . was using those terms "incorrigible," "wayward," "curfew breaker" and "beyond parental control," that, when applied to a young girl, mean simply "she fucks." As late as 1960, the large majority of juvenile females behind bars were there because they had acquired an early taste for sexual intercourse.

T. ROBBINS, *EVEN COWGIRLS GET THE BLUES* 46 (1974). For an updated, but similar, assessment in one jurisdiction, see *State ex rel. Harris v. Calendine*, 233 S.E.2d 318, 326 & n.6 (W. Va. 1977).

39. This type of moral reasoning would fall into Kohlberg's second stage, a level below that usually attained by adults. See text accompanying notes 6 & 7 *supra*. One wonders, however, how many adults conduct their own sexual behavior on the basis of similarly "childish" reasoning.

40. Reasoning in these fashions would correspond to Kohlberg's third and fourth stages, respectively. See text accompanying notes 6 & 7 *supra*.

mal progress in the development of moral reasoning, which hardly should be a reason for state intervention.

If the courts are to retain any power to interfere in an adolescent's life when her parents insist that the adolescent is beyond their control,⁴¹ the only permissible basis for interference should be a showing that the adolescent's disobedient behavior was the result of immature moral reasoning. This should be true regardless of the nature of the disobedient behavior.

Recognizing the rights of competent adolescents will not only mean that parents can utilize the powers of the state against their children less frequently; this recognition will also mean that adolescent children can use these same powers against their parents more frequently. If parents override the decision of their competent adolescent child, the adolescent should be able to obtain court assistance in effectuating his choice.

Again, a concrete setting is helpful: the parents of an adolescent boy commit him to a mental health institution over the boy's objections.⁴² Local studies suggest that many children committed by their parents do not need institutionalized treatment⁴³ but have been "dumped" in mental health facilities nonetheless. Thus, the question arises whether the adolescent can secure his release against the desires of his parents.

Under the traditional notion that the parents speak for the child, the adolescent's complaint can be ignored; at best, the adolescent can obtain his release only by showing that he does not need the treatment he is receiving.⁴⁴ In contrast, a voluntarily com-

41. The Juvenile Justice Standards Project, a joint effort of the Institute of Judicial Administration and the American Bar Association, recommends outright abolition of the courts' beyond-parental-control jurisdiction over children. IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR 1.1 (Tent. Draft 1977).

42. This situation is derived from *Parham v. J.R.*, 442 U.S. 584 (1979), which considered the voluntary commitment of children and made specific reference to the availability of habeas corpus relief for the child. *Id.* at 616 n.22; see note 35 *supra*.

43. The National Institute of Mental Health recently found that only 36% of patients below age 20 who were confined at St. Elizabeth's Hospital [in Washington, D.C.] actually required such hospitalization . . . [A] Georgia Study Commission on Mental Health Services for Children and Youth concluded that more than half of the state's institutionalized children were not in need of confinement if other forms of care were made available.

442 U.S. at 634 n.21 (Brennan, J., concurring in part and dissenting in part).

44. According to Chief Justice Burger, some 30 jurisdictions oblige the state to release a

mitted adult can obtain his release simply by requesting it.⁴⁵

Fidelity to the principle that most adolescents can exercise their rights with as much responsibility as adults would require a different procedure. If an adolescent, voluntarily committed to a mental health institution by his parents, seeks court assistance in obtaining a discharge, the court should order his release unless the adolescent's parents can demonstrate that their child's choice is not a competent one.

The parents' first step in demonstrating the adolescent's immature decisionmaking would be to explain their reasons for committing him. By detailing their son's mental history, the parents would be offering evidence that any mature person in the adolescent's situation would have sought treatment, either to safeguard those around him or to render his behavior more socially acceptable.⁴⁶

To counter the assertion that his choice for release is not a mature decision, the adolescent must explain the reasoning behind his choice. If the adolescent merely indicates that he does not like living at the mental health facility, he has probably not made a mature decision.⁴⁷ If, on the other hand, the adolescent does not consider his allegedly deviant behavior a real threat to others or a genuine departure from what is socially acceptable, and if he can relate these opinions to the views of some social entity other than himself, then the adolescent has in all likelihood made a competent decision.⁴⁸ In the latter instance, the court should order the adolescent released, even if it can be demonstrated that he could

voluntarily committed child no longer in need of institutionalized treatment, with or without a request for release. *Id.* at 612-13 & n.20.

45. After such a request, the state may of course institute involuntary commitment proceedings.

46. These reasons for voluntary commitment correspond to Kohlberg's third and fourth stages of moral reasoning, respectively, and therefore qualify as "adult" thinking. *See* text accompanying notes 6 & 7 *supra*.

47. This type of reasoning would fall into the second of Kohlberg's stages, a level most adults surpass. *See* text accompanying notes 6 & 7 *supra*. Nonetheless, it would be interesting to know how many adults who could profit from institutionalized treatment reject or rescind voluntary commitment for just such a reason.

48. If an adolescent's opinions are derived from those of a peer group or from those of American society in general, the opinions would indicate third- or fourth-stage moral reasoning, respectively. *See* text accompanying notes 6 & 7 *supra*. It is not surprising that reasons both for and against release, *see* note 46 *supra*, can be generated at either stage. *See* text accompanying notes 8-10 *supra*.

benefit from treatment in the mental health institution.

If parents can force decisions on adolescents, the courts should provide some mechanism to enable competent adolescents to overturn those decisions. Similarly, if parents can veto decisions made by their adolescent children, those children should be able to obtain judicial assistance in overriding such vetoes, unless the parents can demonstrate that the child did not make a mature choice. Thus, if an adolescent desires to pursue a particular education but his parents thwart that desire,⁴⁹ the adolescent should be allowed to take his complaint to court. The traditional concept of the parent-child relationship would tolerate such a lawsuit only if the parents' refusal constituted nonsupport, a difficult showing for the adolescent to make.⁵⁰ Recognition of the adolescent's capacity for adult moral reasoning, however, requires a different standard: the court should enjoin the parents from interfering unless the parents can establish that the adolescent has made an immature judgment.

As in the other settings discussed, the court proceeding in this situation would focus first on the reasons given by the parents and then on the reasoning of the adolescent. The parents would offer an "adult" explanation for opposing the child's education plan to show that the adolescent's motivations were "childish." The adolescent would then seek to deny this assertion by offering "adult" reasons for his choice. If satisfied that such reasons motivated the adolescent, the court should enjoin the parents' obstructionism.⁵¹

49. This example derives from *Wisconsin v. Yoder*, 406 U.S. 205 (1972), in which the Supreme Court upheld, on freedom of religion grounds, the right of Amish parents to remove their children from school in violation of Wisconsin's compulsory school attendance law. In dissent, Justice Douglas noted that not all the children involved in the case had expressed a desire not to attend school and determined that if a child wished to attend school and was "mature enough to have that desire respected" then the state constitutionally could compel the parents to school the child. *Id.* at 242 (Douglas, J., dissenting in part).

50. Early cases defined the support obligation as requiring that the child be provided with "necessaries"—usually construed to give the child a claim only for those items deemed essentials of living Most recent cases have expanded the scope of the obligation . . . to require parents to maintain the child in a manner commensurate with the parents' means and station in life.

IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO RIGHTS OF MINORS 3.2, Commentary (Official Draft 1979).

51. Because the competence issue is analytically distinct from the question of the parents' support obligation, an injunction against the parents would not necessarily oblige the parents to pay for the adolescent's planned education. That question would be decided on the basis of other factors. See note 50 *supra*.

Although limiting the circumstances in which parents can mobilize the courts against their children is a popular contemporary reform,⁵² expanding the opportunities for child-induced judicial intervention is not. To proponents of the currently potent "family autonomy" doctrine, which maintains that the family must remain intact as a unit, coercive intervention at the behest of either parent or child is wrong. The work of the Juvenile Justice Standards Project with respect to the fact situation just discussed exemplifies this trend toward nonintervention.⁵³

The Project, a joint undertaking of the Institute of Judicial Administration and the American Bar Association, has promulgated "Standards Relating to Rights of Minors." These standards enunciate the parents' duty to support the child⁵⁴ and grant the child the right to enforce this obligation in court.⁵⁵ The commentary to the standards, however, draws away from this last commitment, citing the need for family autonomy.⁵⁶ Elsewhere, the commentary suggests that courts should upset family autonomy at a child's request only "where the parents have in fact breached, or have come close to breaching, societally acceptable minima as expressed in juvenile court neglect statutes."⁵⁷

Such hostility to all but the most necessary support actions differs markedly from the tone of this Article and is due to the fact that the family autonomy doctrine is ill-suited to the problems posed by an adolescent at odds with his parents. Maintaining family autonomy may make a great deal of sense if the complaining party is someone outside the family who champions the rights of an infant family member; however, deferring to family privacy

52. See note 41 *supra*.

53. See IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO ABUSE AND NEGLECT 1.1 (Official Draft 1979) (speaking of "a strong presumption for parental autonomy in child rearing").

54. IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO RIGHTS OF MINORS 3.1-2 (Official Draft 1979) ("[s]uch support . . . as will permit the child to live in a manner commensurate with [the parents'] means and with the style of life which the child has previously been accorded").

55. *Id.* 3.3A.

56. *Id.* Commentary.

57. *Id.*; see IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO ABUSE AND NEGLECT 2.1 (Official Draft 1979) (limiting neglect findings to cases of "physical harm," "serious emotional damage," sexual abuse, refusal to provide medical treatment that would prevent "serious physical harm," and solicitation to delinquency).

makes no sense if the complainant is an adolescent with a demonstrable ability to form and to voice mature opinions. In this latter situation, courts should feel bound to treat the dispute as an argument between adults and to adjudicate the matter accordingly. Anything less constitutes a denial of the adolescent's rights.

C

Limits must be placed on the idea that the choices of competent adolescents should be treated like the choices of adults. Without such limits, it might be difficult to regulate vendors of items such as prophylactics,⁵⁸ who could otherwise argue persuasively against any statute that restricted the access of competent adolescents to birth control (and all adolescents are presumed competent). The result would be that the vendor could deal with all adolescents regardless of whether the adolescents were competent.⁵⁹

This example is distinguishable from those previously discussed—and thus susceptible of a different resolution—because of the different adolescent decisionmaking processes involved. In all of the choices previously mentioned, a period of consideration is forced upon the adolescent. Before an abortion, *Planned Parenthood* requires discussion with a physician,⁶⁰ and *Bellotti v. Baird* apparently permits required consultation with a court.⁶¹ In a beyond-parental-control hearing, a sexually active adolescent usually would be forced to justify her conduct,⁶² which would require reflection on that conduct and a decision about whether she should continue. In hearings to reverse parental actions or to overcome parental obstacles, the adolescent typically would be required to justify his choices.⁶³ Thus, decisions like rejecting a voluntary commitment or seeking further education would be well considered.

58. The problem is suggested by the facts in *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), in which birth-control vendors challenged a New York statute prohibiting the distribution of contraceptive devices to unmarried minors. Without agreeing on an opinion of the Court, six Justices found the statute unconstitutional. See note 35 *supra*.

59. It can, of course, be argued that there is little harm in allowing the sale of prophylactics to youths too immature to make competent judgments about their use. See text accompanying notes 68-70 *infra*.

60. 428 U.S. at 61 (citing *Roe v. Wade*, 410 U.S. 113, 164 (1973)).

61. See text accompanying notes 25-29 *supra*. See also note 35 *supra*.

62. See text accompanying note 40 *supra*.

63. See text accompanying notes 47-48 & 51 *supra*.

On the other hand, the adolescent's choice to purchase prophylactics is unlikely to be the product of extended deliberation; thus, little guarantees that the adolescent has considered the moral dimensions of his decision. And, without such consideration, even an adolescent capable of a competent choice may not choose competently.

The work of Kohlberg and his followers considered the moral reasoning capacity of children who had the time to reflect on moral choices.⁶⁴ Although this work does indicate the reasoning adolescents use when considering choices in their own lives, it says little about how adolescents make nonreflective decisions. Regarding these nonreflective decisions, scant data exists from which to determine whether an adolescent's spur-of-the-moment choice is more like an adult's or more like a child's.⁶⁵

This lack of data regarding nonreflective choices should not bar completely the competent adolescent from enforcing his choices; he merely should be required to take steps that indicate that his decision is the product of reflection. The seeking of state aid⁶⁶ in obtaining access to birth-control devices would be such a step. Like other invocations of the legal process,⁶⁷ seeking state aid would indicate that the adolescent had engaged in some reflection prior to seeking governmental assistance. The only ground on which the state should refuse such assistance is a determination that the adolescent's decision is not a competent one. The inquiry necessary to determine competence also will force the adolescent to reflect.

This limit on the recognition of the rights of adolescents has not been observed in the birth-control context: four Justices of the United States Supreme Court,⁶⁸ as well as the Juvenile Justice

64. See text accompanying notes 8-10 *supra*.

65. Brown and Herrnstein's text on psychology collects experimental data that suggest that Kohlberg's analysis of moral reasoning is irrelevant in situations requiring quick decisions. R. BROWN & R. HERRNSTEIN, *supra* note 8, at 326-34.

66. At a minimum, the courts should be open to any adolescent desiring a declaration (upon which a vendor could rely) that the adolescent's decision to purchase prophylactics is a mature one. Because few adolescents would be willing to pursue such litigation, a state would better serve the rights of adolescents if it offered such aid administratively. An agency that thus responds to the needs of adolescents could also offer counseling and other services.

67. See text accompanying notes 60-63 *supra*.

68. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 691-99 (1977) (plurality opinion); see

Standards Project,⁶⁹ have suggested that adolescents should have unrestricted access to birth control. Of course, a state may grant unlimited access for reasons other than the need to recognize the rights of adolescents;⁷⁰ however, a state should at least give an adolescent the right to make such a purchase if the adolescent shows that he has considered his decision to purchase contraceptives, absent a showing that the adolescent is not competent to make the decision involved.

The limits imposed by a requirement that the competent adolescent must have considered his choice are also apparent in the application of this article's thesis to the question of adolescent access to pornography.⁷¹ Unless the material is constitutionally obscene—and therefore subject to a legislative determination that no one, whether adult or adolescent, may have access to it⁷²—deference to the choices of competent adolescents would seem to require that such adolescents have the same access to pornographic materials as adults. Sellers of pornography could employ such an argument to strike down laws prohibiting the sale of their wares to adolescents; if the argument succeeded, the sellers could then market their goods to all adolescents, regardless of whether individual adolescents were in fact competent to purchase them, because of the presumption that all adolescents are competent.

The flaw in this argument is that, although all adolescents should be presumed competent, not all adolescent choices should be presumed competent. Only those adolescent choices that have been the subject of consideration should be eligible for the benefits

note 35 *supra*.

69. IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO RIGHTS OF MINORS 4.8 (Official Draft 1979).

70. See, e.g., *id.*, Commentary ("The long range interests of the minor and the community require legislation allowing a minor of any age to consent to medical services, therapy, and counseling for the many problems associated with sexual activity including . . . contraception and birth control." (emphasis added)).

71. This question is suggested by *Ginsberg v. New York*, 390 U.S. 629 (1968), in which the Supreme Court upheld the conviction of a vendor of "girlie magazines," *id.* at 631, for selling such magazines to persons under the age of 17. *Id.* at 633. The Court in *Ginsberg* recognized that "[t]he 'girlie' picture magazines involved in the sales here are not obscene for adults." *Id.* at 634.

72. See *Miller v. California*, 413 U.S. 15 (1973). *But cf.* *Stanley v. Georgia*, 394 U.S. 577 (1969) (private possession of obscenity may not be criminalized).

of this presumption.⁷³ The decision to purchase pornography is one not likely to be carefully considered.

This does not mean that a state should be free to prohibit all access by adolescents to pornography. If an adolescent can demonstrate that he has considered his decision to purchase a particular magazine or to see a particular film, the state may prohibit the adolescent's access to the work only upon a showing of incompetence to make the choice involved. Of course, very few adolescents would be willing to undertake the burdens of establishing a considered choice to purchase pornography⁷⁴ and of refuting a showing of incompetence. Nevertheless, the law should leave this option open to the determined adolescent and those determined to help him.⁷⁵

III

Adolescence marks the end of a child's transition to adulthood, to autonomous interaction in society. The law largely has ignored this transitional process, adhering instead to the concept that childhood is a legally disabling condition that vanishes completely on the attainment of a certain birthday. This Article proposes abandonment of this monolithic view of childhood, urging instead a recognition that some children—those properly labeled adolescents—are in most circumstances capable of making choices for themselves. Experimental data support this conclusion regarding adolescent decisionmaking and indicate that the considered choices of competent adolescents are not appreciably inferior to those of adults. Accordingly, the law should treat the choices of both adults and adolescents similarly, honoring the decision of an adolescent absent a showing either of incompetence to decide or of a lack of reflection in the decisionmaking process.

Adoption of this principle would dramatically affect the law's attitude toward the parent-child relationship by partially emancipat-

73. See text accompanying notes 64 & 65 *supra*.

74. To show a considered choice, the adolescents would have to petition some government entity, either a court or a state agency. See note 66 *supra*. The act of petitioning would demonstrate reflection on the choice the adolescent is seeking to enforce. See text accompanying notes 66 & 67 *supra*.

75. The adolescent committed to pressing such a claim might well find support in an organization devoted to protection of civil liberties, or in an agency whose mission is to provide legal services to the indigent.

ing the adolescent. Thus, the legal aspects of adolescence would match the psychological aspects of adolescence by denoting the end of the transition to adulthood.