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Accountability Versus Privacy: The Plight of Institutionalized Emotionally Disturbed Children

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ACCOUNTABILITY VERSUS PRIVACY: THE PLIGHT OF INSTITUTIONALIZED EMOTIONALLY DISTURBED CHILDREN

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I. Introduction

Recent disclosures of scandal in the operation and management of custodial health care institutions[1] have led to renewed fervor for public accountability of such institutions.[2] While the public's "need to know" is a helpful tool in preventing future Willowbrook-type scandals, it must be balanced against the institutionalized patient's right to be free from unwarranted invasions of privacy. Recognition of the responsibilities of institutional directors and public funding officials as public trustees would be a development as commendable as it is overdue. However, no attempts have been made to determine the extent of such responsibility; the public's demand is potentially one of accountability for its own sake.

A twofold task must be confronted. First, the limits of institutional and managerial accountability must be defined. Second, the public's need to know must be balanced with a respect for the patient's personal privacy and material needs. This Article will examine the individual's right to privacy in relation to the state's interest in a smoothly-functioning system of mental health care for minors, in order to elicit some general guidelines for institutional accountability.

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1. *See, e.g.*, Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974); New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *modified sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); NEW YORK STATE MORELAND ACT COMM'N, REGULATING NURSING HOME CARE: THE PAPER TIGERS 2-4 (1975). *See also* N.Y. Times, Mar. 9, 1975, at 30, col. 1; Feb. 22, 1975, at 13, col. 1; Jan. 21, 1975, at 20, col. 1; Jan. 12, 1975, at 40, col. 3; Sept. 6, 1974, at 1, col. 1.

2. *See, e.g.*, N.Y. PUB. HEALTH LAW § 2807-a (McKinney Supp. 1976) (requiring certification of financial statements and financial information for all nursing homes); NEW YORK STATE MORELAND ACT COMM'N, LONG TERM CARE REGULATION: PAST LAPSES, FUTURE PROSPECTS 40-87 (1976).

II. Rights in Conflict: A Case Study

Recent developments in the supervision of New Jersey institutions underscore the tension between the rights of patients and the duty of public funding officials to account for disbursements made from the public treasury. The New Jersey Department of Institutions and Agencies (DIA), which has statutory authority to inspect all custodial health care facilities within the state,[3] recently initiated procedures for evaluation of the quality of care delivered by residential treatment centers for emotionally disturbed children.[4]

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3. N.J. STAT. ANN. § 30:1-14 (West Supp. 1976) provides:

In addition to the jurisdiction and power conferred upon the commissioner over the institutions and noninstitutional agencies named in section 30:1-7 of this Title, he shall have supervision over all institutions and organizations, whether county, municipal, public or private, to which payments are made from the treasury of the State, directly or indirectly, for or on account of the board and maintenance of any persons admitted or committed thereto, with the right of visitation and inspection at any and all times, for the purpose of determining the conditions, circumstances and surroundings under which such persons so admitted or committed are lodged, boarded, cared for and maintained. In the execution of this power any member of the State board, the commissioner, or his duly authorized agent, shall have the right of admission to all parts of any building or buildings in which such persons are lodged, cared for or treated, as often as may be necessary. The books, records and accounts of such institution or organization shall be open to his inspection, or for inspection and audit by the State Auditor, or any of his subordinates, in so far as they relate to the receipt and expenditure of State moneys, in order to determine whether the amount so paid by the State is a proper charge, which question the commissioner shall determine, and also to determine whether such persons so admitted or committed are properly and adequately boarded, lodged, treated, cared for and maintained. The extent and results of such supervision and inspection shall be included in the annual or any special report of the commissioner with such recommendations [as] he may deem necessary.

Recently, DIA was divided into two departments: the Department of Corrections; and the Department of Human Services.

4. N.J. STAT. ANN. § 30:1-15 (West Supp. 1976) provides:

The commissioner and the State board shall have the power of visitation and inspection of all county and city jails or places of detention, county or city workhouses, county penitentiaries, county mental and tuberculosis hospitals, poor farms, almshouses, county and municipal schools of detention, and privately maintained institutions and noninstitutional agencies for the care and treatment of the mentally ill, the blind, the deaf, the mentally retarded, or other institutions, and noninstitutional agencies conducted for the benefit of the physically and mentally defective, or the furnishing of board, lodging or care for children. The commissioner or his duly authorized agent, and any member of the State board shall be admitted to any and all parts of any such institutions at any time, for the purpose of inspecting and observing the physical condition thereof, the methods of management and operation thereof, the physical condition of the inmates, the care, treatment and discipline thereof, and also to determine whether such persons so admitted or committed are properly and ade-

Included in these procedures are mandatory interviews of resident children by a professional evaluation team. The DIA maintains that such interviews are an essential means of discovering potential abuses within the institution.[5] While an interview, however brief, may not seem to constitute a significant deprivation of personal rights, the children's severe emotional and psychological disturbances render the state procedure far from innocuous. The children's emotional and psychological well-being is thus set off against the DIA's concept of its own duty to account for the disbursement of public funds.

Emotionally disturbed youngsters who are placed in residential treatment centers have frequently been referred to the facility by a court or court-related agency.[6] Such children are painfully aware

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quately boarded, lodged, treated, cared for and maintained. The commissioner and the State board may make such report with reference to the result of such observation and inspection and recommendation with reference thereto, as they may determine.

It is interesting to note that while two procedures are specifically authorized—inspection of facilities and review of financial records—no mention is made regarding interview of residents. In light of the principle that an administrative agency is a creature of statute and possesses only those powers which are statutorily bestowed, *In re* Guardianship of C., 98 N.J. Super. 474, 494 (Union Co. Juv. Dom. Rel. Ct. 1967), the DIA's authority to compel resident interviews is questionable. Neither the bill's legislative history nor the statement of purpose which accompanied it indicates any intent to permit such interviews. *See* 1968 N.J. Laws ch. 85 (current version at N.J. STAT. ANN. § 30:1-15 (West Supp. 1976)).

5. Robert B. Nicholas, Acting Chief of the Bureau of Residential Services of the DIA's Division of Youth and Family Services (DYFS) recently described the objectives of the evaluation procedure to be:

1. To improve the effectiveness of institutional placements by providing the District Offices of the [DYFS] with improved information on the types and levels of treatment currently provided by child care agencies;
2. To provide the Bureau [of Residential Services] with improved programmatic and fiscal information as part of an effort to set more equitable reimbursement rates for agencies providing quality care;
3. To gather information for use by the Division [of Residential Services] in improving contract and fiscal accountability for all agencies receiving placements;
4. To provide the Division [of Residential Services] with information for use in developing programmatic and fiscal standards;
5. To assess the effectiveness of current expenditures for treatment; and
6. To increase the level of federal financial participation.

Letter from Robert B. Nicholas to Rev. Robert J. Vitello, Director of Mount Saint Joseph's Children's Center, Totowa, N.J. (April 19, 1976).

6. For example, in New Jersey, the DIA's DYFS is the state agency responsible for dealing with child welfare problems. N.J. STAT. ANN. § 30:4C-2 (West Supp. 1976). The DYFS refers children to various institutions and out-patient facilities when the courts or non-legal authorities have deemed such children to be in need of specified services or supervision.

that their existence and well-being are closely entwined in state operations; before the children are admitted to a residential treatment center, they have usually been interviewed, analyzed and observed by several physicians, psychologists and social workers. Often, such children have spent a substantial portion of their lives in other institutions or foster homes, and have endured many experiences foreign to the average American child. Alleviation of their emotional problems depends on an effective and continuous course of treatment, and courts have repeatedly upheld the child's right to receive such treatment.[7] Official intervention by state examiners endangers the efficacy and continuity of such treatment.[8]

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7. The leading case in this area is Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *modified sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). In response to evidence which portrayed disgraceful conditions in Alabama state institutions for some five thousand retarded children, the district court imposed elaborate standards designed to improve living conditions, disciplinary policies, staffing ratios, and other facets of institutional management. The Court of Appeals for the Fifth Circuit upheld these standards, adding that, "[T]he provision of treatment to those the state has involuntarily confined in mental hospitals is necessary to make the state's actions in confining and continuing to confine those individuals constitutional. That being the case, the state may not fail to provide treatment for budgetary reasons alone." 503 F.2d at 1315. Where all patients in an institution are subject to similar restrictions on personal freedom, the voluntariness of placement is presumably not a material factor. Developments similar to *Wyatt* have occurred with regard to juvenile detention. *See* Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974); Morales v. Turman, 364 F. Supp. 166 (E.D. Tex. 1973); Martarella v. Kelley, 359 F. Supp. 478 (S.D.N.Y. 1973); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972); *see also* Burt, *Developing Constitutional Rights of, in, and for Children*, 39 LAW & CONTEMP. PROB. 118 (Summer 1975); Symposium, *The Right to Treatment*, 57 GEO. L.J. 673 (1969); Comment, *Wyatt v. Stickney and the Right of the Civilly Committed Mental Patients to Adequate Treatment*, 86 HARV. L. REV. 1282 (1973); Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134 (1967); Note, *Civil Restraint, Mental Illness, and the Right to Treatment*, 77 YALE L.J. 87 (1967). *But cf.* New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 762 (E.D.N.Y. 1973), where Judge Orrin Judd indicated that while due process "may be an element in the right to protection from harm . . . it does not establish a right to treatment."

8. It must be remembered that children under scrutiny suffer from various types and degrees of emotional disturbances, and may be unable to cope with stressful situations. Yet even children who have experienced no abnormal emotional disturbances display behavioral withdrawal when confronted with unfamiliar persons or situations. One authority notes:

> The withdrawal response temporarily removes the child from the feared situation, but the tendency to withdraw becomes stronger each time the child practices this behavior. This defense is therefore often maladaptive, and the child who refuses to cope with stressful situations may eventually become fearful of all problems and stresses, and may never learn to handle adequately the crises that are inevitable in the course of development.

P. MUSSEN, J. CONGER, and J. KAGAN, CHILD DEVELOPMENT AND PERSONALITY 518 (3d ed. 1969).

To be sure, the DIA is entitled to conduct reasonable investigations to determine the propriety of public expenditures; yet these inquiries must necessarily be limited by the child's right to privacy, dignity, and freedom from interference in the therapeutic process. Thus, the state's right to information ends where the child's right of privacy begins.

III. The Parameters of Privacy

A. Historical Development

The concept of an individual "right to privacy" was first expounded in 1890[9] in the now-famous law review article written by Samuel D. Warren and Louis D. Brandeis.[10] Examining numerous cases in which relief had been granted on the basis of defamation, invasion of property rights, or an implied contract, Warren and Brandeis concluded that the decisions were based upon a broader principle deserving separate recognition. The result was the emergence of an individual's right to privacy:[11]

> The right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested.

The principles enunciated by Warren and Brandeis, after surmounting initial resistance in the courts,[12] eventually gained judi-

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Repeated exposure to the probing of state investigators might tend to increase the occurrence of at least one form of maladaptive behavior in some institutionalized children.

9. Prior to 1890, some courts seemed to be moving toward a recognition of a right to be let alone. *See, e.g.*, De May v. Roberts, 46 Mich. 160, 9 N.W. 146 (1881), where relief was granted to a woman who complained of a stranger's intrusion upon her childbirth. The court stated, "To the plaintiff the occasion was a most sacred one and no one had a right to intrude unless invited or because of some real and pressing necessity . . . . The plaintiff *had a legal right to the privacy of her apartment at such a time*, and the law secures to her this right by requiring others to observe it, and to abstain from its violation." *Id.* at 165-66, 9 N.W. at 149 (emphasis added).

10. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

11. *Id.* at 211.

12. New York, the first state to come to grips with the problem, rejected the existence of the right to privacy in Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902), a case involving commercial appropriation of a young lady's photograph without her consent. The decision proved so unpopular that the New York legislature soon enacted a law making it both a misdemeanor and a tort to use a person's photograph or likeness for advertising or trade purposes without the person's written consent. 1903 N.Y. Laws ch. 132, §§ 1-2.

cial recognition as a new tort action;[13] yet for decades, this tort was limited to situations arising out of unauthorized appropriation of a person's name or likeness for commercial purposes.[14] Eventually, courts expanded the right to include physical intrusions upon a person's home[15] or upon him in a place of business,[16] electronic eavesdropping,[17] unauthorized public disclosure of private facts,[18] publication of misleading or defamatory information,[19] and peering into windows.[20] The individual's interest in an "inviolate personality"[21] has blossomed into the "substantial right of legal interest"[22] which Brandeis and Warren foresaw.

Recognition of privacy as a fundamental right resulted in part from several challenges to the enforcement of criminal statutes.[23] Several landmark rulings by the Supreme Court[24] have established

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13. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

14. *See, e.g.*, Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938).

15. *See, e.g.*, Ford Motor Co. v. Williams, 108 Ga. App. 21, 132 S.E.2d 206 (1963); Welsh v. Pritchard, 125 Mont. 517, 241 P.2d 816 (1952).

16. *See, e.g.*, Byfield v. Candler, 33 Ga. App. 275, 125 S.E. 905 (1924); Newcomb Hotel Co. v. Corbett, 27 Ga. App. 365, 108 S.E. 309 (1921).

17. *See, e.g.*, LaCrone v. Ohio Bell Tel. Co., 114 Ohio App. 299, 182 N.E.2d 15 (1961); Roach v. Harper, 143 W.Va. 869, 105 S.E.2d 564 (1958); McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939); Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46 (1931).

18. *See, e.g.*, Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931); *see also* Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927).

19. *See, e.g.*, Goldberg v. Ideal Pub. Corp., 210 N.Y.S.2d 928 (Sup. Ct. 1960); Russell v. Marboro Books, 18 Misc.2d 166, 183 N.Y.S.2d 8 (Sup. Ct. 1959); Martin v. Johnson Pub. Co., 157 N.Y.S.2d 409 (Sup. Ct. 1966). *See also* Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962).

20. *See, e.g*, Souder v. Pendleton Detectives, 88 So.2d 716 (La. App. 1956); Moore v. New York Elevated R.R., 130 N.Y. 523, 29 N.E. 997 (1892); Note, *Crimination of Peeping Toms and Other Men of Vision*, 5 ARK. L. REV. 388 (1951).

21. Warren, *supra* note 10, at 205.

22. *Id.* at 205-06, n.1.

23. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961), where the Court reversed a conviction obtained upon evidence illegally obtained during an unlawful search of defendant's home. The Court expanded the exclusionary rule expressed in earlier cases (Wolf v. Colorado, 338 U.S. 25 (1949); Weeks v. United States, 232 U.S. 383 (1914)), to encompass the individual's "indefeasible right of personal security, personal liberty and private property. . . ." 367 U.S. at 647, *quoting* Boyd v. United States, 116 U.S. 616, 630 (1886).

24. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973), where the Court ruled that the right to privacy covers a woman's decision to terminate her pregnancy through abortion. The Court stated:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee

the right and granted it constitutional protection; privacy is now recognized as "no less important than any other right carefully and particularly reserved to the people."[25] Privacy's stature as a "fundamental liberty" requires the state to show a "compelling state interest" for any infringement on the right.[26]

The right to privacy differs from all other fundamental liberties in that it is not specifically stated in the Constitution. However, the Supreme Court has held the right to be protected by the first amendment,[27] the fourth and fifth amendments,[28] and ninth amend-

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of certain areas or zones of privacy, does exist under the Constitution. . . . These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" . . . are included in this guarantee of personal privacy.

Id. at 152-53. *See also* Griswold v. Connecticut, 381 U.S. 479 (1965), where the Court reversed the conviction of a Planned Parenthood League Director for providing married couples with information, instruction and medical advice regarding birth control methods. The Court recognized a "zone of privacy" and held the criminal statutes involved unconstitutional on the principle that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Id.* at 485, *quoting* NAACP v. Alabama, 377 U.S. 288, 307 (1964).

25. Mapp v. Ohio, 367 U.S. 643, 656 (1961).

26. The "compelling state interest" rule, which the Court has repeatedly applied during the last decade, prohibits the states from regulating "fundamental liberties" unless a compelling state interest for such regulation can be shown; mere rational purpose will not justify state interference with these rights. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969). In addition, regulations which delimit fundamental rights will not be enforced unless they are designed to accomplish the specific goal(s) alleged to be of compelling interest. Kramer v. Union Free School Dist., 395 U.S. 621 (1969). *See also* YWCA v. Kugler, 342 F. Supp. 1048 (D.N.J. 1972), where the court stated that such state intrusions into constitutionally protected areas, including the emerging right to privacy, must be founded on a compelling state interest which overrides private rights. *Id.* at 1072.

27. Stanley v. Georgia, 394 U.S. 557 (1969). *See also* Justice Fortas' dissent in Time, Inc. v. Hill, 385 U.S. 374, 412 (1967):

I do not believe that the First Amendment precludes effective protection of the right of privacy—or, for that matter, an effective law of libel . . . . There are great and important values in our society, none of which is greater than those reflected in the First Amendment, but which are also fundamental and entitled to this Court's careful respect and protection. Among these is the right to privacy, which has been eloquently extolled by scholars and members of this Court.

28. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961), where Justice Clark's majority opinion indicated that, "Since the Fourth Amendment's *right of privacy* has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." *Id.* at 655 (emphasis added). *See also* Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967). In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court held that the fifth amendment "enables the citizen to create a zone of privacy which government may not

ment,[29] the "penumbra" of the Bill of Rights,[30] and the fourteenth amendment.[31]

B. Application to Minors

Traditionally, courts have not afforded minors the full panoply of rights guaranteed by the Constitution. State interests in promoting child welfare have long been thought to justify more pervasive state controls over children's affairs than are permitted in adult matters.[32] However, the Supreme Court has declared that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,"[33] and has extended many fundamental rights to juveniles.

First amendment rights to free speech and free exercise of religion have been extended to minors on several occasions.[34] The most important basis for this development has been the recognition of children as "persons" within the meaning of the Constitution:[35]

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force him to surrender to his detriment." *Id.* at 484.

29. *See* Justice Goldberg's concurring opinion in Griswold v. Connecticut, 381 U.S. 479, 491 (1965):

> The Ninth Amendment to the Constitution may be regarded by some as a recent discovery . . . but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

30. Griswold v. Connecticut, 381 U.S. 479 (1965).

31. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923).

32. In Kent v. United States, 383 U.S. 541 (1966), the Court recognized that, "There is evidence . . . that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitious care and regenerative treatment postulated for children." *Id.* at 556. Yet several of the Court's own decisions seem to have furthered this problem. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (juveniles are not constitutionally entitled to jury trials in juvenile court proceedings); Ginsberg v. New York, 390 U.S. 629 (1968) (individual states have the right to adjust the definition of obscenity as applied to minors); Prince v. Massachusetts, 321 U.S. 158 (1944) (the state's power to control public proclamation of religious beliefs was greater over children than over adults).

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

34. *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (the protection of symbolic speech by wearing armbands in protest of the Vietnam war); School Dist. v. Schempp, 374 U.S. 203 (1963) (no compulsory recitation of prayers in public schools); Engle v. Vitale, 370 U.S. 421 (1962) (no compulsory recitation of a "non-denominational" prayer in school); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (upholding students' refusal to salute the flag on religious grounds).

35. Tinker v. Des Moines School Dist., 393 U.S. 503, 511 (1969).

> School officials do not possess absolute authority over their students. Students 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 obligation to the State.

In re Gault[36] marked the beginning of a new era in the legal development of children's rights. While a few early cases had recognized some procedural and equal protection rights of children,[37] the *Gault* ruling provided the impetus for additional progress. Fifteen year old Gerald Gault was brought before an Arizona juvenile court and charged with making a lewd telephone call.[38] He was found guilty, and was committed to the State Industrial School as a juvenile delinquent.[39] His parents brought a habeas corpus petition, and challenged the constitutionality of the Arizona Juvenile Code, claiming that it denied their son the benefits of procedural due process. The Supreme Court held that in cases where incarceration may result, juvenile defendants are entitled to due process protections. These include adequate written notice of pending charges,[40] notice of the right to counsel,[41] privileges against self-incrimination,[42] and the right to confront and cross-examine witnesses.[43]

In the wake of *Gault,* another important protection for juvenile rights was secured in *In re Winship.*[44] A twelve year old boy had been charged with commission of an act which, had he been an adult, would have constituted the crime of larceny.[45] The New York Family Court Act provided that proof of the juvenile defendant's guilt was

36. 387 U.S. 1 (1967). *See also* Dorzen & Reznek, *In re Gault and the Future of Juvenile Law,* 1 FAM. L.Q. 1, 33 (1967); Paulsen, *The Constitutional Domestication of the Juvenile Court,* 1967 SUP. CT. REV. 233.

37. *See, e.g.,* Brown v. Board of Educ., 347 U.S. 483 (1954) (children entitled to equal protection of laws in obtaining public education); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (education in accordance with religion is granted first and fourteenth amendment liberties). *See* 5 FORDHAM URBAN L.J. 155 (1976) (removal of foster children from foster homes without a prior hearing violates their rights to procedural due process under the Constitution).

38. 387 U.S. at 3-4.

39. *Id.* at 4.

40. *Id.* at 33.

41. *Id.* at 41.

42. *Id.* at 55.

43. *Id.* at 56-57.

44. 397 U.S. 358 (1970).

45. *Id.* at 359-60.

to be by a "preponderance of the evidence."[46] The family court found the defendant guilty,[47] and the court of appeals affirmed.[48] The United States Supreme Court reversed,[49] holding that a finding of proof beyond a reasonable doubt is required for conviction when a juvenile is charged with an act which would be a crime if committed by an adult.[50]

The minor's right to privacy was first judicially recognized in *Merriken v. Cressman.*[51] A junior high school student sought to enjoin implementation of a school's drug prevention program whose stated purpose was to aid school authorities in identifying potential drug abusers. Identification was to be by means of a questionnaire about family relationships and rearing. The district court issued an injunction against use of the questionnaires stating, "[t]he fact that the students are juveniles does not in any way invalidate their right to assert their Constitutional right to privacy."[52] Examining the proposed program, the *Merriken* court concluded that the questionnaire was of a highly personal nature; furthermore, the means used to inform the students and their parents about the program's methods and goals did not approach the status of "informed consent."[53] Finally, the court noted that the testing methodology was of suspect statistical validity.[54]

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46. N.Y. FAMILY COURT ACT § 744(b) (McKinney 1970), *as amended*, (McKinney Supp. 1976).

47. 397 U.S. at 360.

48. 24 N.Y.2d 196, 247 N.E.2d 253, 299 N.Y.S.2d 414 (1969).

49. 397 U.S. at 361.

50. *Id.* at 367.

51. 364 F. Supp. 913, 918 (E.D. Pa. 1973).

52. *Id.* at 918.

53. *Id.* at 918-20. The court noted:

> The facts as stated show that the letters to the parents [describing the testing program] were "selling devices" aimed at gaining consent without giving negative information that would make the parents completely aware of "the relevant circumstances and likely consequences" of the Program. Mr. Streit, the man who conceived the CPI program, admitted that the letter to the parents gave only one side of the test picture. There were no statements to the parents concerning the self-fulfilling prophecy, scapegoating of those children who opted not to participate or the ultimate use of the data as it would affect their children and law authorities who might find it necessary to use that information to learn more about the drug situation in the local community.

Id. at 919.

54. *Id.* at 920. The only objective of the program was to identify patterns of answers similar to those given by marijuana, amphetamine and LSD users. No mention of drugs was made in the questionnaire, and there was no attempt to define what was meant by "drug

Merriken's criticisms of the school's program deserve serious consideration in the analysis of all investigatory or diagnostic procedures involving institutionalized children. Unless a state program is clearly outlined, has a stated purpose, and employs methods which have been proven effective, it should be enjoined, pending investigation.[55] A casual goal of ascertaining whether the institutionalized child is happy or unhappy is perhaps as unconstitutional as it is unrealistic. Institutionalized children frequently suffer from problems which markedly separate them from the majority of other youths. Physical segregation of these so-called "problem" children often crystallizes the emotional and psychological distinctions which are at the root of their behavioral difficulties. Subjecting such a child to an interview by a state representative completely strange to the child, and unfamiliar with his background, is an invasion of the personality of that child. Permitting such interviews without prior development of therapeutically tested procedures is a reckless approach at best.

While privacy is an emerging right, its place among the fundamental liberties is secure. The *Merriken* court stated: "This Court would add that the right to privacy is on an equal or possibly more elevated pedestal than some other individual Constitutional rights and should be treated with as much deference as free speech."[56]

Privacy rights of minors have been further enhanced by several recent decisions dealing with the right to receive an abortion. In *Foe v. Vanderhoof*,[57] a minor plaintiff contended that a Colorado statute which required parental consent to an abortion violated her right to privacy as guaranteed by the first, ninth and fourteenth amendments. Two central issues were presented to the court. First, did the right to privacy as developed in *Roe v. Wade*[58] and *Doe v. Bolton*[59]

abuse." The study did not indicate what a potential drug user was, and it did not clearly establish the correlation of the testing methods employed to the intended results.

55. One commentator has suggested a broad test to evaluate the appropriateness of state testing methods: "The proper criteria can readily be drawn from Supreme Court decisions protecting other 'fundamental rights' from state intrustion—that is, has the need for the state intervention been convincingly identified, and is there a close correspondence between that need and the means proposed to satisfy that need?" Burt, *supra* note 7, at 127.

56. 364 F. Supp. at 918.

57. 389 F. Supp. 947 (D. Colo. 1975).

58. 410 U.S. 113 (1973).

59. 410 U.S. 179 (1973).

extend to minors? Second, did any compelling state interests[60] justify the difference in treatment between minors and adults? On both issues, the *Foe* court ruled in favor of the right to privacy; no sufficient state interest in discriminating was discerned. Adopting the Supreme Court's rationale in *Roe v. Wade,* the court classified privacy as a right which is "a personal one guaranteeing to the individual the right to make basic decisions concerning his or her life without interference from the government,"[61] and concluding that "[m]inors are entitled to this personal right as well as adults."[62]

The *Foe* court indicated that some state regulation infringing the right to privacy may be appropriate.[63] Such infringement is no casual matter:[64]

> Thus the state may infringe on the constitutional right to privacy; however, before it may do so, it must demonstrate interests so compelling as to justify the intrusion on the fundamental right involved. The legislation must be narrowly drawn and confined or restricted to the compelling state interests.

Recently, in *Planned Parenthood v. Danforth,*[65] the Supreme Court of the United States upheld the minor's right to privacy in an abortion situation. Striking down Missouri's parental consent law, the Court emphatically stated that the minor's right to privacy was the same as that enjoyed by an adult: "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[66]

It is apparent that the child has a clear and unequivocal right to privacy. He is entitled to the same constitutional protections given

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60. *See* note 26 *supra.*

61. 389 F. Supp. at 953, *citing* Roe v. Wade, 410 U.S. 113, 152-53 (1973).

62. 389 F. Supp. at 953. In Coe v. Gerstein, 376 F. Supp. 695 (S.D. Fla. 1973), *rev'd on other grounds,* 417 U.S. 281 (1974), a similar controversy resulted in the invalidation of a Florida parental consent statute. The court declared, "[A] pregnant woman under 18 years of age cannot, under the law, be distinguished from one over 18 years of age in reference to 'fundamental', *'personal',* constitutional rights." 376 F. Supp. at 698.

63. 389 F. Supp. at 954.

64. *Id., citing* Roe v. Wade, 410 U.S. 113, 155-56 (1973). The court indicated that "[a]fter careful consideration of the issues involved, we find that [the consent statute] as it relates to the necessity of parental or guardian consent in order for minors to obtain legal abortions is unconstitutional. The statute is overbroad in its reach and is violative of the fundamental right to privacy." *Id.* at 951.

65. 96 S. Ct. 2831 (1976).

66. *Id.* at 2843.

to adults, and he is subject to the same reasonable level of state control.[67] Age alone is not a factor of sufficient weight to affect the liberties of institutionalized emotionally-disturbed children. Absent a compelling state interest, invasion of personality must be prohibited, regardless of a patient's position in the family or ability to act independently of others.

IV. Privacy in an Institutional Setting

Recent decisions recognizing the child's right to privacy compel re-examination of the state's administrative and supervisory role in providing care and maintenance for institutionalized children. Catch-all classification of procedures as being "for the child's welfare" falls far short of the "compelling state interest" standard.[68] The state has an interest in protecting child welfare; and that interest permits the state to exercise greater authority over juveniles than over adults.[69] Equally apparent is the state's interest in supervising the operations of custodial institutions within its jurisdiction. Yet even if these interests are deemed "compelling," state infringement upon privacy rights must be kept within the confines of narrowly drawn regulations, restricted solely to the compelling interest.

Courts have repeatedly held that persons placed in institutions have a constitutional right to receive treatment reasonably calculated to produce some cure or alleviation of symptoms.[70] To meet this end, elaborate conditions have at times been imposed on institutional directors and public funding officials. In *Wyatt v. Stickney*,[71] a federal district court took steps to correct horrendous conditions in Alabama's institutions for the mentally ill. "Minimum Constitutional Standards for Adequate Treatment of the Mentally Ill"[72] were drawn up; no less than thirty-five separate

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67. *See* note 55 *supra*.

68. *See* note 26 *supra*, and accompanying text.

69. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629 (1968); Kent v. United States, 383 U.S. 541 (1966); Prince v. Massachusetts, 321 U.S. 158 (1944).

70. Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974); New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *modified sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972).

71. 344 F. Supp. 373 (M.D. Ala. 1972), *modified sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

72. 344 F. Supp. at 379.

conditions for promoting a "Humane Psychological and Physical Environment"[73] were promulgated. Significantly, the first condition stated "[p]atients have a right *to privacy* and dignity."[74]

Commercial exploitation of mental patients has been restrained when their privacy rights have been infringed. In *Commonwealth v. Wiseman*,[75] a motion picture producer obtained permission to film inmate conditions at the Massachusetts Correctional Institution at Bridgewater. Permission was conditioned upon the producer's "fully protecting" inmate rights and requiring that he not photograph patients without first obtaining written releases. However, very few releases were obtained. The court concluded that the defendant producer had not fulfilled his agreement to protect the rights of the patients and enjoined commercial showing of the film.[76]

The rights of institutionalized children should be protected to the greatest extent possible. At a minimum, the state should be required to adopt professionally-determined and therapeutically-tested investigation procedures, employ competent professional investigators, and take all necessary steps to avoid interrupting the treatment which the children receive in the institution. For emotionally disturbed children, this treatment centers on the healing and development of the personality. Investigators should be thoroughly briefed on each child's case history[77] and should prepare questions in advance. Any other procedure interrupts the course of therapy and is inconsistent with the children's privacy rights which clearly extend to children.[78]

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73. *Id.* at 379-86.

74. *Id.* at 379.

75. 356 Mass. 251, 249 N.E.2d 610 (1969), *cert. denied*, 398 U.S. 960 (1970).

76. *Id.* at 259, 249 N.E.2d at 610.

77. Full knowledge of each child's case is stressed upon those who work with children. *See generally*, A. FREDERICKSEN and P. MULLIGAN, THE CHILD AND HIS WELFARE (3d ed. 1972); L. GEISER, THE ILLUSION OF CARING (1973); J. GOLDSTEIN, A. FREUD AND A.J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973).

78. Included in this category are the right to acquire the intellectual and emotional skills necessary to achieve individual aspirations and to cope effectively in our society, and, for those who need remedial services, the right to care and treatment. *See* JOINT COMMISSION ON MENTAL HEALTH OF CHILDREN, CRISIS IN MENTAL HEALTH 3 (1969). Child care professionals consider emotional relationships as extremely vital to the disturbed child, who has often witnessed destruction of key relationships. The child has often learned to suppress his or her feelings or to suffer the agony of replacement; forcing such a child to reveal his or her feelings to a stranger would undo much of what has been accomplished by therapy. *See* GEISER, *supra* note 77, ch. 5.

The availability of other sources of information, such as inspection of facilities, observation of children in programs, and auditing of books,[79] makes it unlikely that the state's compelling interest can be served only by actual interviews of patients. Even if such interviews are required, the state should be made to disclose their objectives and the questions to be asked.[80] The questions could then be reviewed by institutional directors and the children could be psychologically prepared for the visit.[81]

V. Conclusion

While the right of privacy is not absolute,[82] it is constitutionally protected[83] and it does extend to children.[84] Children have been recognized as "persons" within the meaning of the Constitution[85] and have been accorded rights equal to those enjoyed by adults.[86] These rights have been held to preclude the need for parental consent to abortion[87] and to prohibit school authorities from requiring students to bare personal memories and experiences.[88]

The basis for state intervention in the lives of juveniles usually springs from a desire to act "in the best interests of the child." But this phrase can be a convenient excuse rather than a viable standard.[89] It is unreasonable to think that the best interests of the child

79. N.J. STAT. ANN. §§ 30:1-14 to 1-15 (West Supp. 1976) expressly mandate the availability of these and other sources of information. *See* notes 3-4 *supra.*

80. In New Jersey, at least, present procedure does not include making available precise lists of interview questions, but rather general lists of potential inquiries. Robert B. Nicholas, Acting Chief of the Bureau of Residential Services of DYFS indicated that: "We will provide a *general list* of client questionnaires *subsequent to the completion of the last interview.* This is a Bureau policy which must be adhered to in order to avoid the coaching of residents." Letter from Robert B. Nicholas to Rev. Robert J. Vitello, Director of Mount Saint Joseph's Children's Center, Totowa, N.J. (August 17, 1976) (emphasis added).

81. *See* text accompanying note 26 *supra.*

82. *See* note 26 *supra* and accompanying text.

83. *See* notes 27-31 *supra* and accompanying text.

84. *See* notes 51-67 *supra* and accompanying text.

85. *Id.*

86. *Id.*

87. *See* notes 57-66 *supra* and accompanying text.

88. *See* notes 51-56 *supra* and accompanying text.

89. Several child psychologists have urged the adoption of a new standard to replace the much-criticized "best interests" guideline:

> Even though we agree with the manifest purpose of the "in-the-best-interests-of-the child" standard, we adopt a new guideline for several reasons. First, the traditional standard does not, as does the phrase "least detrimental" [the proposed new stan-

can encompass derogation of the child's personality, but state intervention frequently does just that:[90]

> The traditional goal of such interventions is to serve "the best interests of the child." In giving meaning to this goal, decisionmakers in law have recognized the necessity of protecting a child's physical well-being as a guide to placement. But they have been slow to understand and to acknowledge the necessity of safeguarding a child's psychological well-being . . . . Yet both well-beings are equally important, and any sharp distinction between them is artificial.

Public oversight of custodial health care institutions is both necessary and desirable. Taxpayers have a right to know that their funds are being spent in a productive and prudent manner. But as governmental investigations continue to grow in number, and probe ever more deeply into the affairs of patients, there will be a greater need for clearly-drawn supervisory standards to regulate investigation procedures.

The institutionalized emotionally disturbed child does not cease to be a person merely by reason of his institutionalization. The essential reason for the child's placement in an institution is to make possible the development of personality and ability to cope with society. Measures which deny personal privacy have no place in such circumstances. An emotionally disturbed child cannot tell the state whether its funds are being honestly and productively spent, but an adult who was respected as a child will be a living testament to the wisdom of efficient and effective child service programs.

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dard] convey to the decisionmaker that the child in question is already a victim of his environmental circumstances, that he is greatly at risk, and that speedy action is necessary to avoid further harm being done to his chances of healthy psychological development. Secondly, the old guideline, in context and as construed by legislature, administrative agency, and court, has come to mean something less than what is in the child's best interests. The child's interests are often balanced against and frequently made subordinate to adult interests and rights. Moreover, and less forthrightly, many decisions are "in-name-only" for the best interests of the specific child who is being placed. They are fashioned primarily to meet the needs and wishes of competing adult claimants or to protect the general policies of a child care or other administrative agency.

GOLDSTEIN, *supra* note 77, at 54.

90. *Id.* at 4.