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COMMENT

POSTADMISSION DUE PROCESS FOR MENTALLY ILL AND MENTALLY RETARDED CHILDREN AFTER *PARHAM v. J.R.* AND *SECRETARY OF PUBLIC WELFARE v.* *INSTITUTIONALIZED JUVENILES*

To a great extent, parents have been legally autonomous in deciding what is in their child's best interest.¹ Legislatures and judicial bodies have traditionally interfered with parental control only when parental actions or omissions were obviously detrimental to the child's welfare.² In recent years, however, the courts have begun to recognize the independent rights and interests of minors as factors to be balanced against parental control over the upbringing of a child.³ When faced with severe deprivations of a

1. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish parents in freely exercising their religion may remove their children from public school prior to the state's compulsory attendance age); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (state may not require children to attend public schools if parents wish to send them to private schools).

2. Child abuse is an area where the state has traditionally intervened to protect the interests of the child. *See, e.g.*, *People v. Butler*, 205 Cal. App. 2d 437, 23 Cal. Rptr. 118 (Dist. Ct. App. 1962); *Nebgen v. State*, 47 Ohio App. 431, 192 N.E. 130 (1933); N.Y. Soc. SERV. LAW §§ 411-428 (McKinney 1976 & Supp. 1978-79); PA. CONS. STAT. ANN. tit. 11, §§ 2201-2224 (Purdon Cum. Supp. 1979-80). *See generally* V. FONTANA, *THE MALTREATED CHILD* (1964); Areen, *Intervention Between Parent & Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887 (1975); Wald, *State Intervention on Behalf of Neglected Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 625 (1975); *Symposium — The Medical, Legislative, & Legal Aspect of Child Abuse and Neglect*, 23 VILL. L. REV. 445 (1978).

For other examples of state intervention, see *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245, *cert. denied*, 429 U.S. 964 (1976) (juvenile curfews); *Republican College Council v. Winner*, 387 F. Supp. 739 (E.D. Pa. 1973) (drinking age laws); *Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769, *cert. denied*, 344 U.S. 824 (1952) (blood transfusions); *In re Smith*, 16 Md. App. 209, 295 A.2d 238 (1972) (abortion under parents' compulsion); *Frazier v. Levi*, 440 S.W.2d 393 (Tex. 1969) (sterilization).

3. The traditional view was expressed in *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925):

The fundamental theory of liberty . . . excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers

child's physical liberty, for example, the judiciary has found minors entitled to due process of law⁴ and has turned to the difficult task of deciding what kinds of procedures are constitutionally sufficient.⁵ Near the center of controversy has been the commitment of minors to institutions for the mentally ill and the mentally retarded at the request of their parents.

"Voluntary" commitment procedures in most states allow parents to commit children under statutory age to institutions for the mentally ill and the mentally retarded upon medical recommendation.⁶ As part of the in-

only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty, to recognize and prepare him for additional obligations.

As expressed in *Pierce*, parental control was not an interest or concern to be reckoned with, but a "right" with undefined limits. After *Pierce*, however, courts began to focus on the independent rights of the child. Generally, this was an easy task since the conflict of interests was most often between the child and the state rather than the child and the parent. Compare *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (state cannot infringe child's first amendment rights) with *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (statute requiring parental consent to minor's abortion infringes the minor's privacy right).

4. See *In re Gault*, 387 U.S. 1 (1967). *Gault* was the seminal children's rights case. In finding juveniles entitled to formal due process protections when faced with incarceration, the Court exposed the myth of "benevolent" informal juvenile proceedings and clearly stated that children were people with constitutional rights. *Id.* at 47. See generally Lefstein, Stapleton & Teitelbaum, *In Search of Juvenile Justice: Gault and its Implications*, 3 L. & SOC'Y REV. 491 (1969); *Symposium on Juvenile Problems: In re Gault*, 43 IND. L.J. 523 (1968); *Symposium on the Gault Decision*, 1 FAM. L.Q. 1 (1967); Comment, *In re Gault: Children Are People*, 55 CALIF. L. REV. 1204 (1967).

5. Due process is a flexible concept whereby procedural protections are tailored to the particular situation at hand. See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The Court has often found that the process due cannot be divorced from the ultimate decision and that judicial hearings are not mandated in every situation. See, e.g., *Board of Curators v. Horowitz*, 435 U.S. 78, 90 (1978). For a discussion of the procedural protections afforded when formal hearings are mandated, compare *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (notice and informal hearing normally required prior to suspension from school); *Wolff v. McDonnell*, 418 U.S. 539, 563-70 (1973) (person cannot lose "good-time" without advance written notice, reasons, and opportunity to present evidence, but no right to counsel or cross-examination and confrontation) with *Goldberg v. Kelly*, 397 U.S. 254, 266-71 (1970) (termination of welfare benefits requires notice, hearing, opportunity to be heard, reasons, and impartial decision maker).

6. In most states, the parent or legal guardian may commit the child without his consent. There is generally no conclusory review of the parental decision other than an examination by a physician, and the child may be subject to an indeterminate stay with release available only upon parental request or clinical decision. See, e.g., CAL. WELF. & INST. CODE § 6000 (West 1972 & Supp. 1979) (minor may leave the institution after completing normal hospitalization departure procedures and giving notice); D.C. CODE ANN. §§ 21-512 to -513 (1973 & Supp. 1978) (minors less than 18); GA. CODE ANN. § 88-503.1, .2, .3 (1971) (minors less than 18); KAN. STAT. 59-2905 to -2907 (1976) (minors less than 18, but prior to hospitalization parents or child must be informed in writing of the child's rights and types of treatment available); LA. REV. STAT. ANN. § 28:57C (West 1979) (minor may object to his

creased concern about due process protections for juvenile delinquents⁷ and for involuntarily committed adults,⁸ several fourteenth amendment cases were brought challenging "voluntary" commitment proceedings for both mentally ill and mentally retarded children.⁹ One federal court granted minors facing "voluntary" commitment a full range of procedural protections, including notice, counsel, a probable cause hearing with con-

admission, and upon receipt of a valid objection the director of the facility shall release the minor within three days unless involuntary commitment proceedings initiated); MASS. GEN. LAWS ANN. ch. 123, § 10(a) (West Supp. 1979) (prior to admission, parents offered opportunity to meet with an attorney); MISS. CODE ANN. § 41-21-103(c) (Supp. 1978) (minors less than 18); N.Y. MENTAL HYG. LAW § 9.13 (McKinney 1978) (minors less than 16); N.D. CENT. CODE §§ 25-03.1-04 to .1-06 (1979) (right to release upon application of the child); OKLA. STAT. ANN. tit. 43A, § 184 (West Supp. 1979) (right to release conditioned on judgment of attending physician); S.C. CODE § 44-17-310 (1976) (minor less than 16); TENN. CODE ANN. § 33-601 (1977) (for minors less than 16, but minors cannot be admitted for more than six months in any 12-month period without approval of admissions review committee); WASH. REV. CODE §§ 72.23.070(2), (3) (1978) (for minors less than 13).

In some states, the physician recommending admission is not even required to be a psychiatrist, and family doctors have often taken on this role. *See, e.g.*, ALASKA STAT. § 47.30.020 (1975); WYO. STAT. § 25-3-106(a)(1)(ii) (1977).

State statutes also make distinctions on the basis of age as to the amount of due process protections afforded the child and the requirement of his or her consent to institutionalization. *See, e.g.*, IDAHO CODE §§ 66-318, -326 (Supp. 1979) (parent may admit child under 14, but child over 16 may obtain his or her own release).

7. *See In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966); *Haley v. Ohio*, 332 U.S. 596 (1948). For a historical development and survey of state juvenile statutes, see Comment, "Delinquent Child": A Legal Term Without Meaning, 21 BAYLOR L. REV. 352 (1969); Note, *The Dilemma of the "Uniquely Juvenile" Offender*, 14 WM. & MARY L. REV. 386, 387-89 (1972). *See also* N. KITTRIE, THE RIGHT TO BE DIFFERENT 102-68 (1971).

8. *See, e.g.*, *Suzuki v. Alba*, 438 F. Supp. 1106, 1110 (D. Hawaii 1977); *Stamus v. Leonhardt*, 414 F. Supp. 439 (S.D. Iowa 1976); *Doremus v. Farrell*, 407 F. Supp. 509 (D. Neb. 1975); *Kendall v. True*, 391 F. Supp. 413 (W.D. Ky. 1975); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); *Bell v. Wayne County Gen. Hosp.*, 384 F. Supp. 1085 (E.D. Mich. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1092 (E.D. Wis. 1972), *vacated and remanded*, 421 U.S. 957 (1975). *See generally* Bazelon, *Institutionalization, Deinstitutionalization, and the Adversary Process*, 75 COLUM. L. REV. 897 (1975); Ochberg & Brown, *Mental Health and the Law: Partners in Advancing Human Rights*, 123 U. PA. L. REV. 491 (1974); *Symposium — Mental Illness, The Law and Civil Liberties*, 13 SANTA CLARA LAW. 367 (1973); Comment, *Overt Dangerous Behavior As a Constitutional Requirement for Involuntary Civil Commitment of the Mentally Ill*, 44 U. CHI. L. REV. 562 (1977); Note, *Donaldson, Dangerousness, And the Right to Treatment*, 3 HASTINGS CONST. L.Q. 599 (1976).

9. *See, e.g.*, *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968); *J.L. v. Parham*, 412 F. Supp. 112 (M.D. Ga. 1976), *rev'd sub nom. Parham v. J.R.*, 99 S. Ct. 2493 (1979); *Bartley v. Kremens*, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded*, 431 U.S. 119 (1977); *Saville v. Treadway*, 404 F. Supp. 430 (M.D. Tenn. 1974). *See generally* Note, *The Mental Hospitalization of Children and the Limits of Parental Authority*, 88 YALE L.J. 186 (1978); Note, *Parental Powers in the Voluntary Commitment of Children to Mental Institutions*, 17 WASHBURN L.J. 595 (1978); Note, *Standards for Involuntary Civil Commitment in Pennsylvania*, 38 U. PITT. L. REV. 535 (1977).

frontation and cross-examination of witnesses, and a standard of proof of clear and convincing evidence.¹⁰ In *Parham v. J. R.*¹¹ and *Secretary of Public Welfare v. Institutionalized Juveniles*,¹² however, the Supreme Court curtailed these lower court developments by finding sufficient a determination by a "neutral factfinder," that a child has met the statutory requirements for admission prior to institutionalization by his or her parent. With the exception of some type of "independent" periodic review during the course of a hospital stay, the Court left open what postadmission procedures would adequately protect the juvenile patient's liberty interest.¹³

This comment will discuss postadmission due process for mentally ill and mentally retarded children who have been institutionalized by their parents. The permissible *parens patriae*¹⁴ interest of the state will be explained and balanced against the child's liberty interest and parental control over the child's activities. Special factors in determining appropriate postadmission procedures for specific groups of children will also be identified by comparing the needs and rights of the mentally ill and mentally retarded and of the young and very young child.¹⁵

I. CIVIL COMMITMENT UNDER THE STATE'S *PARENS PATRIAE* Power

It is well settled that the state's power to deprive a person of his or her liberty through institutionalization "must rest on a consideration that soci-

10. *Bartley v. Kremens*, 402 F. Supp. 1039, 1053 (E.D. Pa. 1975), *vacated and remanded*, 431 U.S. 119 (1977), *on remand sub nom. Secretary of Pub. Welfare v. Institutionalized Juveniles*, 459 F. Supp. 30 (E.D. Pa. 1977), *rev'd*, 99 S. Ct. 2523 (1979). Other federal courts indicated that due process protections were necessary in "voluntary" commitment proceedings but were less specific about the particular protections needed. *See, e.g.*, cases cited in note 9 *supra*.

The purpose of a commitment hearing is to determine whether the child is mentally ill or mentally retarded, and in need of a restrictive setting. The district courts in both *Kremens* and *Parham* found the state procedures before them inadequate for making these determinations. *Secretary of Pub. Welfare v. Institutionalized Juveniles*, 459 F. Supp. 30, 45 (E.D. Pa. 1977); *J.L. v. Parham*, 412 F. Supp. 112, 136 (M.D. Ga. 1976); *Bartley v. Kremens*, 402 F. Supp. 1039, 1053-54 (E.D. Pa. 1975).

11. 99 S. Ct. 2493 (1979).

12. 99 S. Ct. 2523 (1979).

13. *Parham v. J.R.*, 99 S. Ct. 2493, 2511 (1979); *Secretary of Pub. Welfare v. Institutionalized Juveniles*, 99 S. Ct. 2523, 2528 n.9 (1979).

14. The term *parens patriae* refers to the quasi-sovereign interest the state possesses in which it assumes a role apart from that of the individuals affected in order either to protect individuals or compel them to act in ways beneficial to society. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-60 (1972). For a discussion of the role of *parens patriae* in commitments, see text accompanying notes 18-29 *infra*.

15. *See* note 6 *supra*.

ety has a compelling interest in such deprivation."¹⁶ In criminal proceedings, for example, this authority is based on the state's police power. Civil commitment proceedings, however, have traditionally been authorized under an application of either the police power, if the person is dangerous to others,¹⁷ or the benevolent *parens patriae* power, if the person is dangerous to himself or in need of treatment or habilitation.¹⁸

16. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1084 (E.D. Wis. 1972).

As the Court stated in *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975), "[M]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." In its most recent term, Chief Justice Burger reemphasized the caution necessary in the commitment context when he stated:

[A]t one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within the range of conduct that is generally acceptable. Obviously such behavior is no basis for compelled treatment and surely none for confinement.

Addington v. Texas, 99 S. Ct. 1804, 1809-10 (1979).

The requirement of a compelling state interest when there is a potential for a severe deprivation of fundamental rights is found in many other contexts. See, e.g., *Roe v. Wade*, 410 U.S. 113, 155 (1973) (abortion); *Sherbert v. Verner*, 374 U.S. 398, 406-09 (1963) (free exercise of religion).

17. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); *Bell v. Wayne County Gen. Hosp.*, 384 F. Supp. 1085 (E.D. Mich. 1974); *Dixon v. Attorney Gen.*, 325 F. Supp. 966 (M.D. Pa. 1971); *Hawks v. Lazaro*, 202 S.E.2d 109 (W. Va. 1974). See generally DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH (C.J. Frederick ed. 1978); A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 25-40 (1975).

18. Changes in civil commitment proceedings have reflected a disillusionment with the prevailing *parens patriae* justification for committing individuals. See Coleman & Solomon, *Parens Patriae "Treatment": Legal Punishment in Disguise*, 3 HASTINGS CONST. L.Q. 345 (1976). The question has arisen whether an individual committed for mental illness has a constitutional right to treatment, or if mentally retarded, a constitutional right to habilitation. This *quid pro quo* view has been accepted by only a minority of federal courts. See, e.g., *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305, 1312 (5th Cir. 1974) (the Constitution guarantees that persons civilly committed to state mental institutions have a right to treatment). But see *O'Connor v. Donaldson*, 422 U.S. 563, 582-83 (1975) (Burger, C.J., concurring) (no absolute right to treatment for mentally ill); *Morales v. Turman*, 562 F.2d 993, 997-98 (5th Cir. 1977), *rev'd on other grounds*, 430 U.S. 322 (1977) (civil commitment of the mentally ill without treatment is not necessarily an impermissible exercise of governmental power). For a discussion of the theories underlying the *quid pro quo* concept, see Note, *Conditioning and Other Technologies Used to "Treat": "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 S. CAL. L. REV. 616, 641-45 (1972). For a discussion of the right to treatment generally, see Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens, an Evolving Legal and Scientific Interface*, 10 CREIGHTON L. REV. 124 (1976); Spece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 ARIZ. L. REV. 1 (1978); Comment, *The Right to Treatment and Educational Rights of Handicapped Persons: Lora v. Board of Education*, 31 STAN. L. REV. 807 (1979); Comment, *Right to Treatment for the Civilly Committed: A New Eighth Amendment Basis*, 45 U. CHI. L. REV. 731 (1978).

On the corresponding right to refuse treatment, see *Rennie v. Klein*, 462 F. Supp. 1131

At common law, procedures for involuntary commitment were unnecessary since there were virtually no public institutions for the mentally ill.¹⁹ Until the middle of the nineteenth century, when the first mental hospital was established in the United States, care for the mentally disabled rested with the family and the community.²⁰ Due to a lack of facilities and limited knowledge about treatment methods, only the violent and the dangerous were committed.²¹ As more institutions were established, however, dangerousness to one's self became an additional justification for confinement.²² This aspect of *parens patriae* was derived from an English practice by which the king became the guardian of a lunatic's person and property.²³ English guardianships, however, were only effective during an individual's insane periods while the American innovation could result in total and possibly permanent loss of liberty.²⁴

(D.N.J. 1978) (involuntary mental patient may have right to refuse medication in absence of emergency situation). See also Griffith & Griffith, *Duty to Third Parties of Dangerousness, and the Right to Refuse Treatment: Problematic Concepts for Psychiatrist and Lawyer*, 14 CALIF. L. REV. 461 (1977).

19. See *Lessard v. Schmidt*, 349 F. Supp. 1078, 1084 (E.D. Wis. 1972).

20. Institutions for the mentally ill and the mentally retarded are the products of nineteenth-century reform movements. See Lazerson, *Educational Institutions and Mental Subnormality: Notes on Writing a History*, in *THE MENTALLY RETARDED AND SOCIETY: A SOCIAL SCIENCE PERSPECTIVE* 33, 35 (M. Begab & S. Richardson eds. 1975). During the same period, the American Psychiatric Association was founded in Philadelphia by 13 hospital superintendents. *THE MENTALLY DISABLED AND THE LAW* 7 (S. Brakel & R. Rock eds. 1971). The primary nineteenth-century reformers were Dorothea Dix and Ms. E.P.W. Packard. Ms. Dix, who spent 50 years fighting for better hospital conditions, was instrumental in founding 32 mental hospitals in the United States and abroad and persuaded 20 states to establish or enlarge existing mental hospitals. Ms. Packard, who had been committed by her husband without procedural protections, worked on commitment laws. Her efforts led to the enactment of a mental health bill requiring a jury trial prior to commitment in Illinois. *Id.* at 7-8.

The law has fluctuated greatly in its treatment of the mentally disabled. Early procedures protected the individual's property but did little to prevent physical abuse or reliance on the charity of friends. Later, the violent and nonviolent mentally disabled were distinguished, with the former being confined with the itinerant poor. At a later point in history, nonviolent individuals who were burdens on their families became the responsibility of the state and were confined in public facilities. *Id.* at 8.

21. *Id.* at 5. See A. DEUTSCH, *THE MENTALLY ILL IN AMERICA* 419-20 (1949). See generally D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (1971).

22. See, e.g., *In re Josiah Oakes*, 8 L. REP. 123, 125 (Mass. 1845) (right to restrain insane person found in law of humanity requiring confinement of those dangerous to themselves). See N. KITTRIE, *supra* note 7, at 66.

23. See BRAKEL & ROCK, *supra* note 20, at 2.

24. Common law protections for incompetents were eroded due to American humanitarian motives regarding indigent incompetents. Such individuals roamed about the countryside in bands, where they were subject to abuses by a society that equated mental illness with moral turpitude. Since the indigent mentally ill were helpless outside an institu-

Historically, children were subject to the *parens patriae* power of the state not only in the commitment context but also in other situations where the state felt it necessary to intervene directly in the management of their affairs.²⁵ In *Wellesley v. Wellesley*,²⁶ for example, an English court denied a father's petition against his deceased wife's sisters for custody of his minor child because he was living in adultery and would be a poor moral example. The court stated that parents had rights over their children by grace of the state and that control of the child's affairs was given to the parent as a trust.²⁷ If this trust were not faithfully discharged, the state could intervene on behalf of the child. Thus, the state's benevolent role as *parens patriae* was used as a protective device for children against their parents as well as a justification for a lack of procedural protections against deprivations of physical liberty.²⁸ Under the doctrine, state intervention has been justified to protect those persons who cannot protect themselves, including the protection of children from their parents or other individuals who seek to harm them, and to compel both children and parents to conduct themselves in ways considered beneficial to society.²⁹

tional environment, they were confined for their own safety. See A. DEUTSCH, *supra* note 21, at 4.

25. See Kleinfeld, *The Balance of Power Among Infants, Their Parents, and the State*, 5 FAM. L.Q. 64, 66 (1971). The state has used *parens patriae* to justify a variety of controls over the child. See, e.g., *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (juvenile has no right to jury trial in adjudicative phase of delinquency proceeding); *Ginsberg v. New York*, 390 U.S. 629 (1968) (preventing access of minors to pornographic material although such restriction would be unconstitutional if applied to adults); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (regulating child labor).

26. 4 Eng. Rep. 1078 (H.L. 1828).

27. *Id.* at 1081. A trust has been defined as a "fiduciary relation with respect to property, subjecting persons by whom the property is held to equitable duties to deal with the property for the benefit of another person which arises as the result of a manifestation of an intention to create it." *Goodenough v. Union Guardian Trust Co.*, 275 Mich. 698, 703, 267 N.W. 772, 773-74 (1936). In one sense, therefore, children were treated as property in the care of, but not belonging to, the parent as trustee.

28. A typical example of the lack of procedural protections was found in the juvenile courts. Prior to the nineteenth century, juvenile offenders were incarcerated with hardened criminals. In the nineteenth century, however, social and penal reforms were enacted whereby children were separated from adults and put in their own reformatories. By 1900, there were 65 reformatories for children in the United States. See Tappan, *Approaches to Children with Problems* in JUSTICE FOR THE CHILD 149, 169 (M.K. Rosenheim ed. 1962). Children were received into these reformatories from both criminal courts and social agencies. In 1899, the first juvenile court was established in Chicago, and by 1932 all but two states had juvenile delinquency laws. See N. KITTRIE, *supra* note 7, at 108-13. Unfortunately, views on the role of the court in juvenile proceedings and the varied remedies prescribed were inconsistent. *Id.* at 113. See *In re Winship*, 398 U.S. 358, 365-66 (1970); *In re Gault*, 387 U.S. 1, 14-16 (1967).

29. See Kleinfeld, *supra* note 25, at 107. The courts and commentators have been critical of the *parens patriae* doctrine. See, e.g., *Kent v. United States*, 383 U.S. 541, 554-60

For many years, civil commitment statutes based on *parens patriae* did not require many of the stringent safeguards of criminal proceedings since the emphasis was on benevolent treatment rather than punishment.³⁰ Moreover, the interests of the family were generally believed to be identical to those of the affected individual, and it was presumed that the rights of the individual could be waived by his or her family members,³¹ especially in the case of children.³² As society became aware, however, that benevolent proceedings allowing wide discretion could lead to frequent erroneous admissions and were often abused by families and authorities, the courts began to require greater due process protection for adults who faced involuntary institutionalization.³³ In the seminal case of *Lessard v.*

(1966); *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1085-90 (E.D. Wis. 1972); *Dixon v. Attorney Gen.*, 325 F. Supp. 966, 972 (M.D. Pa. 1971). See also Note, *Due Process and the Development of "Criminal" Safeguards in Civil Commitment*, 42 FORDHAM L. REV. 611, 615-17 (1974). The Supreme Court has explained that the meaning of *parens patriae* "is murky and its historic credentials are of dubious relevance." *In re Gault*, 387 U.S. 1, 16 (1966). Nevertheless, the Court has frequently used the doctrine to justify varied treatment for minors and adults. See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1978) (limited access to pornography); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (no right to jury trial in adjudicative phase of juvenile court proceedings); *Ginsberg v. New York*, 390 U.S. 629, 636-39 (1968) (limited access to pornographic material for minors).

30. Many commentators have considered the existence of benevolent treatment or habilitation in public institutions for the mentally ill and the mentally retarded to be a fallacy and have described in detail the horrible conditions in many of these facilities. See, e.g., W. GAYLIN, I. GLASSER, S. MARCUS & D. ROTHMAN, *DOING GOOD: THE LIMITS OF BENEVOLENCE* (1978); E. GOFFMAN, *ASYLUMS* (1961); T. SCHEFF, *BEING MENTALLY ILL: A SOCIOLOGICAL THEORY* (1966). Accord, *Halderman v. Pennhurst State School and Hosp.*, 446 F. Supp. 1295, 1308 (E.D. Pa. 1977) ("physical environment at Pennhurst is hazardous to the resident, both physically and psychologically"); *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 756 (E.D.N.Y. 1973) (conditions at Willowbrook cause "deterioration rather than improvement").

31. See Kleinfeld, *supra* note 25, at 106-07.

32. Although some courts have held that parents may not "waive" their children's rights, see *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944); *Bartley v. Kremens*, 402 F. Supp. 1039, 1048 (E.D. Pa. 1975), *vacated on other grounds*, 431 U.S. 119 (1977); *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 762 (E.D.N.Y. 1973), it is uncertain what rights children actually have and how broadly they may be exercised independent of parental authority. Compare *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (minor has constitutional right to an abortion without parental consent) with *Parham v. J.R.*, 99 S. Ct. 2493 (1979) (parent may admit child to institution upon approval of "neutral factfinder" without substantial procedural protections for the child).

33. Around the turn of the century, a fear of railroading innocent people into institutions resulted in several restrictive commitment statutes. See N. KITTRIE, *supra* note 22, at 64. These statutes narrowed the group of people who could be committed and provided procedural protections such as the right to a jury trial. See Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CALIF. L. REV. 840, 842-43 (1974). These statutes came under attack, however, in the 1940's and 1950's when psychiatry became more respected. *Id.* One commentator argued that medical questions rather than

Schmidt,³⁴ for example, a constitutional challenge was raised against a civil commitment statute allowing the hospitalization of adults by their families without formal judicial protections. The district court held the statute defective because it failed to provide notice, counsel, or the opportunity to be heard in an adversarial hearing with the right to a jury decision on the commitment issue.³⁵ The court also required that mental illness and dangerousness to self or others be found beyond a reasonable doubt³⁶ and that the state pursue the least restrictive placement.³⁷

Two years later in *Lynch v. Baxley*,³⁸ another district court required many of the same procedural safeguards set forth in *Lessard*. The procedures applied in *Lynch* were somewhat more flexible, however, in that the court permitted a waiver of the individual's right to be present upon court approval.³⁹ In addition, a guardian *ad litem* could be substituted for counsel if he or she was a licensed attorney with a truly adversarial role.⁴⁰ Finally, the court established a clear and convincing evidence standard

"civil rights" were involved in the commitment decision and procedural protections should be lessened. Comment, *Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill*, 56 YALE L.J. 1178, 1189-90 (1947). The result was a shift of commitment power from judges to psychiatrists. Ellis, *supra* note 33, at 843. With a later trend toward voluntary commitment, see *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1193 n.4 (1974), the percentage of individuals subject to involuntary commitment decreased, and procedures justifying confinement came under stricter judicial scrutiny. See Ellis, *supra* note 33, at 843-44.

34. 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974).

35. *Id.* at 1092. The right to a jury trial in commitment proceedings has been criticized as inducing trauma in the patient and humiliation in his or her family. See Ellis, *supra* note 33, at 884-85.

36. *Id.* at 1095. The Court has recently decided that the appropriate standard of proof for involuntary commitment proceedings is clear and convincing evidence rather than proof beyond a reasonable doubt. *Addington v. Texas*, 99 S. Ct. 1804, 1810-13 (1979).

37. 349 F. Supp. at 1095-96. For a discussion of the right to the least restrictive alternative, see D. Chambers, *The Principle of the Least Restrictive Alternative: The Constitutional Issues*, in *THE MENTALLY RETARDED CITIZEN AND THE LAW* 486-99 (M. Kindred ed. 1971). See also *Halderman v. Pennhurst State School and Hosp.*, 446 F. Supp. 1295, 1319 (E.D. Pa. 1977) (mentally retarded have constitutional right to habilitation in the least restrictive setting); *Eubanks v. Clarke*, 434 F. Supp. 1022, 1028 (E.D. Pa. 1977) (constitutional right to placement in least restrictive setting consonant with legitimate safety, care, and treatment objectives); *Dixon v. Weinberger*, 405 F. Supp. 974, 979 (D.D.C. 1972) (deprivation of liberty of dangerous patient not beyond what is necessary for protection); *Dixon v. Attorney Gen.*, 325 F. Supp. 966, 969-70 (M.D. Pa. 1971) (maximum security institution is adverse to rehabilitation).

38. 386 F. Supp. 378 (M.D. Ala. 1974).

39. Under the procedures applied in *Lynch*, either the child or his attorney could waive the child's presence at the hearing. *Id.* at 388-89.

40. *Id.* at 389. A guardian *ad litem* is a guardian appointed to prosecute or defend a suit on behalf of an infant or a party otherwise incapacitated. BLACK'S LAW DICTIONARY 57 (5th ed. 1979).

rather than proof beyond a reasonable doubt as sufficient for civil commitment.⁴¹

Prior to these and other challenges to involuntary commitment statutes, the courts had begun to recognize that many substantive and procedural rights were applicable to minors. For example, in both *In re Gault*⁴² and *In re Winship*,⁴³ the Supreme Court held that juveniles threatened with confinement in juvenile penal institutions were entitled to many of the due process protections allowed adults in criminal proceedings, including a standard of proof beyond a reasonable doubt.⁴⁴ Despite these encouraging developments, however, the scope of juvenile rights has remained limited. Although the Court has found that minors are "persons" under the Constitution "possessed of fundamental rights which the State must respect,"⁴⁵ it has extended to children only limited first amendment,⁴⁶ due process,⁴⁷ and equal protection rights,⁴⁸ primarily in the areas of education and juvenile court proceedings. Accordingly, the Court has used *parens patriae* to support a broader authority over children than adults, with rights afforded minors often differing in substance and implementation from those granted adults.⁴⁹ Some of the rationales for this differentiation include a child's vulnerability and lack of judgment, maintenance of family author-

41. 386 F. Supp. at 393. The reason given by the court for the clear and convincing standard of proof was that the subjective determinations required in civil commitments "cannot ordinarily be made with the same degree of certainty that might be achieved where purely objective facts and occurrences are at issue." *Id. Accord*, *Addington v. Texas*, 99 S. Ct. 1804, 1812-13 (1979).

42. 387 U.S. 1 (1967).

43. 397 U.S. 358 (1970).

44. *Id.* See Smith, *An Analysis of When Juveniles Must Be Afforded Due Process Rights*, 58 NEB. L. REV. 136 (1978). See note 4 *supra*.

45. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 511 (1969).

46. *Id.* (child's free speech rights violated by school prohibition of political armbands); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (child's required participation in school Bible reading violates establishment clause); *Engel v. Vitale*, 370 U.S. 421 (1962) (required daily prayers in public school violates establishment clause); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (required flag salute violates child's free speech).

47. See *In re Winship*, 397 U.S. 358 (1970) (juvenile proceedings merit due process protections including proof beyond a reasonable doubt); *In re Gault*, 387 U.S. 1 (1967) (minor facing confinement in juvenile facility entitled to due process protections).

48. *Levy v. Louisiana*, 391 U.S. 68 (1968) (illegitimate children entitled to maintain action for wrongful death of their mother); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (educational segregation of children based on race violates equal protection clause).

49. See, e.g., *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (no right to jury trial in juvenile court adjudicative proceedings); *Ginsberg v. New York*, 390 U.S. 629 (1968) (state may prohibit sale of sexual material to children although such material remains available to adults). As one court has suggested, however, either "all fundamental rights apply to minors, but the state may sometimes assert an interest sufficient to justify the state action" or "minors do not necessarily have all of the fundamental rights of adults." *Poe v. Gerstein*,

ity, and some form of independent parental interest.⁵⁰

Children's rights cases have generally pitted the child against the state with the parent's interest assumed to be identical to that of the child.⁵¹ In *Planned Parenthood v. Danforth*,⁵² however, the Court was presented with a conflict between the interests of parent and child, where the state was placed in the position of either supporting parental authority or safeguarding a fundamental right of the minor. The case concerned a state statute which denied a pregnant minor the right to an abortion without parental consent. The Court recognized a clear conflict of private interests and found the family structure sufficiently fractured to find no substantial state interest in sanctioning parental authority at the expense of the clear privacy right of the minor to obtain an abortion.⁵³ Thus, the Court upheld the minor's right to make her own abortion decision.

A similar conflict between the independent interests of parent and child exists in the context of "voluntary" commitment of minors to institutions upon parental request.⁵⁴ For mentally retarded children, these conflicting interests were raised first in *Heryford v. Parker*⁵⁵ and *Saville v. Treadway*.⁵⁶ In *Parker*, the Tenth Circuit found that the deprivation of liberty inherent in the commitment of a nine-year-old child to a training school had enough constitutional significance to require the procedural protection of counsel prior to commitment.⁵⁷ Similarly, in *Saville*, a federal district

517 F.2d 787, 790 (5th Cir. 1975). The Supreme Court has expressed no firm position on this issue.

50. See Teitelbaum & Ellis, *The Liberty Interest of Children: Due Process Rights and Their Application*, 12 FAM. L.Q. 153, 160-63 (1978). This independent parental interest in the child's development was termed a "right" in *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). See note 3 *supra*. It has been suggested that if parents are to have an absolute right over their children in situations where their interests conflict, a theoretical possibility would be "removal of the child from government by rule of law," and a true status relationship would be created whereby the child would be subject to rules enforced by his or her parents. Teitelbaum & Ellis, *supra*, at 167.

51. See note 47 *supra*.

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

53. The Court acknowledged the state's broader authority in regulating children's activities but conditioned this authority on a "significant" state interest rather than the "compelling" state interest used in the context of adult abortion decisions. *Id.* at 75.

54. See *Parham v. J.R.*, 99 S. Ct. 2493 (1979); *Secretary of Pub. Welfare v. Institutionalized Juveniles*, 99 S. Ct. 2523 (1979).

55. 396 F.2d 393 (10th Cir. 1968).

56. 404 F. Supp. 430 (M.D. Tenn. 1974).

57. Finding a liberty interest for mentally retarded children in such proceedings, the court stated:

It matters not whether the proceedings be labeled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration — whether for punishment as an adult for a crime,

court found that procedures which allowed mentally retarded children to be admitted to a state hospital and school by their parents without restriction were constitutionally insufficient when the children could be released only through the consent of state authorities or through court proceedings.⁵⁸ Both *Parker* and *Saville*, therefore, focused more on safeguarding the child's liberty interest rather than deferring to parental decisionmaking.

Challenges to state procedures for the "voluntary" commitment of both "mentally ill" and "mentally retarded" minors became most visible in *Bartley v. Kremens*⁵⁹ and *J.L. v. Parham*.⁶⁰ *Bartley* was a class action brought on behalf of all children under nineteen who were subject to a Pennsylvania statute authorizing commitment to institutions for the mentally ill and the mentally retarded by parental request.⁶¹ After application by the parent, the statute authorized the director of the facility to have an examination made of the child, upon which the commitment decision would be based.⁶² The district court found the procedures inadequate and mandated that the child be given the opportunity for judicial process prior to commitment.⁶³ The court made no distinction between preadmission and postadmission procedures. It allowed the child to be admitted by the parent but required a probable cause hearing within seventy-two hours by an unbiased tribunal to determine whether institutionalization was necessary.⁶⁴ If the probable cause hearing indicated the need for institutionalization, then judicial procedures, including notice and a hearing, were to

rehabilitation as a juvenile for delinquency or treatment as a feeble-minded or mental incompetent — which commands observance of the constitutional safeguards of due process.

396 F.2d at 396.

58. The court reasoned that the potential for such a severe deprivation of the mentally retarded child's liberty and the possible conflict of interest between parent and child made procedural protections necessary. 404 F. Supp. at 432. As one commentator has explained:

[T]he parent may be motivated to ask for such institutionalization for a variety of reasons other than the best interests of the child himself, i.e., the interests of other children in the family, mental and physical frustrations, economic stress, hostility toward the child stemming from the added pressures of caring for him, and perceived stigma of mental retardation. The retarded child's best interests may lie in being with his family and in the community but theirs may not lie in keeping him.

Amicus Curiae Brief, *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), *quoted in* Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW. 133, 139 (1972).

59. 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated as moot*, 424 U.S. 964 (1976).

60. 412 F. Supp. 112 (M.D. Ga. 1976).

61. *See* PA. STAT. ANN. tit. 50, §§ 402(a)(2), 403(a)(2) (Purdon 1969).

62. *Id.* §§ 402(b), 403(b).

63. 402 F. Supp. at 1049-54.

64. *Id.* at 1049.

be made available to the child.⁶⁵ The procedures prescribed by the court were extremely flexible, however, since the child or his or her attorney could waive all of these rights except for notice of commitment and assistance of counsel.⁶⁶

After the Supreme Court granted probable jurisdiction to hear the case,⁶⁷ Pennsylvania enacted a statute giving added procedural protection to "mentally ill" children fourteen years old and older but left largely unchanged the position of the "mentally retarded" minor.⁶⁸ As a result, the Supreme Court refused to decide the case on its merits, finding the claims of the same class members mooted by the legislation.⁶⁹ Although some of the class members had live claims, the Court remanded the case to the district court with clear instructions to narrow the certified class.⁷⁰ The Court thereby avoided deciding what procedural protections were necessary to commit mentally ill or mentally retarded children and youths. On remand, however, the district court merely redefined the class to exclude all mentally ill minors over fourteen subject to commitment; that is, those who had been recently afforded substantial procedural protections under the Act.⁷¹

The Supreme Court again granted probable jurisdiction to hear the case,⁷² this time in tandem with *Parham v. J.L.*, a class action contesting the liberty rights of "mentally ill" children subject to Georgia's voluntary admission statute.⁷³ Under the statute, parents could commit their children under eighteen to mental health facilities if the child showed evidence of mental illness and was found to be suitable for treatment. In addition, the child's release could be conditioned on parental consent.⁷⁴ Moreover,

65. *Id.* at 1049-54.

66. *Id.* at 1053-54, 1054 n.26. See note 152 *infra*.

67. 424 U.S. 964 (1976).

68. PA. STAT. ANN. tit. 50, §§ 7101-7503 (Purdon Supp. 1977-78). The 1976 Pennsylvania Act was a significant reform in commitment procedures granting "mentally ill" minors, at least, some of the most progressive procedural protections in the country. See Comment, *Pennsylvania's Mental Health Procedures Act*, 15 DUQ. L. REV. 669 (1977); Comment, *Pennsylvania's Commitment: The Mental Health Procedures Act*, 50 TEMP. L.Q. 1035 (1977).

69. *Kremens v. Bartley*, 431 U.S. 119, 128-29 (1977).

70. In remanding, the Supreme Court instructed the district court to "stop, look, and listen" before certifying a class and to pay careful attention "to the differences between mentally ill and mentally retarded [children] and between the young and the very young." *Id.* at 135-36.

71. *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 459 F. Supp. 30, 42-43 (E.D. Pa. 1978).

72. 431 U.S. 936 (1977).

73. GA. CODE §§ 88-503.1, .2 (1953).

74. *J.L. v. Parham*, 412 F. Supp. 112, 139 (M.D. Ga. 1976).

the statute made no distinctions between procedure for admission and continuing commitment, and particular procedures were devised without uniformity among the various Georgia hospitals.⁷⁵ The district court found the Georgia statute unconstitutional because it provided "absolutely no due process" protection for the child.⁷⁶ In addition, the district court enjoined future commitments under the procedures and ordered the state either to remove those children already incarcerated or to recommit them utilizing other Georgia laws providing more substantial procedural protections.⁷⁷

II. *PARHAM'S* MINIMAL PREADMISSION DUE PROCESS

In 1979, the Supreme Court disposed of both the Pennsylvania and Georgia cases by determining what protections are constitutionally required prior to "voluntary" admissions of minors to state institutions by their parents. In *Parham v. J.R.*⁷⁸ and *Secretary of Public Welfare v. Institutionalized Juveniles*,⁷⁹ the Court found that some form of inquiry by a "neutral factfinder" with the power to refuse admission must be made to determine whether preadmission due process requirements have been satisfied.⁸⁰ The factfinder, who need not be an attorney or other judicial officer, must probe the child's background employing all available sources, including an interview with the child prior to admission.⁸¹ In addition, the Court ruled in both cases that the child's need for continuing commitment must be periodically reviewed by an independent procedure to be defined by the state.⁸² Since the Court found that both Pennsylvania's and Georgia's procedures comported with these minimal due process requirements,

75. GA. CODE § 88-503.3(a) (1953).

76. For a discussion of the various procedures used, see *Parham v. J.R.*, 99 S. Ct. 2493, 2497-500 (1979).

77. 412 F. Supp. at 140. The court also ordered Georgia to expend whatever amount of money necessary to provide resources and personnel for more appropriate nonhospital facilities. *Id.* at 139-40.

78. 99 S. Ct. 2493 (1979). The Supreme Court decision was captioned under the name of a different member of the plaintiff-class due to the death of the named appellee before the district court, J.L., pending review by the Supreme Court.

79. 99 S. Ct. 2523 (1979).

80. *Parham v. J.R.*, 99 S. Ct. at 2506.

81. *Id.* at 2506. The "neutral factfinder" had to have the authority to refuse any child for admission not satisfying the state's "medical standards." The standards, however, are specified in the statute only as showing "evidence of mental illness" and being "suitable for treatment." GA. CODE § 88-503.1 (1953).

82. *Parham v. J.R.*, 99 S. Ct. at 2506; *Secretary of Pub. Welfare v. Institutionalized Juveniles*, 99 S. Ct. at 2526. In *Parham*, the Supreme Court left the district court free to decide whether the differing review procedures found in the various Georgia hospitals were sufficient in themselves to justify continuing voluntary commitments. 99 S. Ct. at 2511.

it reversed the lower courts' findings that judicial protections were constitutionally required prior to admission.⁸³ On the issue of postadmission procedures, the Court remanded the cases to determine whether the states' procedures were sufficient to justify continuing "voluntary" commitments of children to state institutions.⁸⁴

By distinguishing between preadmission and postadmission procedures, however, the *Parham* Court avoided the most compelling issue before it; namely, what procedures were necessary to justify a child's confinement for an extended period of time. Although Georgia's statute was ostensibly a voluntary admission statute, it permitted confinement for an indeterminate period, conceivably until the child attained his or her majority.⁸⁵ The plaintiffs' attack on the statute was leveled not only at its admission aspects, but also at its continuing commitment power.

In *Institutionalized Juveniles*, the Court's cursory treatment of the issues not only misconstrued the findings of the lower court⁸⁶ but also failed to reach the issue of whether different procedural protections should be granted the various groups within the class.⁸⁷ As previously stated, the district court in this case had denied preadmission hearings and allowed the initial hospitalization of children in state institutions on parental request.⁸⁸ The court foreshadowed the Supreme Court's reasoning by explaining that the prospect of an adversarial hearing prior to admission might deter parents from seeking assistance for their child.⁸⁹ The district court required, however, that within seventy-two hours a probable cause hearing be held on the need for confinement and further required a full hearing on the commitment decision within two weeks.⁹⁰ Procedures for

83. *Id.*; *Secretary of Pub. Welfare v. Institutionalized Juveniles*, 99 S. Ct. at 2528.

84. *Parham v. J.R.*, 99 S. Ct. at 2511; *Secretary of Pub. Welfare v. Institutionalized Juveniles*, 99 S. Ct. at 2523.

85. The statute provides in relevant part: "[S]uch person may be detained by such facility for such period and under such conditions as may be authorized by law." GA. CODE § 88-503.1 (1953). "The superintendent of the facility shall discharge any voluntary patient who has recovered from his mental illness or who has sufficiently improved that the superintendent determines that hospitalization of the patient is no longer desirable." *Id.* § 88-503.2 (1953).

86. Although the lower court had formulated clear postadmission procedures, *see* note 63 *supra*, the Supreme Court characterized these procedures as only being required prior to admission. *Secretary of Pub. Welfare v. Institutionalized Juveniles*, 99 S. Ct. at 2526.

87. The various subgroups included were mentally ill children 14 and over, mentally ill children under 14, mentally retarded children 13 and older, and mentally retarded children under 13. *See Kremens v. Bartley*, 431 U.S. 119, 130-31 (1977).

88. *Bartley v. Kremens*, 402 F. Supp. 1039, 1049 (E.D. Pa. 1975).

89. *Id.*

90. *Id.*

continued commitment, rather than preadmission protections, therefore, were the primary issues before the Supreme Court.

The Court's artificial distinction between admission and continued commitment in both *Parham* and *Institutionalized Juveniles* narrowed its focus to less controversial preadmission procedures. In so doing, it largely ignored the prior law, including the lower court decisions in *Institutionalized Juveniles*, which mandated procedures for continued hospitalization.⁹¹ Accordingly, the Court's discussion of the issues in *Institutionalized Juveniles* was minimal and its analysis was almost exclusively articulated in *Parham*. Within the narrowly defined context of preadmission procedures, the *Parham* Court attempted a due process analysis of the appropriateness of judicial involvement in admissions by parental request.

In determining the private interest involved, the Court acknowledged the child's substantial liberty interest in not being erroneously confined and the possibility of "adverse social consequences" but not necessarily stigma, stemming from institutionalization.⁹² The Court also found, however, that the private interest involved a "combination of the child's and parents' concerns"; the child's interest being "inextricably linked with the parents' interest in, and obligation for, the health and welfare of the child."⁹³ By deferring to traditional parental authority over children, the Court found that parents "retain a substantial, if not the dominant, role in the [admission] decision, absent a finding of neglect or abuse" and accepted the presumption that parents will act in the best interests of their child by seeking the child's hospitalization.⁹⁴

91. See notes 61-66 and accompanying text *supra*.

92. *Parham v. J.R.*, 99 S. Ct. at 2503. The Court used the due process test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), for its determination of what protections were required prior to admission. The three factors to be considered in such a due process analysis are: the private interest to be affected by the official action; the risk of an erroneous deprivation of such interest through procedures used along with the probable value of additional safeguards; and the government's interests, including financial and administrative burdens additional or substitute procedures would entail. *Id.* See *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 848-49 (1977). If the potential for an erroneous deprivation is found to warrant a hearing under the test, the hearing may be conducted before or after the liberty invasion. Compare *Goldberg v. Kelly*, 397 U.S. 254 (1970) (hearing required prior to termination of welfare benefits) with *Mathews v. Eldridge*, 431 U.S. 319 (1976) (for social security disability benefits, a hearing after termination is sufficient). This proceeding may be either administrative or judicial. Compare *Mathews v. Eldridge*, 431 U.S. 319 (1976) (administrative hearing regarding disability benefits) with *In re Gault*, 387 U.S. 1 (1966) (prior to a deprivation of liberty, a juvenile delinquent must receive a judicial hearing).

93. *Parham v. J.R.*, 99 S. Ct. at 2503.

94. *Id.* at 2505.

The Court distinguished *Planned Parenthood v. Danforth*,⁹⁵ by finding that the existence of an independent factfinder made parental power in the commitment context less than absolute. This view assumes, of course, that the "neutral factfinder", namely the admitting clinician, can be truly neutral and capable of making an accurate diagnosis under stressful circumstances.⁹⁶ Even though the Court admitted the "fallibility of medical and psychiatric diagnosis,"⁹⁷ it viewed the commitment decision as medical in nature and more suitably made by a clinically trained physician rather than an untrained judge. Citing evidence that adversarial involuntary commitment hearings for adults were often a sham,⁹⁸ the Court assumed the sufficiency of existing psychiatric practices instead of focusing on alternative safeguards for individual rights. Moreover, recent literature indicates that commitment hearings can produce judgments independent of those made by psychiatrists and are therefore valid.⁹⁹

In terms of the state's interests in "voluntary" commitment proceedings

95. 428 U.S. 52 (1976). See notes 52-53 and accompanying text *supra*.

96. Both assumptions were addressed in the amicus briefs filed with the Court in these cases. See Amicus Curiae Brief of National Center for Law and the Handicapped at 52-55, *Secretary of Pub. Welfare v. Institutionalized Juveniles*, 99 S. Ct. 2523 (1979); Amicus Curiae Brief of Child Welfare League of America at 63-64, *Parham v. J.R.*, 99 S. Ct. 2493 (1979). These assumptions have also been criticized in commentary. See T. SZAZ, *THE MANUFACTURE OF MADNESS* 35 (1970) (tendencies toward overcommitment have been noted as more pronounced for patients who are children). See also LEE & TEMERLIN, *Social Class, Diagnoses and Prognoses for Psychotherapy*, in *PSYCHOTHERAPY: THEORY, RESEARCH AND PRACTICE* 181 (1970); T. SCHEFF, *supra* note 30; Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974); Rosenhan, *On Being Sane in Insane Places*, 179 SCIENCE 250 (1973), reprinted in 13 SANTA CLARA LAW. 379 (1973).

97. 99 S. Ct. at 2507. In *O'Connor v. Donaldson*, 422 U.S. 563 (1975), Chief Justice Burger stated that "there can be little responsible debate regarding the uncertainty of diagnosis in this field [psychiatry] and the tentativeness of professional judgment." *Id.* at 584 (Burger, C.J., concurring) (quoting *Greenwood v. United States*, 350 U.S. 366, 375 (1956)). Recently, Chief Justice Burger reiterated this concern when he stated that "[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations Psychiatric diagnosis is . . . to a large extent based on medical impressions drawn from subjective analysis and filtered through the experience of the diagnostician." *Addington v. Texas*, 99 S. Ct. 1804, 1811 (1979).

98. 99 S. Ct. at 2508.

99. Compare Hiday, *Reformed Commitment Procedures: An Empirical Study in the Courtroom*, 11 LAW & SOC'Y REV. 651, 664-65 (1970) (although judges agreed with psychiatrists on release, they were less willing to do so for commitment) and Zander, *Civil Commitment in Wisconsin: The Impact of Lessard*, 1976 WIS. L. REV. 503, 552 (when strict judicial proceedings are followed, hearings are longer with greater emphasis on dangerousness and less restrictive alternatives) with Wenger & Fletcher, *The Effect of Legal Counsel on Admissions to a State Mental Hospital: A Confrontation of Professions*, 10 J. HEALTH & HUMAN BEHAVIOR 66 (1968) (judges unquestionably rely on medical recommendations, but a correlation exists between representation by counsel and decision not to commit).

for minors, the Court noted the importance of removing unnecessary obstacles to treatment and allocating scarce resources to those most in need.¹⁰⁰ The Court also recognized the state's reluctance to interfere in family disputes. While this policy has a generally sound social basis, particularly within the privacy of the home,¹⁰¹ state action considerations are raised when the state intervenes to assist families in asserting parental authority over children by making available institutional treatment facilities when parents request them.

The state has an obvious responsibility to protect sufficiently the individual child's liberty interest when he or she is institutionalized by parental request.¹⁰² The *Parham* Court, however, was not convinced that protections of judicial process were required to prevent erroneous deprivations of a child's liberty. Giving extreme deference to family autonomy, the Court dismissed the need for a formal adversarial hearing, finding insufficient evidence of a conflict of interest between parent and child.¹⁰³ Moreover, the Court explained that formal hearings risk exacerbation of family tensions.¹⁰⁴ Implicit in the Court's reasoning was the assumption that loving, concerned parents would support the treatment process and welcome the child back into the home as soon as possible while divergence from this pattern would be "a rare exception" to the rule.¹⁰⁵

100. 99 S. Ct. at 2505-06.

101. See Teitelbaum & Ellis, *supra* note 50, at 183.

102. See, e.g., *In re Roger S.*, 19 Cal. 3d 928, 569 P.2d 1286, 14 Cal. Rptr. 298 (1977). In this case a 14-year-old minor sought by writ of habeas corpus his release from a mental hospital to which he had been committed by his mother. The Supreme Court of California held that the parent could not waive the child's right to a determination of whether he was mentally ill, dangerous to himself, or likely to benefit from institutionalization. The court justified this limitation on parental authority by finding that an erroneous commitment would jeopardize the health and safety of the child and would create significant social burdens. 19 Cal. 3d at 929, 569 P.2d at 1290-91, 14 Cal. Rptr. at 302-03.

When a parent removes a child from the family and places him in an institution, the sanctity of family autonomy has been breached by the parents themselves. There is a clear distinction between a parent's decision to seek medical treatment for his or her child and a parent's decision to commit his or her child to a state institution. The former is a temporary removal of the child from the home while the latter is by definition custodial confinement which may be of indefinite duration. See *In re Gault*, 387 U.S. 1, 27-28 (1967); Amicus Curiae Brief of the Child Welfare League of America, *supra* note 96, at 67. Even in the area of medical decisionmaking, however, the state has circumscribed parental authority when the consequences may be of grave concern to the child and not in his or her best interest. See *State v. Perricone*, 37 N.J. 463, 181 A.2d 751, *cert. denied*, 371 U.S. 890 (1962) (blood transfusion for child authorized despite first amendment objections of parents on religious grounds).

103. 99 S. Ct. at 2505, 2508. *But see* note 105 *infra*.

104. *Id.*

105. This assumption, while consistent with the Court's finding that there is no conflict of interest between parent and child in the "voluntary" commitment context, ignores the find-

This assumption of a loving parent-child relationship, however, did not apply to those children who were wards of the state in *Parham*, and the Court had to decide whether these juveniles should receive the same minimal preadmission procedural protections afforded children committed by their parents. Ignoring the increased state involvement, the Court found no need to treat wards differently from other minors if a state's application for admission was reasonable and made in good faith.¹⁰⁶ The majority did suggest, however, that postadmission procedures for wards of the state should be more extensive than those for children committed by their parents, because the "absence of an adult who cares deeply for a child . . . may have some effect on how long a child will remain in the hospital."¹⁰⁷

Although Justice Brennan, with whom Justices Marshall and Stevens joined, agreed with the majority that "voluntary" admission of minors upon parental request required minimal due process protections,¹⁰⁸ they argued that juveniles who were wards of the state were entitled to formal hearings before confinement in mental institutions.¹⁰⁹ In their view, there was no justification for denying these children due process hearings simply because they were committed by their social workers.¹¹⁰ They explained that commitment in such a context does not give rise to the traditional deference to family authority and the special considerations articulated by the Court to justify postponement of formal proceedings when parents initiate commitment.¹¹¹ From a constitutional standpoint, the dissenters argued that a ward's liberty interest required at least as much due process protection, if not more, as adults in the involuntary commitment context. They emphasized the high risk of an erroneous commitment without formal procedures because of the uncertainty of diagnosis,¹¹² the abnormal

ings of fact made by the lower courts. *See, e.g.*, *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 459 F. Supp. 30, 36-38 (E.D. Pa. 1978); *Bartley v. Kremens*, 402 F. Supp. 1039, 1044, 1047-48 (E.D. Pa. 1975). In his concurrence in *Parham*, Justice Stewart expanded this finding of no conflict of interest between parent and child by explaining that there is no constitutional difference between a parent's decision to have an appendectomy performed on his child and a decision to have his child committed. 99 S. Ct. at 2515 (Stewart, J., concurring).

106. *Parham v. J.R.*, 99 S. Ct. at 2512.

107. *Id.*

108. *Id.* at 2515-16 (Brennan, J., concurring in part and dissenting in part).

109. *Id.* at 2516.

110. *Id.* at 2522.

111. Justice Brennan asserted that social workers would not be deterred from initiating commitment proceedings if preadmission hearings were required since children as wards would be receiving assistance while proceedings were pending, and hearings would probably neither traumatize these children nor otherwise hamper their recovery. *Id.* (Brennan, J., concurring in part and dissenting in part).

112. *See* notes 96, 97 and accompanying text *supra*.

degree of stress often exhibited by a child in the commitment situation,¹¹³ and a tendency of psychiatrists to overcommit by erring on the side of caution.¹¹⁴

Addressing the issue of parents seeking the commitment of their children who are not wards of the state, the dissenters emphasized that these children are not accurately described as voluntary patients.¹¹⁵ In their opinion, *Danforth*¹¹⁶ was controlling, but only in the postadmissions context. Analogizing to the privacy interest involved when a minor seeks an abortion without parental consent, the dissenters stated that the right to freedom from wrongful confinement, stigma, and intrusions upon one's bodily integrity is at least as great as the right to obtain an abortion.¹¹⁷ In *Danforth*, however, the Court had recognized a potential conflict of interest surrounding an abortion decision and assumed a fractured family structure, whereas in *Parham* and in *Institutionalized Juveniles*, the Court refused to make these assumptions at the admission stage. By limiting its inquiry to preadmission procedural protections, the majority chose to encourage parents to seek treatment for their child and ignored lower court findings and other evidence in the record on fractured family structures and inaccurate diagnoses. The dissenters, on the other hand, were only willing to postpone formal protections. At the postadmission level, they found a conflict of interest analogous to *Danforth's* requiring a full range of due process.¹¹⁸

Though the dissenters argued that the Court should have determined appropriate postadmission procedures including a hearing and counsel, they too failed to realize that in *Institutionalized Juveniles* and arguably in *Parham* the lower courts had already undertaken this task. Nevertheless, since the Court left unanswered the procedures necessary to maintain a mentally ill or a mentally retarded child in a state institution, an analysis of the similarities and differences between the mentally ill and the mentally retarded, their various needs, and the factors to be considered in applying postadmission due process for both groups is appropriate.

113. See J. SIMONS, *PSYCHIATRIC EXAMINATION OF CHILDREN* 1, 6 (1974); Laurie & Rieger, *Psychiatric And Psychological Examination of Children*, in 2 *AMERICAN HANDBOOK ON PSYCHIATRY* 19 (S. Arieti ed. 1974).

114. See note 96 *supra*.

115. 99 S. Ct. at 2518 (Brennan, J., concurring in part and dissenting in part).

116. 428 U.S. 52 (1976).

117. 99 S. Ct. at 2519 (Brennan, J., concurring in part and dissenting in part).

118. *Id.*

III. POSTADMISSION PROCEDURAL PROTECTIONS FOR BOTH MENTALLY ILL AND MENTALLY RETARDED MINORS

Since the Court has required only minimal procedural protections in the preadmissions context, it is important to ascertain whether such preliminary procedures are sufficient to justify continuing commitments for both mentally ill and mentally retarded children. A due process analysis of postadmission procedures, therefore, must examine the potential problems surrounding the initial admission decision as well as the effects of continued institutionalization.

When both the mentally ill child¹¹⁹ and the mentally retarded child¹²⁰ are voluntarily committed to state institutions by their parents, the surrounding circumstances have often evidenced clear conflicts between the interests of parent and child. The children alleged to be mentally ill in *Institutionalized Juveniles*, for example, were all from disrupted, chaotic homes.¹²¹ The expert witnesses for all parties involved in that case agreed that families in which a minor had been committed were generally characterized by severe stress, disharmony, and dislocation and that often the juvenile's behavior leading to hospitalization may in fact have been provoked by parents.¹²² The testimony also recognized that parents often seek to institutionalize their children for the wrong reasons and cannot be "ob-

119. Mental illness is a vague concept with its definition generally based on the norms of the definer. As stated in one comment: "[B]ecause of the unavoidably ambiguous generalities in which the American Psychiatric Association describes its diagnostic categories, the diagnostician has the ability to shoehorn into the mentally diseased class almost any person he wishes, for whatever reason, to put there." Livermore, Malmquist & Meehl, *On Other Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 80 (1968). See also Duehn & Mayados, *The Effect of Practice Orientations on Clinical Assessment*, 46 AM. J. ORTHOPSYCHIATRY 629 (1976) (extent of negative mental health labeling determined in part by factors extraneous to patient's behavior).

120. To constitute mental retardation, the intellectual impairment must exist "concurrently with deficits in adaptive behavior and [be] manifested during the developmental period." AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, MANUAL ON TERMINOLOGY AND CLASSIFICATION IN MENTAL RETARDATION 11 (H. Grossman ed. 1973). The mentally retarded are generally placed into four categories by psychologists: the educable, who comprise 89% of those labeled mentally retarded, can attain relative self-sufficiency; the moderately retarded, who comprise 6% of the retarded population, can attend to their personal needs, and can assist in the home as well as in sheltered workshops; the severely retarded, who comprise about 3.5% of the retarded population, can learn self-care skills but produce little economically; and finally, the profoundly retarded who require residential care at some period in their lives outside the home, but are generally able to acquire some basic self-care techniques. NATIONAL ASSOCIATION FOR RETARDED CITIZENS — FACTS ON MENTAL RETARDATION 5 (1973).

121. See Brief for Appellees at 55-56, *Secretary of Pub. Welfare v. Institutionalized Juveniles*, 99 S. Ct. 2532 (1979).

122. *Id.* at 52-53.

jective reporters" of their child's behavioral background.¹²³

Similarly, parents who seek to institutionalize their "mentally retarded" children cannot be presumed to be neutral and detached observers of their child's behavior. Having a retarded child leads to stress on a family's emotional and financial resources, threatens its sociopsychological balance, and generally disrupts family life.¹²⁴ Since mental retardation is a combination of intellectual impairment and behavioral maladaptation, the professional's diagnosis of retardation must be based on reports of the child's behavior from lay parent observers who are intimately affected by the decision.¹²⁵ Though many state procedures, such as those relied on in *Institutionalized Juveniles*, may require diagnosis of the child prior to initiation of commitment proceedings by a parent,¹²⁶ it has been noted that family-oriented physicians tend to base a recommendation for commitment on what they feel is best for the entire family rather than what is the least restrictive alternative for the child.¹²⁷

Moreover, parents who seek the commitment of their mentally ill and mentally retarded children and physicians who recommend such institutionalization may not be aware of less drastic alternatives; in fact, none may exist in their community.¹²⁸ A negative societal attitude toward the mentally retarded and the mentally ill has often resulted in prohibitive zoning ordinances and covenants designed to keep mainstreaming projects

123. *Id.* at 54. For a discussion of the tendency of parents to use their disturbed child as a scapegoat for family problems, see Bell & Vogel, *The Emotionally Disturbed Child as the Family Scapegoat*, in A MODERN INTRODUCTION TO THE FAMILY 412 (1968); LAING & ESTERSON, *INSANITY, MADNESS, AND THE FAMILY* (1964).

124. See Begab, *The Mentally Retarded and the Family*, in PREVENTION & TREATMENT OF MENTAL RETARDATION 71 (I. Phillips ed. 1966); Davis, *Family Processes in Mental Retardation*, 124 AM. J. PSYCHIATRY 340 (1967); Mickenberg, *The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals*, 31 STAN. L. REV. 625 (1979).

125. See Teitelbaum & Ellis, *supra* note 50, at 153, 188. Since mental retardation is characterized by intellectual and behavioral maladaptation, reliance on the latter element may provide inaccuracies in diagnosis. *Id.* at 189.

126. See 3 PA. BULL. 1840 (1973).

127. See Kelly & Menolascino, *Physicians' Awareness and Attitudes Toward the Retarded*, 13 MENTAL RETARDATION 10 (1975). See also PARENTS SPEAK OUT: VIEWS FROM THE OTHER SIDE OF THE TWO-WAY MIRROR (Turnbull & Turnbull eds. 1978) (mental retardation professionals describe their experiences as parents of mentally retarded children). Diagnostic tests themselves, if given below the age of two, also have their own problems in terms of reliability over short periods of time. See L. CRONBACH, *ESSENTIALS OF PSYCHOLOGICAL TESTING* 210 (1960); Menolascino, *Emotional Disturbance and Mental Retardation*, 70 AM. J. MENTAL DEFICIENCY 248, 250 (1965).

128. The availability of alternatives is often a function of socioeconomic status. The poor not only have limited access to many private facilities, they also receive less assistance in making the difficult commitment decision. See Ellis, *supra* note 33, at 852.

out of local communities.¹²⁹ Accordingly, parents who cannot afford to send their children to private residential schools are often forced to send their children to restrictive state institutions which have been described as "storing" people rather than vigorously pursuing the goal of normalization.¹³⁰

Once the child is removed from the home, the need to defer to parental interests is significantly diminished, and the state assumes the responsibility of assuring that continued institutionalization is necessary for the child.¹³¹ Regardless of the appropriateness of the initial commitment and placement, once institutionalized, the child's liberty interest should become primary. This liberty interest extends beyond mere freedom from physical confinement and includes protection from the adverse effects of confinement on the overall growth, development, and well being of the child. While institutionalized, juveniles are forced to live away from their families, friends, and community in unfamiliar surroundings in which they may be subjected to intrusive treatments that can violate their bodily integrity.¹³² In addition, once a mentally ill or mentally retarded individual is institutionalized, the lack of opportunities to seek legal assistance and the complacency often accompanying incarceration may functionally diminish whatever motivation the child may have to seek judicial assistance.¹³³ Moreover, while both adults and children suffer the stigma and humiliation resulting from institutionalization, children generally experience more severe effects since they tend to be confined for longer periods of time and are more impressionable and vulnerable.¹³⁴ Indeed, mentally retarded children who are often viewed as incapable of "getting better" may remain in institutions for their entire lives, getting worse.¹³⁵ Given the profound

129. See Schoenfeld, *A Survey of the Constitutional Rights of the Mentally Retarded*, 32 Sw. U.L.J. 605, 629-32 (1978).

130. See *Wyatt v. Aderholt*, 503 F.2d 1305, 1313 (5th Cir. 1974) (Alabama's Partlow State School and Hospital's treatment of its inmates is more accurately described as "storage of persons" rather than care or even custody); *Halderman v. Pennhurst State School and Hosp.*, 446 F. Supp. 1295, 1303 (E.D. Pa. 1977) (treatment and care do not exist in many state institutions).

131. See note 102 *supra*.

132. *Parham v. J.R.*, 99 S. Ct. at 2516 (Brennan, J., concurring in part and dissenting in part). See note 18 *supra*.

133. Strauss, *Reaction Comment to Due Process in Civil Commitment and Elsewhere in THE MENTALLY RETARDED CITIZEN AND THE LAW* 483 (M. Kindred ed. 1976).

134. See J. BOWLBY, *CHILD CARE AND THE GROWTH OF LOVE* 80 (1963); B. FLINT, *THE CHILD AND THE INSTITUTION* 14-15 (1966); N. HOBBS, *THE FUTURES OF CHILDREN* 142-43 (1975); J. HOROCHS, *THE PSYCHOLOGY OF ADOLESCENCE* 156 (1970).

135. See Begab, *The Mentally Retarded and Society: Trends and Issues in THE MENTALLY RETARDED AND SOCIETY: A SOCIAL SCIENCE PERSPECTIVE* 3 (M. Begab & S. Richardson eds. 1975). As a result of institutionalization, studies have shown decreases in

effect institutionalization has on a person's life, additional safeguards must be introduced to prevent continued erroneous commitment.

Another obvious factor to be addressed in determining appropriate post-admission procedures is the risk of erroneous commitment under existing procedures and the extent this risk could be reduced by additional or alternative procedural safeguards.¹³⁶ Questions to be considered include whether the decisionmaker has reliable and direct knowledge of the facts bringing about the deprivation and how other procedures might impact on the risk of error.¹³⁷ At the present time, as in Georgia, the only required postadmission procedural protection for "mentally ill" minors is the undefined independent review required by the Supreme Court in *Parham*. This review should be held promptly after admission, because despite the Court's findings, there is a substantial risk of error in relying upon a "neutral factfinder's" preadmission interviews with distraught parents and an upset child as a basis for hospitalization.¹³⁸ Even assuming no conflict of interest between parent and child, such an emotionally charged situation cannot lead to a great deal of diagnostic accuracy; hence, the medical tendency to err on the side of caution and admit the child will often pre-

intelligence quotients. See Siegel & Sternlich, *Institutional Residence and Intellectual Functioning*, 12 J. MENTAL DEFICIENCY RESEARCH 119 (1968); Silverstein, *Changes in the Measured Intelligence of Institutionalized Retardates as a Function of Hospital Age*, 1 DEVELOPMENTAL PSYCH. 125 (1969). But see Zigler, Butterfield & Capobianco, *Institutionalization and the Effectiveness of Social Reinforcement: A Five and Eight Year Follow-Up Study*, 3 DEVELOPMENTAL PSYCH. 255 (1970). Institutionalization has also resulted in decreased motor skills. See Centerwall & Centerwall, *A Study of Children with Mongolism Reared in the Home Compared to those Reared Away from the Home*, 25 PEDIATRICS 678 (1960); Francis, *The Effects of Own-Home and Institution-Rearing on the Behavioral Development of Normal and Mongol Children*, 12 J. CHILD PSYCH. & PSYCH. 173 (1971). Institutionalization may also adversely affect the development of social skills. See Guthrie, Butler & Gorlow, *Personality Differences Between Institutionalized and Non-Institutionalized Retardates*, 67 AM. J. MENTAL DEFICIENCY 543 (1963) (negative self-attitude); Hobbs, *A Comparison of Institutionalized and Non-Institutionalized Mentally Retarded*, 69 AM. J. MENTAL DEFICIENCY 206, 210 (1964) (socially inadequate children are more likely to be subjected to institutionalization which increases their social incompetence). For a discussion of the impact of institutionalization on verbal skills, see Schlanger, *Environmental Influences on the Verbal Output of Mentally Retarded Children*, 19 J. SPEECH & HEARING DISORDERS 339 (1954). But see Montague, Hutchinson & Matson, *A Comparative Computer Content Analysis of the Verbal Behavior of Institutionalized and Non-Institutionalized Retarded Children*, 18 J. SPEECH & HEARING RESEARCH 43 (1975).

136. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

137. An added benefit from formal procedures such as a hearing would probably be assistance to parents in obtaining less restrictive alternatives to institutionalization for their child. See Teitelbaum & Ellis, *supra* note 50, at 199. The choices for a parent should not be limited to either institutionalization or a return of the child to the home. See generally R. SCHEERENBERGER, *DEINSTITUTIONALIZATION AND INSTITUTIONAL REFORM* (1972).

138. See notes 96-97 *supra*.

vail.¹³⁹ At the bare minimum, postadmission reviews must produce greater accuracy, and a full adversarial hearing would contribute substantially toward attaining this goal.

At the postadmission stage, the *Parham* Court's reasons for precluding adversarial inquiries disappear. First, unlike preadmission judicial process, postadmission procedures would not substantially deter parents from hospitalizing their child. Second, the child's treatment would not be delayed since he or she would already be in the state's custody before a review of the appropriateness of restrictive hospitalization. Third, since the family's autonomy would already have been fractured, a postadmission diagnosis would be based predominantly on observations of staff rather than parents. Moreover, the adversaries in such a hearing would be the physician urging commitment and the child's advocate, rather than the parent and child. Thus, the negative effects of any trauma to parent and child as a result of a postadmission hearing would be outweighed substantially by the involvement of a state institution in the child's daily life. A long-term erroneous commitment would certainly be a far greater trauma for the child.

The precise nature of postadmission protections for the mentally ill or mentally retarded child is complicated by the various classifications of juveniles recognized by the states and judiciary. Some commentators would argue that postadmission procedural protections for "mentally retarded" children should differ from those afforded "mentally ill" children and that young children require less procedural protection than older children.¹⁴⁰ Such disparate treatment is based on societal notions of competence to make one's own decisions and the protective *parens patriae* model. Pennsylvania's postadmission procedures, for example, reflect these notions. Under Pennsylvania procedures, mentally ill children over fourteen are treated like adults facing involuntary commitment. Mentally retarded children thirteen years of age and younger, on the other hand, receive neither representation nor a reasonably prompt postadmission hearing. Either the child or someone acting on his or her behalf must bring a writ of habeas corpus to contest an erroneous commitment.¹⁴¹ Between these two extremes are mentally retarded children fourteen and older and children confined as mentally ill under fourteen who must have their rights explained to them and be informed that periodic status reports on their condition will be made. They may object orally or in writing to their

139. *Id.*

140. *See* *Kremens v. Bartley*, 431 U.S. 119, 135-36 (1977). *See* note 70 *supra*.

141. *Secretary of Pub. Welfare v. Institutionalized Juveniles*, 99 S. Ct. at 2527.

hospitalization, and if they do so, the director of the facility has to inform them of their right to a hearing and provide them with the telephone number of an attorney. Mentally retarded children over thirteen and mentally ill children under fourteen, therefore, have the burden of objecting to their hospitalization.¹⁴² It is unrealistic, however, to expect such initiative from each child without the aid of a state-appointed representative.¹⁴³

The distinction in the Pennsylvania procedures between children of different ages reflects degrees of parental authority over a child depending on the child's capacity to make independent decisions for himself.¹⁴⁴ There is a basis in common law¹⁴⁵ as well as in psychology¹⁴⁶ for allowing children increased self-determination around the age of fourteen. If the basis for procedural protection is purely intellectual capacity, however, then mentally incompetent adults as well as incompetent children could arguably be denied formal due process when they are committed by family members.¹⁴⁷ As the courts have explained, individuals in more helpless situations with less ability to voice their own concerns require more, not less, procedural protection.¹⁴⁸ Since institutionalization can have a profound effect on the young impressionable child and the risk of an erroneous diagnosis is significantly greater in the very early years of a child's life,¹⁴⁹ stricter procedures are required to safeguard the young child's broad liberty interest. Thus, young children as well as older children require at

142. *Id.* at 2527.

143. As Justice Brennan stated, such action would be "no more than a hollow ritual." *Id.* at 2529 (Brennan, J., concurring in part and dissenting in part).

144. While some legislatures have provided procedural protections for all ages, *see, e.g.*, N.M. STAT. ANN. § 34-2A-13 (Supp. 1976-77), others have given them only to older minors. *See, e.g.*, WASH. REV. CODE ANN. § 72.23.070 (Supp. 1977). Recently the California Supreme Court, while reserving judgment on what rights younger children have, chose to provide hearings for children 14 and older alleged to be mentally ill. *In re Roger S.*, 19 Cal. 3d. 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977). *See* note 102 *supra*.

145. The ages of 7, 14, and 21 have been used since early common law days as indicators of legal maturity. Under English common law, for example, children under seven were totally exempted from criminal sanctions. Children between seven and fourteen were presumed to lack criminal capacity unless mental maturity on their part was demonstrated. For children over 14, unless incapacity was proved, they were presumed responsible for their crimes. *See* N. KITTRIE, *supra* note 7, at 108.

146. *See* D. ELKIND, CHILDREN AND ADOLESCENTS 97-104 (2d ed. 1974); B. INHELDER & J. PIAGET, THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE 334-37 (1958).

147. *But see* *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972).

148. One author has attributed the inadequacy of legal representation for children to their lack of money, insensitivity on the part of the bar to recognize conflicts of interest between parent and child, and the child's ignorance of the need for or the availability of legal representation. Kleinfeld, *supra* note 25, at 106.

149. *See* note 96 *supra*.

least an independent advocate to represent their interests after hospital admission.

A final factor to be weighed in determining appropriate postadmission procedures is the state's interest. Fiscal constraints and the administrative burden of new or substitute procedural protections are important governmental considerations when dealing with a limited source of allocated funds.¹⁵⁰ An example of this trade-off in allocating funds for new procedural protections would be the cost of diverting professionals from treatment to participation in postadmission hearings. Flexible procedures, however, can reduce such costs. The type of hearing envisioned by the appellees in both *Parham* and *Institutionalized Juveniles*, for example, could take place within the hospital as an administrative proceeding, thereby saving time and providing convenience to hospital personnel.¹⁵¹ Moreover, institutional psychiatrists currently take part in commitment proceedings for adults, and additional tasks for the commitment of children in light of broad waiver provisions would not represent a substantial burden.¹⁵²

Another valid state interest lies in preserving parental autonomy. If the courts are to preserve this autonomy, however, it is important to outline the parameters of a parent's authority over his or her children.¹⁵³ Unfortunately, the Supreme Court has never established any guidelines on this issue and has addressed the circumstances of each case individually to determine the nature and extent of a child's right.¹⁵⁴ The underlying rationales on which the state has supported parental authority in the past have been: promotion of the child's welfare; parental privilege; social pluralism; and family autonomy.¹⁵⁵

These rationales, however, are inapplicable in the postadmission context. At this stage, the child has been removed from the family and is in the care of the state. The child has often come into the state's custody because the parent has either lost control over the child or feels inadequate

150. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). See note 92 *supra*.

151. Even if judicial review were required of the administrative decision, the number of such appeals would most likely be minimal in light of the waiver provisions.

152. Current waiver provisions leave a great deal to be desired. Extreme reliance is placed on the child's advocate to proceed or not to proceed to a hearing since the child will often be incapable of asserting his or her own rights.

153. See notes 4, 32 *supra*.

154. See, e.g., *Poe v. Gerstein*, 517 F.2d 787, 790 (5th Cir. 1975).

155. A discussion of these rationales is found in *The Mental Hospitalization of Children and the Limits of Parental Authority*, 88 *YALE L.J.* 186, 194-209 (1978).

to meet fully the child's needs.¹⁵⁶ At this point, therefore, parental control should be subordinate to the child's broad liberty interest and the state's duty to protect the child from a continuing erroneous commitment.

Because of the fundamental liberty interest involved, postadmission procedures should follow the directives of the lower courts in *Institutionalized Juveniles* and require notice, presence at the commitment hearing, appointed counsel, cross-examination of witnesses, the opportunity to offer evidence in one's own behalf, and a "clear and convincing" standard of proof. *Ex parte* procedures which deny some type of meaningful hearing to children faced with continuing institutional confinement rely too heavily on "benevolent" motivations¹⁵⁷ and ignore the child's status as a human being entitled to fundamental notions of fairness.¹⁵⁸

The effect of formal postadmission procedural protections for "voluntarily" committed minors would probably be a decrease in the number of institutionalized children in state-run facilities. For most of these children, the state can provide modes of treatment less restrictive than institutionalization. Community-based treatment is often more appropriate clinically and is certainly more responsive to the child's liberty interest.¹⁵⁹ Institutionalization is an expensive and often detrimental way to deal with the mentally impaired and emotionally troubled.¹⁶⁰ Normalization efforts fully supported by the community would not only be less expensive in the long run¹⁶¹ but would undoubtedly be more successful in terms of enabling the individual to lead the most productive life possible.¹⁶²

156. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

157. See notes 16-77 and accompanying text *supra*.

158. See *In re Gault*, 387 U.S. 1, 28 (1966).

159. Over half of the mentally ill children confined in Georgia institutions would not need hospitalization if other forms of care were available in the community. See *J.L. & J.R. v. Parham*, 412 F. Supp. 112, 122 (M.D. Ga. 1976).

160. For a description of some of the alternatives to institutionalization for the mentally retarded, see J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTEREST OF THE CHILD* (1973); Glenn, *The Least Restrictive Alternative in Residential Care and the Principle of Normalization*, in *THE MENTALLY RETARDED CITIZEN AND THE LAW* 499, 505-514 (M. Kindred ed. 1976).

161. See *J.L. v. Parham*, 412 F. Supp. 112, 126 (M.D. Ga. 1976).

162. Even if conditions improve, maintaining children in institutions rather than providing less restrictive alternatives would run contrary to normalization efforts. As one commentator has stated: "[T]he trend is, and must be, toward more temporary placement, community care, and fewer 'life sentences.'" Ennis, *Reaction Comment, Due Process in Civil Commitment and Elsewhere*, in *THE MENTALLY RETARDED CITIZEN AND THE LAW* 476, 484 (M. Kindred ed. 1976).

IV. CONCLUSION

Voluntary commitment of minors to institutions by their parents without formal procedural protections raises the strong possibility of erroneous deprivation of the child's liberty interest. Although concerns and interests of the parent may legitimately factor into the due process balancing, the individual faced with the effects of institutionalization is the child. Extreme deference by the courts to the will of the parent and the diagnostic powers of the psychiatric profession deprives a child of the standard procedural protections afforded other groups faced with less serious constitutional infringements. Children committed by their parents are not "volunteering" to be institutionalized in any sense of the word. The fact that they are young and often incapable of asserting their own rights does not obviate the need to assure that the drastic measure of institutionalization is appropriate for the particular child. The protections of the judicial process, which could in large part be waived by the child and his or her representative, would allow flexibility in commitment proceedings while providing sufficient means to contest inappropriate commitment efforts when necessary.

If institutionalization were made an alternative to be exercised only when absolutely necessary, the emphasis would shift to creation of more community-based alternatives. Although the judiciary can take limited steps to compel the states to create and fund viable alternatives and must continue to safeguard the constitutional rights of the individual, ultimately it is the states and their citizens who must restructure their attitudes toward the mentally ill and the mentally retarded. The long-held view that those deviating from society should be committed and isolated from society must change if added procedural protections are to meet with any long-term success.

The Court's deference to parental authority and psychiatric diagnoses in *Parham* and *Institutionalized Juveniles* is understandable in the preadmission setting. If, however, children are not given the opportunity to contest erroneous commitments soon after their admission, they will be unjustly deprived of their liberty by their parents and the state. What appears to be a return to the benevolent *parens patriae* model at the expense of procedural rights could potentially erode not only the rights of children but also the rights of incompetent or emotionally unstable adults.

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