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Minors' Right to Due Process: Does It Extend to Commitment to Mental Institutions

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MINORS' RIGHT TO DUE PROCESS: DOES IT EXTEND TO COMMITMENT TO MENTAL INSTITUTIONS?

I. Introduction

Currently, many states allow a minor to be committed to a mental institution for an indefinite period upon the request of a parent and the approval of a doctor. The usual statutory scheme provides for "voluntary" commitment of minors, *i.e.*, commitment under the procedures which are applicable to adults who consciously choose to seek admission to an institution. Procedures under voluntary admissions statutes are considerably more relaxed than under those applicable to involuntary commitment.

Under West Virginia law,[1] for example, anyone who is mentally ill or manifests symptoms of mental illness can be admitted to a mental hospital under their "voluntary" scheme. An additional requirement of an evaluation and recommendation for admission by a mental health facility is imposed for those under the age of 18. For involuntary commitment on the other hand, many procedural safeguards are affected, such as the opportunity to be heard, the appointment of an attorney, the opportunity to testify, present witnesses and cross-examine witnesses, the right to an examination by an independent expert, the privilege of protection from being compelled to testify against oneself and the application of rules of evidence.[2] Under West Virginia law this scheme of procedural due process applies to all adults and minors who are 12 years old or older and who do not consent to commitment. Some states, however, apply the "voluntary" commitment procedures to all minors.[3] Typically, then, many minors are afforded virtually no due process when subject to commitment proceedings.

The law presumes that the parent sufficiently represents the interests of the minor so that procedural due process is not necessary to protect the child. Thus, due process is often lacking irrespective of whether the child agrees with the propriety of the commitment. Similarly, the presence of real or potential parental interests which weigh in favor of commitment, although contrary to the best interests of the child, fail to prompt the requirement of procedural safeguards. The legal theory which supports this is a combination of substituted consent and a waiver of due process requirements by the adult seeking to commit the child.[4] Under this theory, because of his or her age, the minor is presumed legally incompetent to consent to medical treatment. Because of this presumed incompetency, the parent[5] can consent to "voluntary" institutionalization for the child. The formalities required for this are no more than those requisite to consent to a surgical operation for the child. That is, as where parental permission is substituted for the minor's own permission to perform surgery, no due process

1 W. VA. CODE ANN. §§ 27-4-1 to 27-4-3 (Supp. 1976).
2 W. VA. CODE ANN. § 27-5-4 (Supp. 1976).
3 *E.g.*, FLA. STAT. ANN. § 394.465 (Supp. 1976).
4 Bartley v. Kremens, 402 F. Supp. 1039, 1045 (E.D. Pa. 1975).
5 For purposes of brevity, "parent" has been used throughout this note to mean parent, guardian or person *in loco parentis*.

is afforded the child. Due process is deemed unnecessary by the law because parents, or the parents in conjunction with a doctor, by consenting to the confinement are presumed to have waived the child's right to due process.

This statutory scheme for "voluntary" civil commitment of minors assumes that the child's interests are adequately represented by the parents. Recently, this assumption and the constitutionality of these statutes have been challenged in federal court: *Bartley v. Kremens*[6] was decided in 1975, and the Supreme Court has noted probable jurisdiction on appeal; *J.L. v. Parham*[7] was decided by a three-judge federal court this year. Both of these cases struck down as unconstitutional "voluntary" commitment for minors.[8]

The task of deciding whether to afford due process to children faced with commitment involves a balancing of somewhat conflicting interests. On the one hand is the parents' interest in maintaining their judicially recognized right to control the rearing of their children. Offsetting this is the child's interest in maintaining his or her liberty. In determining which interest is paramount, several areas must be explored: first, the scope of the parental privilege in raising children; second, a definition of the child's interests and who can appropriately represent them; third, judicial precedent for distinguishing parental interests from children's interests; fourth, the Supreme Court's attitude towards children's rights; and, finally, the conclusions drawn by the two federal courts which have recently dealt with this precise issue.

II. The Scope of Parental Privilege

A. *The Development of the Privilege*

The strongest argument espoused by opponents of due process for minors prior to commitment is based upon the immunity of the family unit from state interference. Recently, the Supreme Court addressed the issue of parental privilege in *Wisconsin v. Yoder*.[9] *Yoder* involved the question of whether parents of Amish children could remove them from school for religious reasons at age 14, in violation of state law which required that they continue to attend until age 16. The Court, in holding for the parents, stressed the importance of parental authority:

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.[10]

This theme is echoed throughout our case law in a variety of factual situations. For example, in *Pierce v. Society of Sisters*,[11] the Supreme Court struck down a

6 402 F. Supp. 1039 (E.D. Pa. 1975).
7 412 F. Supp. 112 (M.D. Ga. 1976).
8 *See* notes 66-83 *infra* and accompanying text.
9 406 U.S. 205 (1972).
10 *Id.* at 232.
11 268 U.S. 510 (1925).

statute which required parents to send their children to public schools, thereby precluding their attendance at parochial schools. The Court referred to "[t]he liberty of parents and guardians to direct the upbringing and education of children under their control."[12] In further reference to the child, the court stated: "[t]hose who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[13]

In another application of the parental prerogative to direct the lives of their minor children, the Supreme Court in *Ginsberg v. New York*[14] upheld the constitutionality of a New York criminal obscenity statute. This law prohibited the sale of "obscene" materials to minors under the age of 17. The materials were defined as obscene on the basis of their appeal to these minors, regardless of whether they would be considered obscene for adults. The Court affirmed that it is "basic in the structure of our society" that parents have authority in their own household to direct the raising of their children.[15]

The logic of this judicial "hands-off" policy with respect to family affairs is illustrated by *People ex rel. Sisson v. Sisson.*[16] In this case the New York Court of Appeals declined jurisdiction to settle a dispute between parents over the education of their child. The parents were on good terms otherwise, and were living together. In its decision the court stressed that the majority of matters concerning the rearing of children must of necessity be "left to the conscience, patience and self restraint"[17] of the parents. The court recognized that unmanageable difficulties would result from judges' attempts to instruct parents on how to raise their children.

If parents can be told by courts whether their children need to be institutionalized for mental health care, how far can this be extended? Could the state not likewise determine that the child's right to liberty demands a due process hearing before the child can be enrolled in a military academy or a boarding school? These fears prompt vigorous resistance to attempts to require due process before civil commitment of minors.

Yoder and *Ginsberg,* then, illustrate the current vitality of the notion of family immunity from state interference as set out in *Pierce. Sisson* illustrates the necessity of such a policy in light of the limitations on our judicial system. However, the ban on such state interference is not absolute.

B. *Limitations on Parental Rights*

While judicial non-interference in family affairs is the general view taken by courts, parental control is not unlimited. Under certain circumstances the courts have recognized that children must be protected from their parents by the state. These circumstances include extremely poor mental, moral or physical conditions in the home environment.[18] Statutes dealing with parental neglect

12 *Id.* at 534-35.
13 *Id.* at 535.
14 390 U.S. 629 (1968).
15 *Id.* at 639.
16 271 N.Y. 285, 2 N.E.2d 660 (1936).
17 *Id.* at 287, 2 N.E.2d at 661.
18 *Id.*

of children exemplify legitimate state intervention into family authority.[19]

Furthermore, the Supreme Court has recognized the states' right to supersede parental authority in order to save a child's life. This state right has been upheld despite the parents' conflicting first amendment right to freedom of religion. *Jehovah's Witnesses v. King County Hospital*[20] involved a situation where parents refused to consent to life-saving medical treatment for their children. The basis for their refusal was their right to freely exercise their religion, and their right to raise their children according to the tenets of that religion. Despite the first amendment right to freedom of religion which supported the parents' position, the court nonetheless held that the state was justified in intervening.

Thus, in *Jehovah's Witnesses* two basic rights of parents, freedom of religion and the traditional right to control the development of one's own children, were insufficient to override the state's interest. In the case of "voluntary" commitment for minors, there is no constitutional right of parents comparable to that asserted in *Jehovah's Witnesses* which must be balanced with the minor's constitutional right to due process. Since the parents have less support for their assertion that due process is not proper where civil commitment of minors is involved, it appears that the state interest should prevail. However, civil commitment may be distinguished from the situation in *Jehovah's Witnesses* in that commitment does not involve a situation in which the child's life is in immediate danger. But this distinction has been rendered ineffectual by another Supreme Court case, *Prince v. Massachusetts*.[21]

In *Prince,* after noting that parents and guardians have wide discretion in the raising of their children, the Court upheld the conviction of the child's guardian. The guardian had been charged with a violation of a Massachusetts statute which forbade child labor: she had allowed the child to sell religious literature on the streets. The Court found the state's interests in protecting the child paramount to the guardian's right to raise her child in her religious faith. The state interest in protecting the child from labor is certainly of lesser import than protecting the child's life. The ramifications of having been institutionalized for even a short period can be felt for a lifetime.[22] While the child's interest in a commitment proceeding is not as great as life itself, it seems to deserve more consideration than the interest protected by the Court in *Prince.*

Thus, while the courts have been careful to defer to parental authority in the rearing of their children, there have been exceptions to this general rule. To protect the life and health of the child, and to prevent child labor, the courts have allowed the state to interfere. When the very serious implications of civil commitment are considered, it seems appropriate for the courts to recognize another limited exception to traditional parental autonomy in decision-making.

19 *E.g.,* W. VA. CODE ANN. § 49-6-5 (1976).
20 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd,* 390 U.S. 598 (1968).
21 321 U.S. 158 (1944).
22 *See* notes 25-26 *infra* and accompanying text.

III. The Child's Interests and Appropriate Representation

A. *The Minor's Interests Defined*

In commitment proceedings, what are the interests of the child which need protection? Can the parent alone, or in conjunction with the doctor, adequately represent these interests? If not, why not? These are some of the questions which must be answered before a determination can be made as to whether due process is so essential that one of the infrequent exceptions to the long tradition of parental rights must be made.

Undeniably, the minor has an interest in his or her own liberty. Unfortunately, substantial loss of liberty follows commitment in most cases. Many state institutions are little more than warehouses: the deplorable conditions and lack of treatment offered in these institutions for the mentally handicapped have been recognized by the courts as inhumane.[23] Furthermore, under many state laws, a minor who is committed cannot be released until the age of majority; earlier release is conditioned upon the consent of the individual who originally consented to the commitment.[24] Thus, the minor may be deprived of his or her liberty for an extended period, with no recourse. The loss of liberty, the uncertainty of release, and the inhumane conditions combine to make a decision to commit a decision with very serious ramifications for the child.

In addition to this loss of liberty, which may continue for days, months or years, there is another negative effect the child will suffer from having been institutionalized. It is well documented that teachers who have read negative psychological reports about students have lower expectations of the abilities of the child.[25] The teacher's lower expectations concerning the child's performance determine how the teacher behaves towards the child; consequently, the child achieves less.[26] Permanent effects can be manifest on the child's learning ability and employability. Thus, minors who are threatened with institutionalization have interests at stake which will affect them not only for the duration of the institutionalization, but for the rest of their lives.

Since the minor's freedom to move about may be limited for an extended period, and his educational capacity can be irrevocably stunted, it is very important that these interests be represented vigorously in any decision-making process involving a possible commitment. Traditionally, for reasons previously noted, the American system of jurisprudence has looked to the parents to play this role.

B. *Parental Interests and the Decision to Seek Commitment*

There is evidence that factors influencing a parental decision to have a child committed are not always directed toward the best interests of the child.

23 New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 756 (E.D.N.Y. 1973), Wyatt v. Stickney, 344 F. Supp. 387, 391 (M.D. Ala. 1972).

24 *E.g.*, W. VA. CODE ANN. § 27-4-3 (Supp. 1976).

25 Mason, *Teachers' Observations and Expectations of Boys and Girls as Influenced by Biased Psychological Reports and Knowledge of the Effects of Bias*, 65 No. 2 J. ED. PSYCH. 238 (1973).

26 *Id.* at 241.

Even with the greatest desire to aid the mentally ill child, the parents may encounter very difficult problems.[27] One obvious and important consideration is the development of other children in the family. Their anger, hostility and feeling of deprivation when they are not able to bring their friends home or to live normally in their own home, due to the presence of a disturbed child, is certain to have an influence on a parental decision to seek commitment.[28] Additionally, society often holds the parents of an emotionally disturbed child partially or totally responsible for the child's condition. This fact, and its resulting burden of guilt, may prompt a parent to endeavor to remove the child from his or her daily presence.[29]

Furthermore, in some states, once a child has been hospitalized for mental illness, release is not allowed without the consent of the parent. Even where this is not a legal prerequisite, parental willingness to accept the child's return plays a role in an institution's decision to release a minor patient. Unfortunately, it appears that parents frequently indicate little desire to receive the child back into the home. Thus, a child could be institutionalized for years longer than is therapeutically necessary, due to parental decision-making. It is clear then, that parental authority is very much open to abuse: under the guise of admitting a child to a mental hospital parents may actually be abandoning their child to the state.[30]

From this evidence, it is apparent that the very serious decision of the parent to pursue institutionalization for the minor child, because that child allegedly suffers from mental illness, is in great need of some kind of check. One obvious source of an advocate for the minor is the medical community.

C. *Suitability of the Doctor as an Advocate for the Child*

Most statutes dealing with "voluntary" commitment of minors require that a doctor agree to the institutionalization before the child can be admitted.[31] Unfortunately, like the parents', the doctor's motives in advising institutionalization have become suspect. There is a question of whom the psychiatrist represents: the child, the parents, or the institution.[32] The doctor is generally employed by either the institution or the parents. In the latter case, it is usually for the purpose of supporting the parental desire to have the child committed. Therefore, the doctor cannot impartially represent the child's best interests. Additionally, doctors have been found to represent the parents' interests regardless of who has hired them. Frequently, the minor becomes such a disruption to home life that the parents feel they can no longer cope with the child. Under these circum-

27 H. Love, Parental Attitudes Toward Exceptional Children 19 (1970).
28 *Id.*
29 *Id.* at 114.
30 J.L. v. Parham, 412 F. Supp. 112, 138 (M.D. Ga. 1976).
31 E.g., Wash. Rev. Code Ann. § 72.23.070 (Supp. 1975).
32 Shestack, *Psychiatry and the Dilemma of Dual Loyalties* in Medical, Moral and Legal Issues in Mental Health Care 7-17 (Ayd ed. 1974); Robitscher, *Implementing the Rights of the Mentally Disabled: Judicial, Legislative and Psychiatric Action,* in Medical, Moral and Legal Issues in Mental Health Care 145 (Ayd ed. 1974).

stances, the doctor will sometimes recommend institutionalization although this drastic measure is not required by the child's condition.[33]

It has been suggested that the best solution to this problem is to appoint both counsel and a psychiatrist to represent the child's interests.[34] Neither of these professionals would be paid by the institution or the parents. They would therefore be free to explore the alternatives available to the child. If it became evident to them that the parents' motive for seeking institutionalization was to remove from the home a child they felt they could no longer cope with, the professionals could take this into account. It is unlikely, under these circumstances, that placing the child back into the home would be in anyone's best interests. However, the child's condition may not be such that institutionalization is necessary. The role of the professional advocates, then, would be to examine such alternatives as foster homes, or group care homes, which are located in the community and are generally less restrictive of the minor's liberty.

Social science arguments point to this scheme as a solution, but it remains to be determined whether it is legally supportable. A discussion of cases wherein the necessity of distinguishing the interests of the child from those of the parent was seen and implemented can begin to answer this question.

IV. Judicial Recognition of the Child's Distinct Interests

Even where a child's life or health is not in danger, courts have, in limited cases, recognized the necessity of separating the interests of children from those of their parents. *Ellis v. Massenburg*[35] is an example of such a case. In *Ellis*, an infant's parent was a nominal plaintiff in a suit to set aside a deed: the infant was a defendant in the same suit. The Supreme Court of North Carolina held that it was error to allow that parent to represent his child's interests, as a court appointed guardian *ad litem*. The parent had disclaimed all interest in the suit and represented that the use of his name as plaintiff was not authorized. Though the court found no evidence of bad faith, it determined that it was essential that the child have representation apart from that provided by his parent. The court held that if a guardian has any interest at all in a suit, that interest must be entirely consistent with that of his ward. Even a mere colorable interest must cause a disqualification if it is at all adverse.

Similarly, in *White v. Osborn*[36] the lower court appointed a guardian *ad litem* to represent a child whose interests conflicted with those of his parents. The child was awarded a judgment for a physical injury which he had suffered. Since his father paid the medical bills, the child was indebted to his father for a fraction of the judgment. When a portion of the judgment was available for collection from the court clerk, the father attempted to collect this entire amount and apply it to his son's medical debt. The clerk felt that the father should be allowed to collect for himself only his pro rata share of the amount available for collection. In the resulting lawsuit, the North Carolina Supreme Court held that

33 J.L. v. Parham, *supra* note 30, at 134.
34 Shestack, *supra* note 32, at 13.
35 126 N.C. 129, 35 S.E. 240 (1900).
36 251 N.C. 56, 110 S.E.2d 449 (1959).

due to the father's obvious conflict of interests, it was improper for him to be allowed to represent the infant for purposes of collection of the judgment. The court separated the interest of the child from that of the parent, although it found that no error had been committed when the lower court allowed the father to represent his son during litigation.

In a factual situation closer to the commitment procedures discussed here, the District of Columbia Municipal Court of Appeals likewise acknowledged that the best interests of the child are not consistently represented by the parent. Thus, in *In re Sippy*[37] the court recognized that when the state's power is invoked for involuntary commitment of a minor, the child should have representation independent of her parent's counsel. In this case a 17-year-old woman was ordered committed for an indefinite period of time to a school where she would receive psychiatric treatment. Her mother had filed a complaint with the Juvenile Court charging that her daughter was habitually out of her control. The daughter argued against the necessity or propriety of the commitment. On appeal the court found that it was prejudicial to allow an attorney who presented himself to the court as representing the mother's interests to also enter an appearance on behalf of the daughter. Additionally, the court held that any waiver of her daughter's rights by the mother was ineffective; the antagonistic position of the mother prevented her from effectively waiving her daughter's doctor-patient privilege.[38]

The court was aware that parent and child in fact had opposing interests which demanded recognition in order for the minor to be adequately represented. Consequently, the court required that the minor have independent representation and refused to allow the mother to waive privileges for her daughter. Despite the traditional role of the parent as proper advocate for the child, the court had no apparent difficulty in ordering an aberration from that norm under these circumstances.

Finally, in a 1973 case, *Horacek v. Exon,*[39] which challenged conditions in a state institution for the mentally retarded, a United States District Court considered the question of whether parents were proper parties to represent their children's interests. The court stated:

> I cannot be insensitive to the possibility that the interests of the parents may conflict with those of the children. . . . While the parents in all good conscience may desire one remedy, or a specific type or style of treatment for their children, it would not necessarily be in the best interests of the children.[40]

Therefore the court thought it would be wise to provide for appointment of a guardian *ad litem* who would not replace the parents as representatives of their

37 97 A.2d 455 (D.C. Mun. Ct. App. 1953).

38 Furthermore, the appeals court found that the daughter's right of confrontation and her right to have witnesses sworn before testifying were denied due to the informal nature of the commitment hearing. "In a case like this where liberty is involved, we think a respondent is entitled to insist that the facts be presented by witnesses who are under the solemnity of an oath." *Id.* at 458.

39 357 F. Supp. 71 (D. Neb. 1973).

40 *Id.* at 74.

children, but would be charged with recognizing potential and actual differences in interests asserted by the parents, and interests that needed to be asserted on behalf of the children.[41]

Thus, in *Horacek* and other lower court cases the parental right to control the raising of children has been necessarily eroded. A strong possibility of conflict of interests has been enough, in some cases, to convince courts to separate the interests of parent and child. The extension of this acknowledgement of the distinct interests of parent and child to all cases of civil commitment seems advisable. That a conflict of interests exists is well documented.[42] The appointment of medical and legal advocates to fully and vigorously represent the child whose liberty is at stake is an appropriate means of ensuring that the child's interests are given full judicial consideration.

Individual rights of minors have in recent years received much attention from the Supreme Court. A brief survey of cases recognizing a host of constitutional rights is essential to a determination of the legal propriety of affording minors due process in civil commitment proceedings.

V. Children's Constitutional Rights and the Supreme Court

A. In Re Gault: *Due Process in Juvenile Delinquency Proceedings*

The watershed decision in the area of minors' rights is *In re Gault,*[43] decided by the Supreme Court in 1966. In this case a 15-year-old boy was accused, in a verbal complaint, of making obscene phone calls. As a result, two hearings were held. At these hearings no witnesses were sworn, and the accusing witnesses were not present. Furthermore, the juvenile's parents were not notified of the hearings, no record of either hearing was maintained, and there was no notification of a right to counsel. As a result of this informal process, Gault was committed as a juvenile delinquent to the state industrial school for the duration of his minority: a time amounting to six years.

The Court described the development of the juvenile court movement from its origins at the end of the nineteenth century. The movement arose in reaction to the horror of adult penalties and procedures, and the intermingling of hardened criminals with children in both courts and prisons. In its beginnings the movement sought to promote the best interests of the juvenile by securing treatment and rehabilitation rather than punishment for the child.[44] The Court noted, however, that the results of the juvenile system have not been wholly satisfactory: "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[45]

The realities of the situation were emphasized by the Court: solely because he was under eighteen years of age, the defendant was subject to a long period

41 *Id.*
42 *See,* notes 27-30 *supra* and accompanying text.
43 387 U.S. 1 (1967).
44 *Id.* at 17.
45 *Id.* at 18.

of confinement. The Court noted the irony of the fact that had Gault been eighteen years old, the maximum punishment for making obscene phone calls would have been a fifty-dollar fine and two months of imprisonment.[46] It was insignificant, the Court felt, that the institution to which Gault was committed was called a "school" rather than a "prison." The institutional hours, regimentation and whitewashed walls to which the defendant would be confined for six years amounted to incarceration and serious loss of liberty.[47] The Court called the prospect of a determination of juvenile delinquency "awesome" since such a determination carries with it the possibility of incarceration until age 21.[48]

With respect to the right to counsel, the Court stated:

> A proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel. . .[49]

It was further noted by the Court that a probation officer who is also the arresting officer—initiating the proceedings, testifying against the child, etc., cannot act as counsel for the juvenile; neither can the judge represent the child.[50]

The Court found that due process was unjustifiably denied the defendant simply because he was a juvenile: "Under our Constitution, the condition of being a boy does not justify a kangaroo court."[51]

The parallels between juvenile delinquency proceedings and "voluntary" commitment for minors are rife: an extended confinement, whitewashed walls, regimentation and institutional hours are all equally present in mental institutions. The child who is subjected to commitment proceedings is also denied due process solely because of his or her minority. The presence of all of these elements in civil "voluntary" commitment for minors points to the necessity for due process in this situation, as it did in *Gault*.

Additionally, in *Gault*, the Court rejected the argument that because it is acting in the best interests of the individual, the state can justify proceedings which do not conform to those applicable to criminal proceedings. The Supreme Court refused to distinguish between juvenile and criminal proceedings with respect to due process. It is the loss of liberty which triggers due process, the Court determined, not the character of the action. This thinking can be applied to civil commitments to mental hospitals as well, given the severe loss of liberty involved.[52]

A final factual similarity between *Gault* and "voluntary" commitment of minors is worthy of consideration, i.e., the role of the doctor in civil commitment

46 *Id.* at 27-29.
47 *Id.*
48 *Id.* at 36.
49 *Id.*
50 *Id.*
51 *Id.* at 28.
52 Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968). "It is the likelihood of involuntary incarceration—whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent —which commends observance of the constitutional safeguards of due process."

and the role of the corrections officer in juvenile delinquency proceedings. In both cases these persons may initiate the proceedings, or cause them to be initiated, and both may testify against the juvenile. As the Court found that the probation officer cannot represent the child's best interests, it can be argued equally well that the doctor cannot represent the juvenile's best interests. As previously noted,[53] the doctor hired by the institution or the parents may testify against the minor. The physician who is an integral part of the commitment process, as required by law, should be precluded from representing the minor under the pretense of being an adequate advocate for the child's rights.

In sum, *Gault* is monumental precedent for those who assert a minor's constitutional right to due process prior to commitment to a mental institution. The important factual parallels and the applicability of the Supreme Court's reasoning in *Gault* to the civil commitment of minors argues strongly for the imposition of similar procedural safeguards to commitment of minors.

B. Tinker *and* Goss: *More Constitutional Rights for Minors*

The Supreme Court has consistently confirmed its holding in *Gault* that children cannot be denied constitutional rights because of their minority. In 1969 the Court decided *Tinker v. Des Moines Independent Community*[54] *School District,* in which it recognized minor students' first amendment rights. Three children wore black armbands to school, in protest of the Vietnam war, and consequently were suspended from school. The Supreme Court upheld the first amendment rights of the students and stated: "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect. . . ."[55] If a child's right to freedom of speech is considered fundamental by the Court, surely that person's liberty is no less fundamental and no less entitled to protection.

Another key case which bolsters minors' claims to constitutional protections is *Goss v. Lopez,*[56] decided by the Supreme Court in 1975. Here several public school students were suspended from school for misconduct for periods of up to 10 days. The punishment was administratively determined without a hearing. A class action was filed against the school officials, seeking a declaration that the Ohio statute permitting such suspensions was unconstitutional, and also asking for an order enjoining the officials to remove from the students' records any reference to the suspensions. The Supreme Court affirmed the federal three-judge court which had held for the plaintiffs.

The Supreme Court found that the students, though suspended for only a few days, had significant interests at stake which were deserving of the protections of due process:

> [T]he total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in

53 *See* notes 31-34 *supra* and accompanying text.
54 393 U.S. 503 (1969).
55 *Id.* at 511.
56 419 U.S. 565 (1975).

> the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.[57]

In elaborating on the liberty interest in reputation, the Court emphasized that if the charges against the students were sustained and recorded, the students' standing with their friends and teachers would be seriously damaged, and the incident would diminish their opportunities in the fields of higher education and employment.[58]

Again, there are important parallels between the case of the "voluntarily" committed child, and the students in *Goss*. Both have important reputational interests: children institutionalized in mental hospitals suffer from severe stigma.[59] The effects of this stigma are often more severe than those discussed in *Goss*, and clearly include negative expectations of teachers and possible employers.[60] Indeed, the combination of this social stigma, and the possibility of confinement for years, involves a substantially greater liberty interest. If due process is mandated for short-term school suspensions, it is certainly an anomaly that due process is not afforded juveniles whose parents seek to commit them to mental institutions.

One additional statement made by the Court in *Goss* constitutes an important argument in favor of due process for children who are facing commitment. It is evident that the Court felt due process would not protect minors from suspensions which were warranted, but instead, would protect both the state's and the child's interests from erroneous suspensions. "The concern would be mostly academic," the Supreme Court felt, "if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is."[61]

The inaccuracy of the commitment process, as well as the difficulties in obtaining a discharge, are well documented.[62] To deprive a child of his or her liberty to the extent involved in commitment without taking every precaution to assure the accuracy of a determination to commit appears to be a direct affront to the Supreme Court's decision in *Goss*. Indeed, the Court has clearly indicated time and again that the condition of being a child is not a sufficient rationale for depriving a person of due process.

C. Danforth: *Current Supreme Court Consideration of Minors' Rights*

Most recently, the Supreme Court has upheld the constitutional rights of

57 *Id.* at 576.
58 *Id.* at 575.
59 *In re* Ballay, 482 F.2d 648, 668 (D.C. Cir. 1973); Matthews v. Hardy, 420 F.2d 607, 611 (D.C. Cir. 1969).
60 Mason, *supra* note 25; Whatley, *Social Attitudes Toward Discharged Mental Patients* in THE MENTAL PATIENT: STUDIES IN THE SOCIOLOGY OF DEVIANCE 401 (Spitzer & Senzin eds. 1968).
61 419 U.S. 565, 579-80 (1975).
62 Rosenhan, *On Being Sane in Insane Places*, 179 SCIENCE 250 (1973). Reprinted in 13 SANTA CLARA LAW. 379 (1973); Kay, *Legal Planning for the Mentally Retarded: The California Experience*, 60 CAL. L. REV. 438, 457-67 (1972).

minors in *Planned Parenthood of Central Missouri v. Danforth.*[63] In striking down as unconstitutional a Missouri law which contained a blanket provision requiring all unmarried women under the age of 18 who desired an abortion to obtain parental consent, the Supreme Court stated:

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess Constitutional rights.[64]

In *Danforth,* the arguments for upholding the constitutionality of parental consent were some of the same ones espoused by opponents of due process for minors threatened with commitment to mental institutions: family unity and preservation of parental authority.[65] The Court was unconvinced by these arguments, determining that any interest which the parent might have in the termination of the minor's pregnancy was subservient to the right of a competent minor who was mature enough to become pregnant.[66]

Danforth again illustrates the willingness of the Court to separate the rights of the child from those of the parent. This case is distinguishable from civil commitment in that not all minors subject to institutionalization are mature and competent. Nevertheless, *Danforth* stands for the proposition that the minor's voice in his or her future is important, and should be treated as such. The implication for civil commitment is that the minor's interests should be represented, whether by the child or an advocate, and seriously considered in any decision to effect institutionalization. In *Danforth,* the Court once again concluded that the constitutional rights of the minor must prevail.

While the Supreme Court has not dealt squarely with the problem of affording minors due process in commitment procedures, two United States District Courts have recently done so. In performing a similar balancing procedure, these courts have come to the same conclusion: the constitutional rights of minors must prevail over parental interests.

VI. Lower Court Treatment of Due Process Rights for Minors Subject to Civil Commitment

Both Pennsylvania[67] and Georgia[68] statutes which allowed "voluntary" commitment of minors have been declared unconstitutional by three-judge courts: the former in *Bartley v. Kremens,*[69] the latter in *J.L. v. Parham.*[70] In *Bartley,* the court found that the state is required, generally, to provide substantial procedural protections when there is a possibility that a person will be

63 44 U.S.L.W. 5197 (U.S. July 1, 1976).
64 *Id.* at 5204.
65 *Id.*
66 *Id.*
67 Act. No. 6 (P.L. 96) art. IV §§ 402-03 1966 Special Sess. (codified as PA. STAT. ANN. tit. 50, §§ 4402-03 (1969)).
68 Ga. Laws 1969, No. 365 § 88-503.1, p. 517 (codified as GA. CODE ANN. § 88-503.1 (1971)).
69 402 F. Supp. 1039 (E.D. Pa. 1975).
70 412 F. Supp. 112 (M.D. Ga. 1976).

erroneously and wrongfully deprived of liberty through commitment to a mental institution. Furthermore, the court found that this possibility of error was quite substantial in civil commitment. The court cited instances in which individuals had been committed for inappropriate reasons, including: difficulty in relating to one parent; so that the rest of the family could vacation; poor family situations, e.g., where there was fear that the mother would have another nervous breakdown; running away; robbing a gas station; physical ailments; delinquent behavior; and a variety of other equally inappropriate and insufficient reasons. In light of these circumstances the court found that:

> The child who faces the possibility of being physically confined for an indeterminate period with all of the ramifications of such confinement clearly has an interest within the contemplation of the liberty and property language of the Fourteenth Amendment.[71]

The state had argued that: (1) the purpose of the act was to rehabilitate the child rather than to punish by incarceration, thus the state is acting as *parens patriae,* and, consequently, no procedural due process is appropriate; (2) if due process applies, in the interest of protecting family unity, the court should consider any due process rights fulfilled by the statute; (3) since parents must set the machinery for commitment in motion, they effectively waive any due process rights of the children.[72]

The court remained unpersuaded by any and all of these arguments. First, the court found that, despite the protective motives of the state, due process is required before a person can be deprived of liberty.[73] The court did not discuss the state's second argument, but, from the conclusions the court drew, it is apparent that it felt the statute's process was inadequate. The opinion made it clear that it is irrelevant whether the proceeding is civil or criminal, or whether the subject matter is juvenile delinquency or mental illness. The critical factor in deciding whether due process applies is the presence of a likelihood of involuntary confinement.[74]

The court continued in its rationale for demanding due process by citing *Gault* for the proposition that due process is necessary for a determination of the truth from conflicting data. *Gault* was also cited for the notion that due process is instrumental in protecting against wrongful commitment regardless of whether the state's purpose is benevolent or punitive.

Finally, the court answered the state's third argument by stating that, while ideally parents always have the child's best interests in mind when making decisions affecting the future of their child, reality falls short of the ideal. Therefore, the court concluded, parents may not waive the child's right to due process absent a showing that the child's interests have been fully and vigorously represented.[75]

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71 402 F. Supp. 1039, 1046 (E.D. Pa. 1975).
72 *Id.* at 1044-45.
73 *Id.* at 1045 n.7.
74 *Id.* at 1046.
75 The court held that:
> [B]efore they may be institutionalized plaintiffs and others of their class are entitled

The court determined that the plaintiffs were entitled to due process similar to that afforded in criminal proceedings. This specifically included the right to a hearing and counsel. Since the Pennsylvania statute failed to provide these protections to minors, the court declared it unconstitutional.[76]

Similarly, in *J.L. v. Parham,*[77] a class action filed by two minors contending that they had been deprived of their right to procedural due process, a three-judge district court in Georgia held that the state's "voluntary" commitment statute for minors was unconstitutional. The plaintiffs contended that their constitutional rights were denied when they were confined without having had a meaningful chance to be heard. Additionally, the plaintiffs complained that alternate treatment facilities which would have been less restrictive of their liberty were never explored. Finally, the plaintiffs alleged that the statute unconstitutionally allowed their parents to effect their involuntary commitment through the use of "voluntary" procedures.[78]

The defendant asserted that pursuant to the statute the state is merely acting as *parens patriae.* The purpose of the statute, the defendant argued, is merely to assist parents in the performance of their traditional duty to provide for and nurture their children.[79] Therefore, it amounts to no more than a statutory confirmation of the freedom parents enjoy to raise their children as they desire. *Pierce* and *Yoder* were cited to support this argument.[80] It was further suggested by the defendant that the statute merely affords parents the authority they need to hospitalize their children, and consequently provides all the due process that the circumstances require.

The court viewed the statute differently. It felt that the statute gave parents the power to capriciously admit their children to mental hospitals for an undetermined length of time, and held that it is essential for the state to provide due process when it undertakes to act as *parens patriae.* A necessary part of this due process is procedural protections to ensure that parents do not abuse their power to institutionalize their children.[81] The court's view was bolstered by the fact that the defendant conceded that there are a considerable number of people who still treat mental hospitals as "dumping grounds."[82]

The court was also troubled by the provision in the statute which mandated that the superintendent discharge any voluntary patient who had recovered or

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to (1) a probable cause hearing within seventy-two (72) hours from the date of their initial detention; (2) a post-commitment hearing within two (2) weeks from the date of their initial detention; (3) written notice, including the date, time, and place of the hearing, and a statement of the grounds for the proposed commitment; (4) counsel at all significant stages of the commitment process and if indigent the right to appointment of free counsel; (5) be present at all hearings concerning their proposed commitment; (6) a finding by clear and convincing proof that they are in need of institutionalization; (7) the rights to confront and to cross-examine witnesses against them, to offer evidence in their own behalf, and to offer testimony of witnesses.

Id. at 1053.

76 *See* note 68 *supra.*

77 412 F. Supp. 112 (M.D. Ga. 1976).

78 *Id.* at 118.

79 *Id.* at 137.

80 *Id.*

81 *Id.* at 138.

82 *Id.* at 133.

improved to the point that the superintendent found that hospitalization was no longer desirable. The application of this part of the statute to children was mere illusion. In reality, children were not released unless there was a parent ready, willing and able to accept the child back. A determination was also made by the court that the lack of such a ready, willing and able parent was not uncommon.[83] Consequently, many children were institutionalized who no longer required such treatment. This, the court felt, was a deprivation of liberty which violated the due process rights of minors.

In light of these findings and the Supreme Court's decision in *Gault* requiring due process for minors subject to juvenile delinquency proceedings, the court in *Parham* held the "voluntary" commitment statute unconstitutional as applied to minors. The court found that though the state purports to act as *parens patriae,* it has an inescapable obligation to guarantee due process.[84] The court continued to find that neither doctors nor parents could be relied upon to fully represent the child's interests; the former because psychiatry is an inexact science,[85] and doctors can make errors, and the latter because their motives do not coincide, in every case, with the child's best interests.[86]

VII. Conclusion

Thus, in weighing the interests of parents and children, two federal courts have recently come to the conclusion that, despite the traditional scope of parental authority, the only suitable protection from error in the civil commitment process is procedural due process, including an opportunity to be heard and present a defense. These safeguards must apply to children as well as to adults. *Bartley, Horacek* and *Parham* taken together constitute part of the developing body of law dealing with substituted consent which makes it abundantly clear that parents may not waive the constitutional rights of their children absent a showing that the child's interests are being fully and vigorously represented.[87]

The child has very important interests at stake: not only the loss of liberty, possibly until the age of majority, but also the stigma of having been institutionalized. While it is difficult for the parents to protect these interests, it is also undesirable to assume that the doctor who is hired by the parents or institution will fully represent the child's interests. Independent representation for the minor is essential to promote accuracy in the commitment process.

The sum of the Supreme Court decisions in *Gault, Tinker, Danforth* and *Goss* indicate a recent emphasis by the Court on the importance of minors' constitutional rights. In light of these cases, when the Supreme Court decides a case like *Bartley* or *Parham,* the result should be an affirmation of children's right to due process.

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83 *Id.* at 135.
84 *Id.* at 138.
85 Rosenhan, *supra* note 62.
86 The court did not set out specific procedures which must be followed in order to comply with due process requirements. The court held only that some due process is necessary and ordered that, within 60 days, proceedings must commence in the juvenile courts for those children detained under the unconstitutional commitment statute.
87 *Accord,* New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973).