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CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—DUE PROCESS—CIVIL COMMITMENT—MENTALLY ILL AND RETARDED JUVENILES—The United States Supreme Court has upheld the constitutionality of Pennsylvania's voluntary admission and commitment procedures for mentally ill or retarded juveniles, which provide for determination by a neutral fact finder of the necessity for confinement and periodic review of the necessity for continued confinement by a similar procedure.

Secretary of Public Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979).

In 1975, a group of juvenile plaintiffs brought a class action in federal district court[1] in which they challenged the constitutionality of the procedures employed by Pennsylvania when admitting or committing juveniles on a voluntary basis to state mental hospitals.[2] The class alleged that they had been deprived of personal liberty without the procedural safeguards required by the due process clause of the fourteenth amendment.[3] The three-judge district court decided, in *Bartley v. Kremens*,[4] that Pennsylvania's procedures for voluntary commitment of juveniles violated the due process clause of the fourteenth amendment.[5] The United States Supreme Court subsequently vacated the

1. Federal jurisdiction was based upon 28 U.S.C. §§ 1331, 1343(3) (1976). Bartley v. Kremens, 402 F. Supp. 1039, 1041-42 (E.D. Pa. 1975), *vacated and remanded*, 431 U.S. 119 (1976), *original judgment reinstated sub nom.* Institutionalized Juveniles v. Secretary of Pub. Welfare, 459 F. Supp. 30 (E.D. Pa. 1978), *rev'd and remanded*, 442 U.S. 640 (1979).

2. Bartley v. Kremens, 402 F. Supp. at 1041. Plaintiffs were juveniles suing on behalf of all named plaintiffs and all persons eighteen years of age or younger who had been, were, or were to be admitted or committed to state mental health institutions under the Pennsylvania Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969).

3. Bartley v. Kremens, 402 F. Supp. at 1042. Section 4402 provides that parents, guardians, or persons standing *in loco parentis* could apply for the voluntary admission of persons eighteen years of age or younger for examination, treatment, and care. The statute had no provisions for notice, hearings, representation by counsel, or the presentation of evidence on the juvenile's behalf. A juvenile could not call his own witnesses or confront and cross-examine the witnesses against him. There was also no provision for contesting detention. If the person admitted was younger than eighteen, only the applicant or his successor could apply to withdraw the juvenile. *Id.* Section 4403 provides for the director of the mental health facility to "cause an examination to be made" and, if determined that care or observation was necessary, a thirty-day renewable commitment was permissible. If older than eighteen, the person could not be detained for more than ten days after giving written notice of objection to detention. Both sections provided that notice of the voluntary status of the commitment be given to the juvenile every sixty days.

4. 402 F. Supp. 1039 (E.D. Pa. 1975).

5. *Id.* at 1053-54. The district court concluded that Pennsylvania's statute did not protect a child's liberty interest because there was no probable cause hearing on the necessity for continued detention after the initial admission. *Id.* at 1049.

decision[6] and remanded the case for rehearing because the claims of some of the plaintiffs had been mooted by the promulgation of supplementary regulations by Pennsylvania's Secretary of Public Welfare.[7]

In *Institutionalized Juveniles v. Secretary of Public Welfare*,[8] the principal case on remand, the district court approved two subclasses of plaintiffs[9] and again declared that Pennsylvania's voluntary admission and commitment procedures were unconstitutional and enjoined their enforcement.[10] In doing so, the court reiterated the guidelines it had

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6. 431 U.S. 119 (1977). The Court instructed the district court to carefully examine the differences between the mentally ill and the mentally retarded when reconsidering the class certification issue. *Id.* at 134-35. On remand, the district court concluded that there was little difference between the two groups in terms of the process due in commitment situations. 459 F. Supp. at 39. The district court reasoned that both groups are in a similar position with respect to stigmatization by society, diagnostic error, parent-child conflicts of interests, and deprivation of personal liberty. *Id.* at 39-40.

7. 431 U.S. at 127-28, 137. By the time the district court decided the class certification issue, the supplementary regulations had become effective. These regulations granted certain additional procedural rights to retarded children over thirteen years of age. *See* 3 Pa. Bull. 1840 (1973). After the Supreme Court had noted probable jurisdiction in *Bartley v. Kremens*, Pennsylvania enacted the Mental Health Procedures Act of 1976. *See* PA. STAT. ANN. tit. 50, §§ 7101-7503 (Purdon Supp. 1979). This Act repealed the 1966 Act as it applied to mentally ill children over fourteen years of age and permitted them to admit themselves for treatment. Withdrawal could be accomplished by giving written notice. Under the 1976 Act and the 1973 regulations, older juveniles could object to their commitment. This required the institution's director to initiate involuntary commitment proceedings if he thought continued confinement was necessary. *See* PA. STAT. ANN. tit. 50, § 7206 (Purdon Supp. 1979); 3 Pa. Bull. 1840 (1973). Mentally ill children younger than fourteen remained subject to parental commitment under the 1966 Act but were not subject to its supplemental regulations. *See* PA. STAT. ANN. tit. 50, § 7502 (Purdon Supp. 1979); 431 U.S. at 130-31. The Supreme Court held that the 1973 regulations and the 1976 Act had fragmented the class certified by the district court because some of the plaintiffs' claims were "satisfied in many respects." *Id.* at 130. Because some of the named plaintiffs were able to secure a hearing and possibly release without relying on a third party's request for withdrawal, the Court held that these plaintiffs' claims were moot and directed the district court to reconsider the class definition and substitute live claims. *Id.* at 134-35.

8. 459 F. Supp. 30 (E.D. Pa. 1978).

9. *Id.* at 40-43. The court certified a class composed of all mentally ill children under fourteen years of age, and a class of all mentally retarded juveniles eighteen years of age or younger.

10. *Id.* at 47. The court specifically declared that the 1966 Act, the supplementary regulations issued in 1973, and the 1976 Act were unconstitutional. In the opinion of the district court, the 1966 Act violated due process because the referring medical person need not have specialized in the mental health area. *Id.* at 46 n.57. *See also* 3 Pa. Bull. 1840 (1973). The statutory role of the facility director may give rise to a conflict with the child's liberty interest and thus interfere with the child's release. The court reasoned that the 1973 regulations were inadequate since the written notice provision did little to aid a child who could neither read nor understand the specified rights. Even if a child did understand, it would be unrealistic to expect him to shoulder the burden of contacting counsel. 459 F. Supp. at 45-46. The court held the 1976 Act to be violative of the due pro-

established in *Bartley v. Kremens*, which included the necessity of post-commitment hearings with the benefit of counsel.[11] The Supreme Court noted probable jurisdiction,[12] consolidated the case with *Parham v. J.R.*[13] for oral argument, and again reversed the district court's decision.

Chief Justice Burger, writing for the majority, noted that the district court in *Institutionalized Juveniles* had concluded that the class members had a constitutionally protected liberty interest that could not be waived by their parents.[14] This conclusion, when coupled with the perceived fallibility of psychiatric diagnosis, had led the lower court to hold that only a formal adversary hearing could adequately protect the class members from needless confinement in mental hospitals.[15] The Chief Justice pointed out that the liberty rights and interests of the children were the same as the interests and obligations of both the parents and the state.[16] The issue, therefore, was not one of parental waiver of the child's rights, but whether Pennsylvania's statutory scheme provided juveniles with sufficient due process protections against unwarranted deprivation of personal liberty.[17]

The majority repeated its conclusion from *Parham v. J.R.*[18] that it is the risk of error inherent in the parental decision to have the child in-

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cess clause because the Act did not provide for a post-commitment hearing within a reasonable time nor did it provide for neutral counsel to represent the child's interests. *Id.* at 47. *See* PA. STAT. ANN. tit. 50, §§ 4402, 4403, 7201 (Purdon 1969 & Supp. 1979); 3 Pa. Bull. 1840 (1973).

11. 459 F. Supp. at 43-44. *See also* 402 F. Supp. at 1043-47. Because the potential for long-term institutionalization and erroneous diagnosis is high, the district court in *Bartley v. Kremens* required certain procedures before juveniles could be institutionalized indefinitely. These procedures included a probable cause hearing within seventy-two hours from the date of initial detention; a post-commitment hearing within two weeks of the date of initial detention; written notice of the hearing date and of the grounds for the proposed commitment forty-eight hours prior to any hearing; the presence of counsel and, if indigent, the right to appointment of free counsel, as well as the right to be present at all hearings and to confront and cross-examine witnesses. The juveniles were also given the right to offer evidence and witnesses in their own behalf. At the conclusion of these procedures, the juvenile could be institutionalized if the need to do so had been demonstrated by clear and convincing evidence. *Id.* at 1053.

12. 437 U.S. 902 (1979).

13. 442 U.S. 584 (1979). *Parham* involved a class action suit challenging Georgia's statutory juvenile commitment procedures on due process grounds.

14. 442 U.S. at 645. In evaluating Pennsylvania's juvenile commitment procedures, the Court relied on the rationale it had employed in *Parham*. *Id.*

15. *Id. See* note 11 *supra*.

16. The Chief Justice declared that "[t]he liberty rights and interests of the appellee children, the prerogatives, responsibilities and interests of the parents and the obligations and interests of the state are the same." 442 U.S. at 646.

17. *Id.*

18. 442 U.S. at 607.

stitutionalized which mandates some inquiry to ensure that the statutory requirements for admission are met.[19] Thus, *Parham* requires a neutral fact finder to inquire into the child's background using all available sources, including an interview with the child. This review must be conducted by a fact finder vested with the authority to refuse admission to any child who does not meet the medical standards for admission. Finally, *Parham* requires a periodic review to determine if continued confinement is necessary.[20]

After establishing that *Parham* controlled the issue of what procedures were required for the voluntary commitment of children, the Chief Justice stated that the only remaining issue was whether Pennsylvania's procedures complied with these requirements.[21] He first examined the statutes, regulations, and procedures for the voluntary admission of mentally ill children. Under the Pennsylvania scheme, a parent or guardian can initiate the commitment process by applying for the voluntary examination and treatment of the child.[22] The hospital treatment team is then required to determine within seventy-two hours whether inpatient treatment is necessary. Should the hospital director decide that institutional treatment is necessary, he must then inform the child and the parents of the decision, and must also inform them of the nature of the proposed treatment.[23] Once committed, the child must be reexamined and his treatment plan reviewed at least once every thirty days.[24] A child can object to the detention, and when he does, the plan is reviewed by a professional who is independent of the treatment team.[25] The findings of this independent

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19. 442 U.S. at 646. The Pennsylvania statute provides for admission if a child is "in need of care or observation" or if he is "mentally ill." *See* PA. STAT. ANN. tit. 50, §§ 4102, 4403, 7102 (Purdon 1969 & Supp. 1979) (§ 4102 defines "mental disability"). Before the decision in *Institutionalized Juveniles* was handed down, Pennsylvania enacted regulations supplementing the commitment procedures applicable to mentally ill juveniles. These regulations were enacted pursuant to § 7112 of the 1976 Act. *See* 8 Pa. Bull. 2433-34 (1978) (§ 7100.101).

20. 442 U.S. at 607.

21. 442 U.S. at 646.

22. *Id.* at 647. Mentally retarded children eighteen years of age and younger and mentally ill children under fourteen years of age can be committed by parents or guardians. *See* PA. STAT. ANN. tit. 50, §§ 4403, 7201 (Purdon 1969 & Supp. 1979).

23. The 1976 Act provides for notice to the child of the nature of his treatment plan; and provides for notice to be given parents when a facility accepts a mentally ill minor aged fourteen to eighteen. *See* PA. STAT. ANN. tit. 50, §§ 7204, 7205 (Purdon Supp. 1979).

24. 442 U.S. at 647. *See* PA. STAT. ANN. tit. 50, §§ 4403(b), 4404(d), 7108(a) (Purdon 1969 & Supp. 1979); 8 Pa. Bull. 2436 (1978) (§ 7100.108(a)).

25. 442 U.S. at 647. *See* PA. STAT. ANN. tit. 50, § 7108(b) (Purdon Supp. 1979).

party are reported to the hospital director who must release a child not in need of institutional treatment.[26]

The Chief Justice then examined the procedures regulating the voluntary admission for institutional care of the mentally retarded. He found that, unlike the procedures for the mentally ill, a hospital cannot admit a mentally retarded child based solely on the application of a parent or guardian. Instead, all mentally retarded children must be referred by a physician.[27] The director of the institution must then make, or cause to be made, an independent evaluation of the child, and if the director disagrees with the referring physician's recommendation, the child must be discharged.[28] The majority noted that if a child over thirteen objects to being institutionalized, the director of the hospital is required to initiate involuntary commitment proceedings in which the director bears the burden of proving that inpatient treatment is necessary.[29]

The single aspect of the commitment process that was unclear, according to the majority, is how the hospital staff decides that institutionalization is required.[30] The only certain evidence on this point

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26. 442 U.S. at 647. There are three additional methods for release of mentally ill juveniles younger than fourteen years of age. First, the parents or guardians may effect release. PA. STAT. ANN. tit. 50, § 7206(b) (Purdon Supp. 1979). Sections 4402(c) and 4403(c) of the 1966 Act are the sections pertaining to parental release of mentally retarded and younger mentally ill children. *Id.* §§ 4402(c), 4403(c) (Purdon 1969). Second, "any responsible party" may petition for the child's release. If a petition for release is filed, an attorney is appointed to represent the child's interests and a hearing is held within ten days to determine if continued inpatient treatment is in the child's best interests. This method of release is apparently available only to mentally ill children as there is no comparable provision for retarded children. *See id.* § 7206(b) (Purdon Supp. 1979). Finally, the director of the facility may release the child when inpatient treatment is no longer necessary. *Id.* § 7206(c).

27. 442 U.S. at 648. *See* PA. STAT. ANN. tit. 50, § 4404(b) (Purdon 1969); 3 Pa. Bull. 1840 (1973). Section 4404(b) requires that the physician's reference be accompanied by a psychologist's report. The 1973 regulations require referral by a psychiatric evaluation. The referring physician, however, may be either a pediatrician, general practitioner, psychiatrist or psychologist. 3 Pa. Bull. 1840 (1973).

28. 442 U.S. at 648. *See* PA. STAT. ANN. tit. 50, §§ 4403(b), 4418 (Purdon 1969); 3 Pa. Bull. 1840 (1973). A mentally retarded child or anyone acting on his behalf may challenge the legality of the commitment proceedings with a writ of habeas corpus. Habeas corpus is also available when hospitalization is no longer necessary. The petition for habeas corpus must be accompanied by a physician's affidavit stating either that there is no mental disability or that institutional treatment is not necessary. 442 U.S. at 648.

29. 442 U.S. at 648. *See* PA. STAT. ANN. tit. 50, §§ 4426(b)(1), (2) (Purdon 1969); 3 Pa. Bull. 1840 (1973). For Pennsylvania's involuntary commitment provision see PA. STAT. ANN. tit. 50, § 4406 (Purdon 1969).

30. 442 U.S. at 648. Neither the statute nor the regulations specify how the initial decision is to be made. The only evidence on this point was the testimony of the director of a state hospital for the mentally ill. *Id.* at 648-49. *See also* note 19 *supra*. The 1973

showed that the decision was based on the initial examination of the psychologist. The majority noted that a preadmission background file on the child was also compiled by the hospital staff. Despite some confusion as to whether these files were actually used in arriving at the admission decision, the Court assumed that the files had been used.[31]

The majority concluded that these procedures satisfied the due process requirements articulated in *Parham* in that no child is admitted without a psychiatric examination undertaken solely to determine if the child would benefit from institutional care.[32] Moreover, the treatment team is not only required to compile a full background of the child's history from all sources, including an interview with the child and the parents, but the director must refuse admission if it is not in the child's best interests.[33] Finally, the majority was satisfied that periodic review of the child's status was provided for by Pennsylvania's procedures.[34] Because the procedures satisfied the *Parham* requirements, the Court reversed the judgment of the district court and remanded the case for further proceedings.[35]

Justice Stewart concurred in the judgment of the majority[36] for the same reasons he concurred in *Parham v. J.R.*[37] In *Parham*, Justice Stewart noted that, notwithstanding the massive curtailment of physical liberty and the stigma attached to institutionalization, it is only loss of liberty caused by government which invokes the due process clause of the fourteenth amendment.[38] Justice Stewart reasoned that

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regulations require a psychiatrist's report stating that institutionalization is *required*. 3 Pa. Bull. 1840 (1973). The 1976 Act provides that if a mentally ill juvenile fourteen years of age or older "believes that he is in need of treatment," the juvenile can commit himself. Parents and guardians are deemed to act for juveniles younger than fourteen. PA. STAT. ANN. tit. 50, § 7201 (Purdon Supp. 1979).

31. 442 U.S. at 649 n.8. The Court also quoted the testimony of the director of the state hospital for the mentally ill describing various subjective and objective testing that was done *after* the initial admission. *Id.* at 648-49. The Court did not state how data gathered after admission could bear on the decision to admit in the first instance.

32. 442 U.S. at 649-50.

33. *Id. See* notes 26, 28 & 29 and accompanying text *supra*.

34. 442 U.S. at 649-50. *See* PA. STAT. ANN. tit. 50, §§ 4403(b), (d), 7108(a) (Purdon 1969 & Supp. 1979). Section 4403(b) provides for thirty-day commitments which may be renewed by reapplication "so long as care or observation is necessary." Section 4403(d) speaks specifically of reviewing commitment "at least annually" by a director-appointed committee. Section 7108(a) provides for examinations and treatment plan review every thirty days. *See also* 8 Pa. Bull. 2436 (1978) (§ 7100.108(a)).

35. 442 U.S. at 650. On remand, the district court was given leave to consider claims that an individual's commitment did not meet the due process standards. The district court is also able to determine whether Pennsylvania's post-admission procedures are consistent with due process requirements. *See* note 73 *infra*.

36. 442 U.S. at 650 (Stewart, J., concurring).

37. *Id.*

38. 442 U.S. at 623-25.

since an adult who voluntarily commits himself cannot claim governmental deprivation of liberty, neither can the child on whose behalf the adult has invoked voluntary commitment procedures.

Justice Stewart further remarked in *Parham* that there is a long legal tradition of permitting parents to make decisions on behalf of their minor children.[39] In his opinion, the Constitution would tolerate interference with the traditional authority of parents, but such intervention could not be compelled.[40] Therefore, a statute which reasonably defines the age of majority and which also creates a rebuttable presumption that the parent acts in the best interests of the child does not violate the fourteenth amendment.[41]

Justice Brennan, speaking for the minority, agreed with the majority that Pennsylvania's preadmission psychiatric interview procedures satisfied constitutional due process requirements.[42] He dissented, however, from the majority's refusal to address the adequacy of Pennsylvania's post-admission procedures.[43] Justice Brennan condemned these procedures as they applied to mentally retarded children thirteen years of age and younger because there is no provision for representation by counsel, nor for prompt post-commitment hearings.[44] He pointed out that mentally retarded children over thirteen years of age fare little better. Although they must be informed of their right to a hearing and be furnished with the telephone number of counsel, these rights are of little practical benefit because the burden of initiating action is placed on the child. Older retarded juveniles are often operating under the same disabilities as are the younger children and cannot read, write, use the telephone, nor understand the explanation of their rights.[45] Justice Brennan stated that the recitation of these statutory

39. *Id.* at 621-22.

40. *Id.* at 623-25. *See* Prince v. Massachusetts, 321 U.S. 158 (1944) (state may intervene between parent and child to enforce child labor laws but intervention is subject to fourteenth amendment limitations).

41. 442 U.S. at 584 (Stewart, J., concurring).

42. *Id.* at 650-51 (Brennan, J., concurring in part and dissenting in part). Justice Brennan agreed with the Court for the reasons he set forth in *Parham*. *See* 442 U.S. at 625-33 (Brennan, J., concurring in part and dissenting in part). Justice Brennan reasoned that parents would be reluctant to seek help for their child if an adversarial precommitment hearing was required. A precommitment hearing might also delay needed treatment and would constitute a direct challenge to parental authority, pitting parent against child and making an eventual return home more difficult. *See Institutionalized Juveniles*, 442 U.S. at 650-53 (Brennan, J., concurring in part and dissenting in part); *Parham*, 442 U.S. at 625-39 (Brennan, J., concurring in part and dissenting in part).

43. 442 U.S. at 651 (Brennan, J., concurring in part and dissenting in part).

44. *Id.*

45. *Id.* *See* 3 Pa. Bull. 1840 (1973), which requires a child to be notified of his rights to use the telephone in order to contact counsel. If the child is unable to read the statement of his rights, hospital personnel must read and explain the rights to the child.

rights was a hollow ritual under current Pennsylvania procedures.[46] In his view, there was a danger that the child's silence or inaction would be seen as a waiver of due process rights. To ensure that this would not happen, he concluded that Pennsylvania was required to assign each institutionalized child a representative who would be obliged to contact the child and ensure that the child's constitutional rights were being fully protected.[47]

Currently, the mentally ill and mentally retarded may be institutionalized rather easily.[48] Recently, courts have recognized that although institutionalization is intended to serve a commendable purpose, it also involves a severe deprivation of liberty.[49] Because of this recognition,

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46. 442 U.S. at 651 (Brennan, J., concurring in part and dissenting in part). There is no requirement that counsel be contacted for the child who cannot use the telephone. Therefore, even if a child does object to detention, there is no guarantee that his right to a hearing will mature.

47. *Id.* at 651-52 (Brennan, J., concurring in part and dissenting in part). Justice Brennan pointed out in *Parham* that post-admission hearings would not delay treatment or cause family discord because the family had already been disrupted by placing the child in the hospital. In a post-admission hearing, the doctors and other institution personnel would be the child's adversaries, thereby avoiding increased friction between parent and child. 442 U.S. at 635-36. *See* note 64 and accompanying text *infra*.

48. Modern statutes tend to a broad definition of mental disability. *Compare* PA. STAT. ANN. tit. 50, § 4102 (Purdon 1969) ("mental disability" is defined as a lack of mental capacity which makes institutional care necessary or advisable) *with* 1960 Ga. Laws 837 (repealed 1964) (permitted admission for observation and diagnosis without requiring evidence of mental illness to be shown) *and* GA. CODE ANN. § 88-503.1 (1979) (detention for treatment of individual showing "evidence of mental illness").

Originally, several states adopted the English practice of determining insanity by a jury proceeding. *See* Annot., 33 A.L.R.2d 1145, 1146-49 (1954). Most early American cases involved a question of whether or not removal from society was necessary "to prevent harm." *Id.* at 1148. The standard for involuntary commitment was that a person be "dangerous to self or others" or suffering from such a degree of incomplete development of mind as to be incapable of adjusting to the social environment in a reasonably efficient and harmonious manner. Teubner v. State, 216 Minn. 533, 13 N.W.2d 487 (1944). *See also Ex parte* Harcourt, 27 Cal. App. 642, 150 P. 1001 (1915); Crawford v. Brown, 321 Ill. 305, 151 N.E. 911 (1926); Milne Asylum v. Reilly, 156 La. 314, 100 So. 438 (1924). For further historical review of the standards for civil commitment, see Lessard v. Schmidt, 349 F. Supp. 1078, 1084-86 (E.D. Wis.), *vacated and remanded on other grounds*, 414 U.S. 473 (1972).

49. *See* Specht v. Patterson, 386 U.S. 605 (1967). *See also In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973); Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); Denton v. Commonwealth, 383 S.W.2d 681 (Ky. 1964). In *Specht v. Patterson*, the Court established that adults have due process rights in involuntary commitment proceedings. The Court held that due process requirements are the same whether the proceedings are civil or whether they carry a criminal connotation. 386 U.S. at 608. In *In re* Gault, 387 U.S. 1 (1967), the Court rejected the contention that because the goal of juvenile delinquency proceedings is to rehabilitate, the due process guarantees given to adults should not apply. *Id.* at 16. In this context, the Court again

adults may not be involuntarily committed unless given due process of law, including an adversarial hearing with representation by counsel.[50] In *Institutionalized Juveniles*, however, the Supreme Court failed to extend the same due process guarantees to the commitment of juveniles by their parents. As a result, the Court's opinion fails to remedy the inadequate due process safeguards afforded juveniles. This is largely because the Court continues to characterize the parental commitment of juveniles as voluntary in nature.[51] In both *Institutionalized Juveniles* and *Parham* the Court's analysis is based on the premise that children are *voluntarily* committed to mental hospitals by their parents.[52] Justice Stewart, in his concurring opinion in *Parham*, stated the rationale behind the voluntary concepts: children are incapable of deciding to commit themselves and parents act in their children's best interests; therefore, parents are constitutionally permitted to initiate voluntary commitment procedures for their children.[53] This rationale is similar to the adage that a sweater is something a child wears when his mother is chilly. That is, parents traditionally have had the right to raise their children because the law presumes that parents act in the child's best interests. Thus, interference with this parental right, despite the child's liberty interest, is not warranted "[s]imply because the decision of a parent is not agreeable to a child or because it involves risks."[54] The effect, however, is that juveniles are involuntarily[55] committed because they enjoy no choice in the matter.

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pointed out that it makes no difference whether the proceeding is labeled civil or criminal because the issue is whether or not the child will be deprived of his liberty. *Id.* at 27, 36. The irrelevance of labeling a procedure as civil or criminal was also noted in the case of a mentally retarded child who was confined in an institution for the "feeble-minded." The court further stated that it was irrelevant to the due process question whether the proceeding concerned "mental instability" or delinquency. *See* Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968). *See also* Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CAL. L. REV. 840, 901 (1974) [hereinafter cited as *Volunteering Children*].

50. Specht v. Patterson, 386 U.S. 605 (1967). *See also* note 49 *supra*. An adult cannot be involuntarily committed using a preponderance of the evidence standard. Instead, the necessity for commitment must be shown by at least clear and convincing proof. Addington v. Texas, 441 U.S. 418 (1979). There is thus a striking difference between adult and juvenile commitment standards, since the juvenile can be committed based on medical recommendations only. *See* notes 60, 61, 65 & 73 and accompanying text *infra*.

51. 442 U.S. at 646.

52. *Institutionalized Juveniles*, 442 U.S. at 646-48; *Parham*, 442 U.S. at 605-06.

53. 442 U.S. at 621-25 (Stewart, J., concurring). *See* note 16 and accompanying text *supra*.

54. 442 U.S. at 602-04. Chief Justice Burger compared the decision to commit with the decision to hospitalize for an appendectomy. *Id.* at 603.

55. The term "involuntary" is defined as "without will or power of choice." BLACK'S LAW DICTIONARY 961 (Rev. 4th ed. 1968). *See* Halderman v. Pennhurst State School, 446 F. Supp.

Parents make the decision limited only by the subjective judgments of physicians or mental health personnel.[56]

It is inconsistent to view the third-party commitment of juveniles as voluntary since a third-party attempt to commit an allegedly incompetent adult is deemed involuntary.[57] This is true even though the applicant is presumed to be acting in the interest of the alleged incompetent.[58] Because the commitment of an adult is seen as involuntary and entails a severe loss of liberty, the adult is entitled to the rigorous procedural protections deemed required by the due process clause of the fourteenth amendment.[59] With both adults and juveniles, the mental health expert can recommend institutionalization if in the patient's best interests,[60] yet the adult but not the child is given the right of

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1295, 1310, 1318 (E.D. Pa. 1977), *modified on other grounds*, 612 F.2d 84 (1979). *See also* Lynch v. Baxley, 386 F. Supp. 378, 387 (M.D. Ala. 1974) (commitment is voluntary only if "knowingly and intelligently consented to by the person to be committed").

56. *See* PA. STAT. ANN. tit. 50, §§ 4403, 7205 (Purdon 1969 & Supp. 1979); 3 Pa. Bull. 1840 (1973); 8 Pa. Bull. 2435 (1978) (§ 7100.101). *See* also note 61 and accompanying text *infra*.

57. *See* PA. STAT. ANN. tit. 50, §§ 4401(b), 4404, 4406(a)(1), 7304, 7305 (Purdon 1969 & Supp. 1979). *See also* Addington v. Texas, 441 U.S. 418 (1979); Specht v. Patterson, 386 U.S. 605 (1967).

58. *See* PA. STAT. ANN. tit. 50, §§ 4404(a), 7201 (Purdon 1969 & Supp. 1979). In Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974), the district court held that where state law requires or permits the appointment of a guardian *ad litem* for an alleged incompetent, the constitutional right to counsel will be satisfied only if the guardian *ad litem* is a licensed attorney who assumes a truly adversary position. *Id.* at 389. *See generally* Vitek v. Jones, 100 S. Ct. 1254 (1980) (due process must be provided before state prisoners can be involuntarily committed).

59. Addington v. Texas, 441 U.S. 418 (1979); Specht v. Patterson, 386 U.S. at 608-09.

60. PA. STAT. ANN. tit. 50, §§ 4404(a), 7201 (Purdon 1969 & Supp. 1979). The Supreme Court has accepted the state's argument that because the state's goal is to help and habilitate, the due process safeguards in juvenile commitments ought not be the same as those required in adult involuntary commitment proceedings. *Parham*, 442 U.S. at 620-21. The "help and habilitate" argument has been stripped of validity in adult involuntary commitment proceedings and in juvenile commitment proceedings. Specht v. Patterson, 386 U.S. 605 (1967); Finken v. Roop, 234 Pa. Super. Ct. 155, 170, 339 A.2d 764, 772 (1975), *appeal dismissed*, 424 U.S. 960 (1976) (because the individual's liberty is at stake, the rehabilitation argument does not justify confinement by a lower standard of due process). The lower federal courts have rejected a similar state argument in regard to the physical plants and staffing of mental health institutions, holding that although states are not obliged to provide treatment facilities, once they assume the responsibility, they must fulfill it in a constitutional manner. *See, e.g.*, Halderman v. Pennhurst State School, 446 F. Supp. 1295 (E.D. Pa. 1977), *modified on other grounds*, 612 F.2d 84 (3d Cir. 1979); Dixon v. Attorney General, 325 F. Supp. 966 (M.D. Pa. 1971). Therefore, merely because the state has voluntarily undertaken to provide assistance, fourteenth amendment protections of juveniles committed for mental health care should not be any different from those afforded any other individuals who are faced with deprivation of their liberty. *See also* note 49 *supra*.

representation and an evidentiary hearing on the necessity of commitment before a final commitment order may issue.[61]

The need for an evidentiary hearing is particularly acute in commitment procedures, and in the adult context is viewed as an essential safeguard against unjust or erroneous commitment decisions.[62] In *Institutionalized Juveniles*, the Court recognized that there is an inherent risk of error in the parental decision to commit a child.[63] However, the

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61. *See* notes 49, 50 & 58 *supra*. In *Parham*, Chief Justice Burger acknowledged the fallibility of psychiatric diagnosis but did not believe that its shortcomings could be avoided by substituting a judicial hearing for an evaluation by a trained specialist. 442 U.S. at 609. *But cf.* Addington v. Texas, 441 U.S. at 430-31 (because certainty of psychiatric diagnosis is "virtually beyond reach," the standard of proof in adult involuntary commitment proceedings must be greater than a mere preponderance of evidence). *See also Parham*, 442 U.S. at 628-29 (Brennan, J., concurring in part and dissenting in part) (psychiatric diagnosis is "fraught with uncertainties" and psychiatrists will err on the side of medical caution).

For various reasons, the view that psychiatric opinion is unreliable, subjective, fallible, and variable is being increasingly adopted in judicial and psychiatric circles. *See In re* Bally, 482 F.2d 648, 658 (D.C. Cir. 1973) (because the standards for commitment differ greatly, not only the dangerous are committed under modern law); Lessard v. Schmidt, 349 F. Supp. at 1092 n.22 (inadequate commitment examinations); *In re* Rosenfield, 157 F. Supp. 18, 20-21 (D.D.C. 1957), *remanded on other grounds sub nom.* Rosenfield v. Overholser, 262 F.2d 34 (D.C. Cir. 1958) (hospital policy changed overnight and doctors associated with the hospital were to classify a sociopathic personality as a mental disease whereas, prior to the policy change, sociopathology was not so classified); Finken v. Roop, 234 Pa. Super. Ct. at 181, 339 A.2d at 777 ("norm" is what a psychiatrist believes it to be). *See also* Albers, Pasewark & Meyer, *Involuntary Hospitalization and Psychiatric Testimony: The Fallibility of the Doctrine of Immaculate Perception*, 6 CAP. U.L. REV. 11, 16 (1976) [hereinafter cited as *Doctrine of Immaculate Perception*]; Rosenhan, *On Being Sane in Insane Places*, 13 SANTA CLARA LAW. 379 (1973) [hereinafter cited as Rosenhan]. In the Rosenhan study, a graduate student and a psychologist joined other professionals and committed themselves to various mental hospitals, claiming to suffer symptoms of different mental illnesses. Once admitted, they ceased displaying any evidence of mental illness and flagrantly pursued the objectives of their study. Hospital personnel never noticed the change in behavior, but patients did. *Id.* at 381, 384-85.

62. *See, e.g.*, Specht v. Patterson, 386 U.S. 605 (1967) (adults facing involuntary civil commitment are entitled to due process protections nearly identical to those guaranteed criminal defendants by the sixth amendment).

63. 442 U.S. at 646. *See also Parham*, 442 U.S. at 606-07. Psychologists, psychiatrists and others who work with and treat the mentally ill contend that often it is the parents, not the disturbed child, who need treatment. The professionals maintain that in some situations, the parents may even be the cause of the child's illness. *See, e.g.*, J.L. v. Parham, 412 F. Supp. 112, 136-37 (M.D. Ga. 1976), *rev'd and remanded*, 442 U.S. 584 (1979). *See generally Volunteering Children*, *supra* note 49, at 859-63; Monahan, *Empirical Analyses of Civil Commitment: Critique and Context*, 11 L. & SOC'Y REV. 619, 624 (1977). The experts have also discovered that parents will seek institutionalization of a mentally ill or mentally retarded child because of their inability to cope with the child's problem. *Cf. Volunteering Children*, *supra* note 49, at 851 (parents may have resorted to voluntary commitment procedures to sanction a child's counter-cultural life-style).

Court appears to be more concerned with not deterring parents from seeking help for their children[64] than with subjecting a potentially erroneous decision to the adversarial process. In an attempt to prevent the embarrassment of an adversarial probe into family matters, the Court tasked psychiatrists with the responsibility of ensuring against parental error.[65] However, the Court's guidelines also require inquiry into the child's background "using all available sources" to determine the necessity for commitment before the child can be admitted *initially*. Since interviews with the parents and the child are specifically required, probes into family affairs would appear to be both unavoidable and necessary in order to comply with the Court's mandate.[66]

If psychiatric inquiry is to be a reasonable substitute for an adversarial hearing in juvenile commitments, a psychiatrist must ask the same probing questions that an advocate for the child would ask.

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64. 442 U.S. at 605. The Court perceived a danger of disrupting family harmony if adversarial hearings were required, since the child would be pitted against the parent. *Id.* at 610. *But see* note 47 *supra*. This rationale is being abandoned as a basis for barring child-parent suits in the tort area due to the realization that the disruption is caused by the tort itself and that harmony has disappeared by the time legal action is taken. *See* W. PROSSER, THE LAW OF TORTS 864-67 (4th ed. 1971). *See also* Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952); Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823, 837 (1956). If the parent is willing to give custody of his child to the state, however temporarily, it would seem that the pinnacle of disruption has been reached. With the growing awareness of parent-child conflicts in the institutionalization setting, the family harmony rationale is as questionable as it is in the tort area. *See* J.L. v. Parham, 412 F. Supp. at 134-35; Bartley v. Kremens, 402 F. Supp. at 1050; *Volunteering Children*, *supra* note 49, at 851.

65. 442 U.S. at 606-08. The majority in *Parham* accepted the argument that since the state is providing treatment at great expense, the state should not be required to burden itself further with "procedural minuets" which would take doctors away from their hospital duties. *Id.* at 606. This does not explain why juveniles are accorded *no* hearing when hearings are deemed constitutionally required in involuntary commitment proceedings against adults where the doctors' time is of secondary importance to the "procedural minuets" comprising what is there called due process of law. *See* notes 49, 50 & 62 and accompanying text *supra*. Citing the article by Albers, Pasewark, and Meyer, the *Parham* Court said that the protections afforded by an adversary proceeding are illusory. 442 U.S. at 609. The article, however, is an indictment of the judiciary for abdicating their responsibility to act as a check on psychiatric judgment. *Doctrine of Immaculate Perception*, *supra* note 61, at 31-33.

Nor is the state's expense argument a valid reason to continue the confinement of those who do not need it. The district court in *J.L. v. Parham* discussed a Georgia Study Commission report which revealed that essential alternative forms of treatment such as specialized foster care or group homes could be provided at less expense to the state. 412 F. Supp. at 124-25 n.18, 126. *See Parham*, 442 U.S. at 604-06, 620-21. Thus the implementation of greater procedural protections for juveniles would benefit the state's financial interests while providing necessary treatment in an environment more suitable to the individual child's needs.

66. *See Parham*, 442 U.S. at 606-07; *Institutionalized Juveniles*, 442 U.S. at 644-45.

History shows, however, that medical personnel are often reluctant to ask parents difficult, probing questions even when the child's safety is threatened.[67]

If psychiatric opinion in adult commitments must be tested through an adversarial hearing to comply with due process requirements,[68] and if, as the Court maintains, children and adults have a common liberty interest,[69] juvenile commitments based upon mere psychiatric opinion should have been viewed as violating the due process rights of juveniles under the fourteenth amendment.

On remand, the district court is to consider the constitutionality of Pennsylvania's post-commitment procedures.[70] If the district court implements stringent post-commitment guidelines, as it has done twice previously,[71] the severe deprivation of liberty worked upon children by the Court's decision in *Institutionalized Juveniles* can be attenuated. Because the parents' decision to commit is not adequately checked prior to commitment, the only procedure remaining which would provide a realistic second look at the commitment decision is that of an adversarial hearing immediately after commitment.[72]

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67. *See, e.g.*, Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 458, 464-65 (1978). *See also* Dickens, *Legal Responses to Child Abuse*, 12 FAM. L.Q. 1, 15-16 (1978) (doctors hesitate to report cases of child abuse because they are reluctant to become involved in legal proceedings and fear confrontations with irate parents who have been reported).

68. *See* notes 50 & 62 and accompanying text *supra*.

69. *Parham*, 422 U.S. at 600. *See also* note 16 and accompanying text *supra*.

70. 442 U.S. at 650 & n.9. The Supreme Court would not consider the issue of post-commitment hearings because the district court "had no reason to consider the issue." *Id.* However, the plaintiffs had raised the issue in their complaint. *See* Bartley v. Kremens, 402 F. Supp. at 1042.

71. *See* notes 1 & 11 *supra*.

72. As Pennsylvania law now stands, mentally ill juveniles are subject to unnecessary institutionalization. The regulatory scheme requires institutionalization, even if not medically necessary, when there are no available alternatives to institutionalization. *Compare* PA. STAT. ANN. tit. 50, § 7107 (Purdon Supp. 1979) (mandates treatment under the least restrictive alternative appropriate to the individual's needs) *with* 8 Pa. Bull. 2433, 2436 (1978) (§§ 7100.101.3, 7100.107(d)) (qualifies § 7107 by requiring only that treatment *available* and appropriate be provided).

The Supreme Court in its decision in *Institutionalized Juveniles* has excepted juveniles from the general rule that institutionalization is constitutionally forbidden when the basis for confinement no longer exists or when the only finding is that the person, although mentally ill, is not dangerous to anyone and is capable of living safely in freedom. *See* O'Connor v. Donaldson, 422 U.S. 563, 575 (1975). Therefore, Pennsylvania's mental health statutory scheme contravenes the logic of *O'Connor* to the extent that juveniles who are merely mentally ill but not dangerous can be confined. *See* PA. STAT. ANN. tit. 50, § 7201 (Purdon Supp. 1979). Even under the dictates of *O'Connor* many men-

tally retarded people are also unnecessarily and unconstitutionally deprived of liberty because most can live in society with a moderate amount of supervision and be gainfully employed. *See Halderman v. Pennhurst State School*, 446 F. Supp. at 1312.