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Institutionalization of Juveniles: What Process is Due?


I. INTRODUCTION

A. The Facts of *Parham*

In *Parham v. J.R.*, the Supreme Court established minimum due process safeguards for minors committed to state mental institutions by procedures initiated by their parents or guardians. The class action suit was brought in the district court by the minors J.L. and J.R., who requested declaratory and injunctive relief under 42 U.S.C. § 1983. J.R., who was thirteen at the time the suit was filed, had been removed from his home by a juvenile court only a few months after his birth because of severe parental neglect. By the age of eight, he had been placed in a total of seven different foster homes. J.R.'s seventh set of foster parents requested his removal from their home because of his "abnormal behavior." Apparently unable to find adoptive parents for J.R., the Georgia Department of Family and Children Services applied for his admission to a state mental hospital. The hospital personnel admitted J.R., finding him to be mentally ill and diagnosing his condition as "borderline mental retardation" and "unsocialized, aggressive reaction of childhood."

After nearly three years of hospitalization, hospital personnel requested that the Department of Family and Children Services

5. 412 F. Supp. at 117.
6. *Id.*
find a long-term foster home or adoptive home for J.R. because of their feeling that continued institutionalization would cause J.R. to regress, and their fear that absent an appropriate placement, J.R. might become "a permanently institutionalized child."7 Two years later, a foster home had not been obtained for J.R. He subsequently filed suit, "requesting an order of the court placing him in a less drastic environment suitable to his needs."8

J.L. was taken to a state mental hospital by his mother and step-father in 1970 at the age of six. He was admitted by hospital personnel who found him mentally ill, diagnosing his condition as a "hyperkinetic reaction of childhood."9 J.L.'s parents agreed to participate in a family therapy program under which the child was allowed to go home for short stays. However, the parents requested that the program be discontinued after several months. After J.L. had been institutionalized for about two years, he was discharged to his mother.10 He was returned ten days later and readmitted because "the parents found they were unable to control J.L. to their satisfaction which created family stress."11 In 1973, hospital personnel informed the Department of Family and Children Services that J.L. should be removed from confinement and placed in "specialized foster care."12 The department, in turn, indicated that it could not pay for such care unless J.L. was eligible for federal funds.13 J.L. was not eligible, thus the specialized foster care was not obtained. J.L. was still confined to the mental hospital when he filed suit in 1975 requesting suitable placement in a less drastic environment.14

B. The Decision

The statute under which J.R. and J.L. were committed governs the voluntary admission of patients to state mental hospitals.15 The superintendent of any facility is authorized to receive for observation and diagnosis any person under eighteen years of age for

7. U.S. v. 99 S.Ct. at 2498.
10. Id.
12. Id. at —, 99 S.Ct. at 2498.
15. GA. CODE ANN. § 88-503.1 (1971). The statutes of most states allow a parent to place his child in a mental hospital subject only to the approval of the admitting physician or hospital administrator. For a listing of state statutes with such provisions, see Ellis, Volunteering Children: Parental Commitment of Minors to Mental Institutions, 62 CAL. L. REV. 840, n.1 (1974) [hereinafter cited as Volunteering Children].
whom application is made by parent or guardian.\textsuperscript{16} If the individual shows "evidence of mental illness" and is found to be "suitable for treatment," he may be detained for care and treatment.\textsuperscript{17} The superintendent is obliged to discharge patients who recover or for whom the undesirability of further hospitalization is demonstrated by sufficient improvement.\textsuperscript{18} In addition, voluntary patients and their representatives have the right to apply for discharge.\textsuperscript{19} The superintendent must ordinarily grant the application unless the patient is dangerous to himself or others, in which case proceedings for involuntary hospitalization must be initiated.\textsuperscript{20} However, in the case of a minor admitted upon application of his parent or guardian, his release prior to reaching the age of majority may be conditioned upon the consent of his parent or guardian.\textsuperscript{21}

J.R. and J.L. attacked the constitutionality of this statutory scheme as applied to minors, claiming that it deprived them of liberty without a meaningful opportunity to be heard, thus violating the due process clause of the fourteenth amendment.\textsuperscript{22} The state argued that the mental health care system was designed merely to assist parents in their traditional parental duties, and that the hospitalization of minors was merely the acceptance of state-provided care by the parent on behalf of his child.\textsuperscript{23} Furthermore, the state argued that the child is sufficiently protected upon admission by his parents and by the professional judgment of the admitting physician; and that during the course of hospitalization, he is protected by the superintendent's continuing duty to discharge patients who have recovered or who have improved sufficiently that the superintendent deems hospitalization undesirable.\textsuperscript{24}

A three-judge district court held that the voluntary commitment statute was unconstitutional as applied to the plaintiffs' class of juveniles and enjoined its further use by state officials and employees.\textsuperscript{25} The court was not persuaded that parental involvement in the commitment process adequately protected the interests of the child, since the decision to seek commitment is often a product

\textsuperscript{16} GA. CODE ANN. § 88-503.1 (1971).
\textsuperscript{17} Id.
\textsuperscript{18} Id. § 88-503.2.
\textsuperscript{19} Id. § 88-503.3.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} 412 F. Supp. at 118. The plaintiffs did not question nor did the court consider the constitutional adequacy of the requisite standard for commitment under the statute, \textit{i.e.}, showing evidence of mental illness and suitability for treatment. Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id. at 140.
of family pathology.\textsuperscript{26} The court noted that mental institutions are still viewed by many as “dumping grounds” for unwanted children.\textsuperscript{27} Furthermore the court held as inadequate whatever additional protection might result from screening by the admitting physician. The inadequacy was said to be due in part to the inexactitude of psychiatry\textsuperscript{28} and the unavailability of less restrictive alternatives to confinement.\textsuperscript{29} The court bolstered its conclusion by citing a report prepared by Georgia’s Study Commission on Mental Health Services for Children and Youth.\textsuperscript{30} After closely scrutinizing the Georgia mental health care system for six months, the Commission observed that “more than half of the hospitalized children and youth would not need hospitalization if other forms of care were available . . . .”\textsuperscript{31} Accompanying the court’s remedy was an order directing the defendants to provide non-hospital facilities where appropriate, at state expense.\textsuperscript{32}

The decision of the district court was reversed on appeal.\textsuperscript{33} While the Supreme Court recognized that a child has a “substantial liberty interest in not being confined unnecessarily for medical treatment”\textsuperscript{34} the Court also stressed the liberty interests of parents in maintaining their authority over the upbringing of their children, including the “high duty” to recognize symptoms and seek medical treatment.\textsuperscript{35} The Court concluded that the parents should retain a substantial, if not dominant, role in the commitment decision, but that the risk to the child’s interest in remaining free from unnecessary incarceration precluded allowing the parents absolute and unreviewable discretion. In striking a balance between the competing interests of parent and child, as well as the state interest in avoiding undue financial and administrative burdens, the Court held that due process required an independent evaluation by a staff physician.\textsuperscript{36} The physician, cast in the role of a “neutral factfinder,” must have authority to refuse to admit any child not satisfying medical admission standards.\textsuperscript{37} The evaluation need not amount to a formal or quasi-formal hearing, for “due process is not violated by use of informal traditional medical inves-

\begin{itemize}
\item \textsuperscript{26} Id. at 133.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} Id. at 138.
\item \textsuperscript{29} Id. at 134-35.
\item \textsuperscript{30} Id. at 122.
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Id. at 139.
\item \textsuperscript{33} Parham v. J.R., — U.S. —, 99 S. Ct. 2493 (1979).
\item \textsuperscript{34} Id. at —, 99 S. Ct. at 2503.
\item \textsuperscript{35} Id. at —, 99 S. Ct. at 2504-05.
\item \textsuperscript{36} Id. at —, 99 S. Ct. at 2506-07.
\item \textsuperscript{37} Id.
\end{itemize}
tigative techniques."\textsuperscript{38}

The \textit{Parham} decision is the most recent application of a three-factor balancing approach to due process which has evolved in recent Supreme Court opinions.\textsuperscript{39} The following section outlines the specific interests involved when this approach is applied to voluntary juvenile commitment. The nature of the process which reflects the appropriate balancing of these interests\textsuperscript{40} and the applicability in this area of the doctrine of the least restrictive alternative\textsuperscript{41} are the subjects of subsequent sections.

II. DEFINING THE INTERESTS

A. Private Interests—Parent and Child

In \textit{Mathews v. Eldridge},\textsuperscript{42} the Supreme Court abstracted from earlier decisions\textsuperscript{43} three factors which ordinarily must be considered in determining the specific dictates of due process in a given case:

- First, the private interest that will be affected by the official action;
- second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
- finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.\textsuperscript{44}

It is now well-settled that "constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."\textsuperscript{45} The right of minors to freedom of expression under the first amendment has been recognized by the Supreme Court,\textsuperscript{46} as has the right not to be placed twice in jeop-
ardy for the same offense in state criminal proceedings.\textsuperscript{47} The liberty interest of minors was recognized by the Supreme Court over fifty years ago.\textsuperscript{48} More recent cases have made it clear that a minor's liberty interest is entitled to the protections of due process whenever the state itself initiates actions imposing bodily restraints\textsuperscript{49} or seriously damaging the minor's reputation.\textsuperscript{50}

In addition, the minor has an interest in avoiding the serious and well-documented dangers that unnecessary institutionalization poses to his mental health.\textsuperscript{51} As one commentator pointed out, "nearly all long-term hospital patients exhibit flatness of response, withdrawal, muteness, and loss of motivation. Once believed to be part of the degenerative process of mental illness, these phenomena are now universally accepted—even by public hospital administrators—as responses to hospitalization itself . . .\textsuperscript{52}" Thus, the minor's liberty interest is not limited to avoiding physical restraint, but in avoiding the potentially negative impact of institutional conditions.\textsuperscript{53}

The liberty interest of a minor is not coextensive with that of an adult. The state has within its police power a broader authority over the activities of children than it has over adults.\textsuperscript{54} In order to protect the welfare of children, states may permissibly regulate such activities as child labor\textsuperscript{55} and the obtaining of sex-related material by minors\textsuperscript{56} even where such a statute would be unconstitutional if applicable to all persons generally.\textsuperscript{57} Thus, a minor has only a conditional liberty interest, but it is one which cannot be abridged by the state arbitrarily and without due process of law.\textsuperscript{58}

The \textit{Parham} Court acknowledged that a child "has a substan-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{47} Breed v. Jones, 421 U.S. 519 (1975).
\item \textsuperscript{48} Meyer v. Nebraska, 262 U.S. 390 (1923); Bartels v. Iowa, 262 U.S. 404 (1923).
\item \textsuperscript{49} \textit{In re} Winship, 397 U.S. 358 (1970); \textit{In re} Gault, 387 U.S. 1 (1967).
\item \textsuperscript{50} \textit{Id.}; Goss v. Lopez, 419 U.S. 565 (1975).
\item \textsuperscript{52} Chambers, \textit{Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives}, 70 Mich. L. Rev. 1107, 1127 (1972) [hereinafter cited as \textit{Alternatives to Commitment}].
\item \textsuperscript{53} \textit{Cf. In re} Gault, 387 U.S. 1, 27 (1967) (discussing the unpleasant conditions to which a juvenile would be exposed upon "therapeutic" incarceration in an "Industrial School" for delinquency).
\item \textsuperscript{54} Prince v. Massachusetts, 321 U.S. 158, 168 (1944)
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} Ginsberg v. New York, 390 U.S. 629 (1968).
\item \textsuperscript{57} Prince v. Massachusetts, 321 U.S. at 167.
\item \textsuperscript{58} \textit{In re} Gault, 387 U.S. 1 (1967). \textit{Cf.} Morrissey v. Brewer, 408 U.S. 471 (1972) (holding that a parolee, who remains in the custody of the state, nevertheless
\end{enumerate}
\end{footnotesize}
tial liberty interest in not being confined unnecessarily for medical treatment... This claim was not disputed by the state. The Court, however, was not clear with respect to the minor's liberty interest in avoiding the stigma of erroneous labeling, stating only that it would assume, without deciding, that the juvenile had a protectible interest in his reputation.

With respect to that portion of the plaintiffs' class who were not wards of the state at the time the commitment process was initiated, the analysis of private interests must also include the interests of the children's parents. Parental authority has traditionally been protected against state action which "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." The major cases establishing this parental interest involved challenges, frequently on religious grounds, to state statutes regulating the nature, content, and duration of mandatory public education. This parental right does not extend, however, to actions which jeopardize the physical health of the child, prevent his well-rounded growth into a mature citizen, or carry the potential of making the child a burden to society.

The Parham Court relied on this area of traditionally protected parental authority and the common law presumption that parents act in the best interests of their children to conclude that parents should retain "a substantial, if not the dominant role" in deciding if their child requires institutionalization.

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60. Id.
61. Id. at —, 99 S. Ct. at 2503-04.
62. See note 2 supra.
64. Id. (holding unconstitutional a statute mandating compulsory attendance at public schools which did not allow parents the option of sending their children to private or parochial schools).
65. Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a statute prohibiting the teaching of foreign languages in public schools); Bartels v. Iowa, 262 U.S. 404 (1923) (also invalidating a statute prohibiting teaching of foreign languages).
66. Wisconsin v. Yoder, 406 U.S. 205 (1972) (striking down a statute requiring attendance at public schools until age eighteen, as applied to Amish children who receive vocational training in Amish community).
68. Prince v. Massachusetts, 321 U.S. at 168 (1944).
70. — U.S. —, 99 S. Ct. at 2505.
Thus, the Court relied rather uncritically on a line of cases involving litigation between parents and state to mark out the scope of parental authority as against the child. As pointed out by Justice Douglas, dissenting in part to the Court's opinion in *Wisconsin v. Yoder,*\textsuperscript{71} "we have in the past analyzed similar conflicts between parent and State with little regard for the views of the child . . . . Recent cases, however, have clearly held that the children themselves have constitutionally protectible interests."\textsuperscript{72} The Court in *Yoder* specifically refrained from deciding if the state could legitimately assert its authority to supervene parental autonomy on behalf of children asserting an independent constitutional right.\textsuperscript{73} In reserving this issue while simultaneously deciding the issue of parental authority as between parent and state, the Court at least acknowledged that the issues and interests involved are not identical.

In *Planned Parenthood of Missouri v. Danforth,*\textsuperscript{74} the Supreme Court was finally presented with a case wherein parental authority came into direct conflict with a minor child's independent assertion of a constitutional right. A Missouri statute required unmarried women under the age of eighteen to obtain parental consent as a precondition to seeking an abortion.\textsuperscript{75} The state defended the statute by pointing out that a state may properly subject minors to more severe restrictions than it can impose on adults.\textsuperscript{76} Furthermore, the state argued, the statute serves the purpose of strengthening the family unit and safeguarding parental autonomy.\textsuperscript{77} The Court was not persuaded that the statute would effectively serve these purposes "where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure."\textsuperscript{78} Unable to find any significant state interest served by conditioning an abortion on parental consent, the Court held the provision to be unconstitutional.\textsuperscript{79} The child's independent liberty right prevailed in the absence of a significant countereviling state interest.

The *Danforth* holding marks a significant departure from the common law rule granting parents the power to make medical decisions for their children.\textsuperscript{80} Previous exceptions had been carved

\textsuperscript{71.} 406 U.S. 205 (1972).
\textsuperscript{72.} Id. at 243 (Douglas, J., dissenting in part).
\textsuperscript{73.} Id. at 231.
\textsuperscript{74.} 428 U.S. 52 (1976).
\textsuperscript{75.} Mo. ANN. STAT. § 188.020(4) (Vernon Supp. 1979).
\textsuperscript{76.} 428 U.S. at 72-75.
\textsuperscript{77.} Id. at 75.
\textsuperscript{78.} Id.
\textsuperscript{79.} Id.
\textsuperscript{80.} See generally Bennett, *Allocation of Child Medical Care Decision-Making*
out where preservation of the child's life or public health and safety required the child to undergo a medical procedure, and the parent, for religious reasons or because of simple neglect, failed to give consent. In such cases, the state has generally been held to have the power to supervene parental autonomy and give consent for the treatment. However, the opinion of the child "is rarely mentioned, apparently because it is not known or not considered relevant," and the parent was generally considered to have the authority to order medical care over the child's objection.

Professor Bennett, in discussing the allocation of child-care decision-making authority in the context of abortions for minors, points out that "surely the individual's interest in a medical care decision diminishes as the medical considerations dominate and provide a clear answer. On the other hand, as a decision becomes medically or personally controversial, the individual's interest in making it for himself increases." The "long-term non-health consequences" of the decision also figure prominently in Bennett's analysis. Because long-term consequences will continue to affect the child after his emancipation at majority, he has a greater interest in making the controversial decision himself.

The Danforth decision is in accord with this analysis, because abortion involves a "personally controversial" decision with very significant long-range non-health consequences. Commitment to a mental institution also involves a personally and medically controversial decision. The long-range non-health considerations are at the least very significant (e.g., stigmatization) and can be overwhelming as in the case of life-long commitment. Thus, by this analysis, juvenile commitment should be at least as appropriate an area as abortion in which to recognize the child's independent interest.


82. Child Medical Care, supra note 80, at 311.
84. Child Medical Care, supra note 80, at 311.
85. Id.
87. Research on the social effects of stigmatization reveals its negative impact in such important areas as employment and interpersonal relations. See, e.g., Farina & Ring, The Influence of Perceived Mental Illness on Interpersonal Relations, 70 J. Abnormal Psych. 47 (1985); Lanny, Social Consequences of Mental Illness, 30 J. Consulting Psych. 450 (1966); Miller & Dawson, Effects of Stigma on Re-employment of Ex-mental Patients, 49 Mental Hygiene 281 (1965).
In *Parham*, the Court did not assume, as it did in *Danforth*, that the child’s liberty interest was entitled to vindication absent significant countervailing interests. The *Parham* Court assumed that the scope of parental authority, as derived from the parent-state line of cases\(^8\) gives the parent the right to decide for the child in the first instance: “The fact that a child may balk at hospitalization . . . does not diminish the parents' authority to decide what is best for the child.”\(^8\) The Court distinguished *Danforth*, arguing that it was the grant of an *absolute* parental veto power which made the abortion statute constitutionally unsound, and that parents do not, under the Georgia commitment statute, have an absolute power to commit their children.\(^9\) However, this distinction ignores the fundamental teaching of *Danforth*. It is not merely the degree of power granted to the parent which is crucial; the significance of *Danforth* is that supervention of the child’s independent constitutional liberty interest requires adequate justification in the first instance,\(^9\) at least where the minor is of sufficient age and maturity.\(^9\)

**B. Risk of Error and Value of Additional Safeguards**

Under the Georgia voluntary commitment statute, it is the parent or guardian who makes the initial decision to initiate the commitment process for his minor child.\(^9\) This decision may be influenced by a number of factors other than the need of the child for institutional care. A countercultural lifestyle may be viewed incorrectly by parents as evidence of psychopathology;\(^9\) other behavior which is merely unconventional may cause parents to seek commitment out of irritation or embarrassment.\(^9\) The interests of other children in the family may take precedence over what is best

88. See notes 60-66 & accompanying text *supra*.
89. — U.S. —, 99 S. Ct. at 2505.
90. *Id.*
91. “The fault with [the statute] is that it imposes a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor’s termination of her pregnancy and does so *without a sufficient justification for the restriction.*” 428 U.S. at 75 (emphasis added).
92. The Court in *Danforth* did not indicate at what age or level of maturity the state may appropriately curtail the minor’s liberty; it held only that the age of eighteen, the same age limit involved in the *Parham* commitment statute, was impermissibly restrictive. 428 U.S. at 72-75. *Cf. In re Roger S.*, 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977) (holding that fourteen year old juvenile is entitled independently to assert right to due process in commitment proceedings).
95. *Id.*
for the "disturbed" child. The presentation of the child for commitment may be a result of pathology on the part of the parent or of the entire family, or it may be an attempt to avoid recognition of larger family problems. The parent may be reacting to community pressure to institutionalize the child. Finally, since the decision is often made during a time of great family stress, the alternatives to institutionalization may not receive adequate consideration.

In light of these extraneous influences on the parental decision to seek commitment, and the lack of any particular psychiatric or psychological expertise on the part of the parent, it would seem reasonable to conclude that the decision carries a very substantial risk of error. The risk would not appear to be any less substantial in the case of children who are wards of the state; the placement decision may turn on administrative or financial considerations or the attractiveness of the child to potential foster parents.

After the decision to seek commitment has been made by the parent or guardian, the child is taken to the mental health facility and examined by the admitting physician for "evidence of mental illness" and to see if he is "suitable for treatment." This additional safeguard of an independent psychiatric evaluation will presumably reduce, to some extent, the risk of error present in the initial decision to seek commitment. The Parham Court expressed confidence in "informal traditional medical investigative techniques." In fact, the Court held that one independent psychiatric evaluation is the only check required by due process on the parent's or guardian's decision to seek commitment. While the

100. Despite repeated requests by hospital personnel to remove J.R. from the institution to a less restrictive setting, the state agency allowed J.R. to remain in confinement, 412 F. Supp. at 117. J.L. apparently remained in hospital confinement only because he was not eligible to receive federal funds. Id.
101. Id. at 134-35.
103. — U.S. —, 99 S. Ct. at 2507.
104. Id. at —, 99 S. Ct. at 2506-13.

It is not necessary that the deciding physician conduct a formal or quasi-formal hearing . . . . Due process is not violated by use of informal traditional medical investigative techniques . . . . The mode and procedure of medical diagnostic procedures is not the business
Court acknowledged the fallibility of psychiatric diagnosis, the opinion did not attempt to determine the magnitude of the risk of error. Such an inquiry would seem crucial in determining the probable value of this procedural safeguard.

The Supreme Court very recently noted that "psychiatric diagnosis . . . is to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient." Empirical studies shed some light on the degree of uncertainty involved in the psychiatric diagnosis. Ennis and Litwack made a comprehensive survey of the professional literature evaluating the validity and reliability of psychiatric judgments. They found that the empirical investigations revealed that psychiatrists were frequently unable to agree on even very broad diagnostic categorizations of patients, and that "they disagree more often than not on more specific diagnoses . . . ." These authors also reviewed a number of studies which have attempted to determine the accuracy with which psychiatrists can determine whether a patient needs to be institutionalized:

In each study individuals who had been examined in a hospital admission ward and found to require full-time hospitalization and treatment were randomly divided into two groups. One group was hospitalized and the other was treated in the community or in a day hospital or on an outpatient basis. Over a substantial period of time, only a few of the community patients failed to get along in the community and had to be hospitalized. In fact, the community patients recovered faster than the hospitalized patients . . . .

of judges. What is best for the child is an individual medical decision that must be left to the judgment of physicians in each case.

Id. at —, 99 S. Ct. at 2507.

Id. at —, 99 S. Ct. at 2507.

Addington v. Texas, — U.S. —, 99 S. Ct. 1804, 1811 (1979). See also O'Connor v. Donaldson, 422 U.S. 563 (1975). "The Court appropriately takes notice at the uncertainties of psychiatric diagnosis and therapy, and the reported cases are replete with evidence of the divergence of medical opinion in this vexing area." Id. at 579 (Berger, C. J., concurring).


Id. at 708 (emphasis added).

Id. at 718.
On the basis of these and many other studies, Ennis and Litwack conclude that psychiatric judgments of whether to commit have not been shown to be substantially more reliable or valid than judgments based on the flip of a coin.\footnote{111}

These authors are not alone in concluding that psychiatric diagnosis contains a very high risk of error.\footnote{112} Perhaps the most vivid illustration of the dangers of psychiatric misdiagnosis was the famous study conducted by Rosenhan\footnote{113} in which eight sane persons (three psychologists, a pediatrician, a psychiatrist, a painter, a housewife, and a graduate student in psychology) gained admission to twelve mental hospitals of varying reputations and locations across the country. In order to gain admission, the "pseudopatients" reported hearing voices which they thought were saying "empty," "hollow," or "thud". Beyond alleging these symptoms and falsifying name and vocation, the pseudopatients gave truthful life histories and accurately answered all questions, behaving in a "normal" and cooperative manner. All were found to be mentally ill and were admitted. Over the course of their hospitalization, which lasted anywhere from seven to fifty-two days, \textit{none} of the pseudopatients was detected. They were released not on the basis of being sane or cured, but because their illness was "in remission." On hearing these findings, the staff of another mental hospital expressed doubt that such a phenomenon could occur at their facility. The staff was informed that over the next three months, one or more pseudopatients would attempt to gain admission to this hospital. During this period, forty-one patients were identified, with a high degree of confidence, as pseudopatients by at least one member of the staff. In fact, \textit{no} pseudopatients had presented themselves. Rosenhan concludes that "one thing is certain: any diagnostic process that lends itself so readily to massive errors of this sort cannot be a very reliable one."\footnote{114}

In the face of such evidence establishing the unreliability of psychiatric diagnosis, the value of an independent psychiatric evaluation as a check on the parent's or guardian's initial decision to commit would seem to be dubious at best.\footnote{115} While the \textit{Parham}
Court acknowledged that the medical decision-making process is not error-free,\textsuperscript{116} it characterized misdiagnoses as "rare exceptions," and stated that "we are satisfied that an independent medical decision-making process . . . will protect children who should not be admitted . . . ."\textsuperscript{117} The relevant research does not justify this conclusion. Furthermore, the study undertaken at the request of Georgia's Director of the Division of Mental Health\textsuperscript{118} indicated that more than half of the institutionalized juveniles in that state's mental hospitals did not require hospitalization.\textsuperscript{119} The independent psychiatric evaluation is an effective safeguard neither in theory nor in practice.

The \textit{Parham} Court discussed the sufficiency of formal or quasi-formal hearings with regard to due process requirements.\textsuperscript{120} It is clear that such hearings have not in all cases proven to be effective safeguards against erroneous commitment.\textsuperscript{121} The shortcomings most frequently cited are the short duration typical of such hearings,\textsuperscript{122} the overreliance on expert testimony,\textsuperscript{123} and the failure of counsel adequately to defend the prospective patient's rights.\textsuperscript{124} These inadequacies have frequently resulted in "the allocation of effective decision-making to the medical, more particularly the psychiatric, profession with the legal process and the attorney assuming a ceremonial function."\textsuperscript{125}

These considerations led the Supreme Court in \textit{Parham} to con-
clude that a formal judicial-type hearing would not significantly reduce the risk of erroneous commitment. This conclusion is very difficult to reconcile with the holding of Addington v. Texas, decided by the Supreme Court last year. The issue in that case was the standard of proof constitutionally required in an adult civil commitment hearing. The Court held that something beyond the preponderance of the evidence standard was required by due process, because "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state . . . ." Thus, the Addington Court held that a hearing employing the clear and convincing evidence standard of proof significantly reduces the risk of erroneous commitment as compared to a hearing using a preponderance of the evidence standard. This implies that an appropriately structured hearing can be of significant value in reducing the risks of error.

While it is clear that commitment hearings have very often been inadequate as procedural safeguards, it is not clear that they could not be made effective. The problem has been recognized in the academic literature; prominent among the suggestions offered are clarifying the role and increasing the effectiveness of counsel, and limiting or even excluding expert psychiatric testimony. The Parham Court simply discounted the possibility that hearings might significantly reduce the risk of erroneous commitment, apparently without considering the potential efficacy of these modifications.

C. Governmental Interests

Several distinct interests of the state are affected by the commitment of juveniles to its mental institutions and by the nature of the process by which this is accomplished. First, the state has an interest in the future development of the child. This implies

128. Id. at 1810.
129. See notes 121-25 & accompanying text supra.
130. See, e.g., Andalman & Chambers, Effective Counsel for Persons Facing Civil Commitment: A Survey, A Polemic, and a Proposal, 45 Miss. L.J. 43 (1974); Attorney's Function, supra note 121; Role of Counsel, supra note 124. See also Nemmel v. Mundy, 75 Wis. 2d 276, 249 N.W.2d 573 (1977) (requiring "adversary counsel" in civil commitment proceedings).
131. See, e.g., Psychiatric Expertise, supra note 108, at 734-47. See also Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967) (discussing the propriety of psychiatric experts testifying in conclusory terms in the context of the insanity defense).
133. Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (recognizing the physical and
both an interest in avoiding erroneous commitment and in providing appropriate care and treatment when needed,\textsuperscript{134} and thus narrows down to an interest in ensuring accuracy of diagnosis. Second, the state has an obvious financial interest in restricting the use of its facilities to those genuinely in need of care.\textsuperscript{135} Once again, this interest is most directly served by procedures which minimize erroneous commitments. Third, the state has an interest in avoiding unduly burdensome procedures, not only because of financial and administrative costs,\textsuperscript{136} but also because of the undesirability of placing unnecessary procedural obstacles in the way of parents who might thereby be discouraged from seeking needed help for their children. Finally, the state has an interest in preserving the family unit.\textsuperscript{137}

The 	extit{Parham} Court suggests that the state’s interest in the family unit is best served by allowing the parent to have the major voice in the commitment decision and thus avoiding the pitting of parent and child against each other as adversaries in a hearing.\textsuperscript{138} It is argued that such a confrontation would adversely stress the family relationship and make it more difficult for the parent to assist the child during and after treatment.\textsuperscript{139} On the other hand, it is the child who wishes to remain with the parents; they are the ones seeking to have him removed from the family unit.\textsuperscript{140} The Court in 	extit{Planned Parenthood of Missouri v. Danforth}\textsuperscript{141} was not persuaded that the interests of preserving the family unit were served by a grant of authority where the conflict “already has fractured the family structure.”\textsuperscript{142}

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\textsuperscript{134} See note 133 supra.

\textsuperscript{135} The State of Georgia estimated the annual cost of care in a state mental hospital to be $40,000 per child. 412 F. Supp. at 125-26.

\textsuperscript{136} E.g., Mathews v. Eldridge, 424 U.S. 319 (1976) “[E]xperience with the constitutionalizing of government procedures suggests that the ultimate additional cost . . . would not be insubstantial.” Id. at 347.


\textsuperscript{138} U.S. —, 99 S. Ct. at 2508.

\textsuperscript{139} Id.

\textsuperscript{140} See In re Roger S., 19 Cal. 3d at 934, 569 P.2d at 1291, 141 Cal. Rptr. at 306.

\textsuperscript{141} 428 U.S. 52 (1976).

\textsuperscript{142} Id. at 75.
While the state interests are diverse and perhaps even somewhat contradictory, it is clear that they would be served by reducing the risk of erroneous diagnosis and commitment. However, a procedure which would accomplish this end at the cost of discouraging parents from seeking needed help for their children or by pitting parents against children in an adversary proceeding would arguably disserve state interests in the child and in the family unit. An expensive or time consuming procedure would obviously disserve state fiscal interests.

III. BALANCING THE INTERESTS

Once the interests of the parties involved have been defined, and the probable value and costs of possible safeguards determined, the difficult task remains of balancing these factors and establishing the minimum requirements of due process.\textsuperscript{143} The balance struck in adult commitment and in juvenile delinquency proceedings will provide useful analogies. In the case of adult involuntary civil commitment proceedings, where the interests and risks closely parallel those of "voluntary" juvenile commitment proceedings, it now seems virtually certain that due process requires a full adversarial hearing before a neutral tribunal. The Court has mandated strict procedural safeguards in the analogous area of quasi-criminal commitment;\textsuperscript{144} at least a minority of Justices have read this case broadly enough to require the same protections in adult civil commitment cases.\textsuperscript{145} Recently, the Supreme Court has held that the standard of proof in an adult involuntary civil commitment proceeding must be more stringent than a mere preponderance of the evidence because of the risks a lesser standard would pose for erroneous commitment.\textsuperscript{146} If due process is not satisfied by a full and fair adversarial hearing employing the preponderance of evidence standard, it would seem


\textsuperscript{144} Specht v. Patterson, 386 U.S. 605 (1967).

\textsuperscript{145} In the absence of a voluntary, knowing and intelligent waiver, adults facing commitment to mental institutions are entitled to full and fair adversarial hearings in which the necessity for their commitment is established to the satisfaction of a neutral tribunal. At such hearings they must be accorded the right to be present with counsel, have an opportunity to be heard, be confronted with witnesses against [them], have the right to cross-examine, and to offer evidence of [their] own.

— U.S. at —, 99 S. Ct. at 2516 (Brennan, J., joined by Marshall & Stevens, JJ., dissenting) (quoting Specht v. Patterson, 386 U.S. 605, 610 (1967)).

that anything less than such a hearing would be a fortiori unconstitutional.

In another line of cases, the Supreme Court has held that due process requires strict procedural safeguards in juvenile delinquency proceedings.\textsuperscript{147} With few exceptions,\textsuperscript{148} juveniles now enjoy the same safeguards as adult criminal defendants. Although these proceedings are nominally "civil" and their purpose is rehabilitative rather than punitive, the Court has refused to be deceived by appearances and representations.\textsuperscript{149} The ultimate effect on the juvenile, \textit{i.e.}, loss of liberty through incarceration and stigmatization, is virtually the same as the effect of criminal proceedings on the adult offender. Since the same interests are at stake, "it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.'"\textsuperscript{150}

The interests to be balanced and the risks of error in the three contexts of "voluntary" civil commitment of juveniles, involuntary civil commitment of adults, and juvenile delinquency proceedings, are virtually identical in many respects. The individual has, in all three cases, a liberty interest\textsuperscript{151} in being free of unnecessary confinement and stigmatization. While it might be argued that a juvenile has only a conditional liberty interest,\textsuperscript{152} and thus does not require the full panoply of procedural safeguards afforded an adult who is subject to commitment, this cannot be squared with the juvenile delinquency line of cases. Both the minor alleged to be mentally ill and the minor alleged to be delinquent have only conditional liberty interests. The degree to which this interest is invaded by a finding of delinquency is substantially the same as the degree of infringement attendant upon a finding of "mental illness" and "suitability for treatment." The net result is incarceration for treatment or rehabilitation in both cases. The justification

\textsuperscript{147} In \textit{re} Winship, 397 U.S. 358 (1970) (requiring proof beyond a reasonable doubt); \textit{In re} Gault, 387 U.S. 1 (1967) (requiring adequate notice, right to counsel, retained or appointed, right against self-incrimination, right to confront and cross-examine witnesses); Kent \textit{v.} United States, 383 U.S. 541 (1966) (placing procedural restrictions on the power of juvenile courts to waive jurisdiction).

\textsuperscript{148} See McKeiver \textit{v.} Pennsylvania, 403 U.S. 528 (1971) (holding that due process does not require jury trials in juvenile proceedings because of the potentially damaging effects on juvenile offenders and juvenile courts). In \textit{Gault}, the Court refrained from deciding whether states must provide judicial review of juvenile proceedings or a transcript of the hearings. 387 U.S. at 57-58.

\textsuperscript{149} See, e.g., the Court's characterization of the juvenile court process and rehabilitative treatment in \textit{Gault}, 387 U.S. at 27-29.

\textsuperscript{150} Id. at 27-28.

\textsuperscript{151} See § III-A of text \textit{supra}.

\textsuperscript{152} See text accompanying notes 54-58 \textit{supra}.
for the radical difference in procedural safeguards, therefore, cannot find its basis in either the nature of the interest subject to curtailment or the degree to which the interest is invaded.

The interests of the state in conserving the administrative resources consumed in adversarial hearings and in restricting the use of its costly rehabilitative facilities to those truly in need are the same in all three contexts. The interest in the future development of its children should be no less for those labeled delinquent than for those labeled mentally ill. The interest in preserving the family unit might arguably be served by giving parents a prominent place in juvenile commitment proceedings. In addition, the state might deem it unwise to place substantial procedural obstacles in the way of parents who might thereby be deterred from seeking help for children who genuinely need institutional therapy. Since the state interests which might be asserted in justification of lesser procedural safeguards are inextricably tied to parental interests they will be included in the discussion of that topic below.

The probable value of procedural safeguards in reducing the risk of erroneous deprivations of liberty is, as previously stated, another factor to be balanced in determining the requirements of due process. The Parham Court expressed the belief that adversarial hearings would be of little or no value in reducing that risk. In Addington, the Court concluded that because the issues involved in a civil commitment proceeding were psychiatric in nature, the reasonable doubt standard of proof was not required. Psychiatric conclusions can rarely reach the level of certainty with which the "straight-forward factual questions" of a criminal or a juvenile delinquency proceeding can be resolved. However, the Court also held that the preponderance of the evidence standard did not adequately protect the prospective patient from erroneous commitment, and thus mandated a more restrictive standard. If the difference in risk entailed in the use of two different standards of proof is constitutionally significant, it is hard to see how the hearing itself is without value. Since the factual issues are essentially of a psychiatric nature in both adult and juvenile commitment proceedings, it would seem logical to conclude that an adversarial hearing would be equally useful for reducing the risk of error in both contexts.

153. See § III-C of text supra.
154. See notes 157-61 infra.
155. See § III-B of text supra.
156. — U.S. —, 99 S. Ct. at 2509.
158. Id.
159. Id. at —, 99 S. Ct. at 1810.
The unique feature of juvenile commitment proceedings which most convincingly distinguishes them from juvenile delinquency and adult commitment proceedings is the involvement of the parent. While other factors were given some weight by the language of Parham, the same factors were not considered of sufficient importance in adult commitment or juvenile delinquency proceedings to justify abandonment of full adversarial hearings. Parham is thus best read as a strong endorsement of parental authority. This is in accord with the common law presumption that parents act in the best interests of their children and the power granted parents ordinarily to make medical decisions in the child’s behalf.

A number of considerations militate against positing parental authority as a superordinate value in the context of juvenile commitment. As discussed above, many factors extraneous to the best interests of the child may enter into the parental decision to seek commitment. In addition, when medical decisions substantially impair a protected liberty interest of the child, it may be highly inappropriate, as recognized in Danforth, to give parents a broad grant of authority to make those decisions.

IV. THE HIDDEN ISSUE—THE DOCTRINE OF THE LEAST RESTRICTIVE ALTERNATIVE

One important issue raised by the Parham case, but virtually ignored in the Supreme Court opinion, is the applicability of the doctrine of the least restrictive alternative to the commitment of juveniles. The remedy prescribed by the district court in J.L. v. Parham required the defendant state officials “to provide necessary physical resources and personnel for whatever non-hospital facilities are deemed by them to be most appropriate for these children, and . . . to place these children in such non-hospital facilities as soon as reasonably appropriate . . . .” It further required the defendants to spend whatever state funds were reasonably necessary to provide these alternatives. The usual due process inquiry examines only the nature of the proceeding in order to
determine if it adequately protects the various interests involved. In going beyond this to consider the types of alternative dispositions which must be made available to the decision-maker, the court implicitly invoked the doctrine of the least restrictive alternative.

Simply stated, the doctrine holds that "governmental action must not intrude upon constitutionally protected interests to a degree greater than necessary to achieve a legitimate purpose." It has been constitutionally applied to curb undue governmental intrusions in a variety of contexts. In the area of personal liberties, the doctrine of the least restrictive alternative has been invoked, for example, to overturn anti-contraceptive legislation which unnecessarily invaded the right to marital privacy, and to hold unconstitutional a law infringing unnecessarily on the right to travel. If the Constitution prohibits the intrusion on these personal liberties beyond the minimum necessary to achieve legitimate state ends, the same principle might arguably be applied to prohibit unwarranted physical confinement. The Supreme Court has recognized that commitment to a mental institution inevitably entails a "massive curtailment of liberty" and affects "fundamental rights."

The least restrictive alternative doctrine assumes, of course, the existence of effective alternatives to the challenged state action. In order to determine what constitutes an effective alternative, it is necessary first to determine the end served by the legislation. In the case of commitment of juveniles to mental hospitals, the state has an interest in the future development and well-being of the child, his ability to discharge the duties and responsibilities of citizenship, and his future ability to be self-supporting. In short, the state end will be served by any effective form of treatment.

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170. Least Restrictive Treatment, supra note 167, at 1101.


176. See, Alternatives to Commitment, supra note 52, at 1112-37.

177. See note 133 supra.
which helps the child recover as fully as possible from his mental illness or retardation. There is a growing body of research indicating that various forms of community treatment programs, e.g., outpatient care, day hospital care or home care services, are as effective or more effective than in-patient hospital care for a large percentage of patients. These programs are not only much less restrictive of the patients' liberty, but they also avoid the positive dangers to mental health that institutionalization can pose.

The Supreme Court has never squarely addressed the issue of whether the doctrine of the least restrictive alternative has application in the area of civil commitment. Some lower courts have construed commitment statutes to require consideration of less restrictive alternatives, while others have held that such consideration is constitutionally required. The Supreme Court has several times hinted that the Constitution might require placement in the least restrictive setting. For example, in Jackson v. Indiana, the Court stated that "at the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." The issue was squarely before the Court on the appeal from a state court decision in State v. Sanchez; however, the appeal was dismissed "for want of a substantial federal question." While this technically constitutes a disposition on the merits and may be con-


179. See note 51 supra.

180. See, e.g., Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969) (in which the court applied the doctrine on statutory grounds but indicated that it is also constitutionally required); Lake v. Cameron, 364 F.2d 637 (D.C. Cir. 1966); Dixon v. Weinberger, 405 F. Supp. 974 (D.D.C. 1975).


183. Id. at 738. See also O'Connor v. Donaldson, 422 U.S. 563 (1975) where the Court said:

the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution. Moreover, while the State may arguably confine a person to save him from harm, incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom on their own or with the help of family and friends . . . .


185. 396 U.S. at 276.
strued as foreclosing the issue, \(186\) many lower federal courts appear to be ignoring the dismissal. \(187\)

The least restrictive alternative issue is of crucial importance in the context of civil commitment of juveniles. In the case of juvenile wards of the state, many of whom will be unable to find adoptive parents \(188\) and will be forced to remain in state custody, the restrictiveness of the setting will often be the only significant issue. Unlike adult commitment where the dispositional alternatives can be framed in black and white, \(i.e.,\) incarceration or release, many juveniles are faced only with different shades of gray—a number of dispositions imposing various degrees of restraint. Where the issue was so clearly raised \(189\) and the context so apt, it is unfortunate that the Supreme Court in Parham chose not to address the question squarely, allowing it to be decided, as it were, by default. \(189\)

V. CONCLUSION

The balancing of important competing values is a difficult task at best, and it is made no easier when procedural structure must be erected on the slippery foundation of our present psychiatric knowledge. In the final analysis, a single psychiatric examination does not afford a minor adequate protection against the substantial risks of erroneous incarceration. Reflecting on this fundamental concern, Justice Brandeis stated:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficient. Men born of freedom

\(186\). See, Alternatives to Commitment, supra note 52, at 1151-53.
\(187\). See note 178 supra.
\(188\). Children who have physical handicaps, emotional problems, or other problems such as enuresis are difficult to place. In fact, children who have committed no sin greater than attaining school age have little chance of finding adoptive homes, and those who have reached their teens have virtually none. 412 F. Supp. at 134-35.
\(189\). Each of the named plaintiffs requested "an order of the court placing him in a less drastic environment suitable to his needs." — U.S. —, 99 S. Ct. at 2498. See also 412 F. Supp. at 139-40.
\(190\). The Court made no reference in its opinion to the consideration of less drastic alternatives mandated by the district court beyond noting that "the court . . . shifted its focus drastically from what was clearly a procedural due process analysis to what appears to be a substantive due process analysis . . . ." — U.S. —, 99 S. Ct. at 2502. The Court's apparent perplexity is difficult to understand in light of the number of cases involving the doctrine of the least restrictive alternative in the context of civil commitment which were brought to the Court's attention. Brief of the American Bar Assoc. Amicus Curiae at 23-24, Parham v. J.R., — U.S. —, 99 S. Ct. 2493 (1979).
are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding.\textsuperscript{191}

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\textsuperscript{191} Quoted in A. Sutherland, \textit{The Path of the Law from 1967}, 83 (1968).