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Children and the Idea of Liberty: A Comment on the Civil Commitment Cases

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CHILDREN AND THE IDEA OF LIBERTY: A COMMENT ON THE CIVIL COMMITMENT CASES

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INTRODUCTION

Despite all the talk about the rights of children in the past few years, it has not often been necessary to parse conflicting claims by parents and children, and to give independent constitutional content to the latter. Before 1979, the Supreme Court had reached the merits in only one case presenting that issue.[1] The problem will arise whenever the state lends its aid to the parents in a familial dispute, and in time will doubtless provoke litigation in which outnumbered children claim the benefit of most of the Bill of Rights.[2] Until now, debate has focused on the procedural and substantive protections afforded by the due process clause in cases in which the child has claimed interference with a protected liberty. What I find curious about the discussion generally, and about the Supreme Court's treatment of the problem in particular, is the nearly universal failure to be precise about the nature of the child's interest in "liberty." My dissatisfaction does not stem purely from a concern for philosophical clarity, for it seems to me that it ought to make a difference in the outcome. Both the utilitarian balance current in procedural due process cases and the distinction between fundamental and less important interests in the realm of substantive due

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[1] Planned Parenthood v. Danforth, 428 U.S. 52 (1976). A similar issue was presented in Bellotti v. Baird, 428 U.S. 132 (1976), but the Court remanded on abstention grounds.

[2] To give just two examples, a child might claim protection of the free speech clause where the state conditions his right to buy some kinds of books on parental consent. *See* Ginsberg v. New York, 390 U.S. 629 (1968). Or he might rely on the religion clauses to dispute a state-supported parental decision that he must attend a parochial school. *See* Wisconsin v. Yoder, 406 U.S. 205, 241-46 (1972) (Douglas, J., dissenting in part).

process presuppose that a whole raft of individual claims which might be listed under "liberty" (or "property" as the case may be) can be assigned a more precise value which determines the amount of judicial protection each warrants. My concern in this piece is to outline what I think is at stake for children and adolescents in disputes over voluntary civil commitment, and to indicate how a more definite statement of the rights involved would have affected the 1979 decisions of the Supreme Court in *Parham v. J.R.*[3] and *Secretary of Public Welfare v. Institutionalized Juveniles.*[4]

I.

Because what I will have to say about children is discerned most easily against a background, I will begin with a brief word about what I think "liberty"—as the term is used in the due process clause—currently means for adults. It seems to me most clear to speak of liberty (or freedom)[5] as a notion compounded of three variables. The variables may be stated as the freedom of a particular subject (X) from a particular constraint or set of constraints (Y) to undertake a particular course of action or cultivate a certain condition of character (Z).[6] For due process purposes, the only relevant constraints are those imposed by some state action rather than by social pressure or individual interference. Insofar as adults are concerned, the history of the due process clause has largely been an extension of the range of variables Y and Z in the form of a gradual increase in the kinds of actions and conditions with which the state could not interfere, absent the requisite procedure or substantive justification.

The most limited application of the term liberty, one which virtually defined it before the turn of the twentieth cen-

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[3] 442 U.S. 584 (1979).

[4] 442 U.S. 640 (1979).

[5] I will the use the terms interchangeably.

[6] In this approach I follow the lead of Gerald MacCallum, *Negative and Positive Freedom*, 67 PHIL. REV. 312 (1967). *See also* F. OPPENHEIM, DIMENSIONS OF FREEDOM 109-18, 132-34 (1961); J. RAWLS, A THEORY OF JUSTICE 201-05 (1971). For an approach which distinguishes two senses of freedom corresponding to more independent variables, see I. BERLIN, TWO CONCEPTS OF LIBERTY (1958), and I. BERLIN, FOUR ESSAYS ON LIBERTY xxxvii-lxiii, 118-72 (1969).

tury, is, to quote Blackstone, "the power of loco-motion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint."[7] That is what we mean by the expression "free as a bird"; but featherless bipeds, as subjects who desire freedom, are capable of an extended range of activity which Blackstone's definition does little to protect. It was the nineteenth century's preoccupation with the meaning of freedom, implemented through the excesses of laissez-faire capitalism, which expanded the constitutional concept of "liberty" to the dimensions it retains today.[8] *Allgeyer v. Louisiana*,[9] the first of the substantive due process cases, illustrates the point perfectly:

> The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[10]

"Free in the enjoyment of all his faculties" is a rather terse way of putting this enlarged notion, but subsequent cases have given a clearer expression to the range of the three variables which may be used to define the idea of liberty. In the first place, the adult as subject (X) is able to enjoy freedom in ways very different from a bird because he has a ca-

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[7] 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *134. For a discussion of the limited nature of the concept until late in the nineteenth century, see Hough, *Due Process of Law—To-Day*, 32 HARV. L. REV. 218 (1918); Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 411-14 (1977); Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in The Federal and State Constitutions Which Protect "Life, Liberty, and Property,"* 4 HARV. L. REV. 365 (1891); Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

[8] I should add that what counts as "due process" has changed considerably during the same period, however.

[9] 165 U.S. 578 (1897).

[10] *Id.* at 589.

pacity for choice. That fact is presumed even in Blackstone's definition, which emphasizes the role of "inclination" in directing locomotion. It is the significance of choice in adult behavior which has surfaced most prominently in the recent attempts to define liberty in the abortion cases;[11] but it is equally evident in the Court's emphasis in *Allgeyer* on the individual's ability to use his faculties—to live and work —"where he will," to carry out his own "purposes," whatever they may be.[12]

In the second place, we have taken a very unqualified view of what counts as a constraint or restraint on freedom (Y). Of course for fourteenth amendment purposes the only relevant impediments are those imposed by the law, but we also have come close to adopting Bentham's view that "[e]very law is an infraction of liberty."[13] This is not as it had to be. There is much to be said for Locke's position "that ill deserves the name of confinement which hedges us in only from bogs and precipices."[14] Once such a step is taken, though, it becomes only a question of what counts as a bog or a precipice, and on that issue of definition is the existence of liberty settled. We have, for example, gone that step with Locke in looking at obscenity: dirty books are bogs (I suppose), not speech, and so not within the intendment of "liberty" in the fourteenth amendment; by the same token, laws regulating dirty books can hardly be seen as restraints on liberty. We might well have gone considerably further in the same direction, counting as an aid to liberty, rather than as a restraint, any law designed to protect us from our own ignorance or impulses, but by and large we have not.

The reason we have not reflects the current view of the third aspect of liberty discussed above: the individual's freedom to undertake a particular course of action or cultivate a certain condition of character (Z). The prevailing notion about

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[11] *See* Roe v. Wade, 410 U.S. 113, 153 (1973): "This right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id. See also* Planned Parenthood v. Danforth, 428 U.S. 52, 67-72 (1976).

[12] 165 U.S. at 589.

[13] 2 J. BENTHAM, WORKS 493 (1843).

[14] II J. LOCKE, TWO TREATISES OF CIVIL GOVERNMENT para. 57 (1966).

what is good for the individual, what he should be free to do, is a very commonsense one: it is what he says he wants, or what he does. In *Bellotti v. Baird*,[15] for example, the Supreme Court held that in cases in which a pregnant minor was mature enough to make her own decision about an abortion, the state could not dictate a contrary course even if a judge, or her parents, determined that it would be in her best interests. I do not mean to suggest that we view as an aspect of liberty the individual's interest in doing absolutely anything he wishes. We are accustomed to think that a law which prohibits burying one's grandparents alive is constitutional not only because the social interest in preserving the older generation outweighs the individual's right to sadistic pleasure, but because that sort of activity is not something the individual is free to do. *Meyer v. Nebraska*[16] seems to indicate that the area of activities and conditions protected against state interference is described by the extent to which the common law protected the individual against private interference:

> [Fourteenth amendment liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[17]

Within that wide perimeter we do not say that an adult can be prevented from engaging in a certain type of conduct—walking about town at 3 a.m., for example—because it is not something he "really" wants to do, because going to bed would be better for him, or make him happier in the long run. It might make sense to speak of such a person as still free because there are no obstacles to doing what he (really) wants,[18] but that is not how the American legal system gener-

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[15] 443 U.S. 622 (1979).

[16] 262 U.S. 390 (1923).

[17] *Id.* at 399.

[18] "In the ideal case, liberty coincides with law: autonomy with authority. A law which forbids me to do what I could not, as a sane being, conceivably wish to do is

ally sees it. We occasionally impose curfews on adults, which we say do not violate due process because they are justified by a social purpose compelling in the appropriate degree, but that is a different thing from saying that they do not restrain liberty.[19]

II.

In assessing against this model what we mean when we speak of children's liberty, let me set to one side for a moment the difficult problem of adolescents. What makes their legal issues so intractable is not just that they fall somewhere between childhood and adulthood, but that no two of the same age progress at the same rate, and no one matures in all aspects at a uniform rate. However, if we focus on those ten, or perhaps twelve and under, there is immediately apparent a quite different range for each of the variables used to define adult liberty. First, we do not attribute to those of that age the ability to make choices, since "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[20] That does not

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not a restraint of any freedom." I. BERLIN, TWO CONCEPTS OF LIBERTY 33 (1958).

[19] In saying that the scope of liberty protected for adults generally is coextensive with the protection afforded by the common law I am guilty of a rather crude simplification. For one thing, it also includes various sorts of statutory entitlements. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974) (revocation of "good time" credits); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probation revocation); Morissey v. Brewer, 408 U.S. 471 (1972) (parole revocation). For another, the Supreme Court in Paul v. Davis, 424 U.S. 693 (1976), made at least one significant move to excise from the scope of fourteenth amendment liberty the individual's interest in protection of his reputation, a claim which undoubtedly was protected at common law against private interference. *See* 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *134; Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 411-14, 523-29 (1977). Moreover, I have completely neglected the incorporation of most of the specific protections of the Bill of Rights into the fourteenth amendment due process clause, and some of them (*e.g.* criminal jury trials) are things which only the state could deny. I would excuse the latter omission on the ground that the issues raised by *Parham* and *Institutionalized Juveniles* concern only whatever independent content the word "liberty" has in the fifth and fourteenth amendments. And the former two problems, while they might affect to some slight degree the number of cases covered by the observations made in the text, do not seem to impair their accuracy.

[20] Bellotti v. Baird, 443 U.S. at 635. *See also* Ginsberg v. New York, 390 U.S. 629, 648-50 (1968) (Stewart, J., concurring); Prince v. Massachusetts, 321 U.S. 158

mean that children, like birds, are not "persons" whose freedom is protected by the due process clause. But what makes a child a person capable of possessing rights are the choices which are made on his behalf by, for the most part, parents, together with his nascent ability to appropriate that function as he grows to maturity.[21] When we speak of the child's right to freedom we are likely to set to one side those traits of character which would lead him to make foolish choices if he were left to his own devices, and which we are inclined to regard as no part of his "real," rational, mature, or future self. And in doing so we permit ourselves to recognize as the child's own, a choice which is in fact made for him by someone else.

Coupled with this view of the child's personality (X) is a similar notion of what counts as a restraint on liberty (Y)—what it is that the child must be free from to be really free. We are inclined to take the "bogs and precipices" view of the child's ignorance and imprudence. Take, for example, our nearly universal system of compulsory education laws.[22] Any law which required adults to be confined in one place for long periods of time and to listen to public servants harangue them on subjects chosen by the state would be treated as the most massive invasion of liberty and free speech.[23] Rather than saying that the state has no right to interfere with a child's freedom of movement and speech though, we are accustomed to think that the state has a duty to provide—and the child a right to receive—education at public expense.[24] Indeed, in holding that notice and a hearing must attend school suspen-

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(1944); Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 771-86 (1978).

[21] A. MELDEN, RIGHTS AND PERSONS 220-23 (1977).

[22] Such laws are in effect in every state in the union except Mississippi. *See* A. SUSSMAN, THE RIGHTS OF YOUNG PEOPLE 238-39 app. H (1977).

[23] That in fact has been the case with conscription, the only parallel in the lives of adults. Only the exigencies of military preparedness can justify restrictions which in civilian life would violate the first amendment, *see* Brown v. Glines, 48 U.S.L.W. 4095, 4097 (Jan. 21, 1980); Parker v. Levy, 417 U.S. 733 (1974), or the fifth amendment, *see* Selective Draft Law Cases, 245 U.S. 366 (1918).

[24] *See, e.g.*, IJA-ABA JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, SCHOOLS AND EDUCATION 1.1 (1978) "Every juvenile who is living within the state and is between the ages of six and twenty-one . . . and not a graduate of high school . . . should have the right to an education provided at state expense . . . ." *Id.*

sions, the Supreme Court found that once the state establishes a school system children had a due process property entitlement to a public education.[25] It is difficult to perceive as a restraint that which the state has a duty to provide. The explanation is that we see education as liberating the child from the confinement of his undeveloped state.

Much the same might be said, from a philosophical perspective, about child labor legislation, although the empirical case for the wisdom of such laws is more difficult to make today than it was formerly.[26] From the outset, statutes preventing children from working have been viewed, not as restraints on the freedom of the young, but as necessary "to diminish ignorance and immorality,"[27] to permit children to develop physically and mentally, free from the hazards of dangerous occupations and overwork,[28] to prevent juvenile delinquency,[29] and to supplement the operation of compulsory education laws.[30] And if we confine our attention to children under the age of twelve, there still is likely a substantial consensus behind the proposition that the hand of the state guides, rather

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[25] Goss v. Lopez, 419 U.S. 565, 573-74 (1975).

[26] A table showing the child labor laws effective in every state is provided in Note, *Child Labor Laws—Time to Grow Up*, 59 MINN. L. REV. 575, 604-08 app. (1975). Most child labor statutes have been subjected to heavy criticism in recent years for a number of reasons. It has been suggested, for example, that the health hazards which led to the enactment of such legislation earlier in this century are now adequately dealt with by union pressure, technological advances, and legal regulations of safety, wages, and hours applicable without regard to age. *Id.* at 578-83; IJA-ABA JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, RIGHTS OF MINORS 90-91 (1978). Moreover, the assumption that employment of youth leads to delinquency has been turned around. *See* Martin, *Lower-Class Delinquency and Work Programs*, WORK, YOUTH AND UNEMPLOYMENT 439, 444 (1968); Fleisher, *The Effect of Unemployment on Juvenile Delinquency*, 71 J. POL. ECON. 543 (1963).

[27] Perry v. Tozer, 97 N.W. 137, 139 (Minn. 1903).

[28] *E.g.*, Sturges and Burn Mfg. Co. v. Beauchamp, 231 U.S. 320 (1913); Gill v. Boston Stores of Chidal, 168 N.E. 895 (Ill. 1929); Casey v. Male, 178 A.2d 249 (N.J. Super. 1962).

[29] *In re* Lewis, 84 N.Y.S.2d 790, 793 (Child. Ct., Westchester County 1948).

[30] Houlihan v. Raymond, 139 A.2d 37 (N.J. Super. 1958). For an illustration that there was some degree of self-interest on the part of job-seekers who supported child labor legislation, see Bakan, *Adolescence in America: From Idea to Social Fact*, 100 Daedalus 979, 985 (1971). However, this does not, it seems to me, weaken the argument made in the text, that such laws have not been seen as restraints on the liberty of children.

than restrains.

The third aspect of liberty—the individual's freedom to undertake a particular course of action or cultivate a certain condition of character (Z)—exhibits a similar tendency to change shape when applied to children. In the case of adults this variable is tied to the first; it specifies the interests which the freely acting individual chooses to pursue: the type of occupation, associations, leisure, thought, and so on. But because the child's choices are made by a surrogate until he is capable of acting autonomously, the interests selected are those which his parent (or other custodian) thinks best for him. It is for this reason that we speak of a certain condition or action as being "*in* the child's interest."[31]

What is most difficult to specify is the relation between this variable and the second. The interests protected are the result of particular choices made, in all but exceptional cases, by the parent in the child's behalf. Indeed, it is appropriate to speak of the child as having a private moral right against his parents to have such choices made for him, because the parents have made his life dependent on theirs during his most helpless stage.[32] Claims of that sort are not legally enforceable against the parents, save when their failure is extreme enough to justify state intervention under abuse and neglect statutes.[33] But the explanation for the limited enforceability of the right to parental guidance is to be found in the nature of the right itself. Insofar as the claim is a demand for the particular choices which the parent would make, it must be protected against state interference—a matter which becomes difficult to distinguish from state enforcement when there are reasonable grounds for dispute as to the appropriateness of any particular choice.

Once it is understood that the child's claim to a particular choice is protected against state interference, it becomes easier to speak of the interest selected by the parents as "his." And although the idea of what counts as a restraint imposed

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[31] A. MELDEN, *supra* note 21, at 24, 73, 151-52, 220-23 (1977).

[32] *Id.* at 56-80, 147-53.

[33] *See generally* Garvey, *Children and the First Amendment*, 59 TEX. L. REV. 321, 330-31 (1979).

by the parents on the child's freedom is very qualified indeed, any meddling by the state with "his" interests can be seen as a deprivation of liberty. Judicial treatment of the second variable historically has conformed to that view, though sometimes in a backhanded fashion. Although the state may impose compulsory education, for example, it may not forbid the child to attend a non-public school,[34] if that is what the parents prefer for the child. *A fortiori*, the state is under a heavy obligation to justify action which would sever the child's connection with his parent altogether.[35] That the cases should speak of the right at stake as the parent's liberty interest is a natural enough ellipsis, since the responsibility for choice and the interest selected may both be traced to the parent, who is the child's surrogate moral agent. But that has not obscured the state's duty to observe the same limits for the child's sake.[36]

If we view the child's claim to freedom in the way this discussion has suggested, a deprivation of liberty by the state

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[34] Pierce v. Society of Sisters, 268 U.S. 510 (1925). *Cf.* Meyer v. Nebraska, 262 U.S. 390 (1923) (limitation of state power to control private school curriculum).

[35] Stanley v. Illinois, 405 U.S. 645 (1972). *Cf.* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion); May v. Anderson, 345 U.S. 528 (1953). Cases outside the due process area have matched the approach discussed in the text. For example, Wisconsin v. Yoder, 406 U.S. 205 (1972), held that the state may not compel school attendance at all once such a requirement occasions serious conflict with religious principles chosen by the parents for the child.

[36] Note, for example, the clear indications from the Supreme Court that the child was entitled to notice, counsel, confrontation and cross-examination, and a privilege against self-incrimination because of the danger of severing his relationship with his parents by a mistaken juvenile court adjudication. *In re* Gault, 387 U.S. 1, 28, 33-34, 41-42, 55 (1967). *See* Tribe, *Childhood, Suspect Classifications, and Conclusive Presumptions: Three Linked Riddles*, 39 LAW AND CONTEMP. PROB. 8, 13 n.14 (1975).

Once again, cases outside the area of due process strictly defined parallel those within. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), a class action brought by three parents on behalf of themselves, their children, and others similarly situated, relied on the free speech rights of the students, *id.* at 637, as well as the rights of the parents, *id.* at 641, in holding unconstitutional a state law requiring participation in the pledge of allegiance to the flag. Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503 (1969), seemed to rest solely on the child's free speech rights in concluding that students might wear black armbands to protest the Viet Nam War. But it was surely no accident that the students' parents supported and encouraged their actions. *Id.* at 504; *id.* at 516 (Black, J., dissenting). *See also* Ginsberg v. New York, 390 U.S. 629, 639 (1968) (child's right to procure obscene literature dependent on parental permission).

could occur in one of several ways. The one which most resembles the garden variety due process problem for adults would be frustrating the child's pursuit of an *ersatz* interest in some particular activity, condition, or course of conduct. Good examples might be child labor laws or curfew laws which interfere with the child's ability to sell religious tracts[37] or attend a drive-in movie. A second type of deprivation, perhaps different only in degree, but unique to the case of children, occurs when state action causes the loss of parental help in providing the child with interests and making choices on his behalf. That potential loss to the child is at stake in any sort of custody proceeding, in many cases within the jurisdiction of the juvenile justice system, and in a somewhat qualified sense in civil commitment to mental institutions. Deprivation of liberty also may occur in a third sense, again related, but perhaps conceptually distinct. There are some kinds of harm which may be inflicted on children, the consequences of which will endure and have their most marked effect in the future, when the minor has become an adult. The stigma which attends conviction as a juvenile offender is an example; whatever may be the effects on the child's growth, we at least attempt to avoid an adverse social response which might affect future education and employment opportunities by prohibiting public access to juvenile court, police, and social agency records, and sometimes by allowing expungement.[38]

III.

If one withdraws to a suitable point of abstraction, it becomes easy to take in the difficult issue of adolescence. Over a period between ten (or twelve) and sixteen (or twenty-one) the child becomes an adult and we must shift from the qualified to the more straightforward sense of each of the variables in discussing his right to liberty. The individual, bit by bit, assumes responsibility for making his own choices, and we are

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[37] *See* Prince v. Massachusetts, 321 U.S. 158 (1944).

[38] *See, e.g.*, Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U.L.Q. 147; Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 799-801 (1966).

gradually more inclined to see as his "real" self that which is manifest in his words and actions. By the same token we begin to speak of his own interests rather than of things which are in his interest, and to think of them as those avenues which he should be free to pursue rather than as a means to eventual autonomy. As he becomes more able to choose his own interests he has less need of an intermediary in making demands against restraints by the state. The problem with discussion at that level of generality is that it provides little help in deciding when a given adolescent should be allowed free rein to make a particular decision. The reflex response, reflected in doctrines like emancipation and the mature minor rule, is to have courts decide such issues case-by-case. There is an appealing similarity in the issue to those which the judicial process is thought to be better than other legal apparatus for resolving: the determination must be individualized; in theory it depends on an assessment of past and present conduct, speech, and demeanor; it requires a conclusion about mental state or ability—the capacity for judgment. But the appeal is deceptive. Judgment, or maturity, is "difficult to define, let alone determine,"[39] and there is an inevitable temptation for the judge to make the decision on the basis of his own values, rather than by applying the evanescent standard of what it means to be an adult.[40] As a result, it is far fairer to both adolescent and parents to base the decision on impersonal, objective criteria such as age, a fact which means that the definition of maturity is ultimately a legislative choice.

Resolution of the problem of defining "liberty" for adolescents would require far more extended discussion than the space here allows. But because a close look at the civil commitment problem reveals that there is little, if any, reason to treat children differently from adults, it is unnecessary to devote much concern to intermediate cases.

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[39] Bellotti v. Baird, 443 U.S. at 643-44 n.23.

[40] *See* Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 662-63 (1977); Katz, Schroeder, & Sidman, *Emancipating Our Children—Coming of Legal Age in America*, 7 FAM. L.Q. 211, 213 (1973).

IV.

The approach to defining the child's interest in liberty previously discussed is difficult to apply in any straightforward fashion to civil commitment. The chief problem is that the very fact of commitment implies that the parents or other guardians admit, to a greater or lesser degree, their inability or unwillingness to direct the child's interests and make appropriate choices on his behalf. The consequences of that admission can best be seen once the problem presented in the commitment cases is brought into sharper focus.

Parham v. J.R.[41] was a class action brought by minors (under eighteen) who were or would be committed to Georgia state mental hospitals, against James Parham—the state Commissioner of the Department of Human Resources, the Director of the Mental Health Division of that Department, and the Chief Medical Officer at one of the eight state regional hospitals where the two named plaintiffs were detained. The plaintiffs sought declaratory and injunctive relief against Georgia's voluntary commitment procedures, which in pertinent part 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 be suitable for treatment, such person may be detained by such facility for such period and under such conditions as may be authorized by law.[42]

Although there were no regulations specifying the exact procedure for admission, the practice at the various regional hospitals generally followed this pattern: the child to be committed would first have been treated as an outpatient at a community

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[41] 442 U.S. 584 (1979). The case was originally argued during the 1977 Term, 46 U.S.L.W. 3386 (December 6, 1977); it was later restored to the calendar for reargument, 46 U.S.L.W. 3452, and consolidated with Secretary for Public Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979).

[42] GA. CODE § 88-503.1 (1975) (amended 1978). Succeeding sections provided for discharge if the superintendent determined that the patient had recovered, or that hospitalization was no longer desirable, *id.* § 88-503.2; or if the parent or guardian consented to a written request for discharge. *Id.* § 88-503.3.

mental health clinic. If that treatment had proved unsuccessful the regional mental hospital, at the request of the parent or guardian, could immediately receive the child for purposes of diagnosis. Shortly thereafter a psychiatrist and some other mental health professional would make a decision about detention for purposes of treatment, after interviewing the child and his parents, and reviewing whatever information was available from the community mental health clinic, school, and similar sources. Once committed, the child would be periodically reviewed by the hospital staff, who were assisted on some occasions by non-staff mental health professionals.[43] Reversing the decision of a three-judge district court,[44] the Supreme Court held that Georgia' procedure did not violate the fourteenth amendment due process clause.

Secretary of Public Welfare v. Institutionalized Juveniles,[45] decided the same day as *Parham*, was a class action challenging Pennsylvania procedures for voluntary admission of mentally ill and mentally retarded children to state institutions. The Pennsylvania Mental Health Procedures Act of 1976,[46] implemented by regulations promulgated by the Secretary of Public Welfare,[47] provides that a parent or guardian may commit for mental illness any child under fourteen.[48] Within three days the hospital staff must inform the child and his parents whether treatment is necessary, and what treatment is proposed.[49] That proposal is made at a staff conference after the child has been examined by a psychiatrist. The staff also has before it the results of psychological,

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[43] The review procedures varied from one hospital to another. To take three examples: at Central State Regional Hospital, where the named plaintiffs resided, the staff formally reviewed the admission a week later, and thereafter did so informally approximately every 60 days. At Savannah Regional Hospital the admission was reviewed within three weeks by a group composed of hospital and clinic staff and people from the community, such as juvenile court judges. At West Central Hospital a consulting psychiatrist would review some cases each week. Parham v. J.R., 442 U.S. 584, 594 (1979).

[44] J.L. v. Parham, 412 F. Supp. 112 (M.D. Ga. 1976).

[45] 442 U.S. 640 (1979).

[46] PA. STAT. ANN. tit. 50, §§ 7101-503 (Purdon 1976).

[47] 8 PA. BULL. 2433 (1978).

[48] PA. STAT. ANN. tit. 50, § 7201 (Purdon 1976).

[49] *Id.*, § 7205.

neurological, and medical examinations, a school evaluation, and a background file on the child.[50] Each child's diagnosis and treatment must be reviewed at least every thirty days,[51] and if the child objects to treatment, review must be conducted by a mental health professional who is not a member of the treatment team.[52]

Voluntary admission of mentally retarded children under the age of eighteen is governed by the Mental Health and Mental Retardation Act of 1966[53] and regulations promulgated in 1973 by the state Secretary of Public Welfare.[54] Any parent seeking commitment of a retarded child must first obtain a referral from a physician, accompanied by a medical or psychological evaluation. The director of the institution must then make an independent examination of the child. A child over the age of thirteen who objects to voluntary commitment can be hospitalized only after an involuntary commitment proceeding.[55] The Supreme Court found that Pennsylvania's procedures also met the demands of fourteenth amendment due process.[56]

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[50] The extent to which the staff relied on the background file was the subject of some uncertainty. 442 U.S. at 649 n.8 (1979).

[51] PA. STAT. ANN. tit. 50, § 7100.108(a) (Purdon 1976); 8 PA. BULL. 2436 (1978).

[52] 8 PA. BULL. 2436 (1978). A child may be released upon his parents' request, upon the determination by the director of the hospital that hospitalization is no longer necessary, or upon the petition of "any responsible party" who believes that treatment in a less restrictive setting would be in the best interests of the child. PA. STAT. ANN. tit. 50, § 7206(b), (c) (Purdon 1976).

[53] PA. STAT. ANN. tit. 50, §§ 4101-704 (Purdon 1966), *as amended by* Pa. Mental Health Procedures Act of 1976, PA. STAT. ANN. tit. 50, §§ 7101-503 (Purdon 1976).

[54] 3 PA. BULL. 1840 (1973).

[55] PA. STAT. ANN. tit. 50, § 4406 (Purdon 1966), *as amended by* Pa. Mental Health Procedures Act of 1976, PA. STAT. ANN. tit. 50, §§ 7101-503 (Purdon 1976).

[56] The litigation in *Institutionalized Juveniles* began with the case of Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), which held unconstitutional Pennsylvania's former voluntary commitment statute. After the case was decided, Pennsylvania passed the Mental Health Procedures Act of 1976, which for the first time treated adolescents 14 and older in the same manner as adults. The Supreme Court then held the claims of the class's named plaintiffs moot, and remanded for substitution of representatives and reconsideration of class definition. Kremens v. Bartley, 431 U.S. 119 (1977). After new plaintiffs were substituted, the district court again held the procedures applicable to both mentally ill and mentally retarded children unconstitutional. Institutionalized Juveniles v. Secretary of Public Welfare, 459 F. Supp. 30 (E.D. Pa. 1977). It was that decision which the Supreme Court ultimately reversed.

To analyze the constitutionality of the Georgia and Pennsylvania voluntary civil commitment procedures the Chief Justice, writing for the majority, applied the balancing approach prescribed in *Mathews v. Eldridge*[57] for procedural due process cases. The Court considered:

> 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.[58]

The child's liberty interest at stake in the proceeding had two components, according to the Court. The first it defined variously as an interest "in not being confined unnecessarily for medical treatment,"[59] or "in being free of unnecessary bodily restraints."[60] The second was a right to avoid any stigma which would taint his later social dealings as a result of an improper confinement in a mental hospital. But the relevant private interests also included the parents' authority to act in the best interests of their child.

It is difficult to see how the state interest in reserving limited bed space for cases of genuine need could conflict with any of those interests. The other two state concerns which the Court identified, though, spoke in favor of a more summary disposition of the commitment question, to the asserted detriment of the child's interests. One was the desire to remove all unnecessary obstacles which might discourage parents from seeking psychiatric assistance for their children; the second was the need to free mental health specialists from obligations, such as participation in hearings, which did not relate to direct patient care. The latter two concerns would not, of course, justify dispensing with any review of the parental decision altogether; but the Court found that they did warrant

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[57] 424 U.S. 319 (1976).
[58] *Id.* at 335.
[59] 442 U.S. at 600.
[60] *Id.* at 601.

leaving review of the commitment choice solely in the hands of mental health professionals. For one thing, it suggested that a judicial hearing would add little in the way of accuracy, since the decision was essentially medical-psychiatric, and the nonspecialist would not be much help in assuring that it was appropriately made. Moreover, close scrutiny of parental motives would both ignore the presumption that parents act in the best interests of their child, and aggravate parent-child tensions, thereby interfering with treatment and making the child's later return home more difficult. If some parents should try to "dump" children not needing assistance in mental hospitals, the examining psychiatrist would quickly discover the abuse.[61]

The first thing to note about the procedures which the Court approved for the commitment of children is that they are more relaxed than what seems to be required for the involuntary civil commitment of adults. The Supreme Court has never explicitely stated what procedural safeguards are required for adult civil commitments, but *Addington v. Texas*,[62] decided two months before *Parham* and *Institutionalized Juveniles*, said that proof in such proceedings must be "clear and convincing," a demand which would be hard to police if applied in anything other than a judicial or formal administrative hearing. And in the closely related area of commitment of a criminal defendant to a mental institution, it is clear that due process requires:

> A. Written notice to the prisoner that a transfer to a mental hospital is being considered;
> B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;
> C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not permitting such presen-

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[61] *Id.* at 606-13.
[62] 441 U.S. 418 (1979).

tation, confrontation, or cross-examination;
D. An independent decisionmaker;
E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;
F. Availability of [qualified and independent assistance by, for example, a mental health professional or licensed psychiatrist];
G. Effective and timely notice of all the foregoing rights.[63]

The difference in the treatment of adults and children clearly does not result from a greater state interest in avoiding the mistaken commitment of adults, nor could it be based on a greater degree of confidence in the diagnoses and predictions of the psychiatric profession with regard to children. Furthermore, the state would seem to have an equal interest in both cases in maximizing the time its mental health professionals have available for direct patient care. What makes the procedures afforded for commitment of children different from those provided adults obviously has something to do with the difference in the individual interests at stake; or, put another way, with the child's right to "liberty" and his parents' influence on that claim.

Before exploring the Court's conception of that right to liberty, I must stress a second point which could be lost in the rhetoric of the *Parham* opinion: that if we forget for a moment about parental input, the procedures afforded children offer less protection against the possibility of a mistaken commitment.[64] Despite the aspersions cast by the majority on the

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[63] Viteck v. Jones, 48 U.S.L.W. 4317, 4321 (March 25, 1980). *See* Specht v. Patterson, 386 U.S. 605, 610 (1967). *See also* McNeil v. Director, Patuxent Inst., 407 U.S. 245 (1972) (detention of alleged defective delinquent after expiration of his criminal sentence for refusal to submit to psychiatric exam violates due process). *Cf.* Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Baxstrom v. Herold, 383 U.S. 107 (1966) (discussion of due process requirement in commitment proceedings).

[64] Consider, for example, the Court's statement that:

> we do not accept the notion that the shortcomings of specialists can always be avoided by shifting the decision from a trained specialist using the traditional tools of medical science to an untrained judge or administrative hearing officer after a judicial-type decision-maker must make a medical-psychiatric decision. Common human experience and scholarly opinions suggest that the supposed protections of an adversary proceeding to determine the appropriateness of medical decisions for the commitment and treatment of

ability of the adversary system to correct for error in a psychiatric determination of the need for treatment, we have long acted on a contrary assumption in related areas of the law. The procedures afforded criminal defendants threatened with commitment to a mental institution rest on such an assumption. The same can be said, with considerable justification, about the general rejection of the *Durham*[65] test for insanity as a criminal defense: that its chief defect lay in the temptation it provided the judicial system to shove responsibility off on the psychiatric profession.[66] I do not mean to suggest that the lay decision-maker is better at diagnosing psychic disorders than the trained medical professional, for that is not the issue in civil commitment proceedings. It is rather a social-legal question: whether the kind of behavior which an individual has exhibited warrants a prediction of future behavior sufficiently aberrant or obnoxious (and perhaps treatable) to justify a deprivation of liberty. And while a psychiatrist may have some useful contribution to make to that determination, he is neither expert at making the choice among the values at stake, nor politically responsible.

That suggests that one function performed by an adversary hearing before a judicial or administrative decision-maker is to prevent medical-psychiatric decisions to commit which are mistaken from a social-legal perspective. But that is not all. As Will Rogers might have put it, it is difficult to go broke underestimating the accuracy of psychiatric diagnosis

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mental and emotional illness may well be more illusory than real. See Albers, Pasewark & Meyer, Involuntary Hospitalization and Psychiatric Testimony: The Fallibility of the Doctrine of Immaculate Perception, 6 Cap. U.L. Rev. 11, 15 (1976).

442 U.S. at 609. Perhaps the error is the typesetter's, but what Albers, Pasewark & Meyer really said at page 15 is that "[s]tudies on psychiatric diagnosis highlight psychiatry's lack of precise definitions and the inability of psychiatrists to apply these definitions in a reliable and consistent manner." More important, the thesis of the article is not that adversary proceedings cannot check the unreliability of psychiatric recommendations; it is rather that the judicial system is to be faulted for not having taken a more active role, and that a much less deferential posture is demanded because of the fallibility of psychiatric testimony.

[65] Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

[66] *See, e.g.*, Dershowitz, *Psychiatry in the Legal Process: A Knife That Cuts Both Ways*, TRIAL Feb./March 1968, at 29; PSYCHIATRISTS AND THE LEGAL PROCESS: DIAGNOSIS & DEBATE 32-37 (1977).

and prognosis. Those studies of reliability and validity which do exist indicate an astonishing inconsistency within the profession in the diagnosis of a particular disorder,[67] and an even more disheartening lack of correspondence between diagnosis and actual behavior patterns.[68] More distressing is the indication that predictions concerning the need for and effect of treatment—the second determination (in addition to mental illness) required by the Georgia and Pennsylvania stat-

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[67] The literature is reviewed in Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974). Among the studies indicating a low percentage of reliability are: Arnhoff, *Some Factors Influencing the Unreliability of Clinical Judgments*, 10 J. CLINICAL PSYCH. 272 (1954) (agreement on diagnosis most common among undergraduates; less among clinical psychology interns; least among experienced clinicians); Ash, *The Reliability of Psychiatric Diagnoses*, 44 J. ABNORMAL AND SOC. PSYCH. 272 (1949) (agreement among three psychiatrists on specific diagnostic category in 20% of cases sampled; on major diagnostic category in 45.7%); Beck, Ward, Mendelson, Mock, & Erbaugh, *Reliability of Psychiatric Diagnoses: 2. A Study of Consistency of Clinical Judgments and Ratings*, 119 AM. J. PSYCH. 351 (1962) (54% rate of agreement among pairs of psychiatrists on specific diagnostic categories; 70% on major categories); Katz, Cole, & Lowery, *Studies of the Diagnostic Process: The Influence of Symptom Perception, Past Experience, and Ethnic Background on Diagnostic Decisions*, 125 AM. J. PSYCH. 927 (1969) (choice of diagnosis and perception of symptomatology affected by cultural background of diagnostician, age of diagnostician, and setting for diagnosis); Mehlman, *The Reliability of Psychiatric Diagnoses*, 47 J. ABNORMAL AND SOCIAL PSYCH. 577 (1942) ("the existing system of psychiatric classification can probably have little value for the administrative management of patients or for research"); Passaminick, Dinitz, & Lefton, *Psychiatric Orientation and Its Relation to Diagnosis and Treatment in a Mental Hospital*, 116 AM. J. PSYCH. 127 (1959) (diagnosis, care, and treatment a function of psychiatrist's preferred school of thought); Rickles, Howard, Covi, Park, Lipman, & Uhlenhuth, *Differential Reliability in Rating Psychopathology and Global Improvement*, 27 J. CLINICAL PSYCH. 320 (1970) (reliability of psychopathology ratings between treating and observing psychiatrists low); Rosenzweig, Vandenberg, Moore, & Dukay, *A Study of the Reliability of the Mental Status Examination*, 117 AM. J. PSYCH. 1102 (1960) (reliability significantly influenced by differences in interviewing technique); Schmidt & Fonda, *The Reliability of Psychiatric Diagnosis: A New Look*, 52 J. ABNORMAL AND SOC. PSYCH. 262 (1956) (agreement between pairs of psychiatrists and residents on 55% of diagnostic subgroups, 84% of major diagnostic categories); Stoller & Geertsma, *The Consistency of Psychiatrists' Clinical Judgments*, 137 J. NERVOUS AND MENTAL DISEASES 58 (1963) (low agreement as to diagnosis, prognosis, treatment among 27 psychiatrists viewing a filmed interview).

[68] The literature is reviewed in Frank, *Psychiatric Diagnosis: A Review of Research*, 81 J. GEN. PSYCH. 157 (1969) (review of research shows diagnosis of psychopathology neither reliable nor valid enough for clinical work or research). *See also* Rosenhan, *On Being Sane in Insane Places*, 179 SCI. 250 (Jan. 19, 1973) (account of the commitment experience of eight normal "pseudo-patients").

utes[69]—are even more inaccurate.[70] Among the explanations given for these inaccuracies and inconsistencies are: (1) the psychiatric orientation that it is better to find mental illness where one does not exist than vice versa;[71] (2) the inexactness of perfunctory interviews;[72] (3) the effect of differences in socioeconomic status between psychiatrist and patient;[73] and perhaps most importantly, (4) the uncertainty inherent in the diagnostic process and criteria.[74] It may not be possible, even

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[69] GA. CODE § 88-503.1 (1975) (amended 1978) ("If found to show evidence of mental illness and to be suitable for treatment"); PA. STAT. ANN. tit. 50, §§ 4402(b), 4403(b) (1966); 7205, 7206(b), (c) (Purdon 1976).

[70] The evidence is unfortunately scant, in large part because most of those labled in need of treatment are hospitalized. One relevant study is Rappeport, Lassen, & Gruenwald, *Evaluation and Follow-Up of State Hospital Patients Who Had Sanity Hearings*, 118 AM. J. PSYCH. 1078 (1962) (no statistically significant difference in adjustment rate among patients released by court, discharged by hospital, or escaped). Ennis & Litwack, *supra* note 67, at 717-19; *see also* Robins & Guze, *Establishment of Diagnostic Validity in Psychiatric Illness: Its Application to Schizophrenia*, 126 AM. J. PSYCH. 983 (1970) (summary of research, indicating inaccuracy of prognosis for schizophrenic patients).

[71] Albers, Pasewark, & Meyer, *supra* note 64, at 30; Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CAL. L. REV. 840, 865 (1974); Ennis & Litwack, *supra* note 67, at 720-21; Leifer, *The Competence of the Psychiatrist to Assist in the Determination of Incompetency: A Skeptical Inquiry into the Courtroom Functions of Psychiatrists*, 14 SYRACUSE L. REV. 564, 573 (1963).

[72] Babigian, Gardner, Miles & Romano, *Diagnostic Consistency and Change in a Follow-Up Study of 1215 Patients*, 121 AM. J. PSYCH. 895 (1965) (significant rate of change in diagnosis for patients seen more than once); Edelman, *Intertherapist Diagnostic Reliability*, 25 J. CLINICAL PSYCH. 394 (1969) (single interviews provide inadequate behavior sampling for certain diagnosis); Ellis, *supra* note 71, at 864-65; Ennis & Litwack, *supra* note 67, at 723-24.

[73] Parham v. J.R., 442 U.S. at 629 (Brennan, J., dissenting). *See also* Haase, *The Role of Socioeconomic Bias*, MENTAL HEALTH AND THE POOR 244 (L. Reismann, J. Cohen, & A. Pearl ed. 1964); Harrison, McDermott, Wilson, & Schrager, *Social Class and Mental Illness in Children: Choice of Treatment*, 13 ARCHIVES GEN. PSYCH. 411 (1965) (children of professional parents offered psychotherapy twice as often as children of blue-collar parents); Harrison, McDermott, Schrager, & Showerman, *Social Status and Child Psychiatric Practice: The Influence of the Clinician's Socioeconomic Origin*, 127 AM. J. PSYCH. 652 (1970) (harsher diagnosis and recommended intervention made for lower class children by clinicians of same background); Hollingshead and Redlich, *Social Stratification and Psychiatric Disorders*, 18 AM. SOC. REV. 163 (1969) (greater prevalence of psychoses among lower socioeconomic classes may be explained by social distance between psychiatrist and patient); Phillips and Dragun, *Classification of Behavioral Disorders*, 22 ANN. REV. OF PSYCH. 447 (1971) (review of the literature); Routh and King, *Social Class Bias in Clinical Judgment*, 38 J. CONSULTING & CLINICAL PSYCH. 301 (1972).

[74] Albers, Pasewark, & Meyer, *supra* note 64, at 12-21; Ellis, *supra* note 71, at

for a medical professional aware of those causes of uncertainty, to improve a given diagnosis or prediction, and if the commitment decision were in fact strictly a medical one, we might have to accept the psychiatrist's recommendation *faute de mieux*. But because the determination ultimately comes down to a choice among non-medical values (liberty, long-term individual happiness and social welfare), it is essential to know by what factor to discount the psychiatric decisional input.

V.

I do not believe that the Court (and the Chief Justice in particular)[75] holds a brief for the psychiatric profession; so it seems to me that the difference in treatment of children and adults must at bottom have something to do with the liberty interest each has at stake in the commitment process. One aspect of the child's interest, according to the Court, was the avoidance of stigma which might later lead to social ostracism and discrimination in education or employment.[76] But in that respect it is difficult to see how adults are any differently affected. It may be that the child will not appreciate the consequences of employment or educational discrimination (though he will probably sense the effect on social relations) until his adult years, but the future effect of the state's mistake will be the same for him as the present effect on an adult, and the Court suggests no reason why we should discount back when evaluating the former.[77]

865; Ennis & Litwack, *supra* note 67, at 729-32; Leifer, *supra* note 71, at 569-70.

[75] *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563, 584 (1975) (Burger, C.J., concurring); Blocker v. United States, 288 F.2d 853, 857 (D.C. Cir. 1961) (Burger, J., concurring); Burger, *Psychiatrists, Lawyers, and the Courts*, 28 FED. PROBATION 3, 7 (June 1964).

[76] Parham v. J.R., 442 U.S. at 601. *See* Note, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1200 (1974).

[77] It may be that the impact of stigma is dissipated over time so that the child committed at age 7 would have less trouble getting his first job at 16 than would an adult who had just been released. Although that might provide a reason for saying that the child had less at stake, the Court made no effort to show that it was so. And, in any event, the effect of stigma on educational opportunities is bound to be felt more severely by the young, who are still in school, than by adults, who by and large are not.

The other element of the child's interest is not very adequately explained. It is first described as "a substantial liberty interest in not being confined unnecessarily for medical treatment."[78] But that's really nothing more than an inversion of the question we're trying to answer, which is: "What interest might the child have in avoiding unnecessary confinement to a mental hospital?" Of course it's clear that he does, for some reason or another, have such a right. But if the reason is that he can't get all the Pepsi he wants, we wouldn't have to worry too much about the commitment procedures.

The Court is a little more specific about the child's liberty interest when it later says that "a child has a protectible interest . . . in being free of unnecessary bodily restraints."[79] That suggests that the basis of the minor's objection is not the scarcity of Pepsi but the inability to move freely about. Of course even those who are fond of Pepsi will admit that a restraint of the latter sort would chafe a bit more, but if that is all there is to the child's claim it still seems unnecessary to lose sleep over what procedural protection to provide. The law has not been accustomed to concern itself overmuch with "bodily restraints" on minors: teachers can paddle them, and presumably keep them after school, without notice or hearing of any sort;[80] cities can require them to stay indoors after curfew hours;[81] all states deny them drivers' licenses until they are in their teens.[82] Why should we deny the psychiatrist a power we grant to the teacher?

One answer might be that no one gets kept after school for a year and a half,[83] and that where long-term confinement

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[78] Parham v. J.R., 442 U.S. at 601.

[79] *Id.*

[80] Ingraham v. Wright, 430 U.S. 651 (1977). The Court suggested that even if it could be shown that advance procedural safeguards were necessary to prevent unjustified punishment, such protection was not "appropriate to the constitutional interests at stake." *Id.* at 680-83 and n.55.

[81] The issue is not as settled as it once was. *See* Justice Marshall's dissent from the denial of certiorari in Bykofsky v. Middletown, 429 U.S. 964 (1976). *See also* cases cited in R. MNOOKIN, CHILD, FAMILY AND STATE 712-14 (1978).

[82] A. SUSSMAN, THE RIGHTS OF YOUNG PEOPLE 245-46 app. K (1977).

[83] The average duration of stay for patients at Central State Regional Hospital, where J.R. was sent, was 456 days. 442 U.S. at 595. My personal experience with detention was that it never lasted longer than two hours.

is at stake—as it is in juvenile delinquency proceedings, for example—we worry a lot more about bodily restraints, and provide nearly full-dress due process.[84] But I don't think that the difference is to be found by simply looking to the duration of the restraint, and supposing that the liberty interest at stake remains freedom in bodily movement. It was suggested earlier[85] that the very notion of liberty presupposes a subject capable of making choices and pursuing his own interests, and that it was those components which gave value to simple freedom of movement. In the case of children the capacity and interests are supplied by surrogates, ordinarily parents. The point of the parents' undertaking is not, generally speaking, to have the child undertake any discrete act or accomplish some particular end; it is rather to teach him values of a certain kind and to assist him in forming a certain condition of character. To illustrate: I may want to take my daughter to the library so that she will learn to enjoy reading, and to value ideas, but whether we go today or not is pretty unimportant to those ends. By the same token, the fact that she misses the trip today because she is kept after school does not seriously interfere with her right against me or my duty to her, which is not to take her to the library now, but to take her to the library sometimes.[86] On the other hand, complete separation for a year and a half would have a pretty grave effect on her growth in that and every other respect. In short, we worry about commitment to the reformatory not because it entails bodily restraint, but because it means a long-term severance of the relationship between child and parent, and an attendant interruption of the choices the parent makes in the child's interest.

That, of course, is what makes civil commitment such a can of worms. If it is the parents' idea to commit the child, what sense does it make to assert that the child has a privi-

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[84] *See, e.g.*, Breed v. Jones, 421 U.S. 519 (1975) (double jeopardy); *In re* Winship, 397 U.S. 358 (1970) (proof beyond a reasonable doubt); *In re* Gault, 387 U.S. 1 (1967) (notice, counsel, confrontation and cross-examination, self-incrimination). *But see* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (no jury trial).

[85] *See* text accompanying note 11 *supra*.

[86] For a more thorough statement of this idea, see Garvey, *Children and the First Amendment*, 59 TEX. L. REV. 321 (1979).

lege, based on due process liberty, against interference with his familial relationship? The way out of that quandary selected by the Court in *Parham* was to assert that the relationship was neither ruptured by the parents nor interfered with by the state, any more than it would be if the child were sent to a state hospital for a tonsillectomy.[87] If that is so it provides a reason for less, not more, procedural protection, as the Chief Justice quite rightly pointed out.[88] But I have a hard time accepting that it is so. Not because the child may object to the commitment; like the Court,[89] I would treat that as fairly irrelevant, at least up to some point in adolescence. The very notion of liberty for the child rests on surrogate choices, not his own. What makes civil commitment different from hospitalization for a tonsillectomy[90] is that in the former case the parents indicate their inability or unwillingness to choose for and direct the interests of the child; his "illness" is his unresponsiveness to their direction. If you will, it's a little like the *Panama Refining* case:[91] it would be one thing for Congress to draw up a petroleum code which the executive might enforce; it is quite another for Congress to turn over to the executive the power to decide what to do with the petroleum industry.

That, however, only brings us back to the original problem: in what does the child's liberty consist once the parents, for a greater or lesser period, step out of their role as surrogates? To that there are two answers. If the state takes custody of the child (procedures aside for a moment), I think it inherits the private duty theretofore binding on the parents; what was the child's privilege against interference with the former relationship becomes a claim, a right in the strict sense, to have the state act as surrogate in his best interests. In simpler terms, the child has a right to have the state act as a parent would. And if the state, while maintaining control over the child's choices and interests, acts differently than a

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[87] 442 U.S. at 603.

[88] *See id.* at 605, 610.

[89] *See id.* at 605.

[90] Or a brain tumor. I don't wish to weaken the point by picking a minor disease.

[91] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

parent would, it deprives the child of liberty. The reason for imposing such stringent obligations on the state is the same as that which explains parents' duties to their children: they have made the child's life dependent on theirs during its most helpless stage, and the resulting relationship entails moral and legal consequences.[92] To draw an analogy which is not too far-fetched, the due process clause acts against the state like a public law "good samaritan" rule.[93]

On the other hand, if the state refuses to act it is very difficult, according to the scheme laid out in the first two sections, to ascribe the term liberty to the child at all. One incapable of making choices, having no interests (though he certainly does have needs and wants),[94] and having no surrogate to act for him in those respects, is not in any real sense free. A couple of things ought to be added here. First, the point is, from a due process point of view, academic, since the child lacks a claim to liberty only when the state does not act (and so is not governed by the fifth or fourteenth amendments). Second, I do not mean to suggest that there would not be significant moral blame to be shared by the parents and the state for their neglect in this instance; only that the Constitution does not codify the state's moral duty to step into the breach when parents fail.

VI.

To say all that has been said so far is only to complete the first part of any due process inquiry, procedural or substantive. Whether the protection of the clause attaches depends in the first instance on the nature of the interest at stake.[95] What sort of safeguards the clause will afford, though, depends on the relative significance of the protectible interest. It remains to say how the notion of the child's liberty proposed above measures up against other types of due process

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[92] *See* note 29 *supra* and accompanying text.

[93] *Cf.* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 343-48 (4th ed. 1971) (the voluntary assumption of a duty by affirmative action subjects one to a certain standard of conduct).

[94] MELDEN, *supra* note 21, at 147.

[95] Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

claims, and how it might make a difference in the procedures approved by the Court in *Parham* and *Institutionalized Juveniles*.

The first thing to notice about the right which has been described is that it is focused on the development of certain abilities and conditions of character; in that process, choices of an infinite variety are made on the child's behalf. It is thus difficult to equate the child's claim with particular kinds of choices—to publish a book;[96] to become an optician[97]—which have received a greater or lesser degree of protection from the due process clause, since in a sense it encompasses them all. But in determining the weight to assign the child's liberty in the civil commitment process, that very fact necessarily means that we must treat the child's interest as carefully as we would the most fundamental kinds of claims which the Constitution is designed to protect. Prolonged confinement in a mental institution will in all cases have a profound influence on the future adult's approach to religion, political ideas, choice of friends, family life, sexual relations, self-definition through occupation and leisure activities, and so on. The effect on the child's choices in such matters is, to be sure, different from the typical deprivation of liberty suffered by adults. It is not the execution of a choice already made (*i.e.*, to observe the Sabbath on Saturday; to vote for Harold Stassen; to live in a commune) but the process of choosing itself which is affected. But as was indicated earlier,[98] it is none the less a deprivation of liberty. So far as my freedom is concerned, I see little difference between loss of unemployment compensation for refusal to work on Saturday, and a psychological operation which will make me believe that one should rest on Sunday.[99]

Suppose, though, that the liberty interest which the child has at stake in the commitment process is one of the most fundamental kind. It remains true that the parents have

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[96] *Cf.* Freedman v. Maryland, 380 U.S. 51 (1968) (prior restraints on the freedom of expression are viewed by the courts with a heavy presumption against their constitutional validity).

[97] Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[98] *See* text accompanying note 13 *supra*.

[99] *See* J. RAWLS, A THEORY OF JUSTICE 249-50 (1971).

sought commitment, and if the state refuses to take custody of the child, he may find himself either locked in his room or out on the street. What sense does it make to worry about the child's future political choices if he may not live long enough to vote? Moreover, once parents acknowledge their inability or unwillingness to choose for the child the state has to do it, unless some latter-day John Jarndyce takes an interest in the case. Given those undeniable facts, shouldn't we say that the due process clause is satisfied whenever commitment is a more pleasant alternative than the options facing the child if the state does not act?

The answer must be that the due process clause still presents two obstacles, one substantive and one procedural. To begin with the substantive problem: if the parents want to relinquish custody of the child and no Jarndyce volunteers to lend a hand, I think that the state may assume the obligation of caring for the child without any procedural impediments whatsoever.[100] If the state takes on that duty, though, it is obliged by the due process clause in its good samaritan aspect to treat the child as nearly as possible as a parent would. In concrete terms, what that means is that the state must provide the closest thing to a family relationship that is compatible with the child's mental, physical, and emotional condition. Needless to say, confinement in a mental institution is not the optimal approach for many children, even some who have mental or emotional disorders. There are numerous alternatives which offer more individual adult attention and opportunities for direction of the child's energies: small group homes, specialized foster care, and rotating parent programs were among those suggested in a study commissioned by Georgia's Director of the Division of Mental Health two years before the *Parham* suit was filed.[101] The demands of substantive due process should have imposed the duty of making available those options to children who were already in state

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[100] Other than those necessary to determine that the parents are serious and that there is no friend or relative willing to help.

[101] Report of Study Commission on Mental Health Services for Children and Youth, at 26-27, *quoted in* J.L. v. Parham, 412 F. Supp. 112, 122-23 (M.D. Ga. 1976).

custody prior to commitment.[102]

Given the Court's conclusion that the class plaintiffs in *Parham* and *Institutionalized Juveniles* were properly admitted,[103] it is not surprising that it did not reach this issue.[104] But I think the principle advanced above is supported by *Bellotti v. Baird*,[105] decided just two weeks after the civil commitment cases. The Massachusetts abortion statute reviewed in *Baird* required, among other things, that an immature minor—one incapable of giving informed consent to an abortion—consult with her parents before seeking a court order authorizing the operation. With regard to that provision, Justice Powell stated:

> Under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity if she so desires to go directly to a court without first consulting or notifying her parents. . . . If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interest. If the court is persuaded that

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[102] According to the Study Commission Report, "Between 50-75% of children served in these institutions [the five mental hospitals in existence at the time of the study] have no family or are part of severely dysfunctional family units (e.g., DFCS [Department of Family and Children Services] custody.)" J.L. v. Parham, 412 F. Supp. 112, 124 (M.D. Ga. 1976).

[103] The statement needs a little qualification. What the Court actually determined was that the admission procedures followed in Georgia and Pennsylvania were constitutionally proper, and that consequently relief on a class-wide basis was unjustified. It admitted the possiblity that injustice could have occurred in individual cases because of institutional pressure to commit, or because wards of the state might receive less protection than children with natural parents. Parham v. J.R., 442 U.S. at 616, 619. Secretary of Public Welfare v. Institutionalized Juveniles, 442 U.S. at 650 n.9. For such cases an appropriate remedy would be habeas corpus. 442 U.S. at 616 n.22. *See also* PA. STAT. ANN. tit. 50, § 7206(b) (Purdon 1976).

[104] *See* 442 U.S. at 620 n.23.

[105] 443 U.S. 622 (1979). Like *Institutionalized Juveniles*, the case has a slightly extended history. A three-judge court convened to determine the constitutionality of Massachusetts's abortion statute, struck down § 12P (later renumbered § 12S) in 1975. Baird v. Bellotti, 393 F. Supp. 847 (1975). The Supreme Court vacated the judgment and directed certification of several questions to the Massachusetts Supreme Judicial Court. Bellotti v. Baird, 428 U.S. 132 (1976). After receiving the state court's answers, Baird v. Attorney General, 360 N.E.2d 288 (1977), the district court again declared § 12S unconstitutional. Baird v. Bellotti, 450 F. Supp. 997 (Mass. 1978). It was that decision which the Supreme Court affirmed last term.

it is, the court must authorize the abortion.[106]

It strikes me as a little extreme to read the case as simply finding that the state may take away from parents decisions they are accustomed to make because the state will afford a better decision. The state was required to provide an independent determination only because it had first passed a law likely to affect the choice which would be made for the immature minor.[107] If that is so, *Baird* stands for the principle that once the state takes a hand in making a decision as crucial as abortion for an immature child, it is required by the due process clause to see that the decision is made in the child's best interests.

It won't do to say that the abortion choice is more serious or somehow qualitatively different from all other choices which may be made on a child's behalf, and that for that reason the principle of *Baird* does not spill over into other due process cases. Abortion certainly has aspects which make it a decision of profound significance for the person affected: it entails enormous emotional trauma; if birth occurs and the mother retains custody it will have grave effects on the mother's financial resources and educational and employment opportunities; moreover the right to a proper decision is one which can be lost altogether, rather than merely postponed like a decision about marriage.[108] But precisely the same things may be said of the effects which attend commitment to a mental institution, particularly the right to parental, or parent-like, guidance which cannot be recaptured by one who passes a significant portion of his childhood in a hospital ward and is then turned out into the adult world.[109]

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[106] 443 U.S. at 647-48. Justice Powell's opinion was joined by the Chief Justice and Justices Stewart and Rehnquist. Justice White's dissent found that *Danforth* only required the state to provide an alternative to parental consent. His disagreement with the plurality opinion focused on Justice Powell's assertion that the minor could proceed to court without notice to her parents. *Id.* at 657.

[107] "[M]any parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court." *Id.* at 647.

[108] *Id.* at 642.

[109] For a more extended statement of the argument that the abortion choice is not unique, see Garvey, *supra* note 20, at 796-802.

The demands made by the due process clause in its substantive aspect would only accrue to the state which chooses to offer the child a full panoply of custodial options, however. The clause does not enact whatever moral obligation the state may have to see that someone steps into the shoes of the parent unwilling or unable to care for a mentally ill child. By the same token the fourteenth amendment does not prevent a state which might so choose from providing nothing other than institutional care for the seriously ill.[110] But just as *Baird* suggests that the state must act in the child's best interests in those cases where it does act, so the clause in its procedural aspect imposes an obligation to assure that no improper commitment is made when only institutional care is provided. How exactly that obligation should be implemented is a more difficult question.

In approving the procedures established by Pennsylvania and Georgia the Court held that we might safely trust the independent judgment of medical and psychiatric professionals to assure state compliance with that duty. About that conclusion I have thus far tried to make several points: (1) that the commitment decision is not, strictly speaking, a medical-psychiatric decision; (2) that if that is so, children are given less protection against erroneous commitment than seems required for adults; (3) that such a difference in treatment is not justified by the nature of the liberty interest which the child has at risk, an interest which is surely as fundamental as any which entails strict scrutiny under the fourteenth amendment. If all that is true, it might seem naturally to follow, as the district courts concluded,[111] that children are entitled to the same elements of an adversarial hearing as adults receive: expert assistance, notice, an opportunity to present evidence, the right to confront and cross-examine witnesses, and a reasoned decision based on clear and convincing evidence.[112] To

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[110] This was to some extent the situation in Georgia. *See* Parham v. J.R., 442 U.S. at 596; J.L. v. Parham, 412 F. Supp. 112, 124-26 (M.D. Ga. 1976).

[111] *See* 442 U.S. at 610-11 n.18; Secretary of Public Welfare v. Institutionalized Juveniles, 442 U.S. at 645.

[112] *See* Vitek v. Jones, 100 S. Ct. 1254 (1980); Addington v. Texas, 441 U.S. 418 (1979).

that conclusion, however, the Court interposed two additional objections. One was that it would "be at odds with the presumption that parents act in the best interests of their child . . . to employ an adversary contest to ascertain whether the parents' motivation is consistent with the child's interests."[113] The second was that "an adversary hearing in which the parents testify" would "exacerbate whatever tensions already existed between the child and the parents," thereby jeopardizing the course of the child's treatment, and making his subsequent return home more difficult.[114]

The first of those objections rests on a confusion of motive with objective. If the only purpose served by a hearing were to determine whether the parents acted out of selfish concern rather than a desire to assist the child, I would have to say that the evidence would not support the need for such a procedure.[115] But there is more at issue than that. For one thing, the Court concedes that it is perfectly all right "to make a careful review of the parents' decision in order to make sure it is proper from a medical standpoint."[116] Given the fallibility of psychiatric diagnoses and prognoses, though, and the magnitude of the liberty interest the child has at stake, there is a lot to be said for requiring both a thorough inquiry into the variables other than the child's condition which influenced the psychiatrist's perceptions, description, and judgment, and a presentation of the views of an independent mental health professional who has no stake in the commitment process.[117] A second and more significant purpose of a hearing is to assure that the parents' objective of committing the child is warranted by the child's behavior from a so-

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[113] Parham v. J.R., 442 U.S. at 610.

[114] *Id.*

[115] *See id.* at 597.

[116] *Id.* at 610.

[117] J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY (2d ed. 1970); Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424, 452, 458 (1966); Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CAL. L. REV. 840, 870 (1974); Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693, 743-47 (1974); Litwack, *The Role of Counsel in Civil Commitment Proceedings: Emerging Problems*, 62 CAL. L. REV. 816, 830 (1974).

cial and legal standpoint. This is not to say that in any but extraordinary cases the law has any more business exploring parents' goals for their children than it does examining their motives. The choice to have the child attend the John Birch Country Day School or to refuse surgery for a cleft palate is a different matter. What makes commitment unique is that it is only a choice that someone else (the state mental hospital) should decide for the child. It is hard to see how a hearing to ascertain whether the child is the sort of person the state will do that for interferes in any way with family autonomy.

The second objection raised by the Court rests on a presumption that the hearing process itself, however correct its conclusions might be, will necessarily have an adverse effect on the parent-child relationship. The thought seems to be that requiring parents to testify, and permitting children to cross-examine them,[118] is asking for a fight which might otherwise be smoothed over. It might be useful to clear the deck by pointing out that an objection of that sort has no relevance to several of the procedures in question. Neither the requirement of notice nor the standard of proof will entail the consequences the Court foresaw. More difficulties attend the decision about counsel, the child's right to testify, and the right to confront and cross-examine the parents.

One solution which accommodates those three claims is that suggested by Justice Brennan's dissent: if the hearing is delayed until some time after admission, the child's adversary will be the institution and its staff, not his parents.[119] If the delay were long enough to permit an accurate assessment of the child's behavior and condition, the judgment about commitment could be made without the need to question "parental authority, judgment or veracity."[120] The nature of the child's liberty interest lends support to such an approach. It was argued earlier that, because the essence of the child's right was a course of direction rather than the execution of particular *ersatz* choices, the length of separation from a parent-figure had a considerable bearing on the kinds of procedu-

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[118] *See* Parham v. J.R., 442 U.S. at 610-11 and n.18.

[119] *Id.* at 635 (Brennan, J., dissenting).

[120] *Id.*

ral precautions which were necessary in advance.[121] If that is true,[122] it provides a convincing reason for treating children differently from adults with respect to the timing of a hearing (though not with regard to the need for an adversary hearing at some point).

Another approach would begin by getting clear about the reasons for requiring counsel, the child's testimony and confrontation and cross-examination. To some extent the push for the traditional components of due process is impelled by a concern for the intrinsic value of participation. It is thought by many that the "moral presupposition of individual dignity, and its political counterpart, self-determination,"[123] are crucial factors in settling on the appropriate ingredients for adjudicatory processes.[124] What that means is that the required process itself, as well as the rights protected (life, liberty, and property) makes certain presuppositions about the individual whose claim is involved. In the case of adults it makes a good deal of sense to say that the autonomous moral actor capable of enjoying liberty would value the chance to participate in making a decision which vitally concerns him. It is harder to maintain that children whose claim to liberty rests on surrogate choices would derive the same benefit from active involvement in the decision-making process. That is not to say that the ingredients of due process at issue are, for the child, useless; but it does mean that they are important only insofar as they contribute to the accuracy of the decision.

It may be that a misapprehension of this point underlay the Court's dissatisfaction with "an adversary confrontation"

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[121] *See* notes 79-86 *supra* and accompanying text.

[122] I admit to some uncertainty about what outer limit to establish on the observation period. Goldstein, Freud, and Solnit seem to indicate that for children under the age of five years, two months may be the maximum; for the younger school-age child it may be six months. J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 40-41 (1973).

[123] Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49 (1976).

[124] *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 501-06 (1978); Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

involving parental testimony.[125] The Pennsylvania district court had held, for example, that the child had a right "to be present and to assist in protecting [his] interests."[126] For the little that is gained in correcting parental misstatements, it does not seem worth the strain on family ties to demand that the child be present while his mother describes how he has been a beast. But that is a different thing from saying that the parent should not have to take the stand, nor be cross-examined by counsel in the child's absence.[127] Moreover, the very idea that it is important to avoid direct confrontation between child and parent while at the same time assuring the accuracy of the result of an adversary proceeding suggests that the assistance of counsel is more necessary than it would be for one able to participate himself in the adjudication. Finally, even if only for purposes of accuracy, there is no substitute for having the decision-maker hear from the child to be committed.[128]

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[125] Parham v. J.R., 442 U.S. at 610.

[126] Bartley v. Kremens, 402 F. Supp. 1039, 1051 (E.D. Pa. 1975), *adopted in* Institutionalized Juveniles v. Secretary of Public Welfare, 459 F. Supp. 30, 43-44 (E.D. Pa. 1978).

[127] It might be objected that such a solution ignores the obvious question of how the attorney is to prepare himself for cross-examination, if not by closeting himself with the child and saying, "Your mother said X. Is she lying?" I think the plain answer is that a lawyer who strains family relations which everyone hopes to restore neglects his duty to his client. There are surely more tactful ways of getting the child's side of the story, and little reason in the ordinary case for counsel to suggest to the child that his parents bear him malice.

[128] Considerations of the sort discussed earlier in this article are unnecessary when the child is already in state custody prior to commitment. *See* notes 119-27 *supra* and accompanying text. The claim of such children against erroneous civil commitment is no less compelling than those for whom application is made by natural parents. In one sense they have less to lose, having already been deprived of the care and affection of natural parents; but that does not diminish their liberty interest in retaining whatever approximation to a familial relationship they do have. Hence the need for procedural protection is equally great. Moreover, as Justice Brennan noted, the concern for interference with parental autonomy and damage from the hearing process to the parent-child relationship vanishes when it is a social worker who seeks commitment. Parham v. J.R., 442 U.S. at 637 (Brennan, J., dissenting).