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Constitutional Collision Course: Family Autonomy and the Rights of Minors in Voluntary Commitment Proceedings

Theresa Gallion

operator duty to encompass an obligation to engage in enhanced recovery could result in an impractical requirement unsuited to the times, thereby hindering national efforts to foster exploration and development in various areas.[64] "It would seem, when all factors are considered together, that implied covenants no longer embody a correct approach to the problem of oil and gas leases."[65] Perhaps the courts should reexamine the entire concept of the prudent operator duty before extending it further.

Cynthia M. Frazier

CONSTITUTIONAL COLLISION COURSE: FAMILY AUTONOMY AND THE RIGHTS OF MINORS IN VOLUNTARY COMMITMENT PROCEEDINGS

Appellees, teenage boys[1] under the age of fourteen, each of whom had been institutionalized in Georgia mental hospitals for at least five years, alleged in a class action that Georgia's provisions for voluntary[2] commitment by parent or guardian constituted a deprivation of the liberty of all persons under the age of eighteen held for observation and diagnosis or detained for care and treatment at any facility within the state.[3] The District Court for the

64. Martin, *supra* note 6, at 208-09.

65. Gibbens, *supra* note 8, at 341-42, *quoting* Kyle, *Conservation of Oil and Gas, Kansas 1937-1948*, in CONSERVATION OF OIL AND GAS 149 (1949).

1. At the time the action was brought in the district court, J.R. was thirteen years old and J.L. was twelve. J.L. v. Parham, 412 F. Supp. 112, 136-39 (M.D. Ga. 1976). Pending review by the Supreme Court, J.L. died; notwithstanding his death, the Court considered his claim because it formed the basis of the district court's decision. Parham v. J.R., 99 S. Ct. 2493, 2496 n.1 (1979).

2. Although the admission procedures whereby a minor patient is admitted by his parents are considered to be voluntary, in fact the children are, with few exceptions, unable to secure their own release. Voluntarily committed patients often enter the hospital under pressure of involuntary confinement and may be held there against their will for the statutory period, during which time they may be converted to involuntary status. Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CAL. L. REV. 840, 846 (1974). *See also* T. SZASZ, LAW, LIBERTY AND PSYCHIATRY 40 & 83 (1963).

3. The class action was brought under 42 U.S.C. § 1983 (1976) which provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person under the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

Middle District of Georgia overturned the entire state statutory scheme[4] providing for civil commitment of minors on the twin bases of substantive and procedural inadequacies.[5] Upon review the Supreme Court acknowledged that the Georgia provisions presented the potential for erroneous or arbitrary institutionalization, but *held* that the fourteenth amendment's due process clause does not require that minors in commitment proceedings be afforded the opportunity to present their cases in adversary hearings. *Parham v. J.R.*, 99 S. Ct. 2493 (1979).

In recent years American courts have recognized a host of claims asserting the rights of minors.[6] To many observers[7] this expansion of juvenile rights has been an affirmation of the United

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shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

4. GA. CODE ANN. §§ 88.503.1 to .3 (1969). Section 88.503.1 provides:

Authority to receive voluntary patients:

(a) The superintendent of any facility may receive for observation and diagnosis any individual 18 years of age, or older, making application therefor, any individual under 18 years of age for whom such application is made by his parent or guardian and any person legally adjudged to be incompetent for whom such application is made by his guardian. If found to show evidence of mental illness and to be suitable for treatment, such person may be given care and treatment at such facility and such person may be detained by such facility for such period and under such conditions as may be authorized by law.

(b) The superintendent of any evaluating facility may receive for observation and diagnosis any individual 14 years of age or older who makes application therefor. If such individual is under 18 years of age, his parent or guardian may apply for his discharge and the superintendent shall release the patient within five days of such application for discharge.

5. J.L. v. Parham, 412 F. Supp. 112, 136-38 (M.D. Ga. 1976).

6. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651 (1977) (corporal punishment of school children implicates constitutionally protected liberty interest); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (rights of minors to obtain abortion without parental consent); Breed v. Jones, 421 U.S. 519 (1975) (double jeopardy clause prohibits prosecution of juveniles as adults after finding of guilt in juvenile court); Goss v. Lopez, 419 U.S. 565 (1975) (minors have protected property interests); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (first amendment entitles school children to wear black armbands to school as protest to involvement in Vietnam War); *In re* Gault, 387 U.S. 1 (1967) (minors facing criminal prosecution entitled to full procedural protection); Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated on other grounds*, 431 U.S. 119 (1977), *reaffirmed in further proceedings sub nom.* Institutionalized Juveniles v. Secretary of Pub. Welfare, 459 F. Supp. 30 (E.D. Pa. 1978), *rev'd*, 99 S. Ct. 2523 (1979) (juveniles in civil commitment proceedings entitled to procedural safeguards commonly associated with criminal proceedings).

7. *See, e.g.*, Hoffman, *The "Due Process" Rights of Minors in Mental Hospitals*, 13 U. S.F. L. REV. 63, 69 (1978); Slovenko, *Criminal Justice Procedures in Civil Commitment*, 24 WAYNE L. REV. 1, 24 (1977); Comment, *Parents, Children, and the Institutionalization Process—A Constitutional Analysis*, 83 DICK. L. REV. 261, 279 (1979).

States Supreme Court's 1967 ruling in the case of *In re Gault*,[8] which held that juveniles are entitled to full procedural protection when criminal proceedings against them might result in an order of delinquency and commitment to a state mental institution.[9] Perhaps of equal importance to any analysis of the constitutionally protected rights of minors is what the Court did *not* decide in *Gault*. Because it was not at issue, that Court did not consider the potential conflict of interests between parent and child or the concomitant necessity of erecting procedural barriers against the ill effects of parental discretion and decisionmaking.[10] Despite this limitation on the scope of the holding, *Gault* did firmly establish for the first time that children are entitled to certain constitutional protections.

Before *Gault* the progress of children's civil rights was largely an outgrowth of the law's recognition of family autonomy and parental authority. Beginning with *Meyer v. Nebraska*,[11] the Supreme Court found the due process clause to include the rights "to establish a home and bring up children."[12] Two years later in *Pierce v. Society of Sisters*,[13] the Court relied upon the doctrine of *Meyer* when considering a challenge to a state law requiring every parent or custodian of children under the age of sixteen to send their children to state-operated schools.[14] In sustaining the challenge, it noted that primary responsibility to raise children does not lie with the state; rather, the Constitution recognizes that parents have supreme authority in that realm and that they are to be free from unreasonable state interference.[15]

After *Gault* defined certain limited rights of juvenile constituents of the family, the Supreme Court continued to develop the

8. 387 U.S. 1 (1967). The *Gault* Court was concerned specifically with proceedings which might result in incarceration of a minor child accused of crime. The procedural safeguards provided there were those already required in criminal proceedings for adults. There is some concern that these procedures are inapplicable to civil commitment proceedings inasmuch as the certainty typical of criminal proceedings is absent in psychiatric diagnosis. *See* Addington v. Texas, 441 U.S. 418 (1979).

9. 387 U.S. at 27-28.

10. In *Gault* the Court considered the individual procedural rights to the child to be for the benefit of the parents as representatives of the child, as well as for the child.

11. 262 U.S. 390 (1923). In *Meyer* the Court addressed a state regulation which forbade teaching any modern language in elementary schools. Stressing the authority of parents over children and the propriety of leaving educational decisions to them, the Supreme Court found the statute violative of the due process clause.

12. *Id.* at 399.

13. 268 U.S. 510 (1925).

14. *Id.* at 534-35.

15. *Id.*

notion of family autonomy,[16] particularly in cases in which the "parent[s'] claim to authority in [their] own household and in the rearing of [their] children"[17] had been set against "the interests of society to protect the welfare of children and the state's assertion of authority to that end."[18] In *Wisconsin v. Yoder*[19] the Court affirmed the authority of parents to make critical religious and educational determinations for their children. Amish parents sought freedom to secure alternative forms of education for their children of high school age because the values imparted in state-supported public schools were in variance with Amish values and the Amish way of life. Relying upon *Meyer* and *Pierce*, the Court acknowledged the overriding importance of the right of parents to provide "equivalent education"[20] in a privately operated system.

More recently in *Moore v. City of East Cleveland*,[21] the Court took the occasion to sum up the progress of its own protection of family rights and the balance of interests to be established in considering challenges by the state to parental authority. Members of a non-nuclear family questioned the validity of a city ordinance which prohibited their maintenance of a common household. Citing the ancient right of any association of family members to live together and the important role of the family in Western tradition, the *Moore* Court concluded that the state's authority to dictate the result of a decision which rests with family members was severely limited.[22] Thus the Cleveland regulation was stricken as violative of the due process clause.

The Supreme Court has tempered its protection of family rights with recognition of the authority of governments to intercede between family and child for the protection of the child. This protective attitude is evidenced by *Prince v. Massachusetts*[23] and *Ginsberg v. New York*,[24] both indicating that, while the family interest in rearing children is strong, it is to be balanced against general state police powers. In *Prince* the guardian of a minor child was convicted of the violation of a state child labor law forbidding minors to sell religious or other literature. Both the minor and her aunt were prac-

16. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Griswold v. Connecticut, 381 U.S. 479 (1965).

17. Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

18. *Id.*

19. 406 U.S. 205 (1972).

20. *Id.* at 213.

21. 431 U.S. 494 (1977).

22. *Id.* at 503.

23. 321 U.S. 158 (1944).

24. 390 U.S. 629 (1968).

ticing members of Jehovah's Witnesses. Rejecting a claim of religious liberty as a limitation on the power of the state, the *Prince* majority upheld the adult's criminal conviction and the state's authority to protect children from adult activities posing threats to public order.[25] At issue in *Ginsberg* was the validity of a New York law prohibiting the sale of obscene[26] literature to persons under the age of seventeen. The finding that the magazines in question could not be characterized as obscene for purposes of adult perusal or purchase provided the opportunity to expand upon the principle announced in *Prince* that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."[27] The *Ginsberg* Court placed no specific limitations on the power of the state to regulate conduct it reasonably finds harmful to the morals of children. Consequently, this case represents the Supreme Court's most expansive statement on state authority in matters previously thought to concern only the family.

Despite its rather broad statements in *Ginsberg*, the Court has shown increased willingness to expand the parameters of what might be termed a "family civil right," but has not taken similar steps to provide for instances in which the powerful institutional rights of the family compete with the less developed rights of its minor members.[28] Such cases may arise either when a *mature* child asserts his authority to make his own decisions irrespective of the wishes of his parents, or when a family is incompetent or disinclined to protect the interests of an *immature* minor member.

One of the earliest statements dealing with the possibility that the interests of parent and child might diverge or conflict was the dissenting opinion of Justice Douglas in *Yoder*.[29] He took issue with the majority's analysis of the matter as being within "the dispensation of parents alone."[30] Reflecting on the history of the Court's treatment of family matters, he noted that in the past the Court had analyzed similar conflicts between parents and the state with little

25. 321 U.S. at 168-70.

26. The characterization of the literature in question as "obscene" obviated the need to consider Ginsberg's first amendment rights. The finding of obscenity applied only to juveniles, the Court having ruled that the magazines were not obscene for adults. 390 U.S. at 634-35.

27. *Id.* at 638, *citing* Prince v. Massachusetts, 321 U.S. at 170.

28. Recognizing the potential for conflicting interests, the *Yoder* majority stated that its holding "in no way determines the proper resolution of possible competing interests of parents, children and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school." 406 U.S. at 231.

29. 406 U.S. at 241 (Douglas, J., dissenting).

30. *Id.*

regard for the interests or rights of children.[31] He nevertheless insisted that if a child is mature enough to articulate his own choices it would be a violation of his constitutional rights to proceed without canvassing those views.[32]

Recently, the Court faced situations in which mature children asserted their singular rights to make critical decisions relative to their future. In *Planned Parenthood v. Danforth*[33] and *Bellotti v. Baird*,[34] the Court settled those abortion-related conflicts in favor of the child by denying to parents "absolute power"[35] to overrule a decision to obtain an abortion made by a minor and her physician. Reasoning that veto power over that determination is not likely to enhance parental authority or control because the parents and child are already so fundamentally in conflict, the *Danforth* Court subordinated the parents' independent interest in preventing an abortion to the more weighty right of privacy of the *competent* minor mature enough to have become pregnant.[36]

Last term in *Baird*, the Court again considered the accommodation of interests in cases in which a minor daughter asserts a right to obtain an abortion against the wishes of her parents. The challenged state law required unmarried minors desiring abortions to secure the consent of one or both parents, or in the event of parental refusal, the ruling of a superior court judge.[37] Significantly, the majority opinion reviewed the principles established in *Gault*[38] and the now familiar statement that the Constitution does not protect only adults. The magnitude of children's rights and their equivalence to the rights of adults, however, required a more exhaustive analysis.

In identifying the peculiar vulnerability of children, their inability to make critical decisions in a mature and competent manner, and the importance of the parental role in child rearing[39] as reasons

31. *Id.* at 243.

32. *Id.*

33. 428 U.S. 52 (1976).

34. 99 S. Ct. 3035 (1979). *Baird* was decided only two weeks after the instant case.

35. Bellotti v. Baird, 99 S. Ct. at 3048; Planned Parenthood v. Danforth, 428 U.S. at 75.

36. 428 U.S. at 75.

37. MASS. GEN. LAWS ANN. ch. 112, § 12(P) (1974). This section provides that a daughter under the age of eighteen who has not married must first obtain the permission of one or both parents before securing an abortion. In the event parental consent is refused, the child may seek a hearing before a superior court judge. By the terms of the statute, a minor is not authorized to seek judicial intervention until such refusal is expressed by her parent(s).

38. See note 8, *supra*.

39. 99 S. Ct. at 3043.

why the constitutional rights of children may not be equated with those of adults, *Baird* established flexible guidelines for resolution of future intra-family disputes, whether abortion-related or not. In that case the characterization of the competent minors' rights as somewhat less comprehensive than those of similarly-situated adults did not mandate a holding inconsistent with the earlier decision in *Danforth*. Rather, the holding in *Baird* reaffirmed that parental consent may not operate as an absolute or arbitrary veto over a minor's decision to obtain an abortion, and required that in instances in which the state chooses to condition exercise of the minor's right on parental consent, it must also provide alternative procedures by which the minor has an opportunity to show that she has attained maturity sufficient to enable her to make that decision independent of the wishes of either her parents or the officers of the state.[40]

The apparent victories for children's rights in *Danforth* and *Baird* notwithstanding, on balance the Court's protection of family interests and rights has been consistent and continuous. It is generally well-accepted that certain rights associated with the family are sheltered by the due process clause. Equally well-accepted is that often these rights relate to child-bearing and rearing. Any encroachment upon the further development of the family civil right first recognized in *Meyer* and *Pierce* is tempered by the great emphasis that *Danforth* and *Baird* placed on the age and maturity[41] of the child requesting authority to obtain an abortion.[42]

A more troublesome point of departure from the balance of interests set forth above is the situation in which an *incompetent* and/or *immature* child asserts a right of similar scope. This situa-

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40. *Id.* at 3048.

41. The *Danforth* Court emphasized that its holding did not suggest that all minors, without regard to age or maturity, may give effective consent to terminate pregnancy. Although the recent ruling in *Baird* is an indication that these factors continue to be critical in abortion-related and other cases debating possible expansion of juvenile rights, that decision represents at least some authority for the proposition that *even incompetent* children desiring abortions may be able to thwart the wishes of their parents and the courts. The *Baird* Court stated in its conclusion that even though a minor has failed to convince the court that she is competent to make an independent decision, she nonetheless must be permitted to show that an abortion would be in her best interest. *Id.* at 3050.

42. Although the impact of *Roe v. Wade*, 410 U.S. 113 (1973), is not to be underestimated, the argument made in this note is that it is the unique combination of the pregnancy and minority factors which produced the results in *Danforth* and *Baird*. Support for this proposition is found in *Baird*, wherein the majority noted that the serious dilemma facing a pregnant woman is not mitigated by the fact of her minority. The Court added that "considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be *exceptionally burdensome* for a minor." 99 S. Ct. at 3048 (emphasis added).

tion, in which the accommodation of the rights and interests of parent, child, and state is marked by tensions of a dimension not presented in *Danforth* or *Baird*, provides the setting for the instant case.

Representatives of the class of institutionalized minors in *J.R.* challenged the validity of Georgia's voluntary commitment scheme which provided for admission upon request of parent or guardian and a finding by the superintendent of the facility that the child was in need of treatment.[43] At the time suit was filed, Georgia's Mental Health Director had published no guidelines establishing specific commitment procedures on a statewide basis.[44] Upon these facts, the district court enjoined further implementation of the state laws until such time as they were amended to provide for "at least the right after notice to be heard before an impartial tribunal."[45]

The *J.R.* Court defined the proper balance of interests as one which takes into account the child's interest in avoiding arbitrary confinement, the parents' interests in the welfare of the child and family autonomy, and the state's interest in maintaining procedures it has selected for commitment and treatment of voluntarily admitted patients.[46] The majority easily established that a child has a substantial liberty interest in escaping unnecessary or arbitrary confinement.[47] Furthermore, it recognized that there may be instances of "railroading" juveniles into mental institutions, thus mandating a check on parental discretion and decisionmaking.[48]

Appellees suggested, and the district court had held, that the instances in which parents could not be expected or trusted to act in a child's best interests were sufficiently numerous to create a legal presumption that unreviewed parental decisionmaking posed a serious threat to the liberty interests of the minor children.[49] To guard against the ill effects of discretionary parental abuse, the

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43. See note 4, *supra*.

44. 99 S. Ct. at 2498.

45. *Id.* at 2501, *citing* J.L. v. Parham, 412 F. Supp. at 137.

46. 99 S. Ct. at 2503.

47. *Id.*

48. *Id.* at 2501. The district court emphasized the testimony of one witness who stated that some in the community look upon mental institutions as "dumping grounds" for unwanted children. 412 F. Supp. at 138. Apparently that court relied upon this testimony in finding a presumption that parents cannot be trusted to act in the best interests of disturbed minor children. The Supreme Court summarily dismissed the witness's assertion of ill-motivation, noting that his statement did not refer to parents. Rather, the Court found, the witness opined that some child welfare agencies and personnel and juvenile court judges abused the availability of state-operated mental hospitals. 99 S. Ct. at 2501 n.8.

49. 99 S. Ct. at 2504.

district court required that a formal adversary hearing be held prior to commitment, thereby interposing counsel and the adversary process between parent and child.[50] The Supreme Court rejected this proposed elevation of parental abuse to the level of a legal presumption, stating that the "notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition."[51]

Essentially the Supreme Court found that the risks inherent in parental decisionmaking do not necessarily mandate the transfer of that power to an alternate agency (in this case, the state courts). Furthermore, the Court forcefully denied the existence of an adverse relation between parent and child as a matter of law.[52] It reiterated that the law's concept of that relation rests on a presumption of good will; historically, the law has recognized that "natural bonds of affection"[53] tie parent and child and lead parents to act in the best interests of their children. Despite appellants' argument to the contrary, the weight of history and tradition prevented the implementation of what the Court considered an "unnatural" presumption.

The Court then explored the adequacy of existing pre-admission standards. The need for a neutral fact-finding agency to ensure the satisfaction of these requirements focused initially on the role of psychiatric diagnosis and treatment. Although acknowledging the inadequacies of psychiatric diagnosis, the Court reaffirmed the belief that medical determinations are best made by medically-trained personnel.[54] The majority remained unpersuaded that due process requires a law-trained judicial or administrative officer to make all findings of fact in all instances, or that deciding physicians must conduct formal or quasi-formal hearings before the conclusion of com-

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50. 412 F. Supp. at 136-39.

51. 99 S. Ct. at 2504 (emphasis in original).

52. *Id.* Significant are the majority's citations to *Meyer*, *Pierce*, and *Yoder*. As was noted in the text at notes 11-20, *supra*, these cases represent the core of interests which mark the boundaries of what is here termed a "family civil right."

53. 99 S. Ct. at 2504.

54. *Id.* at 2507. For analyses of problems associated with medical diagnosis and treatment, *see generally* Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974); Hoffman, *supra* note 7. For a history of medical involvement in commitment proceedings, *see* Ellis, *supra* note 2, at 843-46. Ennis and Litwack examined the competency and reliability of psychiatric experts in civil commitment proceedings. After a thorough analysis, they concluded that, because of inadequacies peculiar to diagnostic methods, there is no evidence that psychiatric opinions and terminology aid the courts in making critical legal determinations in such proceedings. Ennis & Litwack, *supra*, at 699-720.

mitment proceedings against a minor.[55] Instead, they found that due process must be flexible[56] in responding to the needs of diversified individuals, and concluded that the requisite flexibility was decidedly absent from the formal adversary setting envisioned by the lower court.

This insistence on a "flexible" concept of due process led to the subsequent rejection of adversary intervention and judicial control as checks on arbitrary decisionmaking by parents. The *J.R.* Court recognized that neither state nor federal courts are equipped to deal adequately with such delicate decisions; additionally, it pointed out that the efforts of advocates representing the opposing interests of parent and child tend to pit family members against one another, thereby exacerbating already existing problems.[57]

Whether or not the courts are competent to hear such disputes, it seems certain that adversary presence in highly formalized proceedings, such as those proposed by the lower court, creates at least as many problems as it attempts to solve. Considering the role of counsel in juvenile and other commitment settings, commentators have urged that often (1) counsel are no better equipped to articulate the child's interests or suggest alternative methods of treatment than the child himself;[58] (2) counsel are confused about their role in the proceedings and suffer from feelings of divided loyalty which do not pose problems in criminal juvenile proceedings;[59] (3) counsel, recognizing their own inability to make and present medical

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55. Relative to the proper role of medical experts, the *J.R.* Court stated:

> The mode and procedure of medical diagnostic procedures is not the business of judges. What is best for a child is an individual medical decision that must be left to the judgment of physicians in each case. We do no more than emphasize that the decision should represent an independent judgment of what the child requires and that all sources of information that are traditionally relied on by physicians and behavioral specialists should be consulted.

99 S. Ct. at 2507.

56. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Grannis v. Ordean, 234 U.S. 385, 394 (1914). At the same time, due process has never been thought to require that the trier of fact in every case be a legally-trained technician. Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Since *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court has built upon this notion of "flexible" due process, thereby reducing the number of instances in which a full-blown evidentiary hearing is required by the Constitution.

57. 99 S. Ct. at 2508.

58. *E.g.*, Litwack, *The Role of Counsel in Civil Commitment Proceedings: Emerging Problems*, 62 CAL. L. REV. 816, 830-31 (1974).

59. *E.g.*, *id.* at 826-29. Litwack expressed concern over the tendency of counsel to view their function as that of "merely guarding the procedural rights of the patient," and their subsequent hesitation to become totally involved in individual cases. *Id.* at 831.

determinations and judgments, feel constrained to acquiesce in the findings of psychiatrists and other medically-trained personnel.[60]

Perhaps none of these problems presents an insurmountable barrier to the effective use of legally-trained spokesmen for children and/or incompetents. In fact, the *J.R.* Court carefully avoided language containing that implication and made no attempt to rule out the possibility of introducing modified procedural safeguards in commitment hearings. Seemingly, such a possibility inheres in the concept of "flexible" due process. A ruling to this effect, however, was not forthcoming, indicating the Court's hesitation to extend the boundaries of procedural due process. This uncertainty over the efficacy or wisdom of increased judicial and adversary participation in civil and administrative proceedings,[61] coupled with the *known* advantages and limitations of administrative procedures which place decisionmaking authority in the hands of technical and medical personnel, tilted the Court in favor of retaining the existing preadmission standards for voluntarily committed juveniles.

Relying upon a preference for determinations by medical personnel, the rejection of a legal presumption of parental bad faith, and the shortcomings of adversary intervention and judicial control, the Supreme Court upheld both the Georgia provisions[62] and the Pennsylvania scheme for commitment of minors in a companion case, *Secretary of Public Welfare v. Institutionalized Juveniles*.[63] At first

60. *E.g., id.* at 830. *See also* Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424, 437 & 460-66 (1966); MacDougall, *Children and the Law: The Limited Effectiveness of Legal Process*, in THE CHILD AND THE COURTS 185 (1978).

61. *See, e.g.*, New Motor Vehicle Bd. of California v. Orrin Fox, Co., 439 U.S. 96 (1978) (California Auto Franchise Act which does not require hearings on merits in protests upheld); Smith v. OFFER, 431 U.S. 816 (1977) (New York's procedure for involuntary removal of foster children validated); Dixon v. Love, 431 U.S. 105 (1977) (Illinois driver licensing law which allows revocation or suspension without preliminary hearing upheld); Mathews v. Eldridge, 424 U.S. 319 (1976) (Social Security Administration regulation terminating benefits without evidentiary hearing upheld); Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886 (1961) (United States Navy regulation permitting summary expulsion of cook without hearing found not to be violative of due process).

62. See note 4, *supra*.

63. 99 S. Ct. 2523 (1979). Employing the standard set forth in *J.R.*, the Court in *Institutionalized Juveniles* examined the specifics of recently amended Pennsylvania statutes which grant the rights of adult patients to mentally disturbed or retarded children over the age of fourteen, but reserve to parents, guardians, or others acting *in loco parentis*, authority to commit minors under that age after an independent medical examination. A three-judge district court panel had ruled that the statutory scheme, as amended, afforded inadequate protection of the interests of children under the age of fourteen. Institutionalized Juveniles v. Secretary of Pub. Welfare, 459 F. Supp. 30 (E.D. Pa. 1978). In so holding the district court reaffirmed its 1975 order in

glance, these rulings represent a setback for the embryonic movement of children's rights[64] and a signal from the Court that expansion upon the principles espoused in *Danforth* is to be reserved for another day. Significantly, the *J.R.* Court made only a minor attempt to reconcile its holding with that of *Danforth* on the ground that in cases of voluntary commitment, parents "in no sense have an absolute right to commit their children to state mental hospitals."[65] The characterization of the issue in terms of "absolute rights" is not only misleading, but insufficient to answer the dissent's charge that because, in the instant case, a break in family autonomy had occurred prior to the proposed interposition of advocates and judge, any interest in preserving the integrity of the family structure was greatly reduced.[66]

It is submitted that a more informative definition of the rights at issue is that based on the maturity and competency of the children in question. Seen in this light, the more recent ruling in *Baird*[67] illuminates the Court's concern that exercise of constitutional rights vest only in those children capable of informed decisionmaking. As to this group, the *Baird* Court indicated that their rights, although not of the same magnitude as those of adults, continue to be recognized. With respect to the class of children

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Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), and concluded that before a child may be voluntarily committed to a state mental hospital or other state facility, he is entitled to a probable cause hearing within seventy-two hours of the initial detention; a post-commitment hearing within two weeks of the initial detention, the right to notice of the existence and nature of pending proceedings, the assistance of counsel at all significant stages of the commitment process, a finding of the need for hospitalization or other treatment by clear and convincing evidence, and the rights of confrontation, cross-examination, and presentation of evidence. *Id.* at 1053. Relying upon the rationale formulated in *J.R.*, the Supreme Court rejected what it considered to be "an overdose" of due process, and reversed and remanded to the lower court. 99 S. Ct. at 2528.

64. At least one commentator has traced the progress of juvenile rights to the civil rights movement of the early 1960's and other egalitarian trends in the second half of this century. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. REV. 605, 606-07.

65. 99 S. Ct. at 2505.

66. 99 S. Ct. at 2519 (Brennan, J., dissenting in part). In an opinion in which Justices Marshall and Stevens joined, Justice Brennan pointed out that the case is governed by the rule of *Danforth*. Certainly the right to freedom from unnecessary incarceration in a mental institution is at least as important a liberty interest as the right to obtain an abortion protected in *Danforth*. Furthermore, he noted that in the instant case, unlike *Danforth*, the child had been ousted from his family. Under such circumstances, he argued, children have an even greater need for an independent advocate. *Id.*

67. See text at notes 34-40, *supra*.

represented in *J.R.* and *Institutionalized Juveniles*, these recent decisions reveal an unwillingness to depart from more firmly established rights of family autonomy and a belief that, in cases of immature and/or incompetent children, their most fundamental right is protection from their own poor judgment.[68] Traditionally, the family has functioned as the guardian of its individual members, particularly those incapable of protecting their own interests. Relative to these children, the traditional family role continues to receive maximum constitutional protection and the support of a majority of the Court.

Theresa Gallion

Ambach v. Norwick: A FURTHER RETREAT FROM *Graham*

Two permanent-resident alien[1] school teachers[2] instituted an action to contest the constitutionality of a New York statute[3] pro-

68. For expansion on this proposition, *see* Hafen, *supra* note 64, at 651-52.

1. "The term 'alien' means any person not a citizen or national of the United States." Immigration and Nationality Act § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1976). An alien who has been granted the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws is said to have been "lawfully admitted for permanent residence." *See id.* §§ 101(a)(15), 101(a)(20) & 245, 8 U.S.C. §§ 1101(a)(15), 1101(a)(20) & 1255 (1976). For an outline of the regulations pertaining to adjusting one's status from that of a nonimmigrant to that of a person admitted for permanent residence, *see* E. RUBIN, IMMIGRATION PRACTICE A87-A92 (1978).

This note is limited primarily to a discussion of discrimination against resident aliens.

2. The original plaintiff, S. Norwick, was born in Scotland and is a British subject. T. Dachinger, who obtained leave to intervene as a plaintiff, was born in Finland and remains a citizen of that country. The plaintiffs' applications for teaching certificates were denied because of their failure to meet the citizenship requirements of section 3001(3) of the New York Education Law. Ambach v. Norwick, 99 S. Ct. 1589, 1591-92 (1979). For the text of section 3001(3), see note 3, *infra*.

3. N.Y. EDUC. LAW § 3001(3) (McKinney 1967). Section 3001(3) provides in pertinent part:

> No person shall be employed or authorized to teach in the public schools of the state who is: . . . (3) Not a citizen. The provisions of this subdivision shall not apply, however, to an alien teacher now or hereafter employed, provided such teacher shall make due application to become a citizen and thereafter within the time prescribed by law shall become a citizen.

This statute provides that temporary permits can be issued for persons who are ineligible for citizenship because of oversubscribed quotas. The Commissioner of Education can and has provided for temporary certificates for aliens who are not yet eligible for citizenship. 99 S. Ct. at 1591 n.2.