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James W. Ellis

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SOME OBSERVATIONS ON THE JUVENILE COMMITMENT CASES: RECONCEPTUALIZING WHAT THE CHILD HAS AT STAKE

*James W. Ellis**

My remarks will focus on the constitutional issues surrounding the treatment and habilitation of children with mental disabilities. I believe that we need to rethink the premises on which we construct our analysis of these problems, and it will surprise few in this audience that I conclude the Supreme Court of the United States did not get it precisely right.

It is now nearly two decades since the Supreme Court announced its decisions in the juvenile commitment cases.[1] Rather than recounting the widespread criticism that the Court's approach has engendered, I will focus on the question of what liberty interest the child has at stake when residential placement is proposed.[2] The reconsideration that I will propose has implications for both federal and state constitutional litigation,[3] as well as for legislative proposals that might be offered to extend greater procedural protections to children. It will be my contention that both the Supreme Court and some of the advocates for children have misperceived the range of liberty interests that children have at stake in the mental disability

* Professor of Law, University of New Mexico, School of Law.

1. *See* Secretary of Pub. Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979); Parham v. J.R., 442 U.S. 584 (1979).

2. For a much earlier discussion of these issues, see Lee E. Teitelbaum & James W. Ellis, *The Liberty Interest of Children: Due Process Rights and Their Application*, 12 FAMILY L.Q. 153 (1978). For those seeking even more archaic sources and views, see James W. Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CAL. L. REV. 840 (1974) (cited in *Parham*, 442 U.S. at 611).

3. *See generally* Michael L. Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?*, 20 LOY. L.A. L. REV. 1249 (1987) (examining the expanding role of state constitutional provisions as a specific source of rights for the mentally disabled as well as a parallel source of rights for the disabled).

system.

I. *PARHAM'S* CONCEPTUALIZATION OF A CHILD'S LIBERTY

The Supreme Court's decision in *Parham v. J.R.* was one of the first to employ the balancing methodology for procedural due process which the Court had announced a few terms earlier.[4] That formula, first enunciated in *Mathews v. Eldridge*,[5] calls for weighing the individual's interest in the litigation against the state's interest in depriving the individual of the requested procedural protection.[6] This balancing is to be done in the likelihood of erroneous deprivation of the procedure and the probability that the requested procedure would reduce that risk substantially.[7] While *Parham* illustrates many other features of the *Mathews* approach, I will focus exclusively on how to ascertain when children have been erroneously deprived of their liberty.

Chief Justice Burger's opinion for the Court in *Parham* begins by acknowledging that children do, in fact, have a liberty interest in avoiding erroneous confinement in a mental hospital, and that they are not barred from recognition of such an interest by the fact of their minority.[8] "It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined *unnecessarily* for medical treatment . . . ."[9] The problem, as I see it, is in determining what kinds of confinement may be "unnecessary."

The Court makes clear what it has in mind as an "erroneous" commitment in the course of its discussion of whether a hearing would reduce the risk of such errors: "It is unlikely, if not inconceivable, that a decision to abandon *an emotionally normal, healthy child* and thrust him into an institution will be a discrete act leaving no trail of circumstances."[10] In other words, for an admission decision to be an "error," it would have to be shown that the system had somehow gone horribly astray and had confined Beaver Cleaver in Central State Hospital in Milledgeville. Even if this horrific scenario did somehow come to pass, however, we can be assured that Ward and

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4. *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (listing factors to be considered when reviewing for procedural due process).
5. 424 U.S. 319 (1976).
6. *See id.* at 335.
7. *See id.*
8. *See Parham*, 442 U.S. at 600.
9. *Id.* (emphasis added).
10. *Id.* at 611 (emphasis added).

June—if not Lumpy and Eddie Haskell—would blow the whistle. The "concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected."[11]

Few would dispute Chief Justice Burger's conclusion that the commitment of a child who lacks any psychopathology would constitute an error. The problem is that it does not encompass the entire range of errors in the context of the commitment of children. While the commitment of a child without any mental problems or impairment is certainly erroneous, so is the commitment of children who *do* have mental problems but who do *not* require institutionalization for their treatment. The record in the *Parham* case itself is replete with examples of children with mental or emotional problems whom the state's mental health professionals concluded could be treated in settings less drastic than the state hospital at Milledgeville. Given the severe consequences of institutionalization on the life of a child, avoidance of unnecessary harms would seem to be an appropriate function of individualized due process review. This is particularly true where the duration of the confinement is extensive.[12]

The scope of the universe of "errors" is crucial to the due process issue in *Parham*. If the only errors involve cases in which the system has mistakenly institutionalized a child who does not have mental health problems, it becomes easier to agree with the Court that minimal procedures may be adequate. However, if we recognize that it is also a substantial deprivation of liberty to confine a child whose mental health problems do not require institutionalization, then the due process calculus is altered.

The individual interest of a mentally disabled child whose condition can be addressed in a noninstitutional setting is substantial. Although it might appear, at first blush, that such a child has a smaller stake than the child with no mental health problems at all, this may not be true. While the nonpathological child would certainly be frightened by the experience of being confined in a mental ward, we could hope that this child's natural mental equilibrium would have some success in putting the experience into some kind of context—

11. *Id.* at 619 (quoting Addington v. Texas, 441 U.S. 418, 428-29 (1979)).

12. The Court noted that the "patients who were at Central State in December 1975 had been there, on the average, 456 days." *Id.* at 595. The average stay at three other Georgia institutions ranged from 71 days to 127 days. *See id.* at 594. The Court exhibited remarkable equanimity toward this dramatic difference, observing only that there was "no explanation in the record for this large variation from the average length of hospitalization at the other institutions." *Id.*

particularly if, as the Court speculates, such a hospitalization is of very short duration. By contrast, the child with mental health problems is likely to be confined for much longer because the inappropriateness of his hospitalization would be less transparent. During that time, the child would be more likely to develop the manifestations and symptoms of the more disturbed patients in the facility, if not the actual mental health problems themselves. Such a child would also be particularly likely to come to identify himself or herself as seriously mentally ill. Such self-stigmatization can have serious consequences that extend beyond childhood.

The next inquiry under the *Mathews* test would be the probability that the inappropriateness of the child's confinement will go undetected in the admissions process.[13] Certainly, the risk here is substantially higher than with the problem-free child about whom the Court hypothesizes. Moreover, what is the likelihood that more formal procedures would prevent such erroneous commitments? Access to counsel experienced in the mental disability field—such as the lawyers who work for the Protection and Advocacy agencies in all fifty states—would surely be of great assistance in identifying the inappropriateness of the proposed commitment and in identifying alternatives for treatment in a noninstitutional setting. Without such assistance, however, a child with mental difficulties would find it impossible to review the records and documents in the case, confront the weaknesses in the proposed commitment, and explore alternatives. Chief Justice Burger's disdain for the assistance that such lawyers could provide is even more at odds with reality than his naive assumption that the mental health system, left to its own devices, will seldom if ever confine the wrong children.

The state's supposed interest in avoiding procedural protection against the confinement of mentally disabled children who do not require institutionalization is illusory. Confinement to an institution involves much greater financial expenditure than treatment in the child's community, and thus the state has a fiscal interest in *preventing* treatment in the more confining and more expensive settings. This is certainly part of the reason that modern civil commitment statutes include among their criteria for an involuntary hospitalization order that the proposed placement be the least restrictive alter-

13. *See Mathews*, 424 U.S. at 335. The *Mathews* approach dictates consideration of the risk of an erroneous depreciation of the interest through the procedures used. *Id.*

native or consistent with the least drastic means principle.[14] It would certainly be penny wise and pound foolish for the state to insist on saving the modest cost of a hearing for a child, but then to foot the bill for the tens of thousands of dollars that the child's unnecessary institutionalization would cost.

The problem of unnecessary restriction is not unique to the area of juvenile commitment. Nonetheless, there are few legal settings in which the consequences are more likely to be profoundly damaging. For more than twenty years, lawyers in our field have been asserting that the least drastic means principle is central to the meaning of substantive due process. This contention has become part of the controversy over the correct understanding of substantive due process. It seems to me that if we take a more realistic and hard-headed approach to what constitutes an "error" in the commitment process for children, we will have the means to address this serious problem as a matter of procedural protections under *Mathews*.

II. THE CHILD ADVOCATES' CONCEPTUALIZATION OF A CHILD'S LIBERTY

Just as the Supreme Court evidenced a rather myopic perspective on how a child's liberty interest should be understood, so too the advocates for children sometimes take too short-sighted a view of how that interest should be protected.

The problem is the focus on the age of the children. In formulating arguments that minors are entitled to procedural protections against inappropriate commitments, much of the debate has centered around the claimed right of children to make their own choices, or at least to participate in the decision making. The key feature of these arguments is promoting the minor's autonomy in shaping the choice about accepting or rejecting residential placement. Thus the right to a hearing becomes quite literally the right to be heard.

This is a perfectly reasonable argument. Teenagers who are said to have mental health or emotional problems have a legitimate interest in having their views be part of the process in which treatment decisions are made. Particularly when institutionalization is one of the possibilities, that right to be heard certainly becomes compelling. For such a decision to be made without the participation of the child is certainly unacceptable.

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14. *See, e.g.*, N.M. STAT. ANN. § 32A-6-13(I)(4)(Michie 1997); N.M. STAT. ANN. § 43-1-3(D) (Michie 1993 Repl.).

Advocates for giving these teenagers the right to be heard have sought to analogize to arguments they have made with somewhat greater success on behalf of teenagers seeking to participate in decisions about terminating their pregnancies.[15] Such an analogy was part of the argument on behalf of the minors in *Parham* itself, and the Court's rejection of this line of analysis was singularly unpersuasive.[16] In each instance, the claimed right of participation by minors who are sufficiently mature to understand the issue and to articulate a preference is compelling. A number of courts and a few legislatures have followed this line of reasoning by permitting more mature teenagers—generally defined by attaining the age of twelve or fourteen—to be heard regarding their proposed placement in a mental facility.[17]

The problem with this approach lies not in its recognition of the

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15. Professor Costello makes a particularly articulate case for this analogy in this Symposium. *See* Jan C. Costello, *Making Kids Take Their Medicine: The Privacy and Due Process Rights of de Facto Competent Minors*, 31 LOY. L.A. L. REV. 907 (1998).

16. Chief Justice Burger's opinion for the Court found the juvenile abortion cases inapposite:

> [*Planned Parenthood*] involved an absolute parental veto over the child's ability to obtain an abortion. Parents in Georgia in no sense have an absolute right to commit their children to state mental hospitals; the statute requires the superintendent of each regional hospital to exercise independent judgment as to the child's need for confinement.

442 U.S. 584, 604 (1983).

This line of reasoning, which was apparently sufficient to persuade Justice Blackmun that the cases were distinguishable, mischaracterizes the relationship between the cases. The key factor is not the scope of the power that the state granted to the parents; it is whether there is any constitutionally protected role for the minor when the state and the parents have aligned themselves together in opposition to what may be the child's best interest in a crucial decision about one's life.

In the abortion context, the Court has protected such minors both when they are competent to make their own decisions, by protecting their right to decide, and when they are not competent, by vesting the power to decide in a court charged to decide the issue on the girl's best interest, rather than letting it revert to the parents. *See* Bellotti v. Baird, 443 U.S. 622 (1979)(plurality opinion); Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983).

It should be noted that the argument for minors in the commitment context is more modest than the rights recognized in the abortion cases. The claim in mental health cases is merely that children should be able to participate in a hearing before a truly neutral decision maker; the abortion cases find that a competent teenager can simply make her own choices, with the state's power limited to requiring that a parent be informed. *See* Hodgson v. Minnesota, 497 U.S. 417 (1990).

17. *See, e.g., In re* Roger S., 19 Cal. 3d 921, 927, 569 P.2d 1286, 1289, 141 Cal. Rptr. 298, 301 (1977) (stating that "a minor of 14 years or more possesses rights which may not be waived by the parent or guardian").

due process rights of articulate teenagers in the mental health system, but rather in its failure to address the liberty interests of children who cannot articulate their own preferences. This is of particular concern for younger children in the mental health system and for all children in the mental retardation system.

If our conceptualization of commitment hearings for minors is based upon their claim to autonomy in decision making, it is difficult to make a persuasive case for hearings on the proposed institutionalization of an infant, or perhaps for any pre-adolescent. Similarly, if a child's mental retardation is sufficiently disabling, holding a hearing on the articulated preferences of the minor may appear to be a pointless exercise. This approach to children's right to a hearing has resulted in a system that leaves such younger and more disabled children without procedural protections. In those states that have provided hearings for minors, the hearings are generally reserved for children in the mental health—as compared to mental retardation—system, and are usually limited to older teenagers.[18]

I view this as a problematic result, not because the older teenagers have no interest in receiving such a hearing, but because the younger children and children with mental retardation have a particularly pressing need for hearings. The interest in this latter category of children in receiving a hearing is not in vindicating their autonomous choices, nor is its focus the importance of the dignitary interest in "being heard" with regard to their preferences.[19] Rather, the importance of hearings for these children stems from the particularly damaging consequences of unnecessary institutionalization. The harm that any child may experience from an inappropriate residential placement may be even greater for younger children and for those with mental retardation. One reason for this is that their younger age or greater handicap may make them more vulnerable to the potential perils of institutionalization. In addition, the likelihood that the mistake will be corrected in a reasonable period of time is reduced if the child has limited ability to communicate with those around him. Moreover, some of these younger and less articulate children may be particularly likely to come from families that will be reluctant to reintegrate them into the family after a prolonged period of institution-

18. *But see* N.M. STAT. ANN. §§ 32A-6-12 to -13 (Michie 1997) (voluntary and involuntary commitment, respectively).

19. *Cf.* People v. Ramirez, 25 Cal. 3d 260, 599 P.2d 622, 158 Cal. Rptr. 316 (1979) (recognizing a state constitutional interest in being heard before a liberty deprivation).

alization. The long-term, and even lifelong damage from incorrect decisions to hospitalize these children may be particularly acute because children are particularly prone to both stigmatization by others and to self-labeling and self-stigmatization, especially if their formative years are spent in the milieu of an institutional culture.

Viewed from the utilitarian perspective that the *Mathews* inquiry is supposed to reflect, these children have a particularly high interest in avoiding inappropriate residential placement and an unusually high risk of such wrongful confinement occurring if there is no procedural protection in place.

The *Mathews* test also inquires about the likelihood that hearings would reduce the risk of error,[20] and one may ask how hearings would serve this function if the focus of the procedure is not on testing the appropriateness of the child's preferences. In cases involving younger children and minors with mental retardation, the focus of the hearing would be on putting the state to its proof and testing the adequacy of its assertion that the child needs to be placed in an institution. Central to the effective operation of such a procedural structure would be the role of experienced counsel in evaluating and challenging weaknesses in the state's claims and in helping to explore noninstitutional alternatives. Modern mental health lawyers have developed these skills to a far greater extent than was true at the time of the *Parham* litigation in the 1970s. We need to adapt our juvenile commitment statutes to reflect the availability of such assistance and our more complete understanding of the risks of institutionalization for these particularly vulnerable children.

20. *See Mathews*, 424 U.S. at 335 (requiring consideration of "the probable value, if any, of additional or substitute procedural safeguards.")