Constitutional Law - Due Process - Minor Child May Be Voluntarily Committed to Mental Institution by Parents or Guardian Following Precommitment Approval by a Staff Psychiatrist, Provided That the Child's Condition Is Then Periodically Reviewed

Helene M. Koller

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr
Part of the Constitutional Law Commons, Family Law Commons, and the Law and Psychology Commons

Recommended Citation
Helene M. Koller, Constitutional Law - Due Process - Minor Child May Be Voluntarily Committed to Mental Institution by Parents or Guardian Following Precommitment Approval by a Staff Psychiatrist, Provided That the Child's Condition Is Then Periodically Reviewed, 25 Vill. L. Rev. 537 (1980).
Available at: http://digitalcommons.law.villanova.edu/vlr/vol25/iss3/6

This Note is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
CONSTITUTIONAL LAW—DUE PROCESS—MINOR CHILD MAY BE
"VOLUNTARILY" COMMITTED TO MENTAL INSTITUTION BY PARENTS OR
GUARDIAN FOLLOWING PRECOMMITMENT APPROVAL BY A STAFF
PSYCHIATRIST, PROVIDED THAT THE CHILD'S CONDITION IS THEN
PERIODICALLY REVIEWED.

Parham v. J.R. (U.S. 1979)

Two minors confined in a state mental hospital\(^1\) brought a class action\(^2\) seeking to have Georgia's statute governing the voluntary\(^3\) commitment of juveniles to mental institutions by their parents or guardians declared unconstitutional.\(^4\) Alleging that the Georgia commitment procedure deprived

\(^1\) J.L. v. Parham, 412 F. Supp. 112, 114 (M.D. Ga. 1976), rev’d sub nom. Parham v. J.R., 442 U.S. 584 (1979). In 1970, when J.L. was six years of age, his parents placed him in a Georgia state mental hospital. 412 F. Supp. at 117. J.R., who was a ward of the state from the age of three months, was placed in a state mental hospital when he was seven years old. Id. at 116. In the interim between the district court decision and review by the Supreme Court, J.L. died. 442 U.S. at 587 n.1. The death of J.L. did not render the case moot because the suit had already been certified as a class action. Id. See FED. R. CIV. P. 23.

\(^2\) 412 F. Supp. at 117. The class consisted “of all persons younger than 18 years of age now or hereafter received by any defendant for observation and diagnosis and/or detained for care and treatment at any 'facility' within the State of Georgia pursuant to” Ga. Code § 88-503.1 (1975). 412 F. Supp. at 117. For the relevant portion of § 88-503.1, see note 4 infra. The suit was brought under § 1983 which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


\(^3\) It should be noted that the term “voluntary” in statutes providing for the commitment of minors refers to the parents’ or guardians’ desire to commit the child to the mental hospital; thus, the minor may vehemently oppose his “voluntary” commitment. See generally Note, Parental Power in the Voluntary Commitment of Children to Mental Institutions, 17 WASHBURN L.J. 595, 596 (1978). For purposes of the discussion which follows, this note will use the term “voluntary” to designate the admission of children by their parents or guardians, as distinguished from involuntary commitments which are effectuated by the state. See Comment, Overt Dangerous Behavior As A Constitutional Requirement for Involuntary Civil Commitment of the Mentally Ill, 44 U. CHI. L. REV. 562 (1977). See generally Ellis, Volunteering Children: Parental Commitment of Minors to Mental Institutions, 62 CALIF. L. REV. 840, 845-48 (1974); Developments in the Law—Civil Commitment of the Mentally Ill, 87 HARV. L. REV. 1190 (1974) [hereinafter cited as Civil Commitment].

\(^4\) 412 F. Supp. at 118. At the time this suit was instituted, the Georgia procedure governing the commitment of children by their parents or guardians provided:

> The superintendent of any facility may receive for observation and diagnosis... any individual under 18 years of age for whom such application is made by his parent or guardian... If found to show evidence of mental illness and to be suitable for treatment, such person may be given care and treatment at such facility and such person may be detained by such facility for such period and under such conditions as may be authorized by law.


The Georgia provision concerning the release of patients who were voluntarily committed provides: "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
them of their liberty without a due process hearing as required by the fourteenth amendment, the minors requested an injunction against future enforcement of the statute. A three-judge panel of the United States District Court for the Middle District of Georgia granted the relief requested, finding that the due process clause requires preconfinement hearings whenever parents or guardians commit their children to state mental institutions. On appeal, the United States Supreme Court reversed and remanded, holding that Georgia's voluntary commitment statute, which provides for an initial psychiatric investigation by a neutral factfinder—e.g., a staff physician at the hospital—followed by periodic reviews of the child's condition, adequately protects the child's liberty interest and, thus, satisfies the due process requirements of the fourteenth amendment. Parham v. J.R., 442 U.S. 584 (1979).

The due process clause of the fourteenth amendment prohibits the states from depriving any person of "life, liberty, or property, without due process of law." When a state seeks to deprive an adult of his liberty
RECENT DEVELOPMENTS

through criminal prosecution, this due process protection has been construed to provide all fundamental rights "essential to a fair trial." 13 Similarly, in the landmark decision of In re Gault, 14 the United States Supreme Court held that children are protected by the fourteenth amendment and, in juvenile prosecutions, are entitled to most of the procedural safeguards which are afforded to adults in criminal prosecutions. 15

Outside the context of criminal litigation, however, procedural due process protections are not as extensive. 16 To determine which procedural safeguards are available in the realm of noncriminal litigation, the Court has employed a balancing test under which it considers whether the magnitude of the potential harm to the individual and his interest in avoiding that harm are outweighed by the government's stake in preserving the existing procedure. 17

Such a balancing test was recently applied by the Supreme Court in Addington v. Texas 18 where an adult petitioner claimed that his involuntary

13. Pointer v. Texas, 380 U.S. 400, 403 (1965); Malloy v. Hogan, 378 U.S. 1, 6 (1964); Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963). See also Note, Due Process and the Development of "Criminal" Safeguards in Civil Commitment Adjudications, 42 FORDHAM L. REV. 611, 617 (1974). Criminal defendants have been afforded a variety of procedural safeguards including: 1) the fourth amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence seized in violation of this amendment; 2) the fifth amendment right to be free from compelled self-incrimination; and 3) the sixth amendment rights to counsel, to a speedy and public trial, to confront opposing witnesses, and to a jury trial. See Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

14. 387 U.S. 1 (1967). The parents of 15-year-old Gerald Gault sought a writ of habeas corpus to compel the release of their son who had been sentenced to a state reform school after being adjudicated a juvenile delinquent for making lewd telephone calls. Id. at 4. Gerald's family had not been notified when Gerald was taken into custody. Id. at 5. Neither Gerald nor his parents were expressly advised of their right to retain counsel or of their right to appointed counsel if they were financially unable to employ a lawyer. Id. at 42. Furthermore, Gerald's confession had been obtained without informing him of his right to remain silent. Id. at 56.

15. Id. at 13. The Court specifically limited its holding to proceedings in which the determination is whether a juvenile is a "delinquent" and where, as a result of this determination, the juvenile may be incarcerated in a state institution. Id. The Court observed that reform schools may have an adverse impact on juveniles, and thus, the proceeding in which a juvenile is adjudged delinquent must be conducted in accordance with the requirements of due process. Id. at 27-28.


17. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Goldberg v. Kelly, 397 U.S. 254, 266 (1970). In considering whether welfare recipients are entitled to a hearing prior to the termination of their benefits, the Goldberg Court stated:

[T]he interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. As the District Court correctly concluded, "[t]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal."


civil commitment to a state mental hospital violated the due process clause because his need for institutionalization was proved only by "clear and convincing evidence," rather than by the more demanding "beyond a reasonable doubt" standard applied in criminal proceedings. In considering what standard of proof was constitutionally required for an involuntary commitment, the Court balanced the interests at hand and held that, in such proceedings, the due process clause required only the "clear and convincing proof" standard. While the Supreme Court has not expressly addressed the full scope of the procedural safeguards required under the due process provision in the civil commitment context, lower federal courts have consistently held that involuntary commitment proceedings carry with them the constitutional rights to notice, to counsel, and to a hearing.

19. Id. at 421-22. At the commitment hearing, the petitioner conceded that he suffered from mental illness but maintained that "there was no substantial basis for concluding that he was probably dangerous to himself or others." Id. at 421. Petitioner contended that in order to find him "probable dangerous to himself or others," the jury should have been instructed to employ the "beyond a reasonable doubt" standard of proof. Id.

20. Id. at 425-33.

21. Id. The Court considered both the extent of the individual's interest in not being involuntarily confined for an unlimited period and the state's interest in committing the emotionally disturbed under a particular standard of proof. Id.

22. Id. The Court recognized the adverse social consequences which would result to an individual involuntarily confined for an unlimited period of time. Id. at 425-26. The Court also acknowledged the state's interest in 1) providing care for citizens who, because of emotional disorders, are unable to care for themselves, and 2) protecting the community from those people with dangerous tendencies. Id. at 426. Concluding that the possible injury to an individual erroneously committed was significantly greater than any possible harm to the state, the Court ruled that due process requires "the state to justify confinement by proof more substantial than a mere preponderance of the evidence." Id. at 427. Nevertheless, the Court did not deem it necessary to employ the "beyond a reasonable doubt" standard in this instance since, on balance, the interests of both the state and the defendant could best be served by the "clear and convincing proof" test. Id. at 432-33.

The Court advanced several reasons why the standard of proof called for in criminal prosecutions is different from the standard applied in civil commitment proceedings: 1) in a civil commitment proceeding, the state does not exercise its power in order to punish the individual, id. at 428; 2) because of the professional review of a patient's condition and the concern of family and friends, there are continuous opportunities for an erroneous commitment to be corrected, id. at 428-29; 3) a mentally ill person who is not committed suffers greater harm than a criminal defendant who is not convicted, id. at 429; and 4) given the lack of certainty and the fallibility of psychiatric diagnosis, it is doubtful whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous. Id.

23. See NOWAK, supra note 12, at 506. In areas closely related to civil commitment, the Court has set out standards for due process protection. See, e.g., McNeil v. Director, Patuxent Inst., 407 U.S. 245, 250 (1972) (detention of delinquent beyond expiration of his criminal sentence for refusing to cooperate with the examining psychiatrist violates due process); Jackson v. Indiana, 406 U.S. 715, 738 (1972) (due process violated when accused is detained for longer than necessary to determine that he is incompetent to stand trial or that he is unlikely to recover from incompetency in the foreseeable future); Specht v. Patterson, 386 U.S. 605, 610 (1967) (due process requires that defendant have an opportunity to be heard and to confront the witnesses against him, together with the right to be represented by counsel, the right to cross-examine, and the right to offer evidence of his own when his definite sentence is converted to an indefinite commitment under sex offenders statute). See generally Civil Commitment, supra note 3, at 1271.

24. See Heryford v. Parker, 396 F.2d 393, 395 (10th Cir. 1968); Bolton v. Harris, 395 F.2d 642, 651 (D.C. Cir. 1968); Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085, 1094, 1101...
In the context of voluntary parental commitment of minor children, however, the balance struck in involuntary commitment proceedings is complicated by two conflicting interests. First, since parents have a fundamental "liberty" interest in directing the upbringing of their children, courts have been reluctant to interfere with the exercise of parental discretion. In *Meyer v. Nebraska,* for instance, the Supreme Court recognized that parents have a fundamental interest in controlling their children's education and reversed the conviction of an instructor who had taught foreign languages in contravention of a state law. More recently, in *Wisconsin v. Yoder,* the Court held a compulsory school-attendance statute to be unconstitutional as applied to Amish parents who trained their children at home, noting that the


25. See *Meyer v. Nebraska,* 262 U.S. 390, 402 (1923). As the Supreme Court in *Meyer* indicated, the American goal in education and child rearing has always been to foster social pluralism rather than state-mandated uniformity:

In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a state without doing violence to both [the] letter and [the] spirit of the Constitution. *Id.* See notes 26-27 and accompanying text *infra.*

In *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), the Court again emphasized its unwillingness to impinge upon the parent’s right to direct their children’s upbringing:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers 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. *Id.* at 535. In the more recent case of *Stanley v. Illinois,* 405 U.S. 645 (1972), the Court further explicated its theory of deference to parental discretion, stating that

[t]he rights to conceive and to raise one's children have been deemed "essential," . . . "basic civil rights of man," . . . and "[r]ights far more precious . . . than property rights." . . . "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, . . . the Equal Protection Clause of the Fourteenth Amendment, . . . and the Ninth Amendment . . . .

*Id.* at 651 (citations omitted).


27. *Id.* at 401. The statute before the Court prohibited the teaching of "any subject to any person in any language other than the English language" so that the English language would be the mother tongue of all children reared in the state. *Id.* at 397, 398. The Court declared that the instructor’s right to teach, as well as the parents’ right to engage him to instruct their children, are liberties guaranteed by the fourteenth amendment. *Id.* at 400.

Subsequently, in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), the Court ruled unconstitutional a state statute which required parents and guardians to educate their children in public schools because it “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control” in violation of the fourteenth amendment. *Id.* at 534-35 (emphasis added).

statute unreasonably interfered with the parents' right to guide the religious instruction of their children.29

Limitations upon parental discretion have been imposed, however, when the parent's right to direct the upbringing of their children was in conflict with a legitimate and paramount state interest.30 In *Prince v. Massachusetts*,31 for example, the Supreme Court upheld the conviction of a guardian who had violated the state's child labor laws by permitting a minor to work in violation of the statute.32 In so doing, the Court entered the "private realm of family life"33 by restricting the discretion of a foster parent to direct the activities of the minor child.34

The second interest which complicates the situation where parents commit their children to mental hospitals is the interest of the children themselves in being afforded their due process rights.35 In the context of criminal prosecutions, the Supreme Court in *Gault* made clear that juveniles are entitled to substantial procedural due process protection.36 In other contexts, however, the Court has not afforded juveniles such extensive procedural safeguards. For example, in *Ingraham v. Wright*,37 the Court balanced the competing interests and held that due process did not require notice and a hearing prior to the imposition of corporal punishment on juveniles in public schools.38

Nevertheless, the Court has recognized that, in some situations, juveniles are entitled to greater procedural protection than that granted by the *Ingraham* Court. In *Goss v. Lopez*,39 for instance, the Court ruled that before juveniles may be suspended from public school, they must be afforded notice of the charges against them and an opportunity to be heard.40

---

29. Id. at 234. The Court concluded that to enforce the statute would gravely endanger, if not destroy, the free exercise of the Amish people's religious beliefs—a right protected by the first amendment. Id. at 218-19.
30. See notes 31-34 and accompanying text infra.
32. Id. at 169-70.
33. Id. at 166. The Court noted that the state as parens patriae may restrict the parents' control over their children in order to protect the well-being of youth. Id. The term "parens patriae." literally "parent of the country," is used to denote the traditional role of the state "as sovereign and guardian of persons under a legal disability to act for themselves such as juveniles, the insane, or the unknown." West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1089 (2d Cir. 1971).
34. 321 U.S. at 166-67. Although *Prince* specifically dealt with the limitations imposed upon a guardian, the Court treated the guardian as if she were a parent. See id. at 164.
35. See notes 46-48 and accompanying text infra.
38. Id. at 682. Noting that such procedural requirements would significantly interfere with the educational process, the Court held that these safeguards were not constitutionally required because the child was adequately protected against unjustified corporal punishment by the available civil and criminal remedies. Id. at 678.
40. Id. at 582. The *Goss* Court concluded that no formalized procedure was required for this type of hearing. Id. The Court simply held that the student must initially be informed of the basis of the accusation against him. Id.
RECENT DEVELOPMENTS

The Court again addressed the issue of the constitutional rights of minors in *Planned Parenthood v. Danforth* 41 where it upheld children's independent constitutional rights over the parents' interest in controlling the family. 42 The *Danforth* Court declared unconstitutional a state statute which required an unmarried minor to secure her parent's consent before obtaining an abortion. 43 The Court thereby recognized that the constitutional right to privacy of minors could take precedence over the fundamental interest in preserving parental control. 44

Against this background, the *Parham* Court began its analysis by identifying the interests to be weighed in determining whether the minors' due process rights were satisfied under Georgia's commitment procedure. 45 In considering the private interests affected by the statute, the Court first recognized that children have a protectable liberty interest in being free from unnecessary bodily restraint 46 and also assumed that they have an interest in being free from the stigma associated with mental illness. 47 The Court nevertheless evaluated these interests with caution by weighing them against the likelihood of severe harm to children who need hospitalization but fail to receive it. 48

Turning to the interests of the parents, the Court observed that requiring a full trial prior to commitment 49 would significantly interfere with the

---

42. *Id.* at 74. The *Danforth* Court stated: "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Id.* (citations omitted).
43. *Id.*
44. *Id.* at 75. The Court emphasized, however, that its holding was not intended to suggest that every minor, regardless of age or maturity, could give effective consent for the termination of her pregnancy. *Id.*
45. 442 U.S. at 600. For a discussion of the Georgia procedure, see note 4 *supra.* The Court stated that its analysis also applied to commitment procedures for children who were wards of the state. 442 U.S. at 617-18. Nevertheless, the Court suggested that the procedures required for reviewing a foster child's need for continuing care could be different from those required for reviewing the condition of a child with natural parents. *Id.* at 618.
47. 442 U.S. at 601. The *Parham* Court distinguished the instant case from *In re Gault,* 387 U.S. 1 (1967), by noting that the stigmatization associated with being committed to a mental institution is not as severe as that associated with juvenile delinquency. 442 U.S. at 600-01. It should be observed that although the Court considered the effects of social stigmatization on the child, it did not address the possible adverse emotional effects the child may suffer simply by being institutionalized. See *id.*; note 74 and accompanying text *infra.*
48. 442 U.S. at 601. In its discussion of the child's interests, the Court indicated:
The pattern of untreated, abnormal behavior—even if non-dangerous—arouses at least as much negative reaction as treatment that becomes public knowledge. A person needing, but not receiving, appropriate medical care may well face even greater social ostracism resulting from the observable symptoms of an untreated disorder. *Id.* (footnote omitted).
49. *Id.* at 601-02. The minors in *Parham* contended that due process required a precommitment hearing because of the magnitude of their constitutional rights and the likelihood of parental abuse of the commitment procedure. *Id.* at 602. They also argued that the Supreme Court's holding in *Planned Parenthood v. Danforth,* 428 U.S. 52 (1976), supported their position that the parental interests are entitled to little deference when the child is exercising a
The Court acknowledged, however, that in Danforth, it had limited parental discretion where the child was exercising a constitutionally protected right. Although recognizing the child's constitutionally protected liberty interest in the instant case, the court saw no need to strip the parents of their substantial role in the commitment decision. In so concluding, the Court relied upon the presumption that parents generally act in the best interests of their children. Moreover, the Court distinguished Danforth from the instant situation by noting that, unlike the Missouri law in Danforth which granted parents absolute authority over their child's ability to obtain an abortion, the Georgia voluntary commitment statute required the superintendent of the hospital to make his own independent determination of the child's need for hospitalization and, thus, the parents did not possess unfettered authority to institutionalize their child.

Finally, turning to Georgia's interests in maintaining its commitment procedure, the Court found that the state's interests included: 1) confining the use of costly health care facilities to cases of genuine need through accurate diagnosis and admission procedures; 2) removing unnecessary procedural obstacles which could discourage families from seeking needed psychiatric care for their children; and 3) allocating priority to the diagnosis and treatment of patients following admission, rather than devoting time and resources to procedural technicalities.

constitutional right of parents to direct the upbringing of their children. For the Parham Court's response to these contentions, see notes 51-54 and accompanying text infra. 442 U.S. at 604. For the Parham Court's response to these contentions, see notes 51-54 and accompanying text infra.
Having identified the competing interests, the Court considered which procedures might sufficiently protect the child’s constitutional rights without unduly conflicting with parental authority or overtaxing the state’s resources. The Court first rejected the contention that due process requires a determination by a judicial tribunal, finding that such a tribunal lacks the expertise required to ascertain whether commitment is necessary. The Court also observed that a full adversary proceeding was not mandated by the due process guarantee because such a proceeding might unduly affect the sensitive parent-child relationship. Thus, the Court found that the child’s liberty interest could be adequately protected by a thorough, initial psychiatric investigation by a “neutral factfinder” — e.g., a staff psychiatrist at the hospital — followed by periodic reviews of the child’s condition. Consequently, the Court concluded that Georgia’s voluntary admission statute satisfies the due process requirements and is, therefore, constitutional.

substantially outweighed by the cost of providing such protection, and that the expense in protecting those likely to be found undeserving will probably come out of the pockets of the deserving.

58. 442 U.S. at 606.
59. Id. at 607. The Court implied that a judge or administrative hearing officer would probably not have the required training in medical science to make the commitment decision. See id. Moreover, the Court observed that “[d]ue process has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer.” Id. (citations omitted). Thus, the Court concluded that neither judges nor administrative hearing officers would be better qualified than psychiatrists to determine whether commitment is necessary. Id. For a criticism of this view, see notes 81-84 and accompanying text infra.
60. 442 U.S. at 610. See notes 49-53 and accompanying text supra. The Court indicated that requiring an adversary hearing to ascertain whether the parents’ motivation was consistent with the child’s interests would distress the parents and could, therefore, exacerbate whatever tensions already existed between the parents and the child. 442 U.S. at 610. Consequently, the Court concluded that since the parents normally play a significant role in the treatment while the child is hospitalized and, even more so, after his return home, there is a serious risk that an adversary confrontation would detrimentally affect the ability of parents to assist the child both while he is in the hospital and after his release. Id.
61. Id. at 606-07, 613. The Court noted that the inquiry must “carefully probe” the child’s background using all available sources, including parents, schools, and other social agencies, as well as an interview with the child. Id. at 606-07.
62. Id. at 607, 613. The Court found that periodic reviews were necessary since they would help detect errors made in the initial commitment decision. Id. at 617.
63. See note 4 supra. As described by the Court, the process effectuated by the Georgia statute is initiated by the parents who, after concluding that their child has an emotional problem, seek the aid of a psychologist or psychiatrist at a community mental health clinic. 442 U.S. at 614. If the examining doctor deems it necessary, the community clinic will provide outpatient treatment for the child. Id. If the child’s emotional problem persists after the period of outpatient treatment, the community clinic staff will refer the child to an affiliated regional mental hospital. Id. At the hospital, a psychiatrist and at least one other mental health professional will interview the child, examine the medical records provided by the clinic staff, and interview the parents. Id. The mental health professionals should admit the child only if they conclude that the child has an emotional problem and will likely benefit from institutionalized care. Id. at 614-15.
64. 442 U.S. at 616. Georgia’s procedures for the voluntary commitment of children who are wards of the state were also found to be consistent with the mandates of the Constitution. Id. at 619. The Court based this holding on the statutory requirement that official guardians must act in the children’s best interests. Id. at 618. See GA. CODE § 24A-101 (1978). Cf. note 73 and accompanying text infra.
Although Justice Stewart concurred in the judgment upholding Georgia's statute, he expressed the view that the voluntary commitment of juveniles to state mental hospitals by their parents or guardians was not state action sufficient to invoke the protection of the Fourteenth Amendment. Justice Stewart reasoned that since the child is incapable of committing himself, and since the parent or guardian is presumed to be acting in the minor's best interests, the child's commitment can be deemed "voluntary," and thus it cannot be said that the state "acted" in depriving the child of his liberty.

Justice Brennan, joined by Justices Marshall and Stevens, concurred in part and dissented in part, agreeing with the majority that a precommitment adversary proceeding might 1) unduly harm the delicate parent-child relationship; 2) deter parents from seeking needed medical treatment for their children; and/or 3) delay the treatment of children in need of immediate care. Nevertheless, Justice Brennan contended that due process requires post-admission hearings to ascertain the necessity of the child's continued hospitalization. According to Justice Brennan, this post-commitment procedure is necessary because of the magnitude of the potential harm to the child, the high risk of mistaken diagnoses, and his belief that the child is

Voicing a special concern for the plight of foster children, the Court observed that a child without natural parents faces the risk of being "lost in the shuffle" and, consequently, of being committed for a longer period than necessary. In order to minimize this risk, the Court suggested that, on remand, the district court should determine whether different review procedures should be required for a child with foster parents.

Justice Brennan observed that none of the arguments advanced against precommitment hearings are applicable to post-confinement hearings. For the majority's rationale in opposing precommitment hearings, see note 60 supra; text accompanying note 68 supra. Justice Brennan noted that post-admission commitment hearings are unlikely to involve direct challenges to parental judgment, veracity, or authority, since the person advocating the child's release need not contest the parent's decision to seek institutionalization. Rather, to argue for his client's release, the child advocate need only contend that the child had sufficiently improved during his hospital stay to warrant outpatient treatment or discharge.

Justice Brennan further maintained that Georgia's established, informal post-admission procedures do not satisfy the due process requirement of a reasonably prompt hearing. Justice Brennan pointed out that minors in Georgia are not informed of the reasons for their commitment and are given no right to be present at the commitment determination, no right to representation or to offer evidence of their own, and no right to confront or cross-examine adverse witnesses.

Justice Brennan noted that an erroneous commitment decision could adversely affect the child for his entire life, especially since existing mental health facilities are inadequate.

Justice Brennan observed that, in addition to the regular uncertainties associated with psychiatric diagnosis, there is a greater possibility of a misdiagnosis in the case of the commitment of a child. Often, the child is under a great deal of stress at the time of the interview, and frequently, the psychiatrist lacks sufficient time to adequately diagnose the child and to overcome the social and economic barriers which separate him from the child, thereby hindering effective diagnosis.
RECENT DEVELOPMENTS

not adequately protected against the severe consequences of wrongful commitment by dependence upon the presumption that parents generally act in the best interests of their children. In addition, Justice Brennan asserted that precommitment hearings for children who are wards of the state and who are committed by state social workers acting in loco parentis are constitutionally required.

In analyzing the Parham decision, it should be noted that the Court recognized that unwarranted institutionalization of a child could deprive him of a substantial liberty interest. The majority, however, identified two safeguards in the Georgia commitment process which it believed would minimize the risk of erroneous commitment: 1) parents, in deciding whether to commit their child, would act in the child's best interests; and 2) the staff psychiatrist, in his role as a neutral factfinder, would make an independent determination of whether the child needed to be committed.

In considering the efficacy of the first safeguard, it is suggested that the majority placed too great an emphasis on the presumption that parents generally act in the best interests of their children. While it may be true that parents do what is best for their children in most instances, it has been observed that in the particular context of deciding whether to commit their son or daughter, parents are frequently motivated by interests other than those of the child. The Parham Court did recognize this fact as creating

of these impediments and because psychiatrists have a tendency to be overly cautious and to overdiagnose, children are often erroneously committed. Id. See notes 84-85 and accompanying text infra.

72. 442 U.S. at 632 (Brennan, J., concurring in part and dissenting in part). Justice Brennan indicated that many parents commit their children for reasons unrelated to the children's mental condition. Id. Furthermore, he noted that even those parents who do purport to be acting in their children's best interests often lack the expertise necessary to evaluate whether there is actually a need for commitment. Id. See note 78 and accompanying text infra.

73. 442 U.S. at 638. (Brennan, J., concurring in part and dissenting in part). Justice Brennan was not persuaded by the majority's reasoning that state social workers are obliged by statute to act in the children's best interests. Id. at 637. See note 64 supra.

74. 442 U.S. at 600. It has also been observed that erroneous commitment decisions could deprive children of the opportunity for normal emotional development:

Children learn from their environment and adapt themselves to it. Such adaptation usually becomes an integral part of the child's personality. A child institutionalized for long periods of time may learn and assimilate "institutionally appropriate" behavior which in turn is an additional handicap if he is to return to his normal environment.

J.L. v. Parham, 412 F. Supp. at 121-22, quoting REPORT OF THE STUDY COMMISSION ON MENTAL HEALTH SERVICES FOR CHILDREN AND YOUTH 7 (1973). The Study Commission also reported: "It is the observation of both hospital personnel and the commission that more than half of the hospitalized children and youth would not need hospitalization if other forms of care were available in communities." REPORT OF THE STUDY COMMISSION, supra, at 24. See note 70 and accompanying text supra.

75. 442 U.S. at 604. See notes 49-54 and accompanying text supra; notes 77-79 and accompanying text infra.

76. 442 U.S. at 607. See notes 54 & 61 and accompanying text supra; notes 81-85 and accompanying text infra.

77. See 442 U.S. at 602-03.


Experts on mental illness testified that parents often commit their mentally ill children because of pressures in the home related to the child, or because of the parents' inability
"a basis for caution," but maintained that the staff psychiatrist would provide an adequate check against any abuse of parental discretion.

It is submitted, however, that the staff psychiatrist does not provide adequate protection against the potential abuse of parental discretion because he will not always function as a "neutral factfinder." Since the examining psychiatrist is employed by the institution, it has been noted that he is often influenced by the admission policies of the institution and, therefore, cannot impartially evaluate the emotional needs of the child. In addition, the psychiatrist's judgment may be unduly affected by his natural tendency to identify with the interests of the parents. Moreover, it has been observed that the staff psychiatrist may not effectively screen out children who do not need hospitalization because the evaluation interviews are often perfunctory and because psychiatrists frequently tend to overdiagnose in determining whether the child is in need of hospitalization.

to cope with the child's problems and lack of awareness of alternatives to institutionalization. Similarly, parents of mentally retarded children are frequently subject to community pressure to institutionalize their children. Other personal pressures, such as the parents' own emotional difficulties in dealing with the mentally retarded child, as well as the financial problems of providing necessary care, may cause a parent to institutionalize a mentally retarded child although that course is not in the child's best interests. Finally, the parents simply may not be aware of less drastic alternatives to institutionalization.

459 F. Supp. at 39-40 (footnotes omitted). See also H. Love, Parental Attitudes Toward Exceptional Children 19 (1970). The Parham majority placed little emphasis on such evidence, concluding that it should create "a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests." 442 U.S. at 602-03.

79. 442 U.S. at 602. See note 78 supra.
80. 442 U.S. at 607. See notes 54 & 61 and accompanying text supra.
81. See note 61 and accompanying text supra.
82. Amici Curiae Brief of the American Orthopsychiatric Ass'n, et. al., at 37-38, Parham v. J.R., 442 U.S. 584 (1979). The amici brief stated: "In the mental health field, more often than in general medicine, it is institutional policy rather than clinical necessity that determines which children will be admitted and what treatment will be offered." Id. (footnote omitted). The brief also pointed out that "by erring on the side of institutionalization, rather than outpatient care, the mental health professional avoids the possibility that he or the institution will be held responsible, or even liable, if the child should cause harm to himself or others after institutionalization has been denied." Id. at 37 (footnote omitted). See Note, Minors' Right to Due Process: Does it Extend to Commitment to Mental Institutions?, 52 Notre Dame Law. 136, 141 (1976). See also Ferleger, The New Due Process for Children: No Judge, No Hearing, No Lawyer, 3 Change, a Juvenile Justice Quarterly No. 3, at 5, 6 (1979).
83. See In re Long, 25 N.C. App. 702, 708, 214 S.E.2d 626, 629 (1975). One author has commented:

While the goal of the psychiatrist will be expressed — and perceived — as the best welfare of the child-patient, it is the parent who has come to seek help, whose situation seems most desperate, who seems the most reliable source of information about what is wrong, who is closest to the psychiatrist in age and social outlook, and who is paying the psychiatrist's fee.

Ellis, supra note 3, at 868.
84. Ellis, supra note 3, at 864. It has been argued that because of "the time and resource constraints which frequently make comprehensive psychiatric evaluations impracticable, psychiatrists tend to support the parent who has already concluded that his child requires hospitalization." Amicus Curiae Brief of The Child Welfare League of America at 5, Parham v. J.J., 442 U.S. 584 (1979).
85. See Ellis, supra note 3, at 846-66; Note, "Voluntary" Admission of Children to Mental Hospitals: A Conflict of Interest Between Parent and Child, 36 Md. L. Rev. 153, 162 (1976). It has been observed that
RECENT DEVELOPMENTS

Given the questionable protection provided by placing the commitment decision in the hands of parents and staff doctors, it is contended that the due process safeguards articulated by the Parham Court are insufficient to adequately protect the child's interests. Furthermore, it is submitted that the additional safeguard of a post-commitment hearing as championed by Justice Brennan would still be inadequate to protect the child against the harmful consequences of an erroneous commitment decision since the harm occurs from the moment the child's institutionalization takes place.

It is therefore suggested that the commitment decision should be subjected to greater scrutiny by requiring a due process hearing conducted by an independent panel of psychiatrists or social workers. In order to en-

[psychiatrists have a tendency to recommend hospitalization when in doubt. By erring on the side of admission rather than out-patient treatment, a psychiatrist does not have to justify his actions to the party requesting hospitalization of the juvenile, and does not have to fear that he or she will be held responsible if something should happen to the juvenile after hospitalization has been denied. These practical considerations provide a subtle but strong bureaucratic pressure for the psychiatrist to decide for hospitalization where doubts may exist.


Although the Parham Court acknowledged the possibility that the examining physician may not always be "neutral and detached," the Court concluded that in such cases the requirements of due process could be satisfied on an individual basis — e.g., through an action for habeas corpus. 442 U.S. at 616 n.22. Nevertheless, it is suggested that, realistically, habeas corpus is not available to a young child with no one to represent his interests. Having been unnecessarily committed by his parents, having no interested relatives, and having befriended only other children, the child is normally unaware of the existence of any judicial remedies, and it is unlikely that anyone else will assert them on his behalf. See Record at 13-15, Secretary of Pub. Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979).

86. See notes 77-85 and accompanying text supra.
87. See 442 U.S. at 626 (Brennan, J., concurring in part and dissenting in part).
88. See Ellis, supra note 3, at 905. Professor Ellis has asserted:

[A]ccording to a child's sense of time even a few days in the strange and frightening surroundings of even the best mental hospital may be a terrifying and traumatic ordeal. Such an experience should be inflicted on a child only when absolutely necessary. In fact, a child who does not need hospitalization at the time of commitment may learn "crazy" behavior from the culture of the mental hospital.

Id. (footnote omitted).
89. See Note, The Mental Hospitalization of Children and the Limits of Parental Authority, 88 YALE L.J. 186, 209 (1978). One commentator has suggested that the procedural protections available in connection with the commitment of a preadolescent should be different from those available to an adolescent. Id. Because the preadolescent is not yet capable of making an intelligent decision or of formulating his life plans, this commentator contends that due process could be satisfied by an informal conference between the parents and an impartial admissions officer acting independently of hospital authority. Id. at 209-11. If the admissions officer determines that no sufficient reason for hospitalization exists, hospitalization could be accomplished only by a court order following a full evidentiary hearing at which the child would be represented by counsel. Id. at 213. In the situation where the child has already reached adolescence, however, a different procedure would apply. Id. at 213. According to the Yale commentator, at such a stage in life, the child himself would be capable of determining what would promote his own best interests; thus, he should be afforded a meaningful opportunity to be heard regarding the decision to commit. Id. at 214.

Professor Ellis has suggested the possibility of requiring a precommitment hearing but allowing the child to waive this procedural safeguard and consent to hospitalization after consultation with an attorney. Ellis, supra note 3, at 905. Under this scheme, if the child waives the
sure that the hearing examiners accurately determine the child's need for commitment and sufficiently consider any possible alternatives to institutionalization, it is submitted that the child must be represented by a lawyer. It is suggested that only in emergency situations, when immediate hospitalization is deemed necessary, should the full investigation be postponed until after admission. It is also suggested that, with respect to the periodic reviews, a hearing and independent representation for the child should be provided to correctly assess the child's continued need for hospitalization.

As a result of the Court's holding in Parham, it is suggested that many children may still be erroneously committed to mental institutions, thereby being deprived of their liberty and forced to suffer from the stigma of having been labelled "mentally ill." Persistent parents will experience little difficulty in overcoming the slight procedural obstacles imposed by the Court since, now, all they need do is "doctor-shop to find someone who agrees with them"—i.e., parents need only obtain the approval of one psychiatrist at any state hospital.

In conclusion, it is submitted that, despite the likelihood of serious harm to the affected children, the Parham Court refused to provide adequate due process safeguards for minors facing "voluntary" commitment at the behest of their parents or guardians. It is hoped that state legislatures will respond to the Parham Court's failure to recognize that parents often do not act in the best interests of their children and prescribe more effective procedural protections for children facing commitment. Such legislation will ensure that parents and hospital staff members are not solely responsible for a decision which could cause a severe deprivation of a child's constitutionally protected rights.

Helene M. Koller