From Warren to Rehnquist: The Growing Conservative Trend in the Supreme Court's Treatment of Children

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FROM WARREN TO REHNQUIST: THE GROWING CONSERVATIVE TREND IN THE SUPREME COURT’S TREATMENT OF CHILDREN

Historically, children as individuals have not been afforded the same degree of constitutional protection as adults.1 The Supreme Court, while acknowledging that the Constitution guarantees certain individual rights to children,2 has generally not applied stringent standards in determining whether the rights of children have been abridged or denied.3 Traditionally, the Court’s decisions

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1 See, e.g., H.L. v. Matheson, 450 U.S. 398, 413 (1981) (state may require parental notification before dependant, unmarried minor may have abortion); see also Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) (state may provide more restricted right for minors to decide what sex material they will read); Keiter, Privacy, Children, and Their Parents: Reflections on and Beyond the Supreme Court’s Approach, 66 MINN. L. REV. 459, 467 (1982) (rights granted to children are not equal in extent to those granted to adults); Note, California’s Parental Consent Statute: A Constitutional Challenge, 40 HASTINGS L.J. 169, 169 (1988) (hereinafter Note, California’s Parental Consent Statute] (historically, constitutional rights of minors have not been “coterminous” with those of adults); Note, Children’s Rights Under the Burger Court: Concern for the Child, But Deference to Authority, 60 NOTRE DAME L. REV. 1214, 1215 (1985) (hereinafter Note, Children’s Rights Under the Burger Court] (“constitutional rights of children cannot be equated with those of adults”) (citing Bellotti v. Baird, 443 U.S. 622, 634 (1979)).

2 See, e.g., Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) (“[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority”); In re Gault, 387 U.S. 1, 13 (1967) (“neither the Fourteenth Amendment nor the Bill of Rights is for adults alone”).

3 See L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-31, at 1590 n.8 (2d ed. 1988). Although the Bill of Rights guarantees some rights to minors, a “somewhat less rigorous test” applies to a state’s restrictions of a minor’s rights. Id. “[A] significant state interest not present in the case of an adult will suffice in lieu of a ‘compelling justification.’” Id.; see also Bellotti 443 U.S. at 634 (“constitutional principles [should] be applied with sensitivity and flexibility to the special needs of children”); Danforth, 428 U.S. at 75 (state required to show only significant, as opposed to compelling, interest to limit minor’s right to abortion); Note, Children’s Rights Under the Burger Court, supra note 1, at 1226 n.111 (Burger Court vested broad discretionary power in states to regulate what limited rights it had given children).

The Bellotti Court cited three reasons why the constitutional rights of children should not equal those of adults: (1) “[T]he peculiar vulnerability of children;” (2) “their inability to make critical decisions in an informed, mature manner; and” (3) “the importance of the parental role in child rearing.” Bellotti, 443 U.S. at 634; see also Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (“power of the state to control the conduct of children reaches beyond the scope of its authority over adults”); cf. Carey v. Population Servs. Int’l, 431 U.S.
affecting the rights of children were based on the policy that parents have the right to control the upbringing of their children free from unreasonable state interference. Illustrating this traditional view are two cases decided in the 1920's, Meyer v. Nebraska and Pierce v. Society of Sisters. In Meyer, a state statute that prohibited the teaching of foreign languages to students before the ninth grade was held unconstitutional because it interfered with both the teacher's right to teach and the parents' right to control the education of their children. Similarly, in Pierce, a state statute that required parents to send their children to public rather than private school was declared unconstitutional for unreasonably infringing upon the privilege of parents to direct their children's education. Although in both instances the Court agreed that the state had exceeded its authority to direct the actions of minors, the basis for these decisions was not the protection of children's rights. Rather, the Court determined that the state's power was limited by family autonomy and parents' rights.

In Prince v. Massachusetts, the Supreme Court, though reaffirming the traditional view, clarified the state's role in protecting

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678, 693 (1977) (strict scrutiny does not apply to ban on sale or advertisement of contraceptives to minors).

4 See Rush, The Warren and Burger Courts on State, Parent, and Child Conflict Resolution: A Comparative Analysis and Proposed Methodology, 36 Hastings L.J. 461, 464 (1985) (parent-child relationship, though not completely immune from state regulation, has been "viewed as sacrosanct" from "time immemorial"); see also Keiter, supra note 1, at 460 ("[a]bsent parental abuse or neglect, the judiciary has traditionally limited its involvement in the parent-child relationship").

6 262 U.S. 390 (1923).
6 268 U.S. 510 (1925).
7 Meyer, 262 U.S. at 399-400. The Court held that the rights of teachers to teach their students and of parents to educate their children are protected by the fourteenth amendment. Id. in addition, the statute was deemed arbitrary in that it failed to effect any legitimate state interest. Id. at 403.
8 Pierce, 268 U.S. at 534-35; cf. L. Tribe, supra note 3, § 14-16, at 1299. In "[d]enying that the child is 'the mere creature of the State,' . . . [the Court] seemingly opined that the child is entirely the creature of 'those who nurture him and direct his destiny' . . . ." Id. (quoting Pierce).
9 See Pierce, 268 U.S. at 534 ("there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education"); Meyer, 262 U.S. at 403 ("[n]o emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition").
10 See Pierce, 268 U.S. at 535 (parents have right, coupled with high duty, to bring up and educate their children); Meyer, 262 U.S. at 403 (nearly all states enforce parents' natural duty to give their children suitable education by compulsory laws).
minors. The Court in *Prince* determined that a Jehovah’s Witness had violated a state statute prohibiting child labor when she allowed her niece to sell religious pamphlets on a street-corner. The Court held that although the “care and nurture of the child reside first in the parents,” the state may limit parents’ rights in order to protect the well-being of the minor.

The traditional view, encompassing both the family’s right to privacy and the notion that the parent generally acts in the best interests of the child, has never been discredited and, in fact, has served as the foundation for several modern opinions. In certain other decisions, however, the Supreme Court has recognized that the family situation is not always ideal and has emphasized the distinct rights of a minor, or alternatively, has substituted the state as *parens patriae* in the place of a parent or guardian.

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13 See *id.* at 166-69.
14 *Id.* at 160. The child testified that she believed that it was her duty to sell the religious pamphlets or be condemned to “everlasting destruction.” *Id.* at 162-63. The Court’s decision to hold the child’s guardian liable turned on the competing rights of parents to encourage children in the practice of religious beliefs and of the state in protecting the welfare of a child. *See id.* at 165. The rights of children to exercise their religion were only briefly mentioned. *See id.*
15 *Id.* at 166.
16 *Id.* at 166. The Court held that child labor is an evil that is within the state’s police power to regulate, even in opposition to the parents’ wishes. *Id.* at 168-69.
17 *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (“natural bonds of affection lead parents to act in the best interests of their children”); *Prince*, 321 U.S. at 166 (“decisions have respected the private realm of family life which the state cannot enter”). *But see Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972) (warning that parents’ failure to give children necessary care, support, and attention may lead to state intervention and deprivation of parents’ authority).
18 *See, e.g.*, H.L. v. Matheson, 450 U.S. 398, 410 (1981) (“basic in the structure of our society” to recognize claim of parental authority in their own household to direct rearing of their children); *Parham*, 442 U.S. at 602 (parents have right and obligation to prepare child for life).
19 *See, e.g.*, *In re Gault*, 387 U.S. 1, 30 (1967) (fifteen-year-old juvenile delinquent is entitled to due process of law).
20 *See* BLACK’S LAW DICTIONARY 1114 (6th ed. 1990). Literally “parent of the country,” the term *parens patriae* traditionally refers to the role of the state as sovereign and guardian of persons under legal disability. *Id.; see also Feld*, Criminalizing Juvenile Justice: *Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 148 (1984) (“legal justification for intervention was *parens patriae*—the right and responsibility of the state to substitute its own control over children . . . when the [natural parents] were unable or unwilling to meet their responsibilities”); *Kelzer*, supra note 1, at 498 (legal basis for state to protect those who do not have capacity to protect themselves). *See generally Custer*, The Origins of the Doctrine of Parens Patriae, 27 EMORY L.J. 195 (1976) (brief study of medieval English common-law origins of concept of *parens patriae*).
21 *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (citations omitted) (with regard to regulating dissemination of child pornography, a “[s]tate’s interest in ‘safeguard-
This Note will discuss the Supreme Court's treatment of children's rights, focusing primarily on decisions relating to juvenile delinquents, a minor's right to obtain an abortion without her parents' knowledge, and the testimony of a child witness in a sexual abuse case. The discussion will begin with the development of children's individual rights during the Warren era and the Burger Court's occasional return to the traditional view. This Note will then explore recent decisions of the Rehnquist Court and will suggest that the conservative trend apparent in the Court's recent decisions will continue to the detriment of children's individual rights.

I. RECOGNITION AND DEVELOPMENT OF CHILDREN'S RIGHTS

A. The Warren Court: 1953-1969

The development of children's individual rights began with the Warren Court, most notably in 1967, when In re Gault\(^2\) established the principle that constitutional protections extend to children as well as adults.\(^2\) In Gault, a minor had been arrested for making an obscene phone call.\(^2\) The police held and questioned the minor without giving formal notice to his parents.\(^2\) At a hearing to determine whether the minor's parents should retain custody, the complainant did not appear, there was no sworn testimony, and no transcript was taken.\(^2\) Notwithstanding the hearing's failure to satisfy fundamental due process requirements, the Court proceeded to commit the minor to a state industrial
school for six years.\textsuperscript{26}

The juvenile delinquency system under which Gault's case had been prosecuted was a product of the "Progressive Movement," which originated around the turn of the century.\textsuperscript{27} The theory behind the system is that criminal behavior by minors is attributable to "environmental pressures (or lack of them) or . . . other forces beyond their control."\textsuperscript{28} Accordingly, the system focuses on the reformation of offenders rather than on their punishment.\textsuperscript{29} To this end, juvenile court proceedings have been cast in a civil rather than a criminal light,\textsuperscript{30} thus granting judges much more discretion than they would enjoy in ordinary criminal trials.\textsuperscript{31}

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\textsuperscript{26} Id. at 7-8. The provision under which Gerald Gault was convicted, if violated by an adult, would have resulted in a fine of five to fifty dollars or not more than two months of incarceration. Id. at 8-9.

\textsuperscript{27} See Feld, supra note 19, at 142-46. Between 1870 and World War I, the Industrial Revolution in America brought about significant economic development. Id. at 142-43. As the United States developed from an agrarian to an industrial society, the Progressives recognized the effects of urban decay and embarked on a program of "child-saving"; their influence contributed to the passage of child welfare, child labor, and compulsory school attendance laws, and to the development of a juvenile court system. Id. at 143-46; see also W. LaFAvE \& A. SCOTT, CRIMINAL LAW 398-402 (2d ed. 1986) [hereinafter LAFAvE \& SCOTT]. All jurisdictions have laws providing that some or all criminal conduct committed by persons under a certain age must be adjudicated in juvenile court rather than criminal court. Id. at 398. Juvenile courts deal with neglected and dependent children, as well as with juvenile delinquents. Id. at 400.

\textsuperscript{28} McKeiver v. Pennsylvania, 403 U.S. 528, 551-52 (1971) (White, J., concurring).

\textsuperscript{29} See Feld, supra note 19, at 146-47. The "protective" theme inherent to the juvenile justice system reflected changes in some of the basic assumptions about the sources of criminal conduct. See id. at 146. The system functioned upon the theory of parens patriae. Id. at 148. The actual events that brought the minor before the court were secondary to issues involving the child's background and welfare, and did not affect the degree or duration of the court's intervention. Id. at 151. Because the needs of each child differed, no limit to the state's involvement could be defined in advance of each prosecution. Id. The Progressive influence, however, was significantly diminished beginning with the Gault case, in which the juvenile delinquent's procedural due process rights were protected in spite of his minority. Gault, 387 U.S. at 21.

\textsuperscript{30} See Feld, supra note 19, at 149. The civil nature of the juvenile proceedings allowed the courts to reach many noncriminal actions committed by minors, such as smoking, sexual activity, truancy, and vagrancy. Id. Known as "status jurisdiction," it authorized the court to intervene at an earlier, predelinquent stage in order to increase the success of rehabilitation. Id. at 149-50; see also LaFAvE \& SCOTT, supra note 27, at 38 ("a civil rather than a criminal matter, calling for treatment instead of punishment").

\textsuperscript{31} See Schall v. Martin, 467 U.S. 253, 283 (1984) (Marshall, J., dissenting) (very few limits on judge's discretion; there are no guidelines or procedural constraints on judge before he denies juvenile's liberty); see also Walkover, The Infancy Defense in the New Juvenile Court, 31 UCLA L. REV. 503, 516 (1984) ("court was empowered to determine the 'needs' of the child, and its inquiries were not limited to examination and adjudication of criminal conduct").

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Although they were afforded some protections not available to adult offenders, juveniles were denied many basic due process protections. In *Gault*, the Supreme Court began reforming the system by setting aside the minor's conviction and holding that while a juvenile hearing need not "conform with all of the requirements of a criminal trial or even of the usual administrative hearing . . ., [it] must measure up to the essentials of due process and fair treatment." The Court noted that failure by the juvenile courts "to observe the fundamental requirements of due process has resulted in instances . . . of unfairness to individuals," and concluded that requiring adherence to these safeguards is necessary "to protect a juvenile accused . . . on a charge under which he can be imprisoned for a term of years."

The constitutional rights of children were addressed in a different context by the Warren Court in *Tinker v. Des Moines Independent Community School District*. In *Tinker*, the Court upheld a minor's right to demonstrate his objection to the Vietnam war by wearing black armbands in school. Finding the protest to
be a passive expression that did not interfere with the right or ability of school officials to maintain discipline and normal school operations, the Court held that students "may not be confined to the expression of those sentiments that are officially approved."

B. The Burger Court: 1969-1986

Consideration of the individual rights of children continued during the tenure of Chief Justice Burger. During this era, the state became an important player in determining the rights of children, occasionally even to the exclusion of the parent. In the area
of juvenile delinquency, for example, the Court, proceeding from Gault, undertook the task of defining which constitutional protections were necessary to afford juveniles the "essence of due process." As a result, in addition to the protections afforded to minors by Gault, the Burger Court determined that juveniles are protected against double jeopardy and that conviction of a minor requires proof of guilt "beyond a reasonable doubt." The Court also concluded, however, that juveniles are not entitled to a trial by jury. The denial of the right to a jury trial seemed to signify

584, 604-06 (1979) (parents may voluntarily commit their child to institutional mental health facility without formal hearing, but inquiry by "neutral factfinder" required to determine whether statutory requirements for admission are met).

42 See infra notes 43-46 and accompanying text.

43 See supra note 35 and accompanying text (enumerating protections given to minors by Gault).

44 See Breed v. Jones, 421 U.S. 519, 541 (1975). A minor arrested for robbery received an adjudicative hearing in juvenile court, and upon the judge's finding that the allegations in the petition relating to the robbery were true, the proceedings were continued for a dispositional hearing. Id. at 522. At the hearing two weeks later, however, the minor was transferred to criminal court to be prosecuted as an adult. Id. at 523-24. The Supreme Court, ignoring the "civil" label placed on juvenile proceedings, found that the minor had already been put in jeopardy and thus could not be subjected to adjudication twice for the same offense. Id. at 529-33.

45 See In re Winship, 397 U.S. 358 (1970). In Winship, a minor was accused of stealing one hundred and twelve dollars from a woman's purse, an act that would constitute larceny if committed by an adult. Id. at 360. After a hearing before a New York Family Court, "[t]he judge acknowledged that the proof might not establish guilt beyond a reasonable doubt, but rejected ... [the defendant's] contention that such proof was required by the Fourteenth Amendment." Id. The judge instead applied the New York Family Court Act, which required that guilt be proven by the lesser standard of a preponderance of the evidence. Id. The Supreme Court, in rejecting application of the preponderance standard, reasoned that "[t]he same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child." Id. at 365. One commentator observed that Winship "placed the concept of criminal culpability at the heart of the juvenile proceeding," for if the goals of the juvenile system were rehabilitation and treatment alone, a standard of review more lenient than proof "beyond a reasonable doubt" would suffice to effectuate those goals. See Walkover, supra note 31, at 521-22; see also Feld, supra note 19, at 244 (application of this highest standard of review protects against conviction of innocent persons).

46 See McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971). Although the sixth amendment guarantees the right to a jury "in all criminal prosecutions," it does not follow that a jury is required in a juvenile court hearing, since such a hearing is not considered a "criminal prosecution" within the meaning of the sixth amendment. Id. at 540-41. The emphasis in a juvenile proceeding is factfinding, and the Burger Court refused to say that a jury is a necessary component of accurate factfinding. Id. at 543. The Court expressed a fear that a jury would turn the juvenile court hearing into a fully adversarial proceeding and thereby undermine many of the benefits of the flexible juvenile system. Id. at 545. But see Feld, supra note 19, at 241-46. There is a greater risk of prejudice when there is no jury. Id. at 241. Since the judge is both the trier of fact and the one who rules on the admissibility of
that while the Court sought to prevent the type of disregard for procedure evidenced in *Gault*, it was reluctant to completely abandon an informal, nonadversarial juvenile system by extending to delinquents all of the due process protections afforded to adults.\(^4^8\)

In addition to the plight of the juvenile delinquent, the Burger Court was confronted with children's issues that had never previously been addressed.\(^4^9\) In *Planned Parenthood v. Danforth*,\(^5^0\) the Court struck down a state statute that required parental consent before any unmarried girl under the age of eighteen could obtain an abortion.\(^5^1\) The Court found that although the making of certain decisions may be beyond the capacity of the average minor to act in her own best interests,\(^5^2\) a blanket third-party veto of a juvenile's decision to have an abortion cannot withstand constitutional scrutiny.\(^5^3\) The Court in *Danforth*, by concluding that "[a]ny inde-
pendent interest the parent may have regarding the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor," dramatically altered the traditional view of the parents' right to control the actions of their minor child.56

Three years after Danforth, the Supreme Court considered another parental consent statute and outlined a judicial bypass procedure that would render such a statute constitutional.57 In Bellotti v. Baird, the Court held that a minor is entitled to a judicial hearing, conducted without her parent's knowledge, to show either that she is mature enough to make the abortion decision herself,58 or alternatively, to prove that it is within her best interests to have the abortion without informing her parents.59 The Court further concurring). He noted that this would encourage consultation between parent and child without imposing parental approval as an absolute condition. Id. at 91 (Stewart, J., concurring).

For cases upholding bypass provisions similar to the one suggested by Justice Stewart, see generally Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 493 (1983) (upholding statute with such judicial bypass provision); H.L. v. Matheson, 450 U.S. 398, 413 (1981) (statute requiring parental notice, not parental consent, upheld).

55 See infra 57-60 and accompanying text.
56 443 U.S. 622 (1979). The Massachusetts statute required the consent of both parents before an unmarried minor under age eighteen could have an abortion. Id. at 625. If parental consent was refused, the minor could go to court and, "for good cause shown," receive judicial consent. Id. After certifying questions to the Massachusetts Supreme Judicial Court, the United States Supreme Court found that, according to this statute, an unmarried minor could not seek judicial consent without first seeking parental consent. Id. at 630. Furthermore, even if the minor was found to be capable of making this decision, the judge was entitled to withhold consent if he or she felt that an abortion would not be in the best interest of the child. Id.
57 Id. at 643.
58 Id. at 644. The Massachusetts statute failed to pass constitutional muster both because there was no way for a minor to obtain judicial consent without first informing her parents and because the judge could arbitrarily deny a mature minor the choice to have an abortion. Id. at 651; cf. id. at 653-54 (Stevens, J., concurring) (any consent statute, regardless of judicial bypass subjects minor to third party veto); Keiter, supra note 1, at 474-75 (discussion of Justice Steven's concerns in Bellotti).
determined that the procedure must ensure the minor's anonymity and be expedited through the trial court and appellate levels.\textsuperscript{[60]}

Although the Court had apparently ensured a minor's right to privacy in \textit{Bellotti}, the Burger Court appeared to retreat toward a more traditional view of family relations in \textit{H.L. v. Matheson}.\textsuperscript{[61]} In \textit{Matheson}, the Court upheld a statute requiring parental notification, but not consent, before a minor could obtain an abortion, despite the fact that the statute lacked a judicial bypass provision.\textsuperscript{[62]} Although the Court carefully limited its holding to immature and unemancipated minors,\textsuperscript{[63]} its approval of a parental notification statute with no judicial alternatives effectively amounted to a reinforcement of the traditional right of parents to control the upbringing of their children.\textsuperscript{[64]}

Two cases decided by the Burger Court in 1983, however, adhered more closely to the \textit{Danforth/Bellotti} model than to the traditional view resurrected in \textit{Matheson}.\textsuperscript{[65]} In \textit{Planned Parenthood Ass'n v. Ashcroft},\textsuperscript{[66]} a judicial bypass provision similar to the

\textsuperscript{60} See \textit{Bellotti}, 443 U.S. at 644.

\textsuperscript{61} 450 U.S. 398 (1981).

\textsuperscript{62} \textit{Id.} at 409-10. In \textit{Matheson}, a minor discovered that she was pregnant and was advised by a doctor that it was in her best medical interests to have an abortion. \textit{Id.} at 400. Because the girl was unmarried and fifteen, the state statute required that the doctor notify one of her parents, even though a social worker determined that it would not be in her best interest. \textit{Id.} at 400-01. Justice Marshall, in his dissent, criticized the Court for hinting that more carefully drawn pleadings could lead to a successful challenge. \textit{Id.} at 425-26 (Marshall, J., dissenting). He also condemned the state for putting obstacles in the minor's way without demonstrating that they were closely tailored to a "significant state interest." \textit{Id.} at 441 (Marshall, J., dissenting).

\textsuperscript{63} \textit{Id.} at 406.

\textsuperscript{64} See \textit{id.} at 410. A mere parental notice requirement does not violate the rights of the minor, for it is "basic in the structure of our society" to recognize the parents' claim of authority in their own household to direct the upbringing of their children. \textit{Id.} (quoting \textit{Ginsberg v. New York}, 390 U.S. 629, 639 (1968)); see also \textit{Keiter}, supra note 1, at 478 (two sets of interests involved: (1) preventing child from making bad decision; and (2) reinforcing parental role in child-rearing); Note, \textit{Children's Rights Under the Burger Court}, supra note 1, at 1230-31 (Burger Court retreated from \textit{Bellotti} and went back to traditional role of parents as counselor to child).

\textsuperscript{65} See infra notes 66-70 and accompanying text.

\textsuperscript{66} 462 U.S. 476 (1983).
one outlined in Bellotti was upheld. Similarly, the Court in Akron v. Akron Center for Reproductive Health struck down a blanket provision requiring the written consent of one parent before a girl under the age of fifteen could obtain an abortion.

II. THE REHNQUIST COURT

In 1986, a new era in Supreme Court history began when Justice Rehnquist was appointed Chief Justice in place of Chief Justice Burger. The Court continues to be confronted with new issues involving children, such as the difficulties encountered in obtaining the testimony of the child-victim in a sexual abuse case. At the same time, the Court has sought to define the parameters of previously established children's rights. During recent years, increasing public awareness of the tragedy of sexually abused children and frustration over the problems associated with the prosecution of the alleged abusers have led state legislatures to enact statutes designed to remove some of the most serious obstacles to prosecuting these cases. A problem often encountered in

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67 See supra notes 57-60 and accompanying text. Pursuant to the Missouri statute, a minor under the age of eighteen who was seeking an abortion was required to give her informed, written consent. Ashcroft, 462 U.S. 476, 479 n.4. In addition, the statute required the consent of at least one parent unless the minor was emancipated, granted the right to self-consent, or granted consent by a court order. Id. at 479-80 n.4.

68 Ashcroft, 462 U.S. at 490-91. "A [s]tate's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial," but the state must provide an alternative procedure whereby a pregnant minor may demonstrate "maturity" or "best interests." Id. The Court in Ashcroft held that constitutional infirmities were avoided because the judge's discretion was limited in that a denial of judicial consent required a showing of "good cause." Id. at 493.


70 Id. at 441-42. The Akron, Ohio ordinance, id. at 422-25 nn.2-8, six provisions of which were struck down as unconstitutional, was a pervasive abortion statute that sought to regulate the informed consent of both adult women and minors before an abortion could be performed. Id. at 422-51. Among the provisions condemned by the Court was one which required the "attending physician" to provide the minor with information regarding the risks of her pregnancy and the abortion techniques to be employed. Id. at 446. The Court concluded that "we cannot say that the woman's consent to the abortion will not be informed if a physician delegates the counseling task to another qualified individual." Id. at 448.


72 See infra notes 80-87 and accompanying text.

73 See infra notes 88-107 and accompanying text.

74 See Comment, LB 90 and the Confrontation Clause: The Use of Videotaped and In Camera Testimony in Criminal Trials to Accommodate Child Witnesses, 68 Neb. L. Rev. 372, 397 (1989). "Although many cases of child sexual abuse are reported in the United States, a significant percentage of child abuse cases are either dismissed before trial or re-
sexual abuse cases is that the victim's testimony may be the only existing evidence of the crime. Many states, recognizing the traumatic effect that testifying can have on children in these circumstances, have enacted statutes containing alternative procedures to open-court testimony. The alternatives employed, however, have

result in acquittals as a result of problems in getting the child to testify." Id. "Growing public awareness of the problems associated with the prosecution of sex abuse cases has led many states to alter their rules of evidence and criminal procedure." Id. at 373; see generally Note, Sexually Abused Children: The Best Kept Legal Secret, 3 N.Y.L. Sch. Hum. Rts. Ann. 441, 446 (1988) ("it is estimated that only 24 percent of all child sexual abuse cases nationwide result in criminal actions").


In Stincer, the defendant was charged with three counts of first degree sodomy involving three minors. Stincer, 482 U.S. at 732. Prior to trial, a competency hearing was conducted for two of the children. Although the defendant's attorney was allowed to attend the hearing, the defendant himself was excluded. Id. at 732-33. In appealing his conviction, the defendant asserted that his exclusion from the hearing violated his right to confrontation. Id. at 735. The Supreme Court, while agreeing that the hearing was a critical phase of the trial, nevertheless denied the defendant's confrontation clause objection because no substantive evidentiary questions are asked during a competency hearing and because the defendant was given the chance to face and cross-examine the witnesses at trial. Id. at 740.

Similarly, the defendant in Ritchie, accused of sexually abusing his daughter, claimed that his sixth amendment right to confrontation was violated when he was denied access to the office records of the social agency that had reported him. Ritchie, 480 U.S. at 43-45. The Court held that the defendant's right to confrontation was protected because he had the opportunity to cross-examine his daughter. Id. at 54. In addition, the Court determined that the state has a compelling interest in protecting the information gathered on child abuse. Id. at 60-61. Recognizing the difficulty involved in detecting the abuse and prosecuting the abuser, the Court concluded that it "is essential that the child have a state-designated person to whom they can turn" with confidentiality. Id. at 60.

In the earlier Globe case, however, while the court noted the compelling interests of the state in protecting victims from child abuse and encouraging them to come forward, it struck down a statute that made it mandatory to close the courtroom to the press and public during a trial of any sexual offense involving a child-victim. Globe, 457 U.S. at 607-11.

See Comment, The Young Victim as Witness for the Prosecution: Another Form of Abuse?, 89 Dick L. Rsv. 721, 731 (1985) (because of nature of sexual conduct, prosecutors often left with no evidence other than testimony of minor).

See Maryland v. Craig, 110 S. Ct. 3157, 3167-68 (1990). Thirty-seven states have statutes that permit a child victim of sexual abuse to testify by way of videotaped testimony; twenty-four states allow the use of one-way closed circuit television; eight states allow the use of two-way closed circuit television. Id.

often led to sixth amendment confrontation clause objections by the adult defendants.\textsuperscript{77}

In 1988, the Supreme Court considered such an objection in \textit{Coy v. Iowa}\textsuperscript{78} and struck down a state statute that, because of a legislative presumption of trauma, allowed for a screen to be placed between the defendant and the witness during the child-victim’s testimony.\textsuperscript{79} In striking down the statute, the Court stated that it was "difficult to imagine a more obvious or damaging violation of the defendant’s right to a face-to-face encounter."\textsuperscript{80} The
Court indicated, however, that while the statute failed because of its blanket presumption of trauma, children do in fact have a right to be protected from their accused abusers.\footnote{See Coy, 487 U.S. at 1021 ("there have been no individualized findings that these particular witnesses needed special protection"); see also id. at 1025 (O'Connor, J., concurring) ("if a court makes a case-specific finding of necessity ... our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses"); Note, Closed Circuit Television and Videotape Transmission of Child Sexual Assault Victim's Testimony, 10 U. Bridgeport L. Rev. 165, 181 (1989) (Coy rejected statutory presumption of trauma in all cases, not policy of protecting children).}

More recently, the Rehnquist Court upheld the child's right to protection in \textit{Maryland v. Craig}.\footnote{110 S. Ct. 3157 (1990).} In \textit{Craig}, the defendant, who owned and operated a kindergarten and prekindergarten center, was charged with sexually abusing a number of children who had attended the center.\footnote{Id. at 3160-61. The Maryland statute under consideration requires that the child's testimony be taken in a separate room during the proceeding. \textit{Id.} at 3161 n.1. Only the prosecuting attorney, the defense counsel, and the judge may question the witness, and the only people allowed in the room with the child during the questioning are the two attorneys, the operators of the closed circuit television, and a person whose presence "contributes to the well-being of the child." \textit{Id.} According to the statute, the judge and the defendant must be in the courtroom and they must be able to communicate with the persons in the room electronically. \textit{Id.}} At trial, the victims were allowed to testify via one-way closed circuit television.\footnote{\textit{Craig}, 110 S. Ct. at 3167. The procedure in question afforded the defendant the "essence" of confrontation, "including the right to observe, cross-examine, and have the jury observe the demeanor of the witness." \textit{Id.} at 3162. The presence of these elements "adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing." \textit{Id.} at 3166. See generally Christiansen, The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews, 62 Wash. L. Rev. 705, 709-11 (1987) (discussing ability of young children to accurately testify to events they remember).} The statutory requirement that an individualized finding of trauma be made before allowing the minors to testify outside of the courtroom satisfied the concerns expressed by the Court in \textit{Coy},\footnote{See supra note 80 and accompanying text. In \textit{Craig}, before the procedure was invoked, the judge heard an expert, who had interviewed the minor, testify that if forced to take the stand with the defendant present, the child would "suffer serious emotional distress" and would not "be able to communicate effectively." \textit{Craig}, 110 S. Ct. at 3161.} and the procedure itself ensured the reliability of the testimony presented.\footnote{Craig, 110 S. Ct. at 3167. The procedure in question afforded the defendant the "essence" of confrontation, "including the right to observe, cross-examine, and have the jury observe the demeanor of the witness." \textit{Id.} at 3162. The presence of these elements "adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing." \textit{Id.} at 3166. See generally Christiansen, The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews, 62 Wash. L. Rev. 705, 709-11 (1987) (discussing ability of young children to accurately testify to events they remember).} The Court determined that the state, by showing on a case-specific basis that each child-witness would be traumatized by the presence of the defendant, had adequately demonstrated that its interest in protecting the children was sufficiently important to justify this limitation on testimony by "emphasizing the seriousness of the matter ... [, thereby] guarding against the chances of perjury." See Comment, Videotaped Child Testimony, supra note 77, at 385.
the defendant's right to confrontation.\textsuperscript{87}

The Court's recognition of a child's right to protection in sexual abuse cases contrasts with the increasingly restrictive view it has taken regarding children's rights in general.\textsuperscript{88} Its treatment of juvenile criminals, for example, clearly illustrates that the Supreme Court under Chief Justice Rehnquist is less generous than the Court had previously been in recognizing the rights of minors.\textsuperscript{89}

In recent years, the American public has expressed extreme outrage over the ever-rising juvenile crime rate and the increasingly serious nature of the crimes committed by minors.\textsuperscript{90} A number of states have responded to this problem by transferring minors who commit particularly serious offenses to the criminal system, in which they are treated as adults.\textsuperscript{91} This approach to the juvenile crime problem has forced the Court to confront the question of whether a minor may properly be subjected to the same penalties that adults would face for similar offenses. The Court has responded by concluding that while it may be "cruel and unusual punishment" for a fifteen-year-old teenager,\textsuperscript{92} the death penalty

\textsuperscript{87} See Craig, 110 S. Ct. at 3168-69.

\textsuperscript{88} See, e.g., Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 272-73 (1988). In Kuhlmeier, several high-school students sued their school principal in response to his decision to delete from a student newspaper two pages that he found objectionable. Id. at 262-64. The newspaper was published as part of the regular curriculum of a journalism class. Id. at 262. The articles deemed harmful concerned the experiences of three pregnant girls in school and a student's reactions to her parents' divorce. Id. at 263. Distinguishing Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969), as being the standard only for determining when a school may punish student expression, the Court concluded that a school may refuse to lend its name and money for dissemination of student expression. Kuhlmeier, 484 U.S. at 270-72.

\textsuperscript{90} See infra notes 90-95 and accompanying text.

\textsuperscript{91} See Becker, Washington State's New Juvenile Code: An Introduction, 14 GONZ. L. REV. 289, 294 (1979). In Washington, "[l]aw enforcement officers as well as a number of vocal community action groups had expressed their dissatisfaction with what appeared to be insensitivity on the part of juvenile courts to public safety and protection." Id.

\textsuperscript{92} See LAFAVE & SCOTT, supra note 27, at 38. Some jurisdictions have created another special category for treatment of "youthful offenders" who are under age 21, but beyond the jurisdiction of the juvenile court. Id. at 38 n.3.

\textsuperscript{93} See Thompson v. Oklahoma, 487 U.S. 815, 838 (1988). In Thompson, a fifteen-year-old minor, along with three older accomplices, murdered the defendant's former brother-in-law by shooting him in the head twice, cutting his throat, abdomen, and chest, chaining his body to a concrete block, and throwing him in a river. Id. at 819. In rejecting the death penalty for this heinous crime, the Court stated that "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct." Id. at 835. It was noted that the death penalty serves two social purposes—retribution and deterrence—both of which the Court found inappropriate for a minor under age sixteen. Id. at 886-37.
may well be proportionate punishment for one who murders at age sixteen or seventeen. Thus, the Supreme Court's traditional view that "offenses by the young represent a failure of family, school, and the social system," has apparently been replaced by the belief that one need not be mature enough to drive carefully, to drink responsibly, or to vote intelligently in order to conform one's conduct to some minimally civilized standard.

In addressing children's privacy rights, the Rehnquist Court has placed additional obstacles in the path of a minor's right to an abortion. In Ohio v. Akron Center for Reproductive Health, the Court upheld a statute requiring notification by the physician to at least one parent of any minor seeking an abortion. Pursuant to the statute, this notification was required to precede the abortion unless a court granted a bypass following a proceeding in which the minor proved maturity or best interests by clear and convincing evidence. The Court cited its decision in Matheson as au-

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93 See Stanford v. Kentucky, 492 U.S. 361, 380 (1989). Two murder cases were consolidated, one involving a minor age 17 years and 4 months at the time of the offense and the other involving a minor age 16 years and 6 months. Id. at 365-66. In both cases, because of the seriousness of the offense and the repeated unsuccessful attempts at rehabilitation, the juvenile court determined that the minor should be tried as an adult. Id. at 366-67. The Supreme Court found "neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age." Id. at 380. In contrast to the strongly worded dissent joined by four justices, the majority found that their decision did not offend the eighth amendment's prohibition of cruel and unusual punishment. Id.

94 Id. at 385-86 (Brennan, J., dissenting).
95 Id. at 376-77.
96 See infra notes 116-19 and accompanying text.
98 See id. at 2978-79 (expressly declining to decide issue of whether bypass provision is necessary in notice statute).
99 Id. at 2977. The bypass procedure also provided for an expedited appeal. Id. at 2980. This appeal, however, could take as long as three weeks—a period of time that would be crucial when considering the health of the minor. Id.
100 Id. at 2981-83. In addition to challenging the clear and convincing evidence standard and the statute's requirement of parental notification, the plaintiffs put forth three other arguments. Id. at 2979-82. The first alleged that the pleading requirements breached the confidentiality of the minor's identity because "[u]nless the minor has counsel, she must sign a complaint form to initiate the bypass procedure and, even if she has counsel, she must supply the name of one of her parents at four different places." Id. at 2979-80. The second challenged the statute's constructive authorization provisions that "enable a minor to obtain an abortion without notifying one of her parents if either the juvenile court or the court of appeals fails to act within the prescribed time limits." Id. at 2981. The plaintiff's fear was that the constructive authorization would be ineffective because in the absence of an affirmative court order, a physician may be afraid to perform the procedure on a minor. Id. The last argument offered by the plaintiffs was that the pleading requirements were
authority for requiring the physician to notify the parent,\textsuperscript{102} and reasoned that this intrusion upon a minor's right to privacy was warranted "because the parents often will provide important medical data to the physician."\textsuperscript{103}

In a case decided the same day, \textit{Hodgson v. Minnesota},\textsuperscript{104} the Court, in a split opinion, held unconstitutional a provision of a state statute that required notification of both parents before a minor could obtain an abortion.\textsuperscript{105} Although the Court determined that the provision requiring two-parent notification was invalid, a different majority held that the statute as a whole was saved by the judicial bypass procedure.\textsuperscript{106} As a result, the minor was again given the choice of turning to either her parents or the courts for aid in making this important decision.\textsuperscript{107}

\section*{III. The Future Treatment of Children's Rights by the Supreme Court}

Under the leadership of Chief Justice Warren, the Supreme Court substantially modified the traditional perception of chil-
During that era, the Court first recognized that minors possess individual rights and are entitled to be free from unreasonable state interference. Despite its significant advancement of children's rights, however, the Warren Court maintained the view that minors should remain under the broad control of their parents or the state or both, since their immaturity and inexperience cause them to lack generally the capacity to regulate themselves.

Many areas of children's rights were also addressed by the Burger Court. During that period, the Court, while demanding that each child be treated as an individual, continued to define the limits of children's rights by deferring to the authority of the state or the parents, and therefore did little to advance children's rights.

During its first few years, the Rehnquist Court also failed to...
advance significantly the individual rights of children. In fact, it appears that the Court's recent decisions have served to restrict children's rights further. Ronald Reagan, during his tenure as President, contributed to this restrictive trend by creating a solid conservative block on the Supreme Court. President Bush has strengthened this block with the appointment of David H. Souter and Clarence Thomas, thus furthering the Court's retreat


See Hazelwood, 484 U.S. at 274-76 (principal's regulation of student-run newspaper constitutional because it was "reasonable"). Compare Akron Center 110 S. Ct. at 2977-78 (Rehnquist Court upheld statute requiring physician to notify parent of minor's pending abortion, or alternatively, minor must prove by clear and convincing evidence best interests or maturity) with Danforth, 428 U.S. at 72-76 (Burger Court struck down blanket parental consent provision necessary for minors to obtain abortion).

See Ingwerson, Bench Grows More Conservative, CHRISTIAN SCIENCE MONITOR, June 28, 1990, at 1; Schwartz, Why Bush Will Enhance Reagan's Supreme Court Legacy, MANHATTAN LAWYER, Jan. 17-23, 1989, at 15. "President Reagan installed three relatively young, quite conservative justices, who—with a relatively young Rehnquist—represent a solid voting block." Id. Prior to Justice Souter's appointment, the conservative block on the Court was placed at four and one half Justices, with Justice O'Connor being the one-half because she carried the swing vote on many high-profile issues. See Ingwerson, supra, at 15.

The personnel changes made to the Court during the Reagan years were brought on by the resignation of Chief Justice Burger in 1986 and the retirement of Justice Powell in 1987. See G. GUNThER, supra note 71, at B-6. Additions to the Court included Justices O'Connor in 1981, Scalia in 1986, and Kennedy in 1988. Id. Also, Justice Rehnquist was promoted to the Chief Justiceship in 1986. Id.

On July 20, 1990, Justice Brennan retired and was replaced by David H. Souter. G. GUNThER, supra note 71, at B-7 n.2. Justice Souter's past record indicates a conservative lean, but is silent on many issues that he will likely confront on the Supreme Court. Marcotte, Brennan's Exit Marks the End of An Era, 76 A.B.A. J. 12-13 (Sept. 1990). It appears, however, that Justice Souter has already aligned himself with the Court's conservative wing, thus creating a Court "more conservative than any other since the 1920's." Galoway, Balance of Power, 77 A.B.A. J. 74, 75 (May 1991); see also Arizona v. Fulminante, 111 S. Ct. 1246, 1261 (1991) (Justice Souter joined four other Justices in part of opinion holding that use of coerced confession in criminal trial is no longer grounds for automatic reversal of conviction). Moreover, when Justice Brennan retired, the Court lost a great liberal voice. See Marcotte, supra, at 12. "Brennan's departure leaves the liberal faction of the court without its traditional leader." Id.

Justice Thurgood Marshall announced his retirement from the Supreme Court on June 27, 1991. N.Y.L.J., June 28, 1991, at 1, col. 1. Chosen to replace Justice Marshall was Clarence Thomas. N.Y.L.J., July 2, 1991, at 1, col. 1. Prior to his Supreme Court nomination, Judge Thomas served on the U.S. Court of Appeals in Washington for a year after serving as Chairman of the Equal Opportunity Commission for eight years. Id. It is speculated that Judge Thomas will further enhance the conservative slant of the Supreme Court. See id.
from the protection of individuals against governmental interference.  

One area of children’s rights that seems likely to suffer further setbacks under the Rehnquist Court is the minor’s right to privacy. While the views of Justices Souter and Thomas on this issue are not fully known at this time, a number of other Justices have expressed their disapproval of the Burger Court’s decision in *Roe v. Wade.* In light of the Court’s current outlook, it appears likely that a minor’s right to an abortion will soon be restricted further or even abolished.

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120 See Galloway, supra note 118, at 74. “George Bush’s advisors plan to push the already conservative Rehnquist Court further down the slope by appointing more conservatives.” Id. Conservatives judge “tend to come down on the government’s side . . . against the individual, urging judicial restraint in the enforcement of civil liberties such as privacy and free speech.” Id. See generally Ingwerson, supra note 117, at 1 ([l]iberals, viewing the court with alarm, see it retreating steadily from protecting individuals against government intrusion’); Schwartz, supra note 117, at 15 (Reagan administration “tried to roll back the civil rights laws and weaken civil rights enforcement, overturn Supreme Court decisions on abortion and school prayer, and diminish the rights of criminal defendants’); Washington Post, Jan. 29, 1989, at A1 (“[a]ccording to various academic studies, the judges named by Reagan were far more likely than those selected by . . . Carter, to reject claims of race or sex discrimination, rule against criminal defendants, and find that environmental, civil rights groups and others had no standing to sue”).

121 410 U.S. 113 (1973); see also Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989). In *Webster,* the Court declined to pass on the constitutionality of the preamble of a state statute which declared that life begins at conception, but indicated that it would consider the question if the provision were used restrictively. Id. at 3050. The Court did hold, however, that it was not in violation of *Roe* for a state to prohibit the use of public facilities and employees to perform abortions. See id. at 511. This conclusion is likely to have a tremendous effect on pregnant minors, who generally lack the means to obtain an abortion from a private facility. Id. at 557 (Blackmun, J., concurring in part, dissenting in part) (“every year hundreds of thousands of women, in desperation, w[ill] defy the law, and place their health and safety in the unclean and unsympathetic hands of back-alley abortionists”). The most significant aspect of *Webster,* however, was that the Court abolished *Roe*’s trimester system and upheld a statute that allows doctors to determine viability, thereby establishing a variable time frame in which states can prohibit abortion. See id. at 552-54.

122 See Webster, 492 U.S. at 537 (Blackmun, J., concuring in part and dissenting in part). “Today, *Roe v. Wade* and the fundamental constitutional right of women to terminate a pregnancy, survive but are not secure.” Id. See generally Stuart, *Precedent is More Honored in the Breach than the Observance: High Court’s Conservatives Are Cutting Down Liberals’ Pillars,* MANHATTAN LAWYER, May 23, 1989, at 10 (in coming years conservatives may be dismantling some established doctrines and precedents, such as abortion). “Rehnquist and White have explicitly called for overruling *Roe v. Wade,*” id., and Justice Scalia believes “that the Constitution contains no right to abortion.” Ohio v. Akron Center, 110 S. Ct. at 2884 (Scalia, J., concurring). Justice O’Connor has argued that a state’s interest is compelling not only after viability but throughout the pregnancy, since there is a “potential human life” all through the pregnancy. *See City of Akron v. Akron Center for Reproductive Health,* 462 U.S. 416, 459-60 (1983) (O’Connor, J., dissenting). It appears that these four Justices will make it very difficult to expand the right of privacy of both minors and
It also seems probable that the Rehnquist Court's tendency to curtail the protections afforded juvenile criminals will continue in the future. Although the Court has recently stated that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult," its acceptance of the death penalty for sixteen- and seventeen-year-old minors convicted of first degree murder evidences the Court's support for the severe treatment of minors who commit serious criminal acts.

Despite the Rehnquist Court's seeming penchant for reducing the safeguards afforded minors, it is probable that the Court will uphold expanded efforts by the states to shield children who have fallen victim to sexual abuse. The Court's recently exhibited willingness to impose limitations on the criminal defendant's right to confrontation in sexual abuse cases is consistent with its policy of stricter penalties and diminished protections for criminal defendants. Furthermore, in view of the growing conservatism on the Court, it appears likely that the child will be afforded additional protections against the adult defendant, who, with today's expanding technology, will still receive the "essence" of the right to confrontation.

CONCLUSION

During the Warren Court era, cases deciding children's issues reiterated the traditional principle that parents have a constitutional right to control the upbringing of their children, but, at the same time, asserted the new idea that children are "persons" within the meaning of the Constitution and are thus entitled to constitutional protections. The Burger Court was perhaps the first to give serious consideration to this conflict between the constitutional rights of parents and children. Instead of automatically rele-
gating children to the control of their parents, the Court often substituted the state's authority as *parens patriae*.

More recent Supreme Court decisions concerning minors indicate a protective bent on the issues of abortion and of the appearance of child witnesses in sexual abuse cases, but a continuing trend away from the benevolent juvenile justice system envisioned by Progressives on the issue of juvenile delinquency. With regard to abortion and child witnesses, the Court has exhibited a modified traditional view; it has noted that although minors may be incapable of acting independently, they are also unlikely to have an "ideal" family to shelter them and therefore must receive protection and guidance from the state. In the case of juvenile delinquents, it is likely that the growing conservatism on the Court will continue to increase the similarities between the juvenile and adult criminal systems. However, it is unlikely that the juvenile system will be done away with completely, since minors are still generally considered to have a diminished capacity to commit criminal acts willfully.

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