

FREEDOM AND CHOICE IN CONSTITUTIONAL LAW

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The constitutional rights of children, the mentally ill, and other legally incompetent persons have been the subject of much litigation in the past twenty years. In this Article, Professor Garvey develops a general theory to explain the different ways in which persons of diminished capacity can be said to enjoy constitutional protections. He first notes that, of the various constitutional provisions, only one kind — freedoms, which protect the right to make choices — pose serious difficulties when applied to persons of diminished capacity. He then proposes a hierarchy of ways in which we can attribute freedoms to such persons: the laissez-faire notion that all persons (including incompetents) are to be treated identically, the instrumental idea that granting freedoms to incompetents achieves extrinsic goals such as training, and the surrogate notion that persons who cannot make choices for themselves should be able to have those closest to them choose on their behalf. Professor Garvey concludes that, when these options fail and the state takes an incompetent person under its control, the state owes to the incompetent the full package of duties owed by other guardians to those under their control, including treatment in the case of the mentally ill or education in the case of children.

HOW do we justify the attribution of constitutional freedoms to people, such as children and the mentally ill, who are not capable of making choices rationally? There are differences between freedoms and other kinds of constitutional rights that make problematic the ascription of freedoms to such people. One such difference is that the consequences of securing rights are more predictable than the consequences of recognizing freedoms; if I am insane and the state seizes my house, I can exercise my property right to get it back, and that's that. But freedoms afford a protection to choice that makes their consequences uncertain; if, despite my insanity, I am entitled to freedom of speech, I may forge prescriptions for valium or violate the copyright laws. A second difference between freedoms and other rights is that freedoms may have

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varying values for different individuals, whereas the values of other kinds of rights seem to remain constant for all claimants: The fact that I am in a coma does not seem to diminish the value of my house to me, but freedom of speech means little to one biologically incapable of speaking.

In this Article, I try to show that these intuitive differences penetrate the structure of rights and freedoms guaranteed by the Constitution and require new ways of justifying the attribution of freedoms to children, the mentally ill or retarded, and those who are senile or comatose. Part I probes the structure of constitutional freedoms and shows how they contrast with other constitutional rights, with regard to both the conduct protected and the characteristics required of claimants. Parts II–V explore the possible grounds for ascribing freedoms to a person incapable of rational choice, despite the difficulties enumerated in Part I. I consider the possibilities of treating such a person as if he were in fact able to formulate his own values; of permitting him freedoms now so that he will know what to do with them when, as we hope, he becomes fully competent in the future; of accepting as binding the choices made on his behalf by those who stand closest to him; and even of imposing on the state a constitutional obligation to make such choices as surrogate for the incompetent person.

I. THE STRUCTURE OF CONSTITUTIONAL PROTECTIONS

There is a critical distinction between constitutional freedoms¹ and other constitutional protections: A freedom protects from state-imposed constraint individual choices to perform or not to perform certain actions, and to pursue or not to pursue certain conditions of character.² Freedom of speech protects both the choice to speak and the choice to be silent;³ the free

¹ I shall use the words "freedom" and "liberty" interchangeably to indicate those constitutional provisions that protect an individual's ability to choose. This generally tracks the language of the Constitution. See pp. 1757–58 *infra*. There are several provisions, however, such as the "right . . . to vote" and the "right . . . peaceably to assemble," that behave like freedoms although they are designated "rights."

² See generally F. OPPENHEIM, *DIMENSIONS OF FREEDOM* (1961); J. RAWLS, *A THEORY OF JUSTICE* 201–05 (1971); MacCallum, *Negative and Positive Freedom*, 76 *PHILOSOPHY REV.* 312 (1967). The triadic approach does not command universal assent. See generally M. ADLER, *THE IDEA OF FREEDOM* (1958); I. BERLIN, *FOUR ESSAYS ON LIBERTY* xxxvii–lxiii, 118–72 (1969); W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* ch. 1 (1923).

³ See *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

exercise of religion guarantees that the state can no more command piety than it can forbid it.⁴ Likewise, the liberty protected by the due process clause entrusts to individuals the decision whether to bear children or remain childless.⁵ By contrast, although other constitutional protections protect a certain action or condition against state interference, they may not permit a claimant to choose to pursue an opposite action or condition. For example, the seventh amendment protects common law suitors with twenty dollars at stake from governmental deprivation of the "right of trial by jury." The amendment does not guarantee suitors the option *not* to have a jury trial; it would permit the government to require jury trials in all cases.⁶ The fourth amendment "right to be secure . . . against unreasonable searches and seizures" does not protect an eccentric interest in a condition of insecurity.⁷

Because they protect choice, freedoms produce by their very nature greater unpredictability than do other constitutional protections. For example, granting children the freedom to vote would entail the unique and unpredictable cost of introducing a largely irrational influence into the electoral process. By contrast, although extending the ban against unreasonable searches and seizures to incompetents would involve social costs, the incompetence of some of those thereby protected would not impose any *special* costs.

The elements of choice and unpredictability create obvious difficulties for the ascription of liberties to individuals incapable of making rational choices. The reason is that the rationales thought to justify protection of the various constitutional freedoms presuppose that the claimant can make rational decisions that will not result in significant social or individual harm. The Supreme Court has said that freedom of speech is guaranteed, in part, to achieve the goal of pro-

⁴ *Torcaso v. Watkins*, 367 U.S. 488 (1961). To a great degree, the freedom to be irreligious is independently secured by the establishment clause. Freedom of the press similarly protects the freedom not to publish as well as the freedom to publish. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). But see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (government permitted to require radio and television stations to give time for political replies).

⁵ See cases cited note 19 *infra*; p. 1760 *infra*.

⁶ *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959); see *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 459-60 (1851); *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486, 490 (5th Cir. 1961). But see Note, *The Right to a Nonjury Trial*, 74 HARV. L. REV. 1176, 1176-78 (1961).

⁷ U.S. CONST. amend. IV. By the same token, the fifth amendment protection against double jeopardy has not been understood to permit the defendant to demand double jeopardy. The eighth amendment guarantees that the state will not inflict "cruel and unusual punishments," but it does not oblige the state to provide such treatment to the masochist who would demand it.

tecting "the free discussion of governmental affairs."⁸ That protection in turn rests on two principles. First, the speaker has a right to participate in decisions that affect him.⁹ Second, the public deserves unrestricted access to information so that decisions arrived at democratically will be made intelligently.¹⁰ Both principles, however, make certain assumptions about the characteristics of the speaker. The first assumes a moral and rational being capable of self-government, an ability that voting laws do not attribute to children¹¹ or to the mentally disabled.¹² The second, though imposing no explicit limitations on the character of the speaker, at least supposes that his speech might possibly assist democratic decisionmaking; one who is severely retarded will only rarely offer such assistance.

The other principal reason for the guarantee of freedom of speech is its intrinsic value "as a means of self-expression, self-realization, and self-fulfillment."¹³ It might seem contradictory for society to sanctify the speaker's autonomy while at the same time evaluating his competence in order to determine whether he has a right to speak. But I doubt that we really believe the two are incompatible. We let adults utter obscenities,¹⁴ but we don't let children hear them,¹⁵ however satisfying the exchange might be to both in their separate ways. The reason is that we recognize a right to autonomy only for persons within a certain range, a range defined by the ability to make rational choices about how one's self ought to be expressed, realized, and fulfilled.¹⁶ Thus, as the individual's capacity for moral and rational choice diminishes, state action restricting speech is less likely to be seen as a restraint on freedom.

The constitutional guarantee of the free exercise of religion presents a similar set of problems. It is nearly a matter of

⁸ *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776-77 (1978) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

⁹ See *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). See generally T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970); A. MEIKLEJOHN, *POLITICAL FREEDOM* (1960).

¹⁰ See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776-77 (1978). See generally A. MEIKLEJOHN, *supra* note 9.

¹¹ See A. SUSSMAN, *THE RIGHTS OF YOUNG PEOPLE* 236-37 (1977) (voting age for state elections); cf. U.S. CONST. amend. XXVI (reducing voting age to 18).

¹² See Note, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644, 1644-47 (1979). See generally J. RAWLS, *supra* note 2, at 504-12.

¹³ *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 804 (1978) (White, J., dissenting). See also *id.* at 777 n.12 (opinion of the Court).

¹⁴ *Cohen v. California*, 403 U.S. 15 (1971).

¹⁵ *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

¹⁶ See J. MILL, *ON LIBERTY* 9 (E. Rapaport ed. 1978). See generally J. RAWLS, *supra* note 2, at 243-51, 504-12.

definition that religious faith is not the product of a strictly "rational" choice. But that is not to say that, because the protected choice may not be wholly rational, persons incapable of rational choice may lay equal claim to the guaranteed freedom. The requirements that protected religious activity be "based . . . upon a faith to which all else is subordinate or upon which all else is ultimately dependent"¹⁷ and be "intimately related to daily living"¹⁸ take for granted that claimants are capable of ordering life's important concerns and acting consistently with their convictions. The qualities of experience, judgment, and moral conviction that govern those choices are not ones that we attribute, say, to young children.

What I have said about first amendment freedoms applies as well to the substantive protections of the due process and equal protection clauses. An aspect of due process "liberty" that currently receives vigorous judicial protection is the freedom to make one's own decisions about procreation without state interference, unless the state has a compelling reason to intervene and avoids unnecessary restrictions. The protected choices most often litigated have been those pertaining to abortions and contraception. The individual interest at stake — though sometimes styled a right of "privacy" — is in fact an interest in autonomous resolution of one of life's most important questions.¹⁹ If the purpose of the due process clause is to insulate that interest, though, it does not apply straightforwardly to tinkering by the state with the reproductive decisions of persons incapable of moral and rational choice. For all of *Bellotti v. Baird*'s talk about the child's right to "seek" an abortion,²⁰ five members of the Court agreed that the state could prevent an immature minor from making that decision — four by committing the choice to a court, one by committing it to the child's parents.²¹

¹⁷ *United States v. Seeger*, 380 U.S. 163, 176 (1965).

¹⁸ *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

¹⁹ *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693 n.15 (1977) (plurality opinion in relevant part); *Whalen v. Roe*, 429 U.S. 589, 599–600 & n.26 (1977).

²⁰ *Bellotti v. Baird*, 443 U.S. 622, 642, 647, 648 (1979) (plurality opinion).

²¹ Justice Powell's opinion, joined by Chief Justice Burger and Justices Stewart and Rehnquist, explicitly recognized that "minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." 443 U.S. at 635. The Justices held that the state, if it has a parental consent requirement, must provide an alternate procedure so that minors can still obtain an abortion if the minor proves herself mature or shows that an abortion is in her best interests. Court approval would be one such constitutionally permissible alternate procedure. *Id.* at 642–44. Justice White would have upheld a requirement of parental consent. *Id.* at 656–57 (dissenting opinion).

In considering access to contraceptives, the Supreme Court has also looked to the characteristics of the individual. Although *Carey v. Population Servs. Int'l*, 431 U.S.

Closely related to the due process liberty of procreative autonomy is the fundamental equal protection freedom to marry.²² That right is withheld from both minors²³ and the mentally incompetent²⁴ because they lack the full capacity for individual choice — and freedom of choice is at the heart of the right to marry.²⁵ So too with the right to vote. We permit the imposition of age and competence restrictions because the freedom at stake presupposes that one claiming it has the “ability to participate intelligently in the electoral process.”²⁶ It could hardly be otherwise, since ultimately the ballot functions as a means of *self*-government, an activity difficult for those incapable of moral and rational choice.²⁷

678 (1977), held that children had a right to acquire contraceptives, Justice Brennan’s plurality opinion assumed that “the Constitution does not bar state regulation of the sexual behavior of minors.” *Id.* at 694 n.17 (plurality opinion in relevant part). Thus, it is difficult to say that the child has any freedom to make decisions about procreation.

However questionable its conclusions may be for other reasons, *Buck v. Bell*, 274 U.S. 200, 207 (1927), suggests the importance of the ability to choose for decisions about the propriety of involuntary sterilization. *See also In re Grady*, 85 N.J. 235, 426 A.2d 467 (1981) (upholding involuntary sterilization statute, giving as one reason the inability of incompetents to choose).

²² Although the Supreme Court considered the right to marry only under the equal protection clause, it seems likely that it also qualifies as a substantive due process interest. *See Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

²³ *See* M. PAULSEN, W. WADLINGTON & J. GOEBEL, *DOMESTIC RELATIONS* 116–28 (2d ed. 1974).

²⁴ *See* S. BRAKEL & R. ROCK, *THE MENTALLY DISABLED AND THE LAW* 240–43 (rev. ed. 1971).

²⁵ *See Zablocki v. Redhail*, 434 U.S. 374, 387 (1978).

²⁶ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966) (wealth not a permissible restriction for voting because not germane to ability to participate intelligently).

²⁷ By contrast with freedoms, other constitutional rights are justified in ways that say little about the character of the person claiming the right. Consider, for example, the procedural protections afforded by the fifth and 14th amendments in adjudication of property interests. Most of us would agree that someone mentally ill or in a coma is entitled to due process protection against the seizure of his property. The courts seem to concur. *See Vecchione v. Wohlgemuth*, 377 F. Supp. 1361 (E.D. Pa. 1974), *aff’d*, 558 F.2d 150 (3d Cir.), *cert. denied*, 434 U.S. 934 (1977); *McConaghley v. City of New York*, 60 Misc. 2d 825, 304 N.Y.S.2d 136 (1969). Part of the reason is that we define interests in property without reference to any characteristics of the owner; a three-year-old can own land in fee simple just as an adult can. Procedural protections can also be justified without reference to individual traits; they ensure accuracy in decisions about the disposition of property. *See Fuentes v. Shevin*, 407 U.S. 67, 97 (1972). One might approach the seventh amendment right to a jury trial in civil cases in the same way: It is designed to assure a fair determination of disputed facts, something to which even one in a coma is entitled, provided he has \$20 at stake.

Even in its nonsubstantive aspects, the equal protection clause necessarily entails some attention to the characteristics of the rights-claimant, because it requires only

Any argument, then, that incompetents are entitled to claim constitutional freedoms encounters two serious obstacles, one practical and one theoretical. The first is the unpredictable social and individual consequences that may result from the exercise of irrational choice; the second is the difficulty of explaining why we should ascribe, to those unable to choose, liberties that are valued because of the protection they offer for choice. Despite these problems, I believe it is nonetheless possible to ascribe constitutional freedoms to persons with a diminished capacity for choice. In the next four Parts, I explore a number of theories to justify such an ascription. The first conception, which I call *laissez faire*, argues from premises of human dignity or of utility that we should in all cases show the same concern and respect for children, the retarded, and so on, as we would for fully competent adults. A second possibility is an instrumental one — to value freedoms not because they are intrinsically valuable but because they contribute to some other interest of the incompetent. A third approach, which relies on surrogate choices, assumes that freedoms are important even to one who has no concern for them, if those who care for him value freedoms on his behalf. Finally, for those lacking a surrogate to make such choices for them, we must proceed on the premise that the state has a duty to act in their interests as would a surrogate. I state these theories in increasing order of intrusiveness into the individual's life, and I shall argue that judges and legislators should consider them in series to settle on the least intrusive means of control.

II. THE LAISSEZ-FAIRE APPROACH TO FREEDOM

A. Laissez Faire as an Absolute Principle

Among the arguments for securing liberty for all individuals regardless of age or capacity for choice, the most protec-

that those similar in relevant respects be treated alike. See generally Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). But the relevant individual characteristics normally do not include the ability to make choices. In equal protection cases involving children, the question is typically whether one group of children, defined by race or circumstances of birth, should be treated like another class of children, not like mature adults. See, e.g., *Lalli v. Lalli*, 439 U.S. 259 (1978) (illegitimacy); *Trimble v. Gordon*, 430 U.S. 762 (1977) (same); *Mathews v. Lucas*, 427 U.S. 495 (1976) (same); *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) (race).

The ban on cruel and unusual punishment also requires some attention to the character of the person claiming its protection, but the capacity for rational choice is not a relevant characteristic. All that is presupposed is a human being who is sentient and capable of suffering.

tive is laissez faire. By that term I mean to designate an ideology holding that everyone should be entitled to all freedoms in equal measure. In one form, the laissez-faire argument derives from the "premise of individual dignity"²⁸ the conclusion that freedom is an end in itself: "To be able to choose is a good that is independent of the wisdom of what is chosen."²⁹ Because of this heedlessness of consequences, the laissez-faire position based on individual dignity needs no special rules for those unable to choose wisely. If choice is an intrinsic good, then even the youngest child, who is bound to make foolish choices, should be entitled to claim constitutional freedoms.

The application of this view to those, such as children, without a full capacity for rational choice has a legitimate judicial pedigree. For example, one crucial premise in Justice Fortas' opinion upholding the free speech rights of children in *Tinker v. Des Moines Independent Community School District*³⁰ was that "[s]tudents in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."³¹ Other instances may be found in a number of early cases dealing with the abortion rights of minors. *State v. Koome*³² is illustrative. In striking down a state law requiring parental consent to abortions performed on unmarried minors under eighteen, the Washington Supreme Court began with the assumption that, "[p]rima facie, the constitutional rights of minors, including the right of privacy, are coextensive with those of adults."³³

²⁸ *Cohen v. California*, 403 U.S. 15, 24 (1971).

²⁹ Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 107, 117 (R. Wasserstrom ed. 1971).

³⁰ 393 U.S. 503 (1969).

³¹ *Id.* at 511. *But cf. id.* at 515 (Stewart, J., concurring) (first amendment rights of children are not coextensive with those of adults).

³² 84 Wash. 2d 901, 530 P.2d 260 (1975).

³³ *Id.* at 904, 530 P.2d at 263; see *Foe v. Vanderhoof*, 389 F. Supp. 947, 953-54 (D. Colo. 1975); *Coe v. Gerstein*, 376 F. Supp. 695, 698 (S.D. Fla. 1973), *direct appeal dismissed and cert. denied per curiam*, 417 U.S. 279 (1974), *and aff'd*, 517 F.2d 787 (5th Cir. 1975); Pilpel & Zuckerman, *Abortion and the Rights of Minors*, 23 CASE W. RES. L. REV. 779, 795-804 (1972). *Koome's* "prima facie equality" between adults and children is cast in doubt by other language in the opinion. After the statement quoted in text, the court went on to say that, when minors' rights have been held more limited than those of adults, "it has been because some peculiar state interest existed in the regulation and protection of children, not because the rights themselves are of some inferior kind." 84 Wash. 2d at 904, 530 P.2d at 263. But rights that children need to be protected against exercising hardly qualify as rights. See p. 1781 *infra*.

The laissez-faire position based on individual dignity does present an internally consistent claim on behalf of equal liberty for all, but it is both unjust and impractical. Its key assumption is that children, the mentally deficient, and other legal incompetents have the same claim to "individual dignity" as competent adults. The most obvious problem with this assumption is that few of us are willing to make it. We are not, for example, willing to allow a child the freedom to roam at will at the cost of having him run down by a car. In fact, my child has a private right, enforceable under the neglect statutes, to my restricting his freedom to wander in the street. By the same token, the state would act unjustly if it did not restrict the sale of liquor or airplane glue to six-year-olds. These examples are extreme, but they make the point that we hardly go all out as a society for every proposition that a strict principle of human dignity would entail. Compulsory education violates such principles, as does the civil commitment of a retarded person who would otherwise starve in the street.

A weaker version of the laissez-faire argument, which has its genesis in the ideas of Herbert Spencer, is essentially utilitarian. It sees human happiness as the ultimate goal and liberty of action as a means of producing that happiness.³⁴ Like the version based on human dignity, the utilitarian position holds that people can claim the benefits of liberty without regard to their capacity for choice. People may differ greatly in their ability to enjoy the benefits of freedom, but a child and an adult can both be free in the same way a shotglass and a tumbler can both be full. On this view there is no justification for permitting greater state interference with a child's freedom of speech, for example, than with an adult's.

The utilitarian affirmation of laissez faire as a means as well as an end is illustrated by Justice Brandeis' concurrence in *Whitney v. California*:³⁵ "Those who won our independence believed that the final end of the State was to make men free to develop their faculties. . . . They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty." Cases such as *Cohen v. California*,³⁶ *Roe v. Wade*,³⁷ and *Stanley v. Georgia*³⁸ contain similar intimations that freedom of choice is valued for its contribution to individual happiness.³⁹

³⁴ H. SPENCER, *SOCIAL STATICS* 154 (Robert Schalkenbach Foundation ed. 1974) (1st ed. 1872). See also J. MILL, *supra* note 16, at 10, 12, 74.

³⁵ 274 U.S. 357 (1927).

³⁶ 403 U.S. 15 (1971).

³⁷ 410 U.S. 113 (1973).

³⁸ 394 U.S. 557 (1969).

³⁹ See *Roe*, 410 U.S. at 153; *Cohen*, 403 U.S. at 24; *Stanley*, 304 U.S. at 564

This utilitarian approach is plainly untenable as an argument for full recognition of liberty for incompetents.⁴⁰ It founders on the unwarranted assumption that, for such a person, freedom necessarily produces happiness. If that is not so, liberty loses some of its utilitarian appeal and may yield to other means of achieving the desired end. And, of course, freedom does not always produce happiness. If I allow my three-year-old to play ball outside by himself, he is free to exercise his faculties, but it's a good bet that sooner or later he will chase his ball into the street and be run over. Because he lacks judgment, patience, and a working knowledge of Newton's laws, I have little doubt that his long-term happiness will be best assured if I forbid him to play near cars. The same might be said for a city ordinance forbidding him to play in the street at night.

B. Laissez Faire as a Limiting Principle

Nevertheless, whether based on dignity or utility, laissez-faire ideology currently plays an important and useful role in constitutional law. Although we may not favor universal application of the principle, laissez faire does work to broaden our idea of who is entitled to enjoy constitutional liberties. One illustration is the rule concerning the abortion rights of mature minors that emerges from *Planned Parenthood v. Danforth*⁴¹ and *Bellotti v. Baird*.⁴² Together, those cases indicate that, because *some* minors under eighteen are able to make rational choices about the desirability of an abortion, a state may not require all pregnant females under that age to secure parental permission or a court order before seeking an abortion. Instead, if the state wishes to act, it must inquire in each case whether the minor is mature enough to make the decision on her own, and if she is, it may not interfere with her choice even though a judge believes that it is not in her best interests.⁴³ A second example is the frequent suggestion that a mere showing of mental illness is not enough to justify involuntary civil commitment. Because mental illness may

(quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

⁴⁰ See L. HOULGATE, *THE CHILD AND THE STATE* 49 n.1 (1980); Schrag, *The Child in the Moral Order*, 52 *PHILOSOPHY* 167 (1977).

⁴¹ 428 U.S. 52 (1976).

⁴² 443 U.S. 622 (1979) (plurality opinion).

⁴³ This point remains open to question in light of Justice Stevens' separate concurrence in *Bellotti*, *id.* at 652-56. He objected to permitting a judge to make the decision, but whether he would balk in the case of an immature minor was not clear. Justice White, who dissented, seemed willing to go along with a court's decision, provided the parents could participate. *Id.* at 657.

take many different forms and does not necessarily entail incompetence to make decisions about the need for treatment, a more particularized finding of incapacity should be required if a commitment statute is to comport with due process.⁴⁴ Much the same is often said about the right of mental patients to refuse treatment.⁴⁵ For similar reasons, blanket disqualifications of mentally disabled persons from voting⁴⁶ and from marriage⁴⁷ have been criticized as unconstitutionally overbroad.

Courts in these cases accept the notion that freedom to undertake a particular course of conduct may be less meaningful for one with diminished capacity for choice. Nevertheless, they try to ensure that the state does not use unjustified presumptions to enlarge the class of individuals considered unable to choose. In short, they seek to maximize the reach of *laissez faire* so that the principle is used whenever practicable. Of course, in some cases the courts will tolerate blanket denials of freedom to those of diminished capacity.⁴⁸ Case-by-

⁴⁴ See, e.g., *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1124-25 (D. Hawaii 1976); *Lynch v. Baxley*, 386 F. Supp. 378, 391 (M.D. Ala. 1974). See also *O'Connor v. Donaldson*, 422 U.S. 563, 583 (1975) (Burger, C.J., concurring); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1094 (E.D. Wis. 1972) (three-judge court) (dictum), *vacated on other grounds and remanded*, 414 U.S. 473 (1974); *Dix, Hospitalization of the Mentally Ill in Wisconsin: A Need for Reexamination*, 51 MARQUETTE L. REV. 1 (1967); *Siegel, The Justifications for Medical Commitment — Real or Illusory*, 6 WAKE FOREST INTRA. L. REV. 21, 29-33 (1969); *Developments in the Law — Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1212-19 (1974) [hereinafter cited as *Developments — Civil Commitment*]; Project, *Civil Commitment of the Mentally Ill*, 14 U.C.L.A. L. REV. 822, 826-32 (1967); Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1295 (1966).

⁴⁵ See, e.g., *Scott v. Plante*, 532 F.2d 939, 946 (3d Cir. 1976); *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973); Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 NW. U.L. REV. 461, 496 (1977).

⁴⁶ Note, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644, 1656-59 (1979). See also D.C. CODE ANN. § 21-564(a) (1973); R. ALLEN, E. FERSTER & H. WEIHOFEN, *MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY* 364-67 (1968); Klein & Grossman, *Voting Competence and Mental Illness*, 3 PROC. 76TH ANN. CONVENTION AM. PSYCHOLOGICAL ASS'N 701, 702 (1968). For examples of cases reaching the same conclusion on nonconstitutional grounds, see *Boyd v. Board of Registrars of Voters*, 368 Mass. 631, 334 N.E.2d 629 (1975); *Carroll v. Cobb*, 139 N.J. Super. 439, 354 A.2d 355 (1976). See also Project, *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 91-96 (1971).

⁴⁷ *Shaman, Persons Who Are Mentally Retarded: Their Right to Marry and Have Children*, 12 FAM. L.Q. 61 (1978); Wald, *Basic Personal and Civil Rights*, in THE MENTALLY RETARDED CITIZEN AND THE LAW 6-9 (M. Kindred ed. 1976); *Developments in the Law — The Constitution and the Family*, 93 HARV. L. REV. 1156, 1259-61 (1980) [hereinafter cited as *Developments — The Constitution and the Family*].

⁴⁸ E.g., *Ginsberg v. New York*, 390 U.S. 629 (1968) (right to buy pornography); see U.S. CONST. amend. XXVI (right to vote); cf. CAL. CIV. CODE § 4101 (West Supp. 1979) (right to marry).

case adjudication about claims to everything from obscene books to voting has a certain pious appeal, but it would be awfully expensive and might well produce arbitrary results. The decision whether an individual is sufficiently rational, mature, and experienced to make up her own mind about whether to have an abortion or get married is not one that judges are especially well equipped to make.⁴⁹ Consequently, before jettisoning general rules, the courts ask what precisely is the individual harm from a categorical approach, and also how important it is to have a general rule at all.⁵⁰ It is easy to see by almost any measure of individual harm why we might want case-by-case determinations of maturity when the issue is abortion, but not when it is the right to buy pornography. A young woman denied the choice to have an abortion may suffer an impairment far more serious,⁵¹ permanent, and total than will one merely prevented from purchasing pornographic books. The factor of permanence also helps explain why marriage and voting rights are more frequently championed for the mentally disabled, for whom any denial may be long term, than for minors, who in any case will have both rights in a few years.

Although methods other than *laissez faire* may be used to attribute freedoms to those who are not rational adults, the use of the limiting principle just discussed shows that the courts prefer a *laissez-faire* approach whenever possible. This preference suggests that *laissez faire* is our primary conception of liberty, greater deviations from which require correspondingly greater justification. Moreover, the rule of autonomous choice is easier to apply than the rules discussed below, which at times require courts to decide what will be most likely to enhance an individual's welfare. Society benefits when its courts are not forced to make such difficult and time-consuming choices.

⁴⁹ See Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 796-804 (1978); Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 650, 663 (1977).

⁵⁰ For discussion of the "flexible balancing" approach to substantive due process and the equal protection clause, see *Developments — The Constitution and the Family*, *supra* note 47, at 1193-97; Note, *Equal Protection and Due Process: Contrasting Methods of Review Under Fourteenth Amendment Doctrine*, 14 HARV. C.R.-C.L. L. REV. 529, 537-41, 548-54, 561-65 (1979).

⁵¹ See *Bellotti v. Baird*, 443 U.S. 622, 642, 643 n.23 (1979) (opinion of Powell, J.).

III. AN INSTRUMENTAL CONCEPTION OF FREEDOM

If liberty involves the making of rational choices, its intelligent exercise demands practice. This idea is at the core of one way of justifying liberty for those whom the justifications for laissez faire do not reach. According to this instrumental conception, the right to freedom may depend on the ability to choose, but acquiring the ability to choose also depends on the exercise of freedom. We can thus justify the ascription of freedoms to one presently without the capacity for choice because the individual's development into a mature and healthy person depends in large measure on the prior recognition of liberties. Using freedom of speech as an example, I begin by showing that such a view of liberty is really something different from our conventional understanding of the term. I then illustrate what an instrumental view of free speech might mean for children⁵² and the mentally ill. Finally, I suggest a few other applications of the instrumental conception and sketch some of its limitations.

A. The Need for an Instrumental Conception: Freedom of Speech

Over nearly the whole range of "speech" activities, the courts have imposed paternalistic restraints on the free speech of children in order to advance their health, education, and morals.⁵³ A minor's freedom to peddle even religious ideas may be limited in order to avoid "emotional excitement and psychological or physical injury."⁵⁴ The child's right of access to ideas, at least those that are vulgar or pornographic, can be specially limited because a state might rationally conclude that such matter impairs the child's "ethical and moral devel-

⁵² For a more extended discussion, see Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321 (1979).

⁵³ Children are treated precisely the same as adults only in the area of coerced speech. *Compare* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), with *Wooley v. Maynard*, 430 U.S. 705 (1977).

⁵⁴ *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944). Sarah Prince was convicted of giving to her nine-year-old niece, and allowing her to sell, copies of *Watchtower* and *Consolation*, two publications of the Jehovah's Witnesses, in violation of § 80 and § 81 of the Massachusetts child labor law. Those sections were provided to enforce the prohibitions of § 69, which stated: "No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise . . . in any street or public place." But Prince might well be exonerated today if § 69 violated the free speech or free exercise rights of her niece. See *Eisenstadt v. Baird*, 405 U.S. 438, 443-46 & n.6 (1972); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-60 (1958).

opment.”⁵⁵ Such cases permit states to “protect” children by preventing them from doing things adults have a constitutional right to do.⁵⁶ Perhaps the most severe imposition on the child’s right of free expression is made in the interest of education: the requirement that youngsters hear what the state seeks to communicate through its compulsory school system. Although there is no serious question about the propriety of the government using this means to inculcate values in the young,⁵⁷ it would be a massive infringement of the first amendment for the state to herd adults together and propagandize them for seven hours a day.⁵⁸

Parallel paternalistic limitations on freedom of expression exist in the institutional mental health system. Although the logistics of running a large institution obviously necessitate some restrictions,⁵⁹ in many cases the restraint is justified primarily in terms of the patient’s own interests. Statutes frequently permit censorship of incoming mail to promote the patient’s welfare⁶⁰ or to control the receipt of possibly harmful substances.⁶¹ Similarly paternalistic reasons are given for permitting qualification of visitation privileges, even when it is unnecessary to protect the interests of others.⁶² Even the availability of writing materials, though guaranteed in some

⁵⁵ *Ginsberg v. New York*, 390 U.S. 629, 641 (1968) (quoting N.Y. Penal Law 484-e (current version at N.Y. PENAL LAW § 235.20-.22 (McKinney 1980))); see *FCC v. Pacifica Foundation*, 438 U.S. 726, 749-50 (1978) (vulgarity).

⁵⁶ See *Ginsberg*, 390 U.S. at 634-35; *Prince*, 321 U.S. at 167-68.

⁵⁷ See Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1350-51 (1976).

⁵⁸ Cf. *Public Utils. Comm’n v. Pollak*, 343 U.S. 451, 467-69 (1952) (Douglas, J., dissenting) (the right to privacy should prevent a regulated streetcar company from forcing “the streetcar captive audience” to listen to certain radio broadcasts). See generally T. EMERSON, *supra* note 9, at 710-12.

⁵⁹ See, e.g., N.C. GEN. STAT. § 122-55.2(b)(2) (1981); NATIONAL INSTITUTE OF MENTAL HEALTH, A DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL § 21(a)(2) & Commentary (Public Health Service Publication No. 51, rev. Sept. 1952) [hereinafter cited as DRAFT ACT].

⁶⁰ ALASKA STAT. § 47.30.150(a)(1) (1979); S.C. CODE § 44-23-1030(1) (1976); DRAFT ACT, *supra* note 59, § 21(a)(1); cf. *Wyatt v. Stickney*, 344 F. Supp. 373, 379-80 (M.D. Ala. 1972) (patient in mental institution should have right to receive sealed mail unless personnel responsible for patient’s treatment impose special restrictions), *aff’d sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). See also S. BRAKEL & R. ROCK, *supra* note 24, at 156-57.

⁶¹ See, e.g., FLA. STAT. § 394.459(5)(b) (Supp. 1980); GA. CODE § 88-502.7(c) (1978).

⁶² See *Constitutional Rights of the Mentally Ill: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. 343 (1961) [hereinafter cited as *Hearings*]; CONN. GEN. STAT. ANN. § 17-206h(a), (d) (West 1981); N.J. STAT. ANN. § 30:4-24.2g(1) (West 1981); VT. STAT. ANN. tit. 18, § 7705(a)(2) (1968). See also Brakel, *Legal Problems of People in Mental and*

states by statute,⁶³ may be restricted to prevent injuries from pens or pencils.⁶⁴

Both courts and commentators often suggest that the interest of the state as *parens patriae* in restricting the freedom of incompetents is weighed against a right to free speech that is equal in scope whether the claimant is a child, a mentally ill person, or a healthy adult.⁶⁵ That conception is misguided. Far from simply overriding an incompetent individual's freedom, we implicitly deny the freedom of incompetents when we impose paternalistic restraints upon them. The point is made clear if one compares the reasons for limiting the free speech of adults with the paternalistic reasons for limiting the rights of incompetents. For adults, we override free speech rights only when necessary to give equal respect to the dignity of other persons, and not simply to protect the would-be speaker from harming himself. Thus, for fully competent persons, freedom to speak can be outweighed only by conflicting claims of other individuals (libel, fraud, invasion of privacy, fighting words) or by social necessities that interfere neutrally and minimally with expression (no sound trucks, no parades during rush hour) or are sufficiently compelling to overwhelm speech rights (subversive advocacy).⁶⁶ There is an essential difference between these countervailing individual rights and social necessities, on the one hand, and paternalistic restraints on the other: The latter are inconsistent with the ideas of

Penal Institutions: An Exploratory Study, 1978 AM. B. FOUNDATION RESEARCH J. 565, 592.

A less justifiable practice than those noted above is censorship of outgoing mail in order to prevent the patient from transmitting inaccurate or indecent information. See, e.g., FLA. STAT. § 394.459(5)(a) (Supp. 1980); WYO. STAT. § 25-3-124a(1) (1977); DRAFT ACT, *supra* note 59, § 21(a)(1). Nebraska provides that letters will not be mailed if reasonably believed to be threatening or if the recipient asks in writing not to have them sent. NEB. REV. STAT. § 83-314 (1976).

⁶³ See, e.g., CAL. WELF. & INST. CODE § 5325(e) (West Supp. 1981); MINN. STAT. § 253A.17.4 (1980).

⁶⁴ See *Hearings*, *supra* note 62, at 134 (statement of Hon. John Biggs, Jr.).

⁶⁵ *Colyar v. Third Judicial Dist. Court*, 469 F. Supp. 424, 430 (D. Utah 1979); *State v. Koome*, 84 Wash. 2d 901, 530 P.2d 260 (1975); *Developments — The Constitution and the Family*, *supra* note 47, at 1358-64. See also *Trachtman v. Anker*, 563 F.2d 512, 519-20 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978); B. ENNIS & R. EMERY, *THE RIGHTS OF MENTAL PATIENTS* 154 (1978); Note, *First Amendment Limitations on the Power of School Boards to Select and Remove High School Text and Library Books*, 52 ST. JOHN'S L. REV. 457, 471 n.83 (1978).

⁶⁶ See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* ch. 12 (1978). The one exception is the treatment of obscenity, the justification for which appears paternalistic. But even obscenity regulation is defended to some degree on the basis of the rights of other individuals (prevention of sex crimes) and social concerns (effect on the quality of life). See *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 58-63 (1973).

human dignity and political equality that are the basis for conventional theories of rights.⁶⁷ Paternalistic restrictions can be justified only on the assumption that the state is best able to choose on the individual's behalf, that is to say, only on the assumption that the individual's choice in the matter in question is not entitled to the same respect, and to the same constitutional protection, as the preference that the majority establishes for him.

B. An Instrumental Justification for Freedom of Speech

If freedom of speech has to be justified in more restrictive terms for children and the mentally ill, what warrants attributing it to them at all, and what form would it take? Earlier I noted that we value freedom of speech because of its contribution to self-government and to self-expression. In this Section, I consider the ways in which permitting incompetent persons to exercise freedom of speech might advance those goals.

1. *Self-Government.* — One part of the instrumental justification of freedom of speech for children is that liberty assists their development into mature adults capable of democratic self-government.⁶⁸ The Supreme Court has clearly endorsed this view in *Tinker v. Des Moines Independent Community School District*.⁶⁹ *Tinker* held that high school and junior high school students, aged thirteen to sixteen, were deprived of their freedom of speech when they were suspended for wearing black armbands to protest the Vietnam War. At first blush it might seem that this freedom was indistinguishable from that of their parents: Justice Fortas' opinion for the Court speaks throughout of "First Amendment rights"⁷⁰ in an unqualified way and imputes to the children a desire to influence others regarding the formulation of political policy.⁷¹ Ultimately, though, the Court thought free speech important not because Washington waited on the outcome of the school's foreign policy debate, but because free speech played a role in the students' own development: "*The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of*

⁶⁷ See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 198-99 (1977). See generally L. HOULGATE, *supra* note 40, at 15-16, 36-37, 42-43.

⁶⁸ See pp. 1758-59 *supra*.

⁶⁹ 393 U.S. 503 (1969).

⁷⁰ *Id.* at 506, 507; *cf. id.* at 511 ("Students . . . are 'persons' under our Constitution. They are possessed of fundamental rights which the state must respect . . .").

⁷¹ *Id.* at 514.

tongues, [rather] than through any kind of authoritative selection.'"⁷²

The primarily instrumental character of the child's free speech rights means that these rights need not be protected as zealously as those of adults. For example, prior restraints have long been seen as the cardinal sin against adult freedom of speech, in part because "[i]t is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances."⁷³ Such restrictions are widely accepted when imposed on school newspapers, though; the justification demanded is nothing more compelling than a reasonable likelihood of disruption to school processes.⁷⁴ The explanation is surely that the significance of student expression in ensuring the right outcome counts for far less than it would in the adult world, and the instrumental value of immediate publication — the educational benefits that are lost when restraint or prepublication review is allowed — is outweighed by the significance of the pedagogical process that might be disrupted.⁷⁵

A similar instrumental analysis of the relation of free speech to self-government is applicable to the mentally ill. Within the miniature society of the institution, the patient's role, like the child's within the school system, is more passive than active. The one striking exception to that passivity is the active role encouraged by the law for the patient in his efforts to expose wrongful confinement. Statutes in nearly all states

⁷² *Id.* at 512 (emphasis added) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)); see *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637, 641 (1943); *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960, 972-73 (5th Cir. 1972); *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803, 807 (2d Cir. 1971).

⁷³ *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 182 (1968) (quoting *A Quantity of Books v. Kansas*, 378 U.S. 205, 224 (1964) (Harlan, J., dissenting)).

⁷⁴ *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975); *Jacobs v. Board of School Comm'rs*, 490 F.2d 601, 609 (7th Cir. 1973), *vacated as moot per curiam*, 420 U.S. 128 (1975); *Baughman v. Freienmuth*, 478 F.2d 1345 (4th Cir. 1973); *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960 (5th Cir. 1972); *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803 (2d Cir. 1971); *Frasca v. Andrews*, 463 F. Supp. 1043 (E.D.N.Y. 1979). *But see Fujishima v. Board of Educ.*, 460 F.2d 1355 (7th Cir. 1972) (prior restraints per se unconstitutional).

⁷⁵ Compare *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (adults may be sanctioned after the fact only for advocacy "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action"), with *Karp v. Becken*, 477 F.2d 171, 176 (9th Cir. 1973) (student expression may be prohibited if there is "reasonable forecast" of disruption), and *Tate v. Board of Educ.*, 453 F.2d 975 (8th Cir. 1972) (same), and *Guzick v. Drebus*, 431 F.2d 594 (6th Cir. 1970) (same), *cert. denied*, 401 U.S. 948 (1971).

permit unrestricted communication with specified officials, the committing court, or a central mental health agency,⁷⁶ and in many cases with lawyers as well.⁷⁷ The issue is not litigated as frequently as one would suppose, because claims by the mentally ill have generally been based on grounds other than free speech.⁷⁸ There are, however, occasional indications that such limited communication privileges are all the first amendment demands.⁷⁹ To the extent to which this is true, freedom of speech for the institutionalized is important not because the mentally ill govern themselves — they don't⁸⁰ — but because as an ally of habeas corpus it may assist their readmission into the community of those who do.

2. *Self-Realization*. — The second significant value attributed to freedom of speech in the adult model is the key role it plays in the process by which an individual defines himself. This position is less plausible with regard to children,⁸¹ since

⁷⁶ ME. REV. STAT. ANN. tit. 34, § 2254.1 (1978); PA. STAT. ANN. tit. 50, § 4423(1) (Purdon 1969); VT. STAT. ANN. tit. 18, § 7705(b) (1968); WIS. STAT. ANN. § 51.61(1)(c) (West Supp. 1980). Somewhat dated tabulations may be found in S. BRAKEL & R. ROCK, *supra* note 24, at 174-79; Note, *The Committed Mentally Ill and Their Right to Communicate*, 7 WAKE FOREST L. REV. 297, 307-11 (1971).

⁷⁷ KAN. STAT. ANN. § 59-2929(8) (1976); LA. REV. STAT. ANN. § 28-171C (West Supp. 1980); N.J. STAT. ANN. § 30:4-24.2g(1) (West 1981).

⁷⁸ Most cases affirming the existence of the right base it on some right other than the first amendment, such as the right of habeas corpus, *see Hoff v. State*, 279 N.Y. 490, 18 N.E.2d 671 (1939); *People ex rel. Jacobs v. Worthing*, 167 Misc. 702, 4 N.Y.S.2d 630 (1938); *In re Weightman's Estate*, 126 Pa. Super. 221, 190 A. 552 (1937), on a common law right against false imprisonment, *see Stowers v. Wolodzko*, 386 Mich. 119, 191 N.W.2d 355 (1971), *aff'g Stowers v. Ardmore Acres Hosp.*, 19 Mich. App. 115, 172 N.W.2d 497 (1969) (private hospital), or on some statutory right against interference with communications with counsel, *see In re Hofmann*, 131 Cal. App. 2d 758, 281 P.2d 96 (1955); *cf. Gerrard v. Blackman*, 401 F. Supp. 1189, 1193 (N.D. Ill. 1975) (suit against physician for allegedly monitoring telephone conversations in violation of Omnibus Crime Control and Safe Streets Act of 1968, § 802 (currently codified at 18 U.S.C. § 2520 (1976)). *See also* cases cited in *Hearings*, *supra* note 62, at 343 n.115.

⁷⁹ *Fhagen v. Miller*, 65 Misc. 2d 163, 173-74, 317 N.Y.S.2d 128, 139 (1970), *modified*, 36 A.D.2d 926, 321 N.Y.S.2d 61 (1971), *aff'd*, 29 N.Y.2d 348, 278 N.E.2d 615, 328 N.Y.S.2d 393, *cert. denied*, 409 U.S. 845 (1972); *cf. Wyatt v. Stickney*, 344 F. Supp. 373, 379-80 (M.D. Ala. 1972) (unrestricted right to send sealed mail; unrestricted right to receive sealed mail from attorneys, private physicians, mental health professionals, courts, and government officials). *See also Brown v. Schubert*, 347 F. Supp. 1232, 1234 (E.D. Wis. 1972) (apparently broader affirmation of the right to communicate by mail), *supplemented*, 389 F. Supp. 281, 283-84 (E.D. Wis. 1975).

⁸⁰ A. MEIKLEJOHN, *supra* note 9, at 84-85.

⁸¹ However, the position is frequently taken on their behalf. *See, e.g.,* ABA & INSTITUTE OF JUDICIAL ADMINISTRATION, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO RIGHTS OF MINORS 119-22 (tent. draft 1977); Letwin, *Regulation of Underground Newspapers on Public School Campuses in California*, 22 U.C.L.A. L. REV. 141, 197-205 (1974); Tushnet, *Free Expression and the Young Adult: A Constitutional Framework*, 1976 U. ILL. L.F. 746, 760; Project, *Education*

they can hardly be expected to develop their natural capacities in a socially acceptable fashion when allowed to act without interference. Therefore, we are willing to impose significant limitations on the freedom of children to express themselves. We do not want to risk having too many people grow up to define themselves as liars or bigots; as a society we are not above bending the twig a little, though we won't tamper with the tree.⁸² But this does not mean that, for anyone not a fully competent adult, freedom of expression is completely subordinate to some social blueprint for the ideal citizen. Instead, we permit children to express themselves — within limits — with the instrumental hope that they will grow up able to appreciate the intrinsic satisfactions of self-expression. Society has an interest in encouraging autonomy and diversity, and freedom of speech for children serves several values important to that end.⁸³ Courts often note the value of freedom in teaching children the satisfactions that can result from expression of their own individuality;⁸⁴ in ensuring the development of skills used for rational discourse;⁸⁵ in instilling an appreciation of how speech can affect, assist, and injure others; and in providing for the receipt of information important to the child's development.

An illustration of how these values are implemented is the treatment of racial insults in schools. Though face-to-face racial slurs could probably be forbidden for both adults and children,⁸⁶ courts have tolerated restrictions even on wearing Confederate flags in the interest of avoiding racial disputes in the schools.⁸⁷ Such control, greater than anything we would

and the Law: *State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1460 (1976); Comment, *Public Secondary Education: Judicial Protection of Student Individuality*, 42 S. CAL. L. REV. 126, 141 (1969).

⁸² See J. DEWEY, *DEMOCRACY AND EDUCATION* chs. 7-9 (1916).

⁸³ *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 511-12 (1969); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943); *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923).

⁸⁴ This may explain the emphasis in *Tinker* on the importance of individuality. 393 U.S. at 511. Notice also the rejection in *Barnette* of "national unity" as a warrant to force school children to salute the flag. 319 U.S. at 640-42.

⁸⁵ See J. MILL, *supra* note 16, at 35.

⁸⁶ T. EMERSON, *supra* note 9, at 326; Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. C.R.-C.L. L. REV. 1, 27 (1974); cf. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (upholding statute prohibiting public name-calling); J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 793 (1978).

⁸⁷ See, e.g., *Augustus v. School Bd.*, 507 F.2d 152 (5th Cir. 1975); *Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972), *cert. denied*, 411 U.S. 951 (1973). But see *Tate v. Board of Educ.*, 453 F.2d 975 (8th Cir. 1972); *Banks v. Muncie Community Schools*, 433 F.2d 292 (7th Cir. 1970). The Juvenile Justice Standards promulgated

permit over adults, is prompted by the greater sensitivity of children to racial disparagement. But it can only be tolerated if we see the self-realization functions served by the speech of children as instrumental rather than intrinsic. Consider the first of those instrumental values: teaching children the satisfaction that can result from expressions of individuality. Expression of racial discrimination doubtless serves that end, in a perverse fashion, but precisely because it is perverse, we regulate children's speech, lest they develop into adults who define themselves as racists. With regard to the second and third of the functions served by the child's free speech right — the development of skills and of an appreciation of the impact of speech on others — it makes sense to conclude that those are lessons that may be learned another time when the consequences for the listener are not as severe.⁸⁸

As with children, recovery of a healthy personality in the case of the mentally ill does not necessarily occur without regulation. That being so, the individual's self-definition or realization through expression or receipt of information may play only an instrumental role in the patient's recovery, rather than be assigned an ultimate value as a good in itself. Thus, the statutes of most states provide that the communication and visitation rights of patients may be restricted "for the medical welfare of the patient."⁸⁹

Some of the instrumental purposes served by granting freedom of speech to children are already fulfilled in the case of the institutionalized mentally ill, whose language skills are more likely to be well developed. Free speech rights can nonetheless serve an important instrumental function in aiding the eventual readaptation of the mentally ill individual to society. The principle of normalization espoused by such cases as *Wyatt v. Stickney*⁹⁰ builds on the perception that the total

by the Institute of Judicial Administration and the American Bar Association would permit restriction of student expression that "advocates racial, religious, or ethnic prejudice or discrimination or seriously disparages particular racial, religious, or ethnic groups." ABA & INSTITUTE OF JUDICIAL ADMINISTRATION, JUVENILE JUSTICE PROJECT, STANDARDS RELATING TO THE SCHOOLS AND EDUCATION Standard 4.2C, at 84 (tent. draft 1977).

⁸⁸ A second illustration of the difference between the adult's and the child's freedom of speech in the process of self-realization is provided by cases establishing variable standards for obscenity, e.g., *Ginsberg v. New York*, 390 U.S. 629 (1968), and vulgarity, e.g., *FCC v. Pacifica Foundation*, 483 U.S. 726, 749-50 (1978). Regulations like these do not affect the development of the speaker's skill, but rather curtail the receipt of information that is important to the recipient for one reason or another.

⁸⁹ ALASKA STAT. § 47.30.150(a)(1), (2) (1979); CONN. GEN. STAT. ANN. §§ 17-206g(c), 17-206h(d), (f) (West 1981); MINN. STAT. ANN. §§ 253A.17.5-.6 (West 1971); VT. STAT. ANN. tit. 18, § 7705(a)(1), (2) (1968); DRAFT ACT, *supra* note 59, § 21.

⁹⁰ 344 F. Supp. 373 (M.D. Ala. 1972), *modified sub nom.* *Wyatt v. Aderholt*, 503

control exercised by an institution over its inmates fosters a dependence that is itself an obstacle to social readjustment.⁹¹ The surest means of avoiding such institutional dependence is to grant the patient the greatest possible autonomy consistent with the purposes of commitment.

C. Applications and Limitations of the Instrumental View of Freedom

Having discussed freedom of speech, I want to say a word about the application of the instrumental approach to other freedoms. Issues of freedom of association, assembly, and movement arise when the visitation rights of the institutionalized mentally ill or retarded are limited, and indeed when such individuals are institutionalized in the first place.⁹² The same liberties are implicated by juvenile curfew ordinances. Many of these questions can be approached in the manner I have outlined above. Consider juvenile curfews. It would surely be unconstitutional to forbid children to appear on the streets without a chaperone at any time of day, and would just as surely be constitutional to require an adult companion between one and six in the morning. But absent emergency conditions, both ordinances would be unconstitutional if applied to adults.⁹³ The difference is that, for children, the freedoms of association and assembly have less an intrinsic than an instrumental significance; they can therefore be restricted somewhat because children have other opportunities to pursue their group objectives. As long as a child has nineteen hours a day to meet with his street gang, his development is not likely to be significantly impaired by the fact that he cannot do it all night long. Freedom of the press, the liberty preeminently involved in cases dealing with the regulation of underground or official student newspapers, may also be approached in the same instrumental fashion.

F.2d 1305 (5th Cir. 1974); cf. Glenn, *The Least Restrictive Alternative in Residential Care and the Principle of Normalization*, in PRESIDENT'S COMM. ON MENTAL RETARDATION, *THE MENTALLY RETARDED CITIZEN AND THE LAW* 499 (1976) (need to avoid creating a "deviancy subculture").

⁹¹ For a study of the phenomenon of institutional dependence, see E. GOFFMAN, *ASYLUMS* 3-73 (1961).

⁹² See Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107, 1158-61 (1972).

⁹³ See *Bykofsky v. Borough of Middletown*, 429 U.S. 964, 965 (1976) (Marshall, J., dissenting from denial of certiorari); *Hayes v. Municipal Court*, 487 P.2d 974 (Okla. Crim. App. 1971); *City of Portland v. James*, 251 Or. 8, 444 P.2d 554 (1968); *City of Seattle v. Drew*, 70 Wash. 2d 405, 423 P.2d 522 (1967).

However, the instrumental view of freedom is not applicable to all actors of diminished capacity with respect to all choices. If its essential premise is that freedoms are protected in order to assist the individual's development into a healthy adult capable of exercising choice in an unrestricted fashion, it has little relevance for the attribution of liberties to the severely retarded, the very senile, or those who are comatose. A decision about the free speech rights of a severely retarded adult, for example, must take into account that he may never be allowed to vote, that he will never derive a full measure of satisfaction from expression as a means of self-realization, that he will never fully master the skills of rational discourse nor appreciate fully how his expression affects others, and that he is incapable of grasping a good deal of what others are trying to impart to him.

Moreover, there are some choices that even healthy children or the treatable mentally ill can be permitted to make only at extreme peril to their long-term development. A decision whether to undertake a painful and hazardous life-saving medical procedure involves consequences far more weighty than a decision whether to wear a black armband to school, and the importance of making the choice correctly may far outweigh the developmental significance of allowing the incompetent individual to make it on his own.

Part II considered and rejected the suggestion that we apply the laissez-faire conception of freedom across the board to those of diminished capacity. Nevertheless, it argued that the laissez-faire idea of freedom serves as a benchmark and that the justifications for extending freedom become less acceptable as they deviate from that idea. Of the various grounds for attributing freedoms to incompetent persons, the instrumental notion deviates least from this benchmark justification. In fact, the instrumental conception just discussed strongly resembles the utilitarian laissez-faire position — both share the fundamental assumption that freedom is a means to a more valuable end. What distinguishes the instrumental justification is that it assigns a qualified rather than an absolute value to liberty itself, because it assumes only an imperfect correlation between freedom and happiness. In part, this skepticism inevitably results from the attempt to be more specific about the ends to which freedom is a means. It also results from the realization that for certain actors and for certain choices, an individual's freedom to choose can actually produce significant individual and social harm. It is to those cases that I now turn.

IV. FREEDOM TO FOLLOW SURROGATE CHOICES

This Part maintains that, in the more difficult cases in which the individual is too incompetent or the choice too significant to risk noninterference, an individual should still have the right to be free from state interference, provided that his choices can be made by a surrogate decisionmaker who is sufficiently close to the individual. In Section A, I begin by exploring the configuration of private rights and duties in the relation between parent and child. Section B shows how this matrix of private rights figures in the assertion of rights against the state. Finally, in Section C, I propose a number of other applications for the theory of surrogate choices.

A. The Relation Between Claimant and Surrogate

A proper understanding of the child's claim to freedom against the state must begin with an exploration of the private rights and duties that exist between parent and child. Only thus is it possible to see what the state takes away from the child and whether what is lost might qualify as a protected liberty. That focus has not always been the concern of the courts. In cases involving the custody of children, the decision is usually governed by the child's statutory or common law right to have his "best interests" pursued.⁹⁴ It is odd, then, that when parents and the state are fighting about how the child will be educated, the decision so often turns simply on a consideration of the *parents'* due process⁹⁵ and free exercise⁹⁶ rights. One reason for this peculiarity is that laws saying when and where children have to go to school and what they have to do there are enforced against the parents.⁹⁷ Although this need not be an obstacle to deciding the case on the basis of the child's rights,⁹⁸ the parties naturally look to their own

⁹⁴ For examples of neglect statutes, see D.C. CODE ANN. § 16-2320(a) (1973); MD. CTS. & JUD. PROC. CODE ANN. § 3-831(c) (1980); OR. REV. STAT. § 419.507 (1974); WYO. STAT. ANN. § 14-2-307(a) (1977). For a list of standards employed in divorce custody cases, see Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROB., Summer 1975, at 226, 235-37.

Of course, the question of the parents' constitutional rights has also arisen. See, e.g., *Caban v. Mohammed*, 441 U.S. 380 (1979); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

⁹⁵ See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923).

⁹⁶ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 230-31 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 160 (1944).

⁹⁷ See, e.g., *Yoder*, 406 U.S. at 207-08 & n.2; *Barnette*, 319 U.S. at 629 & nn.5, 8; *Pierce*, 268 U.S. at 530-31; cf. *Prince*, 321 U.S. at 161 (child labor law enforced against parents).

⁹⁸ See note 54 *supra*.

claims first. A second and more persuasive reason is the reluctance of the courts to recognize constitutionally protected freedoms for children in matters that their parents usually decide for them.⁹⁹

Yet there is something awry with this focus on the parents. After all, it is the child who is being forced to go to public school and forbidden to learn German, and unless the state succeeds in its coercive conditioning, it is he who will sense the deprivation most acutely later on. If the parents believe they will be damned for sending their children to public school,¹⁰⁰ they surely have a free exercise claim of their own. But cannot one say the same thing a fortiori of the children, whose souls the parents have failed to save?¹⁰¹ To make the point, I begin with the general proposition that "the parent, being the cause of the child's existing in a helpless condition, would be indirectly the cause of the suffering and death that would result to it if neglected."¹⁰² Beyond the fact that, in the case of blood parents, they have brought the child helpless into the world,¹⁰³ they are also the persons most aware of his circumstances and are consequently in the best position to help him.¹⁰⁴ Their duty to act in his interests, and thus the private right that he has against them, may be seen as the paradigm of the "good samaritan" principle.¹⁰⁵ The same may be said to a large extent of adoptive and foster parents, stepparents, and other guardians; although they have not given the child life, they have at least taken control of him, and by their action they have put themselves in the best position to provide for his needs.

As a moral matter, the extent of the child's right against his parents finds its source in his dependence. Because during his early years they hold his life in the balance, they have a duty to provide him with the essentials of life: not simply food, clothing, shelter, and health care, but also the education nec-

⁹⁹ *Yoder*, 406 U.S. at 232 ("There is nothing in the record or in the ordinary course of human experience to suggest that non-Amish parents generally consult with children of ages 14-16 if they are placed in a church school of the parents' faith.").

¹⁰⁰ Jonas Yoder believed that by sending his children to high school he would endanger not only their salvation but his own as well. *Id.* at 209.

¹⁰¹ *Id.*; see *id.* at 241 (Douglas, J., dissenting in part).

¹⁰² H. SIDGWICK, *THE METHODS OF ETHICS* 249 (1962).

¹⁰³ See Blustein, *Child Rearing and Family Interests*, in *HAVING CHILDREN* 116-17 (O. O'Neill & W. Ruddick eds. 1979) [hereinafter cited as *HAVING CHILDREN*].

¹⁰⁴ See A. MELDEN, *RIGHTS AND PERSONS* 75 (1977).

¹⁰⁵ Cf. M. SHAPO, *THE DUTY TO ACT* 38-42 (1977) (duties of teachers, universities, and lawyers). Indeed, only the existence of family immunities to suit has thus far prevented the full integration of parental duties — well established in the criminal law — into the law of tort. See W. PROSSER, *LAW OF TORTS* 342 (4th ed. 1971).

essary for him to discover and develop his talents and to grow as a responsible moral person.¹⁰⁶ In varying degrees, these private rights are backed by the legal sanctions imposed in dependency, abuse, and neglect statutes.¹⁰⁷ Such laws typically require parents, on pain of losing custody, to provide "adequate food, clothing, shelter[,] education . . . [and] medical . . . care."¹⁰⁸ They may also require provision of "proper care and attention . . . emotionally or morally."¹⁰⁹ Some of these demands may be defined objectively so that the general public concurs in the definition and enforcement is relatively fair and certain. Obligations to feed, clothe, shelter, and provide urgently needed medical care fit that description.¹¹⁰ On the other hand, there is little agreement about what constitutes either a proper education¹¹¹ or proper emotional and moral care and attention.¹¹²

Not only is the definition of "proper education" and "proper care and attention" much debated, but available evidence also indicates that the child's interests are best served when such matters are left to private choice. In the first place, the child needs the "identity and continuity of cultural heritage"¹¹³ that only parents can provide. Perhaps equally important, the state

¹⁰⁶ See A. MELDEN, *supra* note 104, at 149-50.

¹⁰⁷ These rights are also enforced in a perhaps less constructive fashion by "cruelty to children" statutes, which criminalize acts of abuse and endangerment as well as the deprivation of "necessities of life." For a general review of such laws, see Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 681-86 (1966).

¹⁰⁸ N.Y. FAM. CT. ACT § 1012(f)(i)(A) (McKinney 1975); *cf.* ARIZ. REV. STAT. ANN. § 8-546 A.2. (1974) ("abuse" defined to include endangering the child's "health and well-being").

¹⁰⁹ CONN. GEN. STAT. § 46b-120 (1981).

¹¹⁰ See generally ABA & INSTITUTE OF JUDICIAL ADMINISTRATION, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO ABUSE AND NEGLECT Standards 1.1-1.8, 2.1-2.2 & Commentary (tent. draft 1977) [hereinafter cited as ABUSE AND NEGLECT]; J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 59-109 (1979); Abrams, *Problems in Defining Child Abuse and Neglect*, in HAVING CHILDREN, *supra* note 103, at 156-64.

¹¹¹ See, e.g., *In re Rice*, 204 Neb. 732, 285 N.W.2d 223 (1979) (child given Christian education at home).

¹¹² Compare *id.* and *In re Karr*, 66 Misc. 2d 912, 323 N.Y.S.2d 123 (1971) (possibility that child would be raised in Hare Krishna faith not sufficient for finding neglect), with *In re Watson*, 95 N.Y.S.2d 798 (Dom. Rel. Ct. 1950) (child fed only at religious "banquet" found to be neglected); compare *In re Raya*, 255 Cal. App. 2d 260, 63 Cal. Rptr. 252 (1967) (mother's living with man insufficient to establish improper control of children), and *In re Cager*, 251 Md. 473, 248 A.2d 384 (1968) (neglect not proved by fact that household consisted of mother and several illegitimate children), with *In re Anonymous*, 37 Misc. 2d 411, 238 N.Y.S.2d 422 (1962) (immoral conduct of mother deprived child of guidance and constituted neglect).

¹¹³ ABUSE AND NEGLECT, *supra* note 110, Standard 1.4 & Commentary. See also J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 9 (1973).

can often do little to improve a child's lot, for reasons that may include not only lack of funds, but also the difficulty of supervising interpersonal relations and the virtual impossibility of predicting human development.¹¹⁴ Finally, the success of the family venture will depend on giving some measure of recognition to parental desires to share in the life of their offspring.¹¹⁵

Do parents have rights against, as well as duties toward, their children? I think not. One obvious candidate for such a right is the parents' claim to the obedience and cooperation necessary to raise their children successfully. Properly considered, though, this is not an independent right; it is simply a derivative of the child's right to have discipline and guidance imposed upon him in his own interests.¹¹⁶ One might also think that parents have a right to have their children pursue life prospects acceptable to the parents. But that interest, too, functions more as a limitation on parental duty than as an independent right. An Amish mother has no obligation to support her daughter's decision to go to Yale, but the daughter likewise has no duty to live out her life in her parents' community. I find it more difficult to say in what way a parent may claim a debt of gratitude, repayable in the coin of affection and, perhaps, support in later years. There is something peculiar about saying that such things are "owed";¹¹⁷ yet there is a sense in which love creates duties and so (I suppose) corresponding rights.

B. The Ascription of Liberties in Claimant-Surrogate Relations

What does all this talk about private rights mean for the distribution of rights against the state between parent and child? Historically, courts have looked to the free exercise rights¹¹⁸ or due process "liberty of parents . . . to direct the upbringing and education of [their] children."¹¹⁹ I have just

¹¹⁴ J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 113, at 49-52. See generally ABUSE AND NEGLECT, *supra* note 110, Standard 1.3 & Commentary.

¹¹⁵ For a sensitive treatment of this issue, see Ruddick, *Parents and Life Prospects*, in *HAVING CHILDREN*, *supra* note 103, at 124-25.

¹¹⁶ J. LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT* § 58 (P. Laslett ed. 1960); see Blustein, *supra* note 103, at 120-22 (children have duty of facilitation and noninterference with child-rearing duties).

¹¹⁷ See Blustein, *supra* note 103, at 121-22; English, *What Do Grown Children Owe Their Parents?*, in *HAVING CHILDREN*, *supra* note 103, at 351.

¹¹⁸ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 230-32 (1972).

¹¹⁹ *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); see *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("the interest of a parent in the companionship, care, custody, and management of his or her children"); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) ("the power of parents to control the education of their own").

argued that parents have no rights against their children, although they do have duties to them. It is perfectly consistent with this argument to say that parents can claim freedom from state interference in performance of those private duties. The parental freedom that the Constitution protects is itself derived from the child's personal moral right against the parent. The parent's liberty against the state is akin to the parent's hypothetical "right" against the child to demand cooperation in the task of rearing. In essence, the latter describes a duty that the child owes himself,¹²⁰ and the former a duty that the state owes to the child.¹²¹

Accepting that the state owes a duty to the child brings us closer to the proposition that this Part advances: Constitutional liberties protect children in the exercise of choices that their parents have made for them. This proposition radically alters our conception of the individuals involved and the rights protected. The individual to whom the liberty is attributed will differ in important respects from the typical adult claimant. The child in a case such as *Wisconsin v. Yoder*¹²² may be insufficiently mature to assert, waive, or forgive violations of his free exercise rights. Moreover, what the Constitution protects is not a choice that the child has made but one that his parents have determined is beneficial to him. Nevertheless, insofar as his parents are sensitive to their private duties to the child, the decision that results is his decision in the sense that it is in his interest.¹²³ Interference by the state with the child's "choice" is thus forbidden in much the same way as it is for conventional adult claimants.

¹²⁰ See Blustein, *supra* note 103, at 120.

¹²¹ There are some indications that the Supreme Court has recently begun to see the matter in this light. In *Planned Parenthood v. Danforth*, 428 U.S. 52, 74-75 (1976), and *Bellotti v. Baird*, 443 U.S. 622, 642 (1979) (plurality opinion), the Court supported the child in conflict with her parents over abortion. One might say that, when the parent seeks to act contrary to the child's best interests, he has no right to freedom from state interference, since he is not in fact fulfilling an obligation to the child. Moreover, the state would violate its primary duty to the child by supporting the parental choice. Although I subscribe to that theory, I would dissent from its application to the specific question in *Danforth* and *Bellotti*, not because I place supreme confidence in parental wisdom and good will, but because I have even less confidence in the state's ability to determine the child's best interests.

For other suggestions of the principle in text, see *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 840-41 (1977); *Moore v. City of E. Cleveland*, 431 U.S. 494, 500-06 (1977) (plurality opinion). Both cases are discussed in Garvey, *supra* note 49, at 808-22.

¹²² 406 U.S. 205 (1972).

¹²³ A. MELDEN, *supra* note 104, at 147-53.

*C. Applications and Limitations of the Surrogate-Choice
View of Freedom*

In this Section, I offer a few applications of the surrogate-choice approach to constitutional freedoms and suggest several significant areas to which it should not be applied. The surrogate approach affords a useful vantage point from which to view the difficult problem of state intervention in decisions about the provision of urgently needed medical treatment. Consider, at the easiest end of the spectrum, a religiously motivated parental objection to a blood transfusion necessary to save an infant's life.¹²⁴ In favor of permitting the state to make the choice are the relative unintrusiveness of the procedure, the high probability of success, and the fatal consequences of nonintervention. Moreover, from a purely secular point of view, the child's need can be objectively defined and satisfied in a way that commands general public agreement. Finally, the choice is not one that involves any special parental familiarity with the child's social and emotional needs.¹²⁵ One could say with some confidence, then, that a parent who withholds authorization is violating the child's private moral right against the parent and that enforcement of the parent's choice would thus be inconsistent with the child's liberty interest. Even the addition of a religious component does not significantly change the equation. The parent has no personal right that the child live a life — or suffer a death — acceptable to the parent.¹²⁶ Nor is the intervention in a single, short-term, and fairly unintrusive instance likely to affect the child's moral development in matters that the parents have an obligation to control.

On the other hand, as the operation in question becomes more experimental, as the degree of intrusiveness becomes greater (for instance, if more pain is involved, the side effects are more severe, or the duration of the treatment is prolonged), and as the consequences of inaction become less serious, the propriety of state interference becomes more questionable. The parents' knowledge of their child's emotional needs plays

¹²⁴ See *Jehovah's Witnesses v. King County Hosp.*, 390 U.S. 598, 598 (1968) (per curiam) (citing *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)); *In re Pogue*, Wash. Post, Nov. 14, 1974, § C, at 1, col. 1 (No. M-18-74, D.C. Super. Ct., Nov. 11, 1974), discussed in Goldstein, *supra* note 49, at 652-53; cases cited 1 N. DORSEN, P. BENDER & B. NEUBORNE, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 1018 (4th ed. 1976).

¹²⁵ See Bennett, *Allocation of Child Medical Care Decision-Making Authority: A Suggested Interest Analysis*, 62 VA. L. REV. 285, 311-12, 317 (1976).

¹²⁶ See p. 1781 *supra*.

a greater role.¹²⁷ Because the decision is not a stark and certain one between life and death, it involves choices among values not subject to objective definition and not reinforced by general public consensus.

The same range of questions arises for medical patients who, because they are comatose or senile, are incapable of making their own choices and consequently possess rights to liberty only in the derivative sense discussed in this Part. If the surrogate decisionmaker acts within a family relationship to the rightholder — children deciding for aged parents, one spouse for another — much of what was said about the matrix of private rights and duties in Section A obtains with equal strength. Cases such as *In re Quinlan*¹²⁸ show how the factors of control over the patient, familiarity with his or her desires, and ties of love, friendship, and gratitude give the patient a claim to the exercise of the surrogate's judgment and the right to freedom from state interference with its implementation. The only significant difference from the case of children is that the surrogate's decision should be guided by the patient's system of values, to the extent that they are known.¹²⁹

The surrogate approach to constitutional freedoms may also provide some help in analyzing the judicial treatment of uncontested custody arrangements following divorce. An explicit focus on the child's constitutional entitlement to parental choices regarding living arrangements, rather than on the arrogant presumptions of the "best interests" standard, would make interference with joint custody agreements less acceptable.¹³⁰

¹²⁷ *Developments — The Constitution and the Family*, *supra* note 47, at 1355–56.

¹²⁸ 70 N.J. 10, 41, 355 A.2d 647, 664, *cert. denied*, 429 U.S. 922 (1976); *see In re Young*, 48 U.S.L.W. 2238 (Cal. Super. Ct. Sept. 11, 1979).

¹²⁹ *See generally* J. RAWLS, *supra* note 2, at 249. To take an extreme case, the courts should surely have power to prevent the legatees of a senile Catholic priest from seeking euthanasia for him. In general, judicial activism is warranted when there is evidence of the claimant's own historic preferences, since courts are competent to discover these preferences and would not have to construct a hypothetical system of values for the patient.

¹³⁰ *See* Bratt, *Joint Custody*, 67 Ky. L.J. 271, 288–95 (1978–79); *Developments — The Constitution and the Family*, *supra* note 47, at 1323–26. Two other examples are worth mentioning. Justice Douglas' dissent in *Yoder*, 406 U.S. at 242, argued that it was improper for the Court to affirm the right of Amish parents to withdraw their children from public school after eighth grade without considering the views of the children. I would maintain, on the contrary, that the mere expression of conflicting desires by the child is not a sufficient justification for state interference with parental choices — indeed, state intervention to enforce the child's opinions would, according to my view, restrict the child's freedom of religion. What I have said about the relation of parents and children also suggests that one of the guidelines laid down by Justice Powell for minors' abortions in *Baird* should be reconsidered: the indication that a pregnant minor female too immature to make the decision on her own could

Still, there is a significant number of cases in which the surrogate-choice theory fails to give any meaningful content to constitutional freedoms. The theory presumes an available surrogate, related to the claimant by a network of private rights and obligations, who can stand between him and the state to retain private control over choices in his interest. When incompetent persons are under the direct control of the state, no such surrogate exists. This group includes children who are wards of the state, patients in state mental institutions, and even those receiving state medical care who have no remaining family ties.

V. THE FOURTH DIMENSION OF FREEDOM: A THEORY OF THE RIGHT TO "LIFE"

The freedoms guaranteed by the Constitution make no sense for an incompetent individual under state control and lacking a surrogate to make choices for him. The state is charged with making critical choices for the individual; yet it is from the state's interference with choice that constitutional freedoms are intended to provide protection. In this Part, I argue that the residue of constitutional protection left behind when freedom enters this fourth dimension may most appropriately be called a right to "life"; those over whom the state exercises total control are entitled by this right to a certain minimal level of benefits from the state. I then try to illustrate and justify this right by discussing the right to treatment for the civilly committed mentally ill. Finally, I suggest several other applications of the right to life.

A. A Note on Terminology

Of the rights to "life, liberty, and property" protected by the fourteenth amendment, the first has received by far the narrowest interpretation.¹³¹ I propose to use the term "life"

not be required to get parental consent unless an independent judicial determination were also available. 443 U.S. at 643-48 (plurality opinion). For such an individual, a requirement of parental consent does nothing more than ensure that a third party, the doctor, assists in securing to the minor the private right that she has against her parents. Cf. *H.L. v. Matheson*, 101 S. Ct. 1164 (1981) (upholding statute requiring doctor to notify parents before performing abortion on minor). To say that her substantive due process liberty is better protected by leaving the choice to the state rather than to the parents is to say that what would ordinarily count as a restraint of freedom — state interference with choice — is in fact the process by which the choice should be made.

¹³¹ It is worth noting, however, that Blackstone, who gave the term "liberty" a rather restricted definition, 1 W. BLACKSTONE, COMMENTARIES *134, understood "life" to refer to "the right of personal security [that] consists in a person's legal and

broadly, in the way we use it when we speak of "a life worth living." My notion of a "right to life" includes, for an incompetent in state custody, claims to food, clothing, shelter, medical care, a decent physical environment, and, in addition, education, treatment, or habilitation. The most obvious objection to this approach is that it subjects to new tensions constitutional language whose meaning has long been settled. But that is not at all different from what has happened with the word "liberty," whose common law and pre-Civil War meaning extended little beyond the freedom from physical restraint.¹³² The same expansion has characterized the term "property."¹³³

However, the term "life" is not simply "the most convenient vehicle into which to pack all kinds of rights";¹³⁴ it is also the most suitable term, given the nature of the duties undertaken by the state. In discussing the child's private claims against his parents in Part IV, I pointed out that the child's claims have their source in his dependence. Because they control his life, the parents' duty encompasses all the essentials of life.¹³⁵ It is this obligation that the state assumes when it acts as *parens patriae*.¹³⁶

uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, 18 NOMOS: DUE PROCESS 7 (1977).

¹³² See generally Hough, *Due Process of Law — To-Day*, 32 HARV. L. REV. 218, 222-23 (1918); Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 411-12 (1977); Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

¹³³ Reich, *The New Property*, 73 YALE L.J. 733 (1964).

¹³⁴ Warren, *supra* note 132, at 439 (referring to the term liberty).

¹³⁵ See p. 1780 *supra*.

¹³⁶ An alternate candidate for characterizing the minimum demands posited in this Part, one proposed several years ago by Professor Kurland, is the privileges or immunities clause of the 14th amendment. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 WASH. U.L.Q. 405, 418-20. It suffers from more than a century of neglect, since *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), rendered it a "practical nullity." THE CONSTITUTION OF THE UNITED STATES OF AMERICA 965 (E. Corwin ed. 1953). Moreover, reading the clause for all it is worth would solve just half the problem we are concerned with, since it applies only to the states. The obvious way to extend its directive to the federal government is to do what was done in the case of equal protection — read it into the fifth amendment's due process clause. *Bolling v. Sharpe*, 347 U.S. 497 (1954). But that only brings us back to the problem of deciding whether the rights at issue are best described as "life," "liberty," or "property." I would be willing to overlook even this problem, given the historically more plausible argument for finding substantive guarantees in the privileges or immunities clause, see J. ELY, *DEMOCRACY AND DISTRUST* 25-28 (1980), if there were some indication that the content of the privileges or immunities clause would be easier to specify than the content of an expanded right to "life." In either case, however, we would be starting from scratch. See *id.* at 98; Benoit, *The Privileges or Immunities Clause of the Fourteenth Amendment: Can There Be Life After Death?*, 11 SUFFOLK U.L. REV. 61, 101-02 (1976).

The right for which I am contending is far narrower than a general claim of constitutional entitlement to basic welfare rights for everyone,¹³⁷ for the state's obligation to provide services only arises when the state has supplanted private decisionmakers. In fact, as a matter of constitutional law, the right does not even mean that the state has an affirmative duty to step in to care for orphans, the mentally handicapped, the aged, and so on. It might be morally reprehensible for the state to allow such people to die for want of help, but that is another matter. Finally, I would grant this right against the state only to those for whom freedom can have none of the meanings discussed in Parts II–IV. Thus, it must be shown that: (1) the individual in question is incompetent to make a specific choice (thus satisfying the concern of the laissez-faire approach that categories of incompetents not be drawn too broadly); (2) the decision is sufficiently important that one cannot allow him to make it solely to promote his autonomous development (rendering inapplicable the instrumental conception of liberty); and (3) no private decisionmaker is sufficiently close to the individual to make a better choice than the state could make (rendering the surrogate conception of liberty useless). Any attempt at state control that did not satisfy all three conditions would violate the individual's constitutional liberties.

B. An Application: The Right to Treatment

Suppose that an individual is reliably diagnosed as severely psychotic-schizophrenic, that a satisfactory treatment is available, and that he irrationally refuses it.¹³⁸ Those facts would put him beyond the range of laissez faire even as a limiting principle. Suppose further that the patient's behavior presents a danger to himself because he avoids all contact with other people and is therefore unable to acquire food, medical care unrelated to his illness, and other necessities of life. Any instrumental value in allowing him to make his own decision would thus disappear. If we add that he has no family or friends willing to assist him either by deciding about care or by providing the essentials of life, I believe that involuntary civil commitment would be justified. If the state took that step, however, I would answer the question left open in *O'Connor v. Donaldson*¹³⁹ by saying that the state's duties go

¹³⁷ See Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659.

¹³⁸ Suppose, for example, that he believes that he is radioactive and that no one should touch him. I borrow the example from A. STONE, *MENTAL HEALTH AND LAW* 66–69 (1975).

¹³⁹ 422 U.S. 563 (1975).

beyond mere provision of food, clothing, shelter, and routine medical care, and encompass as well the obligation to provide some accepted form of treatment for a patient's psychotic condition.

What basis is there for reading a right to such a package of benefits — including treatment — into the Constitution? The question is one to which a number of unsatisfactory answers have been proposed.¹⁴⁰ I begin with the proposition that the state owes to one involuntarily committed to its custody the same moral obligation that Part IV attributed to

¹⁴⁰ The quest to find a constitutional basis for the right to treatment has been going on for some time. The most recent attempt to find a basis for the right to treatment, however, looked to a statute rather than the Constitution. In *Pennhurst State School & Hosp. v. Halderman*, 49 U.S.L.W. 4363 (U.S. Apr. 20, 1981), the Supreme Court rejected a claim that the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-6081 (1976 & Supp. III 1979), guarantees a right to "treatment, services, and habilitation" to mentally retarded individuals committed to institutions run by participating states.

The Fifth Circuit in *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *vacated and remanded*, 422 U.S. 563 (1975), suggested that provision of treatment was a constitutionally required quid pro quo owed the individual who is deprived of his liberty without the usual criminal restrictions on methods of proof, the demand for a specific act, and a sentence limited to a fixed period of time. *Id.* at 521-27. The difficulty with the quid pro quo theory is that the exchange it proposes makes no sense. If the state — because of a relaxed procedure — locks up a sane person, he would hardly consider it a fair trade if he were treated for schizophrenia. And if the state locked up a person for five years after proving by the most procedurally scrupulous methods possible that he was schizophrenic, he might properly feel cheated that the state refused to provide treatment after proving so carefully that he needed it.

An alternate due process theory is most commonly identified with *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971), *aff'd sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *see* *Welsch v. Likens*, 373 F. Supp. 487, 496 (D. Minn. 1974) (dictum). *See generally* Dowben, *Legal Rights of the Mentally Impaired*, 16 HOUSTON L. REV. 833, 839-40 (1979); Spece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 ARIZ. L. REV. 1, 5-12 (1978). This theory, which was also adopted by the Fifth Circuit in *Donaldson*, would base the right on the notion that legislative means must rationally promote legislative ends: "To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process." *Wyatt v. Stickney*, 325 F. Supp. at 785, *aff'd sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *see* *Donaldson v. O'Connor*, 493 F.2d 507, 520-21 (5th Cir. 1974), *vacated and remanded*, 422 U.S. 563 (1975). *See also* *Rouse v. Cameron*, 373 F.2d 451, 453 (D.C. Cir. 1966) (dictum); *Welsch v. Likens*, 373 F. Supp. 487, 496 (D. Minn. 1974); *Stachulak v. Coughlin*, 364 F. Supp. 686, 687 (N.D. Ill. 1973); *Developments — Civil Commitment*, *supra* note 44, at 1326-27. The problem with *Wyatt's* means and ends argument is that the state's provision of simple custodial care is perfectly rational if the state commits an individual for the announced purpose of providing custodial care rather than "for humane therapeutic reasons."

The popularity of both due process approaches has suffered since the Supreme Court in *Donaldson* stripped the Fifth Circuit's opinion of precedential effect. 422

U.S. at 578 n.12. Subsequent cases have picked up the hint. *See* *Morales v. Turman*, 562 F.2d 993, 998 (5th Cir. 1977); *Scott v. Plante*, 532 F.2d 939, 947 (3d Cir. 1976). *See also* Spece, *supra*, at 4-15; Note, *Right to Treatment for the Civilly Committed: A New Eighth Amendment Basis*, 45 U. CHI. L. REV. 731, 732-35 (1978).

Some cases derive an eighth amendment approach from *Robinson v. California*, 370 U.S. 660 (1962), which prohibited incarceration for the status crime of being a narcotics addict, and conclude that it is cruel and unusual punishment to confine the mentally disabled without provision of treatment. *See, e.g., Rouse v. Cameron*, 373 F.2d 451, 453 (D.C. Cir. 1966) (dictum); *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1316 (E.D. Pa. 1977), *aff'd in relevant part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *rev'd*, 49 U.S.L.W. 4363 (U.S. Apr. 20, 1981); *Welsch v. Likens*, 373 F. Supp. 487, 496 (D. Minn. 1974); *Martarella v. Kelley*, 349 F. Supp. 575, 598-603 (S.D.N.Y. 1972). It is questionable, however, whether the eighth amendment has any application outside the criminal process. *See* *Ingraham v. Wright*, 430 U.S. 651, 664-71 (1977). Even if it does, the issue in right-to-treatment cases would be whether custodial confinement in a mental institution counted as "punishment," a matter taken for granted with regard to the county jail to which *Robinson* would have been sent. 370 U.S. at 660 n.1. One could draw the lesson that mere custodial confinement is "punishment" from *Estelle v. Gamble*, 429 U.S. 97 (1976), which held that deliberate refusal to provide medical treatment to a prison inmate might violate the eighth amendment. *Id.* at 104-05; *see* Note, *supra*, at 731. But it is difficult to see mere neglect of the mental patient as in any sense retributive or deterrent, and hence punitive, whereas the Court is inclined to view prison brutality as "part of the total punishment to which the individual is being subjected for his crime and, as such, . . . a proper subject for Eighth Amendment scrutiny." *Ingraham*, 430 U.S. at 669 (quoting lower court's opinion, *Ingraham v. Wright*, 525 F.2d 909, 915 (5th Cir. 1976)).

A final ground advanced for the right to treatment is sometimes tied to the equal protection clause, *see Developments — Civil Commitment, supra* note 44, at 1329-30, and sometimes discussed as an unadorned right to the least restrictive alternative, Spece, *supra*, at 3, 33-47. In either case, it amounts to an application of strict scrutiny to the deprivations of primary freedoms that commitment may entail: travel, speech, association, voting, sexual relations, bodily integrity, etc. *Chambers, supra* note 92, at 1155-68; *see Developments — Civil Commitment, supra* note 44, at 1193-201. Interference with such paramount rights can only be justified if the state demonstrates that its interest is sufficiently compelling and that the intrusion results in the least possible restriction of individual liberty. Because treatment may lead to an earlier release or greater freedom within the institution, it is argued that treatment is constitutionally required for all commitments save those in which the state can prove that treatment will be ineffective. *See* Spece, *supra*, at 42-43. The problem with this approach is its unquestioning assignment of value to the primary rights affected by commitment. On one hand, if the illness has no effect on, say, the schizophrenic's competence to vote, the state would show more respect for his constitutional right by providing an absentee ballot than it would by providing treatment leading to an earlier release. On the other hand, it is difficult to see how the inmate has a fundamental right to those freedoms affected by his illness — in the case of one who believes he is radioactive and shuns all contact with other human beings, for example, freedom of association or interests related to sexual relations. If he is unable to make rational choices regarding such matters, he is "free" before commitment only in the descriptive sense that he is subject to no governmental constraint. *See* p. 1759 & notes 13, 14 *supra*. If, as I have argued, the consistent interpretation of the Constitution has been that freedom presupposes the ability to choose, his enjoyment of those liberties is not diminished by the fact of commitment, and they provide no basis for the state's obligation to treat.

surrogates acting within a family relationship to the right-holder. The state exercises control over the patient's life to a degree equivalent to a parent's control over the life of a child; it prescribes diet, dress, living conditions, schedule, medication, companionship, and rules for enforcement of its regimen, and to a great degree interdicts the private provision of those same necessities. The reverse side of the state's control is the patient's dependence, a fact that is guaranteed if the *laissez-faire*, instrumental, and surrogate tests are applied before commitment is permitted. Given the absence of private alternatives and the institution's continuing supervision of his behavior, the state may be both the only entity able to provide help and the entity most familiar with the individual's needs.

Granted that a moral right against the state exists, is there any basis for constitutionalizing the good samaritan principle — for saying that the state may not have a duty to act, but that if it does take control of an incompetent's life, it cannot stop short of providing appropriate treatment? The answer is that the state creates a right to "life" in the same way it creates property rights and liberty rights. Strictly speaking, there is no such thing as a constitutional right to welfare payments,¹⁴¹ to a driver's license,¹⁴² to a teaching job at a state college,¹⁴³ to parole,¹⁴⁴ to probation,¹⁴⁵ or to "good-time credit."¹⁴⁶ Yet the Supreme Court has held that the government may create property and liberty interests in such benefits by statutes, "rules[,] or mutually explicit understandings."¹⁴⁷ The process by which such interests are created need not follow any particular formula:

[A]bsence of . . . an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in re-employment. . . . Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances."¹⁴⁸

The meaning of these due process cases for the right to "life" advanced in this Part is this: Once the state, by involuntary commitment, has taken complete control of the individual's life and required his total dependence upon the insti-

¹⁴¹ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

¹⁴² *Bell v. Burson*, 402 U.S. 535 (1971).

¹⁴³ *Perry v. Sindermann*, 408 U.S. 593 (1972).

¹⁴⁴ *Morrissey v. Brewer*, 408 U.S. 471 (1972).

¹⁴⁵ *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

¹⁴⁶ *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974).

¹⁴⁷ *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

¹⁴⁸ *Id.* at 601-02 (quoting 3 A. CORBIN, CONTRACTS § 562, at 287 (1960)).

tution, it is no longer in a position to make disclaimers about what the individual can expect. Its constitutional obligation to care for the incompetent arises not from what it explicitly promises — which may be nothing — but from what it does. By making the committed person look solely to the state for the necessities of life, it has in the clearest possible fashion created an expectation. The constitutional duty is coextensive with the degree of the claimant's dependence; its duty to act as surrogate is not simply a moral obligation but a constitutional one, equal to its duty not to interfere with private performance of the same function.

Could the state explicitly deny that it intends to provide anything more than food, clothing, and shelter, thereby getting itself off the hook of having to provide treatment? I think not. The crucial fact is that the relationship of control and dependence is not offered but imposed. By taking complete control of the institutionalized individual's life, the state steps into a well-defined role that our society endows with well-defined obligations. The paradigm is the relation of control and dependence between parent and child — a role that entails parental duties to provide not only food, clothing, and shelter, but in addition education and proper moral care and attention. The role the state plays should thus define the contours of its obligation.¹⁴⁹

C. Further Applications of the Right to "Life"

In this final Section, I would like to suggest a few other applications of the right to "life." A logical extension of the right to treatment just discussed is a right to habilitation for the institutionalized mentally retarded. Such a claim does not require new grounds on which to base the right; the same factors of control and dependence, familiarity with the individual's needs, and capacity to meet them provide a foundation for the state's constitutional obligations.¹⁵⁰ The only signifi-

¹⁴⁹ Even so, why say that treatment is owed when the incompetent has no expectation of private help that he loses by entering the institution? The answer is that there is no reason to suppose that the state's constitutional duty must have a quasi-contractual basis. After all, the recipients of government relief in *Goldberg v. Kelly*, 397 U.S. 254 (1970), had to be unable to support themselves from other sources, *id.* at 355 n.1; thus, they gave up nothing by their reliance on state aid. The crucial point is that the state is constitutionally required to provide for those whom it chooses, expressly or impliedly, to make its dependents.

¹⁵⁰ Cases and commentators have not hesitated to extend the right to treatment for the mentally ill to encompass a right to habilitation for the retarded. See, e.g., *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1314-22 (E.D. Pa. 1977), *aff'd in relevant part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *rev'd*, 49 U.S.L.W. 4363 (U.S. Apr. 20, 1981); *Gary W. v. Louisiana*, 437 F. Supp. 1209 (E.D.

cant difference between the mentally ill and the mentally retarded is that most commitments of the retarded are "voluntary," that is, initiated by the family. This fact appears to leave open to the state the argument that, since the retardate's life is still being controlled by private surrogates, the state's only obligation is not to interfere actively with the surrogate's choices. Thus, if the state provides inadequate care, the state may claim that the parents are ultimately responsible.¹⁵¹ But applying this argument to long-term commitment stretches the meaning of "private control" beyond recognition. When the surrogate turns over total care of the incompetent for any extended period, he effectively indicates his inability or unwillingness to look after the incompetent's interests. The state must accept the responsibility that comes with the power it has assumed and provide the habilitation that the private surrogate would ordinarily provide.

State removal of children from abusive and neglectful parents presents a more complex problem. The primacy of choices made by familial surrogates suggests that state intervention should be limited to cases in which it would harm the child demonstrably less than his current family situation — cases of actual or imminently threatened severe physical harm, sexual abuse, or perhaps serious and reliably diagnosed emotional damage.¹⁵² If, for these reasons or because of abandonment, parental rights must be terminated, the right to "life" requires careful attention to the state's manifest inability to take over the role vacated by the parents.¹⁵³ This inability means that, prior to taking direct control of the child, the state must explore all alternatives, such as relatives, foster care, and group homes, focusing on their resemblance to the child's original home situation.

The disposition of juveniles who have been adjudicated delinquent presents still more difficult issues. Although one

La. 1976); *Welsch v. Likens*, 373 F. Supp. 487, 491-500 (D. Minn. 1974); *Wyatt v. Stickney*, 344 F. Supp. 387, 390 (M.D. Ala. 1972), *modified sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Renelli v. State Comm'r of Mental Hygiene*, 73 Misc. 2d 261, 263, 340 N.Y.S.2d 498, 500 (1973). See generally Halpern, *The Right to Habilitation*, in PRESIDENT'S COMM. ON MENTAL RETARDATION, *supra* note 90, at 385; Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 CREIGHTON L. REV. 124 (1976).

¹⁵¹ Although it dealt with procedural due process rights of juveniles "voluntarily" committed by their parents, *Parham v. J.R.*, 442 U.S. 584 (1979), relied heavily on the theory outlined in text. See *id.* at 602.

¹⁵² For more careful treatment of the grounds for termination of parental rights, see ABUSE AND NEGLECT, *supra* note 110; J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 110; Mnookin, *Foster Care — In Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973).

¹⁵³ See J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *supra* note 110, at 11-12.

can find considerable support for a right to treatment for such juveniles,¹⁵⁴ the problem is complicated by the fact that, unlike abandoned children or the mentally ill, the juvenile offender has been found to have committed a crime punishable without treatment when committed by an adult.¹⁵⁵ Many offenses are grounds for depriving adults of liberty, and in some cases even of life. If there is a reason for treating the juvenile differently, it is because his responsibility is diminished in proportion to his lesser capacity for choice.¹⁵⁶ If the hierarchy advocated in this Article¹⁵⁷ is used, the laissez-faire conception of liberty requires case-by-case adjudication of competence in such an important matter (though, in this case, the juvenile will want to show that he is *incompetent*). For juveniles found to be of diminished capacity, the right to "life" suggests that when the state commits the delinquent to the coercive custody of an institution, it must assume the role left vacant or unfulfilled by the juvenile's parents — a point recognized by a number of state delinquency statutes.¹⁵⁸ What is troubling about the theory is the current, and maybe absolute, impossibility of putting it into practice. If we are to accept the idea that an institution is to have custody of the juvenile delinquent convicted of certain offenses, we inescapably abandon all hope of providing the love, stability, fair discipline, and mutual self-interest that characterize the best family relationships. Those are qualities of care that the law is simply incapable of enforcing.

VI. CONCLUSION

Medieval painters often gave the infant Jesus a child's body and an old man's head. Judges and lawyers frequently think of children that way — as simply miniature adults with the

¹⁵⁴ See, e.g., *Morales v. Turman*, 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd and remanded*, 535 F.2d 864 (5th Cir. 1976), *rev'd and remanded per curiam*, 430 U.S. 322 (1977); *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1972), *aff'd*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *Inmates of the Boys' Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972); cf. *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972) (adequate treatment to nondelinquent infant detainees required by due process and prohibition of cruel and unusual punishment). See generally ABA & INSTITUTE OF JUDICIAL ADMINISTRATION, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO DISPOSITIONS Standard 4.1 & Commentary (1980); Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 GEO. L.J. 848 (1969); Pyfer, *The Juvenile's Right to Receive Treatment*, 6 FAM. L.Q. 279 (1972).

¹⁵⁵ *Morales v. Turman*, 562 F.2d 993, 998 (5th Cir. 1977).

¹⁵⁶ See generally H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 173-83 (1968).

¹⁵⁷ See p. 1761 *supra*.

¹⁵⁸ See, e.g., Juvenile Court Act, § 1-2(1) (1965), ILL. REV. STAT. ch. 37, § 701-2(1) (1977); IND. CODE § 31-5-7-1 (1976); R.I. GEN. LAWS § 14-1-2 (1970).

same sort of constitutional freedoms. In defining the constitutional freedoms of the mentally ill, the retarded, and other incompetents, the legal system often makes the same mistake. Because these individuals lack the capacity to make fully rational choices, constitutional freedoms and the choices they protect must often be justified for them in different ways. This Article suggests a hierarchy of possible justifications for granting freedoms to persons of diminished capacity. First, we should look to see whether the deprivation of a particular constitutional freedom is so severe that we must make individualized determinations about competence to exercise it. Second, we should investigate whether there are instrumental reasons for allowing incompetent persons to exercise freedoms: to train children in the exercise of liberties, or to aid the institutionalized mentally ill in seeking freedom if they have been wrongfully confined. Third, when too much is at stake to allow the incompetent to make choices for himself, or when he is simply incapable of choosing at all, we should protect his right to have decisions made on his behalf by those closest to him — typically, his family. Finally, when these three options have been exhausted, the state may step in to make choices for the incompetent. When it does so, it assumes all the duties that caretakers such as parents normally owe to their charges, including both the familiar necessities of life and treatment or habilitation as well.