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The Liberty Interest of Children: Due Process Rights and Their Application

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Introduction

Few areas pose more difficult problems in the application of due process doctrine than does regulation of parent-child relationships. The Supreme Court has repeatedly declared over the last dozen years that the protections of the Fourteenth Amendment are not for adults alone,¹ and a number of decisions have recognized and upheld liberty interests of children against infringement by state agencies.² During the same period (and sometimes in the same cases) the Court has cautioned that states possess greater power to regulate the conduct of children than that which can be exercised against adults.³ These principles, while not logically opposed, require delicate accommodation, and the Court has been reluctant to

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address the liberty interests of children in a comprehensive fashion.\textsuperscript{4}

The Court's preference for case-by-case adjudication of claimed violations of children's rights seems to have been prudent. Identifying pieces of the puzzle rather than announcing a grand design of constitutional law at the outset gave the justices and the country time to consider the variety of issues that "children's rights" might involve while achieving practical and acceptable outcomes in those cases which have arisen. It does not seem, moreover, that the lack of a clear theoretical basis for determining the extent to which minors enjoy "adult" liberties has created major practical problems. While the results of some decisions have been controversial,\textsuperscript{5} even these have fallen within the limits of socially accepted principles holding, on the one hand, that children should not be abused or harmed by the state and, on the other, that young people are unable to exercise fully the panoply of economic, political, and social rights possessed by their elders.

The Court may also have been prudent in the cases it has chosen to decide. Virtually all have involved situations in which the interests involved are clearly presented. Some involve conflict between state and parents\textsuperscript{6} and others controversy between state and child;\textsuperscript{7} only the recent cases involving statutes creating a parental veto over abortion by minors clearly present a situation in which the interests of the family are divided and the state weighs in on one side.\textsuperscript{8} Increasingly, however, Fourteenth Amendment cases are reaching the courts which require a more comprehensive explanation of the child's liberty interests than is needed where the state acts against a unified family, represented (perhaps adventitiously)\textsuperscript{9} by a parent or

\textsuperscript{4} Decisions have routinely insisted that they do not attempt "to consider the impact of [constitutional guarantees] upon the totality of the relationship of the minor and the State..." Ginsberg v. New York, 390 U.S. 629, 636 (1968) (First Amendment); In re Gault, 387 U.S. 1, 13 (1967) (juvenile delinquency proceedings).

\textsuperscript{5} E.g., Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976); Wisconsin v. Yoder, 406 U.S. 205 (1972); In re Gault, 387 U.S. 1 (1967).


\textsuperscript{7} E.g., Ingraham v. Wright, 430 U.S. 651 (1977); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); In re Gault, 387 U.S. 1 (1967).


\textsuperscript{9} In a number of situations, either parent or child might be the subject of a proceeding, at the election of the prosecutor. Truancy laws, for example, commonly run against both parent and child. Thus, Yoder might have been a "children's right" case rather than one involving parental prerogative.
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a child. In these matters, the child's parents and the state are aligned in opposition to the child's assertion of some liberty claim; they may arise when the state initiates formal action at the request of the parents, authorizes by law an exercise of power by the parent, or provides services in aid of some parental exercise of authority which deprives the minor of what would be a protected liberty interest in an adult. This article will examine the constitutional issues presented by such conflicts and will explore their resolution in the context of one such case: "voluntary" commitment of a child by his parents to an institution for the mentally retarded without any hearing to determine the appropriateness of that action. 10 Exploration of this case will also illustrate some of the practical problems which can successfully be resolved only by careful attention to the theoretical basis for defining the liberty of children.

The first part describes briefly the generally applicable due process framework. Part II examines in some detail the doctrinal meaning of liberty for children, concluding that children are entitled to the same classes of rights as adults but are more subject to state regulation in the exercise of those rights. This part also specifies the grounds for that greater regulation and examines the extent to which it is justified. Part III addresses what is sometimes said to constitute a separate source of limitation on the child's freedom, the interests of parents in controlling their children, and considers the implications of such a doctrine for the nature of the child's liberty interest. The next part is directed to the question of what process is due. It examines the holding of Mathews v. Eldridge in the context

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Although the discussion here will focus on a parent's decision to commit his child, a variety of related situations present the same or similar issues. A few examples of actual and potential cases illustrate the complexity and delicacy of the legal and social questions involved:
of family dispute cases, and Part V attempts a detailed application of the Eldridge test to the specific case under consideration—"voluntary" commitment of allegedly mentally retarded children.

I. The Due Process Framework

Traditional due process analysis comprises three distinct inquiries: Has a constitutionally recognized liberty been infringed? If so, is that infringement attributable to state action? If both of these are true, what procedures are required by the state in so limiting the liberty interest involved? Establishment of each of the first two propositions is a necessary but not sufficient condition for invocation of a due process claim.

All of these inquiries present special and perhaps unique problems in the context of government intervention in parent-child disputes. We shall, however, confine this discussion to placements in state hospitals, on the assumption that they, at least, will satisfy the requirement that an infringement be supported "by State authority in the shape of laws, customs, or judicial or executive proceedings." When a child is placed in a publicly operated facility, state officials assume custody of and render treatment to the inmate; they are responsible for his confinement and for all aspects of his life during that confinement. In brief, the state's participation in the activity is precisely the same as when an adult is confined to a mental hospital or a child to an industrial school—both of which

1. A parent seeks to have his child sterilized. [This situation is suggested by Stump v. Sparkman, ___ U.S. ___, 98 S. Ct. 1099 (1978)].
2. A parent forces his daughter to have an abortion over the latter's objection. [This is, of course, the reverse of Danforth and has arisen. See, e.g., In re Smith, 16 Md. App. 209, 295 A.2d 238 (1972).]
3. A parent consents to the child's participation in hazardous medical experimentation which offers no therapeutic benefit to the child. [See, e.g., NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH. RESEARCH INVOLVING CHILDREN (1977).]
4. The parent seeks to have the child institutionalized as incorrigible because the child disobeys parental commands. [Such proceedings occupy approximately one-third of all juvenile court business nationally, whether in the form of delinquency proceedings or some separate jurisdictional category. See Gough, BEYOND CONTROL: STATUS OFFENDERS IN THE JUVENILE COURT 271 (1977).]
5. The parent is the complaining witness and seeks to have the child institutionalized as delinquent for, e.g., theft. [A significant number of juvenile delinquency cases arise this way. See, e.g., Lefstein, Stapleton, & Teitelbaum, IN SEARCH OF JUVENILE JUSTICE: GAULT AND ITS IMPLEMENTATION, 3 LAW AND SOC. REV. 491, 547-49 (1969).]

have been viewed, usually without discussion, as state action for due process purposes. The only distinction between these cases and "voluntary" commitment of children for state action purposes is that institutionalization in the former occurred pursuant to judicial action. However, it is plain that confinement, not the hearing, constitutes the deprivation of liberty and it is the state which has accepted responsibility for that confinement and all of its incidents. The hearing is only the process by which state assertion of control over an individual is legitimated; its absence can hardly change the nature of that control.

On the assumption that state action is present in the case of admission to public mental retardation institutions, the remaining issues involve determination of whether children have a liberty interest in this setting and evaluation of procedures for their commitment. It will appear, as is true of the state action doctrine, that formulations developed for adults do not provide a sure guide to analysis in cases involving children and that, to some extent, a special theory will be required.

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13. Were a child placed in a private hospital by her parents, the existence of state action would be more problematic. There would be neither a public order of confinement nor assumption of custody by a publicly operated facility. As a policy matter, a finding of no state action in the private hospital creates the conclusion that federal review may be had for poor families but not for those of parents with the means to place children in private facilities—a stark and troubling kind of discrimination.

Before it is decided that state action is lacking, however, attention should be directed to the special features of this practice. There has been a total deprivation of physical liberty sanctioned by state law. If it be said that no state action would exist in this situation if the person confined were an adult, the simple response is that no such deprivation would occur to an adult. Physical liberty, at least, inheres in the notion of citizenship (or even personality) and is protected against private intrusion by a virtually comprehensive body of municipal civil and criminal law. Thus, any confinement of an adult either is remediable by state law or, if undertaken by the state itself, is reviewable under the due process clause.

This scheme does not apply comfortably to children, who are routinely subject to privately undertaken action authorized by state law in some sense. While traditional categories of state action may be of some help, special analysis will ultimately be required. For example, many state laws authorize parental commitment of children. Thus, the child's liberty interest in physical freedom or personal security has been restricted by action "supported by State authority in the shape of laws..." Civil Rights Cases, 109 U.S. 3, 17 (1883).

This is by no means a purely semantic argument. The Court presumably concluded that the existence of a statute creating a parental veto over the abortion decision constituted state action in Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976); otherwise the due process claim could never have been reached. The same basis would apparently exist if the state law were of common law rather than statutory derivation since they are equal in effect and authority.

By the same token, one might well say that laws requiring parents to provide health care for their children and authorizing the use of private hospitals to that end is "encouragement"
II. The Doctrinal Meaning of Liberty for Children

A. The Child's Liberty and State Regulation

However widely it may once have been believed that "the basic right of a juvenile is not to liberty but to custody," the Supreme Court has at every opportunity declared a contrary view of the child's constitutional condition. The core meaning of liberty—freedom from physical confinement—was held applicable to children in *In re Gault* and recently reaffirmed in *Breed v. Jones.*

> [C]ommitment [of a minor to an industrial school] is a deprivation of liberty. It is incarceration against one's will. . . . Nor does the fact that the purpose of the commitment is rehabilitative and not punitive . . . change its nature. . . . Regardless of the purposes for which the incarceration is imposed, the fact remains that it is incarceration.

Indeed, it is by now fair to say that children have the same liberty interests as adults, but that the occasions for legitimate state restriction of the exercise of those liberties are more frequent. The Court has recognized liberty claims for minors in every domain where adults may invoke such an interest. In addition to an interest in physical freedom, a constitutional right of access to benefits created by state law was recognized in *Goss v. Lopez.* Interests created by federal constitutional command have also been held applicable to minors, without exception. First Amendment rights to political expression have been upheld for even very young children and an interest in access to the general flow of information has likewise been recognized on behalf of minors. Corporal punishment of commitments by parents in at least the degree that passage of Proposition 14 "encouraged" racial discrimination by individuals selling real property in California. *Reitman v. Mulkey,* 387 U.S. 369 (1967).

On the other hand, it is possible that these approaches prove too much as a general theory. Would it not follow that parental consent to a tonsilectomy or to enrollment in a private school will equally satisfy the state action requirement, and does that result seem consistent with the constitutional policies underlying that doctrine? It may, therefore, be necessary to develop a special theory for state action in connection with governmental regulation of parent-child relations, a task which must be discharged elsewhere.

15. 387 U.S. 1, 27 (1967).
17. *Id.* at 530 & n.12 (citations omitted).
19. *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503 (1969): "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 . . . ." *Id.* at 511. The petitioners in *Tinker* were aged 8, 11, 13, 15, and 16. *Id.* at 516.
by school officials affects the student's constitutionally recognized interest in freedom from "unjustified intrusions on personal security," and denial of choice with respect to abortion and childrearing has been held to invade an interest in making important decisions enjoyed at least by "mature" minors.

This is not to say, of course, that the constitutional protection available to children—the range of protected autonomy they may claim—coincides with that of adults. In a number of the cases just cited, the rights afforded minors differ in their substance or their implementation from those guaranteed adults. The Court has, moreover, repeatedly affirmed its observation in *Prince v. Massachusetts* that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." States may restrict religiously motivated activities of children where some danger exists, although adults probably could not be so controlled; they may require attendance at school by minors and may limit their access to "objectionable" but not "obscene" material which could not constitutionally be kept from adults.

Thus, while generally it can be said that the child has a liberty insignificant measure of First Amendment protection. . . and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Id.* at 212-13. *See also* Ginsberg v. New York, 390 U.S. 629 (1968).


It is worth noting that none of the foreseeable family dispute cases mentioned in note 10 involve claims of right which one can imagine the Court holding inapplicable to children. On the contrary, all are related to or directly governed by existing cases recognizing a liberty interest in children. The hypotheticals involving commitment to an industrial school or like facility for delinquency or incorrigibility obviously involve a deprivation of physical liberty of the kind held applicable to minors in *Breed* and *Gault*. Participation in medical experimentation surely involves an interest in personal security, recognized for adults in *Rochin* v. California, 342 U.S. 165 (1952), and for children in Ingraham v. Wright, 430 U.S. 651 (1977). Compelled sterilization and abortion also invoke interests in personal security and, as well, those of privacy and choice in important matters recognized in *Danforth*, *Bellotti* v. Baird, 428 U.S. 132 (1976), and *Carey* v. Population Services Int'l, 431 U.S. 678 (1977).


interest if one recognized for adults is involved in a given case, it must further be asked whether there is some reason for not according a child the full freedom an adult would enjoy. The Court has more than hinted at such an analysis in recent cases. In Planned Parenthood of Central Missouri v. Danforth, the Court addressed the constitutional rights of minors by first finding a liberty interest in the decision whether to seek an abortion, and then inquired into the existence of "any significant state interest in conditioning an abortion on the consent of a parent or person in loco parentis that is not present in the case of an adult."31

B. Special State Interests for Limiting the Freedom of Minors

Any theory of the constitutional liberty of minors must take account, therefore, of the differences between the rights of children within a category and those of adults. Three principal rationales for that differentiation—the vulnerability of minors to harm, their lack of mature judgment, and maintenance of family authority—have been stated or are inferable from judicial and other sources. A fourth ground, based on an independent parental interest not necessarily held by the state, may also play a part in defining the scope of the child's liberty.

1. VULNERABILITY TO HARM

One recurring theme is that children need greater protection than adults because of their vulnerability in the world. In Prince v. Massachusetts, the Court upheld a ban on the involvement of children in the street sale of religious literature, noting that the "streets afford dangers for them not affecting adults."32 A similar rationale supports governmental prohibitions on child labor,33 and doubtless may be used in conjunction with other arguments to sustain restrictions on the use of alcohol and tobacco by minors. Concern for the

33. The Fair Labor Standards Act, 29 U.S.C. § 201 et seq., undertakes to protect children from harm, even against their parents. Section 203(l), while generally excepting parental employment from the coverage of the Act, prohibits even such employment in mining, manufacturing, or any other occupation "found . . . to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being."
vulnerability of minors also appears in *Ginsberg v. New York*, justifying denial of access to some types of sexual material which would not be considered obscene if sold to adults. Ordinarily, of course, it is expected that custodial relationships—most frequently with parents—will supply the needed protection against this vulnerability; however, states may claim an independent interest in providing such protection when the custodian fails to do so.

2. LACK OF JUDGMENT

A related but distinguishable rationale for recognizing a greater state power to protect children lies in the conviction that immaturity may render them incapable of making adequate decisions about important matters in their own lives. Mr. Justice Stewart, concurring in *Ginsberg*, offered the following observations:

I think a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.

Mr. Justice Brennan's plurality opinion in *Carey v. Population Services International* sounded the same theme. The privacy interest implicated (access to contraceptives) was at base an "'interest in . . . making certain kinds of important decisions,

... and the law has generally regarded minors as having a lesser capability for making important decisions.'" Accordingly, he concluded, the state had greater latitude in dealing with the privacy interests of children than with those of adults.

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35. See Prince v. Massachusetts, 321 U.S. 158 (1944). See also *Ginsberg v. New York*, 390 U.S. 629, 640 (1968): "'While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them.'"
38. Id. at 693 n.15.
39. The concurring and dissenting opinion of Mr. Justice Stevens in *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 101, 102 (1976), provides another summary of the presumed effects of immaturity:

Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a
Focusing upon incapacity as a reason for distinguishing the liberty claims of children from those of adults will explain a variety of restrictions commonly imposed on minors and a considerable part of juvenile court business. Approximately one-third of all juvenile court cases involve allegations that the minor refuses to obey the reasonable commands of his parent, guardian, or custodian. These are in some sense decisional liberty cases, in which the child has asserted a choice or series of choices with respect to companions, hours, or other activities, and the parents have insisted upon some other choices in these activities. An adjudication of incorrigibility in such a situation reflects a decision that the parents are reasonable in limiting the child's choice in that respect and, correlative, that the child lacks capacity for independent choice in that domain.

As with the greater-vulnerability-to-harm theory, reliance is usually placed on families and guardians to inform the child's judgment and protect him against mistake, but not to the exclusion of direct state regulation in the event that reliance is misplaced. As the Court observed in Prince, "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." The same caution is reflected in juvenile court statutes which commonly limit the child's duty of obedience to law—

1. "[O]ur legislature enacted the current law, apparently concluding that one in the sunlight of youth, standing on the threshold of life, should not walk precipitously into the marriage chamber, but first should look with calm deliberation whether the step is both desirable and safe.

The statute in question . . . fulfills a two-fold function in protecting marriage as an estate and in placing a restraining hand upon the shoulder of impetuous youth.


41. See Katz & Teitelbaum, PINS Jurisdiction. The Vagueness Doctrine, and The Rule of Law, 53 Ind. L.J. 1, 16-23 (1977-78), also printed in L. Teitelbaum & A. Gough, supra note 40, at 201, 211-17.

42. 321 U.S. 158, 170 (1944).
ful and "reasonable" parental commands and in laws providing that children below a certain age may not marry even if their parents actively consent to that step.

3. MAINTENANCE OF FAMILIAL STRENGTH
Both of these rationales for limiting the ambit of liberty available to minors initially (but not exclusively) depend on parental guidance and control to protect the child against his own weaknesses. This allocation of responsibility serves goals beyond protection itself. Reliance on parents is an important strategy in conserving public resources, which are most needed and perhaps most effective in dealing with the relatively few but serious instances of gross deviance, involving violation of basic societal norms. To squander public force in ordinary tasks of socialization seems at least uneconomical; furthermore, official agencies may be less effective for that purpose than natural families. State laws expect parents to rear their children and impose an affirmative duty to do so, while placing a correlative obligation on children to obey lawful and reasonable parental commands. The result is a unique body of law in which the state does not act by direct commands concerning behavior, but rather lends support to commands issued by private parties (parents, guardians, or custodians) with responsibility for directing the growth of young persons. Ultimately, moreover, the state offers the use of public force to, or sanctions private use of force by, parents whose children are disobedient.

Although the Court has never passed on the constitutionality of incorrigibility laws, it has recognized a special state interest in preserving the family as an agency of socialization and source of judgment for children. To the extent that a given law will promote familial unity and acceptance of parental judgments, a rationale for limiting the minor's freedom exists which cannot apply to adults, whose socialization is presumed to be complete.

C. The Limitations of Limitations
It in no way denigrates the importance of these rationales to observe
that they are only factors to be considered in determining whether a
given state limitation on a child's liberty interest is adequately jus-
tified to satisfy substantive due process. The fact of minority does
not, of itself, always imply that the young person lacks a constitution-
ally recognized ambit of choice. The decision in Danforth ex-
pressly recognized that minors may be sufficiently mature to decide
whether to terminate a pregnancy,46 and In re Gault extended to
minors charged with delinquency the privilege of deciding whether
to assist the state by their own words. 47 Moreover, capacity may well
vary according to the kind of decision or activity involved. A twelve-
year-old apparently is entitled to political expression after Tinker48
and to refuse cooperation in juvenile delinquency proceedings after
Gault.49 The same child may, however, be subject to greater limita-
tions than an adult or older minor in his choice of reading mat-
er and probably with respect to obtaining an abortion.50

Nor does intervention in support of family discipline necessarily
insulate that intervention from due process concerns. At least in
cases involving fundamental rights, there must be some showing
that denial of the child's liberty will strengthen the family unit; a
bare allegation to that effect will not suffice. In Danforth, it was
strenuously argued that a parental veto over abortion was necessary
to maintain parental authority and familial strength—a proposition
rejected by the Court on the following basis:

It is difficult, however, to conclude that providing a parent with absolute
power to overrule a determination, made by the physician and his minor pa-
tient, to terminate the patient's pregnancy will serve to strengthen the family
unit. Neither is it likely that such veto power will enhance parental authority
or control where the minor and the non-consenting parent are so fundamen-
tally in conflict and the very existence of the pregnancy already has fractured
the family structure.52

46. Id.
48. See note 19 supra.
49. Gault set no age floor for the rights it announced, including the privilege against self-
    incrimination. Moreover, many states place no age floor on prosecution as a delinquent,
    making it entirely possible that a very young child would be in a position to assert his
    privilege.
50. "In assessing whether a minor has the requisite capacity for individual choice [in First
    Amendment areas] the age of the minor is a significant factor." Erznozniik v. City of
    Jacksonville, 422 U.S. 205, 214 n.11 (1975). See also Rowan v. Post Office Dep't, 397 U.S.
52. Id. at 75.
Thus, appeals to family integrity stand on the same basis as other rationales for burdening exercise of a fundamental right: the countervailing state interest must be established by more than an unsubstantiated assertion.\textsuperscript{53}

Ultimately, therefore, the liberty interests of children are the same in kind but not in breadth as those of adults. There exist special reasons for limiting the free choice of children, which may be accomplished directly by legislation (such as prohibition of employment) and common law rule (denying binding effect to contracts of minors) or indirectly, by requiring children generally to obey parental commands. These reasons do not, however, negate the existence of a constitutional liberty interest in a given area, and the Court has never held or suggested that to be the case. Rather, they constitute grounds upon which a state can justify action in derogation of rights which, absent such justification, would be protected constitutionally.

The existence of special reasons for limiting the scope of children's liberty may also affect the placement and weight of burdens in determining the constitutionality of a law. When fundamental rights are restricted, the state bears the burden of showing why the restriction is necessary to the accomplishment of some compelling governmental purpose.\textsuperscript{54} Placing the burden on the government and requiring compelling justification reflect a conviction that the right involved is one which ordinarily ought not be limited, just as requiring the state to justify resort to suspect classifications in equal protection cases presupposes that the classification is one which should not ordinarily be made. In view of the broader latitude for regulating children, limitations on their freedom are more likely to be reasonable even in areas such as speech or privacy and, therefore, the skepticism associated with "strict scrutiny" may be inappropriate.

This approach seems to have found a measure of support in the \textit{Danforth} and \textit{Carey} decisions. The plurality opinion in the latter observed—even while holding that no sufficient state interest for treating children differently from adults existed—that the test it

\textsuperscript{53} See \textit{Carey v. Population Services Int'l}, 431 U.S. 678 (1977). However, demonstration of a compelling state interest, as would be required for adults, may not be necessary. See text at notes 54-55 \textit{infra}.

employed (whether the restriction was justified by a state interest that did not apply to adults) was "less rigorous than the 'compelling state interest' test applied to restrictions on the privacy rights of adults." This does not mean, of course, that frivolous or factually unlikely justifications for restriction will do, nor is it yet clear how much less rigorous the special state interest test is than the strict scrutiny employed for adults. Certainly, however, minimal scrutiny is not involved, since the Court in both *Danforth* and *Carey* found the asserted special state interest inadequate to justify the invasion of privacy involved.

III. The Child's Liberty and Parental Interests

The foregoing discussion of the nature of the child's liberty has primarily concerned conflicts between the state and the child, with the exception of the *Danforth* and *Carey* decisions. While the role of parental authority in defining the child's liberty was considered, it was addressed as a product of state policy, by which the family serves (in effect) as an agency of governmental activity. In *Danforth*, for example, the majority held that an absolute parental veto was unconstitutional, in part because the state had no such veto power to delegate to the parents and viewed the claim of family authority principally as a matter of state interest.

Parental authority might, however, enter into the definition of a child's liberty in a quite different way. Practical experience tells us that parents control most aspects of their children's development, and the Supreme Court appears to have raised this activity to the status of a constitutional right in a number of cases. In *Pierce v. Society of Sisters*, the Court invalidated an Oregon statute prohibiting attendance at non-public schools in fulfillment of compulsory education requirements, holding that the restriction bore no reasonable relationship to a legitimate state purpose:

> [W]e think it entirely plain that the Act . . . unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

57. 268 U.S. 510 (1925).
58. *Id.* at 534-35.
The same theme reappeared in *Wisconsin v. Yoder,* striking down a law requiring education through age sixteen as applied to children of Amish parents who asserted that education past age fourteen interfered with their children's acceptance and maintenance of Amish religious precepts. The majority emphasized "the values of parental direction of the religious upbringing and education of their children in their early and formative years..." and observed that a state is not entitled to "save" a child from religious or cultural values preferred by the parents. Most directly, the Court found there to be a constitutional right of parents to assume the primary role in decisions concerning the rearing of children, a role "now established beyond debate as an enduring American tradition."

Both practical experience and these decisions have led some to conclude that all or essentially all of a child's life is within the constitutional power of parents to control. This result is said to be impelled by the treatment of children at common law and by the necessities of the child's condition; it is, in short, a natural product of the development of Anglo-American law. Such a view, however, entails serious theoretical consequences, and takes slight account of the factual circumstances presented by the decided cases and of the existing body of law circumscribing parental decision-making.

The theoretical consequences of recognizing an independent constitutional interest in the parent are profound. Ultimately, it means removal of the child from government by rule of law, in which the freedom of persons is recognized unless limited by general and uniform laws which serve some legitimate purpose. Instead, the child is placed in what amounts to a true status relationship. He will be subject to particularistic rules created and enforced by parents,

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60. *Id.* at 213-14.
61. *Id.* at 232.
62. *Id.* The same values have been expressed in other contexts by the Court. Parental and familial importance has been recognized in requiring notice prior to termination of parental rights. *Stanley v. Illinios,* 405 U.S. 645 (1972), and in invalidation of a statute narrowing the class of family members who may claim that status for purposes of living in a single dwelling unit. *Moore v. City of East Cleveland,* 431 U.S. 494 (1977). The opinion of the Court in *Moore* goes some distance in stressing the importance of the family unit as the primary agency for inculcating cultural and moral values. *Id.* at 503-504.
63. *E.g.* In re Guardianship of Faust, 239 Miss. 299, 305-07, 123 So. 2d 218, 220-21 (1960). For a detailed exposition of this approach, see Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Children to Their "Rights."
64. See *Katz & Teitelbaum,* supra note 41, at 4-6.
without any requirement that others be so treated or that the treatment serve some goal other than the will of the guardian. In short, recognition of a constitutionally based independent parental power over children creates a sphere of personal domination which, at least formally, resembles the relationship of the early Roman father over his children.\textsuperscript{65}

The corollary of this point would seem to be that, to the extent parents possess and exercise some independent right of control, the notion of a child's right in that respect must be negated.\textsuperscript{66} An independent parental interest therefore affects the definition and not merely the scope of the child's liberty interest by operating as an inherent aspect of that definition. This conclusion differs markedly from the situation in which state interests in protecting children (including preservation of parental authority) are involved, since the Court has uniformly viewed those interests only as factors affecting the adequacy of any restriction on an existing liberty claim rather than as an element negating such a claim.

That a regime of this kind could not generally be reconciled with the due process clause hardly requires stating. The Court has repeatedly invalidated laws permitting the domination of persons. It observed, in striking down a statute giving certain officials unlimited discretion to grant or deny occupational licenses, that "the very idea that one man may be compelled to hold his life, or the means of living, ... at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."\textsuperscript{67} The requirement that statutes be definite in their meaning reflects the same proposition. Rules which are unclear appear to and may in fact allow the freedom of citizens to depend on the subjective judgment of police officers, prosecutors, and judges, from whom uniformity and generality cannot be expected.\textsuperscript{68} Vague

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\textsuperscript{65} This was, of course, the archetypical status relationship, in which the liberty, marriage, and even the life of a Roman child were within the discretion of the pater familias. See H. MAINE, ANCIENT LAW 133 (1864).

\textsuperscript{66} If the parent has a constitutional right to decide, for example, what church a child attends or what he may read, it is hard to see how a child can also claim such an interest vis-à-vis his parents. The child either may or may not read the Family Law Quarterly; if the parents have a right to forbid his doing so, he cannot have a right to do so.

\textsuperscript{67} Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

\textsuperscript{68} See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972): "Those generally implicated by the imprecise terms of the ordinance—poor people, nonconformists, dissenters, idlers—may be required to comport themselves according to the lifestyle deemed
laws create the vices associated with personal domination as they blur the distinction between law-maker and law-enforcer and, in doing so, violate due process.

It would be remarkable indeed if the general condemnation of government by status were suspended when parents turned to law for control over their children's behavior. Suppose, for example, that a parent wished to commit a child to a reform school for disobedience to his or her commands. Could it be maintained, after Gault and Breed v. Jones, that no liberty interest of the child was affected because control over his behavior was vested in the parents? The minor respondent will, after all, be subjected to the same consequences that were described in Gault: "His world becomes 'a building with whitewashed walls, regimented routine and institutional hours. . . .'"69 If such treatment amounts to a deprivation of liberty at the instance of neighbors, it must be no less so when it occurs at the request of the parents.

Planned Parenthood of Central Missouri v. Danforth makes this point even more clearly. That case did involve a law purporting to support parental authority over children regarding abortions. The Court expressed no doubt about the existence of the child's liberty interest, nor did it suggest that contrary parental wishes diminished that interest.70 But surely, if parental interests negate a liberty interest in children, the statute ought to have been upheld, simply on the basis that it offended no constitutional liberty interest held by minors. Not only is such a result flatly inconsistent with Danforth, but it is also hard to reconcile with Tinker v. Des Moines Independent Community School District,71 where the Court sustained the contention that suspension from school for symbolic protest against the Viet Nam War invaded the students' freedom of speech. Although the record and opinion strongly suggest that the parents of

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70. While the possibility of an independent parental interest was mentioned, it was quickly dismissed: "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." 428 U.S. 52, 75 (1976). Nor was the nature of the independent interest specified.
the suspended children supported the protest,72 nothing in the Court's decision indicates that the result would have differed had some or all of the parents disapproved their children's actions.

The point is, of course, that the issues of parental control presented in Danforth and those involved in Meyer, Pierce, and Yoder are fundamentally different. The latter series involves no conflict between parent and child. As far as we know, both students enrolled in Oregon parochial schools and their parents preferred Catholic to public education and were equally aggrieved by the statute in Pierce. The majority in Yoder insisted, with considerable strength, that its decision was limited to the same factual situation and expressly reserved questions that would arise where the child wishes to attend school and his parents insist that he leave.73 These were cases in which parents and children sought to resist state imposition. The value protected by invalidating the legislation, by the same token, was not parental control vis-à-vis children but parental control vis-à-vis the state.74 The first decision in this line, Meyer v. Nebraska, makes this very clear. Although the statute involved (banning the teaching of a foreign language to children of compul-

72. Id. at 504.
74. There is, it is true, dictum in Yoder supporting the proposition that the child's liberty interests are qualified by the existence of an independent parental interest. The majority addressed the hypothetical case of conflict between parent and child regarding continued school attendance in the following way:

Our 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 despite their expressed desires to the contrary. Recognition of the claim of the State in such a proceeding would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions. It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here and those presented in Pierce v. Society of Sisters. . . . 406 U.S. 205 at 231-32 (1972). This dictum views the hypothetical conflict as identical with the issue actually presented—that is, one between state and parent. If that view is taken, then a true status relationship would indeed exist: the liberty interests of the child would have been negated by those of the parents. It is only in this way that the hypothetical issue described by the Court can be considered "comparable" to those presented in Pierce and in Yoder itself, where the interests of parents and children apparently coincided.

One may doubt, however, that the issue will ultimately be postured in this way, without consideration of, for example, the child's own claim to religious liberty in this setting, of the likelihood that requiring the child to leave school would as a practical matter lead to family harmony and acceptance of the parent's religious views, and of the extent to which pluralism is furthered by requiring a child to abide by precepts which he rejects. The majority's language is largely addressed to a strong dissent by Mr. Justice Douglas and reveals, rather than decides, the difficult issues presented by laws touching on the parent-child relationship.
sory school age) was in fact challenged by a school teacher convicted of instructing one Raymond Parpart in the German tongue, the Court plainly considered the state's true opponent to be the family of Raymond Parpart and the opposed value one of pluralism.\textsuperscript{75}

In such cases, there may be good reason to indulge a presumption that parents are better able than the state to determine what the child should do or believe.\textsuperscript{76} They are more familiar with the child's needs within the home and are prepared to teach other than orthodox doctrine.\textsuperscript{77} The child's agreement or acquiescence affords some evidence that their judgment is correct or at least tolerable. Nor should the desirability of parental action be judged mechanically by the application of majoritarian norms.\textsuperscript{78} Disruption of a unified family is more likely to be destructive than helpful, and should occur only on a convincing showing of good cause.\textsuperscript{79}

These propositions seem to be justified, moreover, even when parents discipline children in the home. Punishment in the family does not necessarily or even usually indicate family disunity; it is more frequently an integrating process by which the child and parent come to reaffirm their reciprocal relationship. While force or its threat may be used, sanctioning in the home rarely occurs entirely by these means; rather, it takes place in the context of a relationship within which the sanction has a broader meaning. Ultimately, the expected and probable result of such discipline is maintenance and not fracture of the family unit.

This is the family function which is presumptively entitled to

\textsuperscript{75} In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and learning to official guardians. Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.

Meyer v. Nebraska, 262 U.S. 390, 402 (1923). See also Wisconsin v. Yoder, 406 U.S. 205, 226 (1972), where the Court observed that, while Amish religion and culture were plainly divorced from mainstream American life, "[e]ven their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage."

\textsuperscript{76} See Bezanson, Toward Revision of Iowa's Juvenile Commitment Laws: Thoughts on the Limits of Effective Governmental Intervention, 63 IOWA L. REV. 561, 566 (1978); Burt, Developing Constitutional Rights Of. In, And For Children, 39 LAW & CONTEMP. PROB. 118, 127 (1975).


\textsuperscript{78} See sources cited in notes 76-78 supra.

\textsuperscript{79} Bezanson, supra note 76, at 566.
deference, perhaps as a constitutional matter and certainly in point of policy. A different situation is presented, however, when the family is genuinely disunited or when the parents take action which will have that effect. In these instances, the very resort to public force changes the nature of the enterprise, both practically and in principle. Whereas action in the home is typically a private event, unknown by other members of the community or even other family members not part of the immediate unit, public action is more widely known and lasting in effect. Because threat or use of force is a nearly universal occurrence in child-rearing and, moreover, a recurring circumstance in almost every family, little significance attaches to its use even when known, unless the force obviously exceeds common practice or is ineffective. But while a report that Johnny is "grounded" will likely produce an understanding or even sympathetic response from both peers and adult members of the community, a report that he has been detained at the police station or suspended from school will result in serious inferences about his character.  

Proceedings involving incorrigibility—the classic resort to public force in support of parental authority—illustrate the difference between action within the home and resort to governmental authority. These cases arise upon allegations that a child has refused to obey his or her parents; the court is employed as a means of supplying force the parents are unwilling or unable to bring to bear in the home. Although the Supreme Court has never addressed proceedings of this nature, it cannot seriously be doubted that a liberty interest is involved. Whether such matters under local procedure are labeled "delinquency" or occupy a separate jurisdictional category, the result from the child's perspective is much the same as that involved in the Gault case itself. The child will be subject to a finding of wrongdoing and may be committed to a reform school with delinquents or, in some jurisdictions, to a separate facility usually indistinguishable in design and program from institutions for delinquents.  

81. See L. Teitelbaum & A. Gough, supra note 40, Appendix, for the various legislative treatments of noncriminal misbehavior by children.
The parent's motives in an incorrigibility matter are obviously the same as those he would claim in disciplining the child within the home, and these motives ought not be impeached. Yet the child's position and entitlements are radically and appropriately altered when the parent goes to court. The latter cannot rely on a constitutional right to control his child as a means of avoiding constitutional scrutiny of the basis and procedures for imposing control when this avenue has been chosen.

Parental commitment of children to public institutions for the mentally retarded seems to stand on the same basis. The conditions which justify or even demand deference to parental choice are absent when removal from the home for an indefinite period is sought. Again, motives may be the best or not; their characterization is unimportant. In the case of commitment, as with incorrigibility (or delinquency) cases, the family has reached the conclusion that the child has a problem which cannot or can no longer be managed (treated) in the home. When that conclusion is reached, the same liberty interest ought to be involved, whatever the nature of the proceeding.

It might also be observed that commitment resembles incorrigibility proceedings far more closely than it does ordinary medical care, even where surgery or quarantine is involved. Both a tonsilectomy and treatment for smallpox are known to involve only temporary and partial disruption of the family. The child will return within a predictable, relied-upon period and the family relationship will largely continue during hospitalization. Placement as mentally ill or retarded constitutes, however, a general and indefinite (often permanent) disruption, in which the child's return may not be relied upon, expected, or even desired.

This is not to say that the child's liberty interest will be vindicated in all or even most commitment cases; virtually all incorrigibility cases, for example, result in an adjudication and assumption of wardship. Nor, for that matter, is it true that every claim of infringement of a right requires an elaborate procedure. It is only to say that when the state becomes significantly involved in limiting

the child's freedom—whether by initiating an incorrigibility case, denying access to some otherwise available product or service, or assuming responsibility for the care of a child—the existence of a constitutional interest in the child is not negated by reference to a parental claim of control.

IV. Determining What Process Is Due

Establishing that a substantive liberty interest has been affected by state action is a necessary precondition to determination of what process is due, but does not tell us what that process is. It is by now clear that a virtually infinite variety of processes can be erected, ranging from the very informal to the most complete. These procedures may be conducted before or after the liberty invasion has occurred, they may be conducted administratively or judicially, and may include different kinds of review at different stages of the process.

Whether any set of procedures is sufficient for a given kind of liberty restriction has always involved a complicated calculus, which received its most recent and comprehensive formulation in *Mathews v. Eldridge*. Under this decision, a court must consider the following categories:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Assuming that these standards govern the appropriateness of a given procedure—for example, judicial oversight of state-parent actions affecting a child's liberty interest—the courts would first look to the nature of the private interest involved. Determination of...

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85. See, e.g., Ingraham v. Wright, 430 U.S. 651 (1977) (consultation between teacher and principal prior to corporal punishment of students).
88. Compare, for example, procedures required for issuance of an arrest or search warrant with those required at trial for serious crime.
89. Compare, for example, procedures required for issuance of an arrest or search warrant with those required at trial for serious crime.
91. Id. at 335. It appears that this formulation, if not any given application, was adopted by all members of the Court.
this private interest is of paramount importance because the weight assigned it largely governs how accurate a procedure must be provided and how great a burden the government will be required to bear in providing that process.\textsuperscript{92} Determination of the private interest is, at the same time, far from simple; it involves more than mere characterization of the child’s interest as ‘‘liberty,’’ ‘‘privacy,’’ or even ‘‘freedom from physical restraint.’’ Rather, courts will examine the actual importance of that interest to the well-being, growth and development of the child, among other factors, and to the nature and extent of harm he might suffer in consequence of the action sought to be taken by the parent in cooperation with the state.\textsuperscript{93} In all likelihood, serious controversy would be required to justify imposition of significant procedural hurdles to adjustment of the parent-child relation. An interest which the court might view as \textit{de minimis}, such as the child’s preference in hair length, distaste for a particular school program, or even objection to moderate corporal punishment would prove insufficient to require great accuracy in process or heavy burdens on a governmental agency supporting the parent. But where the interest was an important one appropriate to the child’s situation, and where action depriving the child of that interest might result in serious harm, the court would be justified in characterizing the private interest as sufficiently significant to require serious judicial review.\textsuperscript{94}

The second element of the \textit{Eldridge} test addresses the risk of error associated with existing procedure and the extent to which that risk could be reduced by other procedures. The former question


It is, however, clear that reliance on gross categories will not do. In \textit{Eldridge} itself, the Court conceded that the claimant’s interest—‘‘the uninterrupted receipt of his source of income pending final administrative decision of his claim’’—was of the same kind as that involved in Goldberg v. Kelly, 397 U.S. 254 (1970), where the Court imposed a requirement of prior hearing before termination of welfare benefits. However, the majority in \textit{Eldridge} found that the claimant’s interest in continued receipt of disability payments was less important than that of the welfare recipient, a distinction affecting both the calculus and the result. 424 U.S. 319, 340-43.

\textsuperscript{94} For a more thorough analysis of the harm which might result from one form of state intervention in behalf of the parent, see Part V(A) \textit{infra}.
seems essentially an empirical one: to what extent does current practice produce error in factual determinations? The latter comprises, in addition to this factual component, the nature of the factual determination to be made. To the extent that the issues presented are susceptible of reasonably reliable written proof, for example, it may follow that requiring an opportunity for personal appearance will enhance reliability little, whereas the contrary would be true where the issues presented turned on the credibility or subjective condition of the claimant.95 The context in which the deprivation occurs may also affect the accuracy issue; when the action is taken by persons with direct knowledge of the facts occasioning the deprivation, the risk of error has been described as "typically insignificant."96 Finally, the existence of other remedies for an erroneous invasion of liberty bears on the risk of error. The Court observed, in connection with that risk in corporal punishment of students by teachers, that the latter "are unlikely to inflict corporal punishment unnecessarily or excessively when a possible consequence of doing so is the institution of civil or criminal proceedings against them."97

As with assessing the private interest factor, particularistic analysis is required with respect to the accuracy question. Even empirical determination of the error rate may be complicated or worse,98 and certainly the same is true of resort to the nature of the factual determination involved. Whether the resolution of an issue will be advanced by opportunity for personal participation depends not only on the general character of the issue (e.g., "scientific" or "claimant credibility") but on the extent of consensus among pro-

96. Ingraham v. Wright, 430 U.S. 651, 678 (1977). But see Mayberry v. Pennsylvania, 400 U.S. 455 (1971), holding that, in general, the due process clause requires that a defendant in criminal contempt proceedings be given a public trial before a judge other than the one reviled by the contemnor.
98. Identifying the indicia of accuracy, against which actual decisions will be measured, is often a difficult and disputable matter. "Accuracy" might, for example, be measured by the number of decisions reversed by a reviewing agency, or in terms of consistency by decision-makers within a single agency level, or by the degree of confidence felt by decision-makers in the adequacy of the information before them, or by the extent to which persons affected by decisions accept those decisions rather than seek further review. A number of other devices might also be suggested. The utility of any of these measures in turn depends on a variety of factors, raising all of the questions of reliability and validity which have concerned social science research in every area. For a discussion of some of these problems, see Mashaw, supra note 93, at 40-45.
professionals concerning the factual problem and the degree of certainty with which professionals can resolve that problem. Other issues may also arise concerning the appropriateness of a liberty deprivation that relies on "objective" evidence but includes a judgmental component as well.99 Careful examination of the extent to which the existence of other remedies affects the likelihood of error is also necessary. The utility of a formally recognized remedy may be generally doubtful or doubtful in certain kinds of situations.100 Take, as an instance, reliance on civil remedies by children against state agents. The practical value of such remedies will turn on the extent to which the child can apprehend the existence of a legally cognizable wrong against him, the extent to which his parents are sympathetic with his claim of injury, and their readiness to undergo the inconvenience and expense of litigation. At least the first two conditions will often be satisfied in situations like Ingraham v. Wright, where the parents may well be associated with the child's interests. None is, however, likely to be satisfied in commitment settings, for example, where the child is allegedly mentally retarded or ill and it is the parents who have initiated and cooperated in his institutionalization.101 Cases involving state-parent action affecting the child's liberty, therefore, may well present greater risks of error and greater need for oversight than those in which the parents are identified with the child's interest and may assist him both in questioning a proposed deprivation of liberty before it occurs and in challenging the action if it transpires.

The third factor concerns the government interest in avoiding a requirement of greater process. In Eldridge itself, that interest was reflected in matters of cost and administrative convenience. Cost, however, is not determined solely by the expense of employing further or different procedures but also includes costs flowing from the enterprise in question (there, continuing payments to ineligible persons until a hearing).102 With respect to these interests, the family cases considered here present no real difference in approach, although other cost factors might enter into the balance.103 Presum-

99. See Mashaw, supra note 93, at 41-42.
101. See text at notes 156-174 infra.
103. See text at notes 193-94 infra.
ably, moreover, fiscal and convenience concerns will play a significant role only when the individual interest is weak and/or additional procedures will contribute little to the accuracy of decision-making.\footnote{104} It may be, however, that the government will claim a quite different kind of interest than cash or convenience—the desire to leave families to their own devices in settling disputes. This is not, as we have seen,\footnote{105} an insubstantial interest; in most situations it is based on sound social policy and yields acceptable results. At the same time, this interest is no more extensive than the borders of the liberty interest claimed by the child. As the \textit{Danforth} case makes clear, the state may not delegate to the parents—nor may it protect the parents in governing—matters in which the child’s liberty interest takes precedence.\footnote{106} Moreover, the cases with which we are concerned here are not cases in which families are settling their own disputes within the home; rather, the parents have sought to rely on state authority in order to reinforce their assertion of power.

Perhaps it will be said that this last “cost” is not in any event contemplated by the governmental interest element of \textit{Eldridge}. That is literally true, of course, and suggests some differences in applying the \textit{Eldridge} formula to cases involving children. An even more significant adjustment will be required, however, to the extent that parents may claim an independent interest in controlling their children in cases of intra-family conflict. The \textit{Eldridge} formulation is designed for the common due process situation—where there is a single private interest to be weighed against considerations of accuracy and practical cost. If a second private interest is raised, it probably should be dealt with separately. Inclusion with the child’s interest seems inappropriate, nor can protection of such an independent interest systematically be treated as a form of governmental interest, if only because the government might well favor limitations on parental action or participation in a given setting. However, as we have seen, a true independent parental interest will rarely if at all exist in cases where public force is sought or used and the

\footnote{104. Mathews v. Eldridge, 424 U.S. 319, 348 (1976) (”Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision.”)}

\footnote{105. See text at note 45 \textit{supra}.}

\footnote{106. Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 74-75 (1976).}
interest of the parent diverges from that of the child.\textsuperscript{107}

V. Application of the Theory: Commitment of Children to Mental Retardation Institutions

A number of difficult cases, similar to Danforth,\textsuperscript{108} are likely to arise, in which parent and state are aligned together in opposition to a claimed liberty interest of the child. Each of those cases will require a careful analysis of the interests attributable to parent, state, and child. The balancing of these interests would be accomplished by use of a variation of the formula announced in Mathews \textit{v. Eldridge}.\textsuperscript{109} This section will examine this approach in the context of one controversial issue: the current system by which parents can "voluntarily" admit their child to an institution for the mentally retarded without any form of due process hearing.\textsuperscript{110}

\textsuperscript{107} See text at notes 73–82 supra.


\textsuperscript{109} 424 U.S. 319 (1976).


One important difference between institutions for the mentally ill and those for the mentally retarded involves their historical development. While each was a product of the institution-creating movement in the nineteenth century, see Lazerson, \textit{Educational Institutions and Mental Subnormality: Notes on Writing a History}, in \textit{THE MENTALLY RETARDED AND SOCIETY: A SOCIAL SCIENCE PERSPECTIVE} 33, 35 (M. Begab & S. Richardson eds. 1975), see generally D. Rothman, \textit{THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC} (1971), the decision to segregate the mentally retarded in isolated institutions was much more a response to fear of their impact on society. The conventional wisdom early in this century held that mentally retarded people had overwhelming criminal tendencies, were sexually amoral, and would in every case transmit their deficiencies to their offspring. These views, which we now know to be wholly or largely incorrect, resulted in compulsory sterilization statutes; see Buck \textit{v. Bell}, 274 U.S. 200 (1927), and a policy of lifelong institutional confinement. See Begab, \textit{The Mentally Retarded and Society: Trends and Issues}, in \textit{THE MENTALLY RETARDED AND SOCIETY: A SOCIAL SCIENCE PERSPECTIVE}, supra at 3; L. Kanner, \textit{A HISTORY OF THE CARE AND STUDY OF THE MENTALLY RETARDED} (1964); \textit{THE HISTORY OF MENTAL RETARDATION: COLLECTED PAPERS} (M. Rosen, G. Clark, & M. Kiwitz eds. 1976); W. Sloan & H. Stevens, \textit{A CENTURY OF CONCERN: A HISTORY OF THE AMERICAN ASSOCIATION ON MENTAL DEFICIENCY}, 1876–1976 (1976).

The impact of this history upon the legal issue at hand includes such legacies as the common assumption that lifelong commitment is appropriate for many mentally retarded people and continuing misconceptions among professionals and the general public about the "risks" posed by children thought to be retarded and about their actual potential for development.
A. The Private Interest Affected—

The Child's Liberty

The first element to be considered in the Eldridge balancing approach is the nature of the private interest affected. The impact of the proposed action on the child is confinement in an institution. The Supreme Court has characterized civil commitment to similar institutions for the mentally ill as a "massive curtailment of liberty." But is the constitutional significance of such confinement the same for children as it is for adults? It may be argued that what would be unconstitutional physical confinement if applied to adults is a commonplace experience in the everyday lives of children. Children are, after all, frequently subject to limitations imposed both by parents and the state on their right to travel or even to leave their homes.

This argument neglects, however, a central point made in the general discussion of children's liberty interests: that, while confinement in the home may be commonplace and ultimately of little significance, removal from the home and placement in an institution is neither. In re Gault considered and rejected just such an argument and emphasized the differences between deprivations of liberty in the home and commitment to a state institution:

Ultimately, however, we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. . . . His world becomes "a building with white-washed walls, regimented routine and institutional laws. . . ." Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents". . . .

Delinquency proceedings and dispositional commitments do not resemble "grounding" but rather the consequences of conviction for felony. The asserted (and accepted) rehabilitative motive for confinement in no way diminishes the gravity of that action.

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112. As when a parent "grounds" the child as punishment for misbehavior. Disobedience of such parental commands could lead to adjudication of the child as incorrigible, thus involving state action.
113. As with a curfew ordinance which applies only to minors.
114. 387 U.S. 1, 27 (1967).
115. Id. at 36, 49-50.
The parallels between commitment for delinquency and for mental retardation are compelling. Both are intended to be therapeutic and both rely on removal from the family in favor of placement in a total institution. Indeed, one court which has carefully examined an institution for the retarded describes the daily regimen in terms remarkably reminiscent of the language in *Gault*:

> These institutions are the most isolated and restrictive settings in which to treat the retarded. Pennhurst is almost totally impersonal. Its residents have no privacy—they sleep in large, overcrowded wards, spend their waking hours together in large day rooms and eat in a large group setting. They must conform to the schedule of the institution which allows for no individual flexibility. Thus, for example, all residents on Unit 7 go to bed between 8:00 and 8:30 P.M., are awakened and taken to the toilet at 12:00-12:30 A.M. and return to sleep until 5:30 A.M. when they are awakened for the day, which begins with being toileted and then having to wait for a 7:00 A.M. breakfast.\(^{117}\)

It therefore seems clear that whatever liberty interest might be involved in other circumstances, placement in an institution for the mentally retarded constitutes a deeply significant deprivation of the child’s liberty.

Turning from the general character of the private interest involved to its specific meaning for the person affected, it is important to explore the possible harms which might befall a child through inappropriate commitment.\(^{119}\) One form of harm recognized by pre-

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While it is true that institutions vary, and not all mental retardation institutions have the same characteristics as Pennhurst, the large, isolated, impersonal facility is still found in most, if not all, states. See generally R. Scheerenberger, DEINSTITUTIONALIZATION AND INSTITUTIONAL REFORM (1976); F. Menolascino, CHALLENGES IN MENTAL RETARDATION: PROGRESSIVE IDEOLOGY AND SERVICES (1977); Mason and Menolascino, THE RIGHT TO TREATMENT FOR MENTALLY RETARDED CITIZENS: AN EVOLVING LEGAL AND SCIENTIFIC INTERFACE, 10 CREIGHTON L. REV. 124 (1976); B. Blatt & F. Kaplan, CHRISTMAS IN PURGATORY (1974).

The suggestion that the existence of infringement of a liberty interest may be negated by the nature of the particular institution involved seems inconsistent with both the theory of liberty interests and existing case law. There has been no suggestion that *Gault*’s procedural protections are inapplicable to “model” reform schools.


119. Another possible approach at this point might be to balance the possible harm the child could suffer against the possible benefit he could realize. Such an approach is not supported in the case law. Cf. Breed v. Jones, 421 U.S. 519 (1975).

But even if this approach were consistent with previous decisions, it would present almost insurmountable practical problems. Evaluating the probability of risk against the likelihood of benefit and then assigning some qualitative valuation to the nature of both the harm and the benefit would be an extraordinarily complex and imprecise task for courts—a task for which they are ill-equipped. The better approach would seem to be the one suggested by *Breed*—granting the possibility of benefit but focusing the liberty inquiry on the risk side of the ledger.
vious decisions is the possibility that a child will be stigmatized by placement in the institution.\textsuperscript{120} In the case of mental retardation facilities, the extent of this social disadvantage is not entirely clear. The likely ill effects of labeling were noted in the early days of such institutions by pioneers in the field of diagnosis and treatment.\textsuperscript{121} A noted anthropologist who has studied the matter suggests that the stigma of mental retardation may be uniquely damaging. Attachment of a label implying that its holder is incompetent in all areas of practical affairs is peculiarly burdensome in American society, where intelligence is so highly valued. Moreover, retardation, unlike mental illness, is viewed as permanent and incurable.\textsuperscript{122}

Another authority observes, however, that “although the evidence is more anecdotal than truly scientific,” the real effect of mental retardation results from the behavioral abnormalities which community members observe in retarded individuals rather than from either an official label or the fact of past institutionalization.\textsuperscript{123} This can only partially explain the social disadvantage, it should be said, since the behavior of those who are incorrectly labeled and institutionalized either is within normal limits or, if not, results from some cause other than retardation—perhaps the experience of institutionalization itself.

Moreover, the effects of stigmatization are not limited to the perception of strangers. One consequence of attachment of a disadvantaging label is its acceptance by that person’s own family and by himself. The former is particularly likely where the family has publicly committed itself to that label by initiating proceedings, as has


\textsuperscript{121} It will never be to one’s credit to have attended a special school. We should at the least spare from this mark those who do not deserve it. Mistakes are excusable, especially at the beginning. But if they become too gross, they could injure the name of these new institutions.


been suggested of "incorrigibility" charges and seems equally probable with "voluntary" commitments. That stigma is felt by those labeled is strikingly revealed in the experience of mildly retarded persons who, once released, often deny the nature of their past confinement. "They employ almost any other excuse, from epilepsy to 'craziness'—excuses that are themselves highly stigmatizing. Never is mental retardation mentioned." While it may not be possible to say that the stigma associated with institutionalization as mentally retarded is greater or less than, for example, mental illness, delinquency, or conviction of crime, it is undoubtedly a substantial factor to which the courts must give some weight.

Stigmatization is probably not, however, the greatest harm facing the child who is committed. An even more serious problem is the risk that the child in an institutional environment will fail to obtain the skills normally acquired in childhood or will even lose some of the skills he had at the time of his admission. The scientific literature on this point is voluminous, and a number of studies indicate that institutional residents, particularly children, show a decrease in intelligence quotient, motor skills, social competence, and verbal skills.

125. R. Edgerton, supra note 122, at 207.
126. The role of stigma in Fourteenth Amendment analysis is somewhat less clear than it was at the time of Gault. At least one member of the Supreme Court appears to have doubts about a concept which he characterizes as "a subjective judgment that is standardless." Regents of the University of California v. Bakke, _ U.S. _, 98 S. Ct. 2733, 2751 n.34 (1978) (opinion of Mr. Justice Powell). In Paul v. Davis, 424 U.S. 693 (1976), the Court rejected the contention that harm to reputation was by itself sufficient to constitute a deprivation of liberty or property. But the Court carefully distinguished cases like Wisconsin v. Constantineau, 400 U.S. 433 (1971), in which the stigmatization is accompanied by deprivation of some other statutory or constitutional right. In the case under consideration, the child who is placed in an institution for the retarded is deprived of his physical liberty by the same action which stigmatizes him. This would appear to meet the test in Paul.
128. E.g., Francis, The Effects of Own-home and Institution-rearing on the Behavioural Development of Normal and Mongol Children, 12 J. Child Psych. & Psych. 173 (1971) (less visual contact and fewer types of behavior among institutionalized children); Centerwall & Centerwall, A Study of Children with Mongolism Reared in the Home Compared to those Reared Away from the Home, 25 Pediatrics 678 (1960); but see Stedman & Eichorn, A
Although there is some disagreement in the literature about the universality of harm from institutionalization, it is incontrovertible that many persons institutionalized as retarded do in fact regress and lose skills after institutionalization. Perhaps the most disturbing aspect of this process is what one author has termed "learned helplessness," a phenomenon in which institutionalized residents become functionally incapacitated by the very fact of their prolonged confinement. The process of treating someone, especially a child, as mentally retarded evokes from him the behaviors which are expected. Assumption of, and adaptation to, the role of "institutionalized retardate" by inmates may be the most profound harm caused by institutionalization—both for those who are in fact retarded and especially for the minority of committed children who are not. The behavioral patterns which result may also prove a serious impediment to later adaptation to life in the community.

Comparison of the Growth and Development of Institutionalized and Home-reared Mongoloids During Infancy and Early Childhood, 69 AM. J. MENTAL DEFICIENCY 391 (1964) (later age of walking by institutionalized children could be explained by higher incidence of physical handicaps, but institutionalized children do have more trouble using small objects).

129. E.g., Guthrie, Butler, & Gorlow, Personality Differences Between Institutionalized and Non-Institutionalized Retardates, 67 AM. J. MENTAL DEFICIENCY 543 (1963) (negative self-attitude); Mitchell & Smeriglio, Growth in Social Competence in Institutionalized Mentally Retarded Children, 74 AM. J. MENTAL DEFICIENCY 666 (1970) (deterioration in social competence unless special programming provided); Hobbs, A Comparison of Institutionalized and Non-Institutionalized Mentally Retarded, 69 AM. J. MENTAL DEFICIENCY 206, 210 (1964) (socially inadequate children more likely to be institutionalized than those with more skills, and institutionalization only increases their social incompetence).


134. See J. Mercer, supra note 121, at 33.
Since institutionalization as a mentally retarded person appears to have all the indicia of a serious deprivation of the child’s interest in liberty, the only question remaining in the “private interest” area is the effect of extreme youth and immaturity upon the analysis. We have already seen that the confinement itself is as salient here as it is in other commitment situations. It may be argued, however, that even if hearings are appropriate for relatively mature adolescents who can participate in them the “right to be heard” can have no practical meaning for a very young child or a newborn infant.\textsuperscript{135} 

The resolution of this issue depends upon the function performed by a hearing. If the only purpose of the hearing is to allow the child to be “heard,” then it may be correct to limit such rights to older children. But if that is the only function of the hearing, then \textit{Gault} hearings should also be extended only to older children, allowing younger children charged with delinquency to be incarcerated without a hearing—at least if their parents consent. Similarly, the only prospective adult mental patients who would be entitled to a civil commitment hearing would be those competent enough to participate in the proceedings—the others could be summarily confined for an indefinite period. And in the case of mentally retarded minors, the age differentiation would itself lose meaning. Many of the older minors will have such limited abilities (restricted by their retardation rather than by their chronological immaturity) that they too would be unable to meet the competence requirement for obtaining a hearing. The unsatisfactory results obtained in these examples should indicate the impracticality of making capacity to participate in a hearing a doctrinal limitation on recognition of liberty interests.

Moreover, provision of a hearing serves functions other than allowing the subject a forum. The major purpose of a commitment hearing for juveniles of any age must be to determine the necessity and appropriateness of the proposed placement in an institution.

\textsuperscript{135} The United States Supreme Court suggested there might be a difference between the rights of adolescents and of younger children. Kremens v. Bartley, 431 U.S. 119, 135-36 (1977). While reserving judgment on the question of younger children’s rights, the California Supreme Court recently chose to provide hearings only for those children 14 and older who were alleged to be mentally ill. \textit{In re Roger S.}, 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977). And while some legislatures which have provided procedures have done so for all ages, \textit{e.g.}, N.M. \textsc{Stat. Ann.} § 34-2A-13 (1976-1977 Inter. Supp.), others have extended rights only to older minors, \textit{e.g.}, REV. CODE WASH. ANN. § 72.23.070 (Supp. 1977).
This issue is no less important when the minor is incapacitated either by age or by mental condition. Exploration of the facts which allegedly indicate the need for placement and consideration of the possible alternatives do not require the active participation of the child himself. And if alternatives to institutionalization can be found, the child will benefit no less because of his inability to participate in the hearing. Indeed, there may be reason to believe that a hearing is even more important to the future of a younger child than to an older one, since the harmful impact of institutionalization may fall even more heavily upon very young children.\footnote{136. E.g., Sternlicht & Siegel, \textit{supra} note 127; Kaufman, \textit{The Formation of a Learning Set in Institutionalized and Non-Institutionalized Mental Defectives}, 67 \textit{AM. J. MENTAL DEFICIENCY} 601 (1963); \textit{see also} S. Provence & R. Lipton, \textit{Infants in Institutions: A Comparison of Their Development with Family-reared Infants During the First Year of Life} 162-64 (1962).} It also appears that the likelihood of erroneous diagnosis is greater in the very early years or months of the child's life;\footnote{137. \textit{See, e.g.}, J. Cronbach, \textit{Essentials of Psychological Testing} 208-209 (1960).} this too argues for procedural protections. Avoiding unnecessary institutionalization in such cases is a paramount liberty interest for those children.

B. The Likelihood of Erroneous Decision and the Likelihood that Additional Procedures Will Reduce that Risk (the Accuracy Factor)

As will often be the case with the second prong of the \textit{Eldridge} analysis, the accuracy factor in our problem does not readily admit of quantification. No reliable national data exist revealing either the incidence of inaccurate diagnosis of mental retardation in children or the number of cases in which a child correctly diagnosed as retarded is unnecessarily proposed for institutionalization. Accordingly, less direct measures of reliability must be used. This can be done by addressing two answerable questions: is the factual issue one about which it is likely that errors will occur, and is the process used one which may produce significant error?

1. THE DETERMINATION OF MENTAL RETARDATION AND OF THE NEED FOR INSTITUTIONALIZATION

There are two kinds of error that may arise in commitment of a child to a mental retardation institution. The first concerns the
diagnosis of mental retardation itself; the second, choice of commitment rather than other forms of treatment for the child. As the immediately preceding section makes clear, the consequences of confinement in an institution are extremely grave; accordingly, choice of care for children is not merely a tactical or insignificant issue.

If diagnosis of mental condition were as routine and even mechanical as identification of a broken leg or tonsilitis, one could reasonably be confident of accuracy in ascertaining that condition.\(^{138}\) However, diagnosis and prognosis in this area present grave difficulties for courts and professionals alike. In discussing the certainty with which one may rely upon psychiatric judgments of mental illness, the Supreme Court has stated that "[t]he only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment. . . ."\(^{139}\) Twenty years later, Chief Justice Burger found the state of the art not greatly improved. Diagnosis in the field remains "tentative," professional judgment is still "uncertain,"\(^{140}\) and there is "wide divergence of medical opinion regarding the diagnosis and proper therapy for mental abnormalities."\(^{141}\) Recent studies continue to find that symptoms produced by organic disease are diagnosed in terms of mental disturbance\(^{142}\) and that, once a person has been committed, normal behavior may not be recognized nor sanity distinguished from insanity.\(^ {143}\)

It might appear that mental retardation is a more "objective" and "measurable" phenomenon than mental illness and that, consequently, the likelihood of error will be lower. A review of the available evidence indicates, however, that entire confidence cannot be placed in professional diagnosis in this area either. Mental retardation consists of subaverage intellectual performance combined with behavioral maladaptation.\(^{144}\) On the latter issue, the professional typically obtains his information from parents. The risk of error

\(^{141}\) Id. at 587.
\(^{142}\) Leeman, Diagnostic Errors in Emergency Room Medicine: Physical Illness in Patients Labeled 'Psychiatric' and Vice Versa. 6 INT'L J. PSYCH. MED. 533 (1975).
\(^{144}\) MANUAL ON TERMINOLOGY AND CLASSIFICATION IN MENTAL RETARDATION 11 (H. Grossman ed. 1977): "Mental Retardation refers to significantly sub-average general intel-
associated with this aspect of diagnosis is clear, and one study of institutionalized children reports that "[i]t was difficult . . . to get an accurate picture of the institutionalized subjects' level of functioning and general adjustment prior to commitment due to the tendency of those committing them to exaggerate their difficulties in order to expedite admission." A variety of factors may account for the inaccuracies associated with the behavioral component. One is that behavior is inherently a difficult matter to judge, one for which parents and professionals have no common objective standard for measurement. In addition, the behavior described is not a single isolated episode, but commonly a lengthy course of conduct into which the attitudes of the parents, other family members, and members of the community necessarily enter. The parents may also lack objectivity in describing conduct, interpreting it in light of their own embarrassment arising out of public response to the child. Moreover, the parent's own desire to have the child committed, even if reached only after a long and difficult experience at home, may well affect the way in which he describes the child. The former may have—indeed typically has—interests of his own which, while often understandable and perhaps praiseworthy, may be quite different from those of the child.

The professional, then, must base his judgment at least partially on the reports of lay observers who are intimately affected by the decision in question. Nor can he look to the particular kinds of behavior described, even if the description is largely accurate, as themselves conclusive on the existence of mental retardation. Children with cerebral palsy frequently behave in a manner generally associated with mental retardation, but many cerebral palsied children are not in fact retarded. And, when the child is proposed for placement immediately after birth or at a very young age, there is

147. It has been stated that only about one-third of all cases of cerebral palsy suffer the functional disorder of subnormal intellect. Stein & Susser, The Epidemiology of Mental Retardation, in 2 AM. HANDBOOK PSYCHIATRY 464, 465 (S. Arieti ed., 2d ed. 1974). In state institutions, however, "retarded" frequently include the nonverbal cerebral palsied patient of normal intelligence. G. JOEL, SO YOUR CHILD HAS CEREBRAL PALSY 31, 49 (1975).
little if any behavioral information that will be of diagnostic use.\textsuperscript{148}

It might seem that the availability of diagnostic tests greatly mitigates these problems in accurate identification of mental retardation. Two obstacles to that comfortable conclusion exist, however. The first is fundamental to the definition of mental retardation itself—retardation is behavioral as well as intellectual.\textsuperscript{149} To say that a child does not function well intellectually only means that he does not take tests well, unless some behavioral maladaptation is also present. Moreover, what is inadequate behavioral functioning in one society or set of social circumstances may be adequate or more nearly so in another. Thus, weaknesses in evaluation of the behavioral element diminish fundamentally the accuracy of the diagnostic procedure as a whole.

The diagnostic tests themselves, it must be added, contain their own problems of accuracy. The degree to which they are tied to the dominant culture has been thoroughly documented.\textsuperscript{150} Additionally, reliance on objective tests for very young children is a very difficult business. Tests of early development in children consist primarily of observations of the child's response to stimulation; they are intended to determine whether development is normal rather than to assess mental level specifically. Moreover, the predictive value of scores achieved at very early ages is low and tests given before the age of two are likely to be unreliable even over very short periods of time.\textsuperscript{151}

Having regard to the difficulty of diagnosis and of ascertaining the most appropriate course of treatment for children who appear or are said to be mentally retarded, it is not surprising to find that errors are committed and that children are wrongly institutionalized. As early as the 1940s, the professional literature recognized that a considerable number of individuals who were labeled mentally retarded were not in fact retarded. This phenomenon was given

\textsuperscript{148} Cytryn & Lourie, Mental Retardation, in A. Freedman, H. Kaplan, & B. Sadock, I Comprehensive Textbook Psych./II 1174 (1975); Stein & Susser, The Epidemiology of Mental Retardation, 2 AM. HANDBOOK PSYCHIATRY 465 (1974); G. Joel, So Your Child Has Cerebral Palsy 49 (1975).

\textsuperscript{149} Manual on Terminology and Classification in Mental Retardation. supra note 144 at 11.

\textsuperscript{150} J. Mercer, Labeling the Mentally Retarded 14 (1973) and sources cited therein.

\textsuperscript{151} L. Cronbach, Essentials of Psychological Testing 210 (1960).
the name "pseudo-feeblemindedness" at the time.\textsuperscript{152} That such errors continue today is suggested by a recent study in Nebraska. While the study did not include a random sampling, it was discovered that of 616 children identified as mentally retarded and seen on an out-patient basis, 191 had prominent psychiatric problems, for which treatment as mentally retarded offered no help and who might well have been more appropriately treated in some other way. Moreover, 40 of these patients were found not to be mentally retarded at all.\textsuperscript{153} The explanations offered by those who conducted the study for these misdiagnoses reflect the difficulties of interpreting behavior. Symptoms of hyperactivity, it was observed, can be an expression of anxiety rather than a sign of mental retardation; a short attention span may be produced by an inadequate mother-child relationship although it might also indicate mental retardation.\textsuperscript{154} Children with functional psychoses may as well appear to be "atypical" mental retardates.\textsuperscript{155}

Summarily stated, the problems in accurately interpreting the behavior of children, together with inherent limitations of testing for various groups of children, produce significant risk that emotional disturbance, psychosis, or neurosis may be classified as retardation by both parent and professional. The risk of unnecessary institutionalization is, if anything, more severe, since the process relies heavily upon the perceptions and expressed attitudes of parents concerning treatment of their child.

2. THE "VOLUNTARY" COMMITMENT PROCESS

Given the practical difficulty of diagnosing and determining a course of treatment in cases of possible mental retardation, it becomes necessary to examine the process by which such conclusions are reached with a view toward the degree of accuracy it will probably produce.


\textsuperscript{153} Menolascino, \textit{Emotional Disturbance and Mental Retardation}, 70 AM. J. MENTAL DEFICIENCY 248, 250 (1965).


Initially, it is important to recognize that the process relies on only two sets of actors: the parents and the professional from whom they seek advice and services. No hearing agency is involved, nor is there judicial review of the conclusions they reach or the treatment they settle on. An examination of the roles of each of these actors will reveal some of the strengths and weaknesses of the current system.

a. The Parent. The magnitude of the problems faced by parents of a retarded child cannot be overstated. They do not resemble those of parents whose children present ordinary medical problems, or even serious but transient illness or injury. The discovery that a child is mentally retarded produces a number of emotional reactions, which one authority has summarized as "chronic sorrow." As the child grows up and develops, albeit slowly, the parents also experience joy and satisfaction in their child, but the heavy emotional burden remains. Feelings of shame, ambivalence, depression, self-sacrifice, aloneness and the like have a powerful impact on the parents' attitudes toward and relationship with their child, and also manifest themselves in increased strain in other relationships such as marriage. These emotional problems are often exacerbated by unsatisfactory relationships with and advice from uninformed or inexperienced professionals.

Together with these emotional burdens are the considerable—often overwhelming—practical and physical burdens imposed by

156. There is considerable discussion of parents' attitudes and problems in the literature. Perhaps the most moving accounts are found in PARENTS SPEAK OUT: VIEWS FROM THE OTHER SIDE OF THE TWO-WAY MIRROR (A. Turnbull & H.R. Turnbull eds. 1978), which is a collection of accounts by parents of retarded children of their family experiences, and of their dealings with mental retardation professionals and physicians. These accounts are particularly noteworthy, since the parents who have written the essays are mental retardation professionals themselves.


158. Id. at 22.

159. Roos, Parents of Mentally Retarded Children—Misunderstood and Mistreated, in PARENTS SPEAK OUT, supra note 156, at 12, 18-22.

160. As my wife and I struggled with our feelings regarding Val's mental retardation, we became aware that, although we certainly experienced some of the feelings just described, we were more preoccupied by the reactivation of old conflicts and anxieties. These conflicts and anxieties were not specific to having a retarded child; rather, they seemed inherent in the human condition as experienced by most people, and that having a retarded child merely tends to exacerbate them.

Id. at 19.

161. See text accompanying notes 175-186 infra.
everyday care of a retarded child. These problems are increased in the common situation where the child's mental disability is accompanied by serious physical handicap. It must also be kept in mind that, unlike occasional crises encountered by the parents of non-retarded children, the problems faced by the parents of the handicapped are chronic and unceasing. The strain these factors place upon parents is revealed by the fact that, when a child is placed in an institution, a sense of relief from the burdens created by the child's presence in the home is one of the most prominent reactions experienced by parents.

It is in the context of these factors that parents confront the decision whether to institutionalize their child. There is no reason for surprise at finding, therefore, that perhaps the most important factor in seeking commitment is the decision that the presence of the retarded child in the home has become an unacceptable disruption of family life and the realization that the parents have become too physically and emotionally weary to deal with the problems the child's presence brought to the family. Economic factors associated with the often considerable cost of caring for a retarded child play an important part, as does the perceived impact of the retarded child on the lives of his non-retarded brothers and sisters. The dominant theme in all studies, however, is the conviction of parents that the problem is one they cannot manage and for which they wish others to assume responsibility. An institutional superintendent who has surveyed the literature concludes that "[o]ne con-

162. Morton, Identifying the Enemy—A Parent's Complaint in PARENTS SPEAK OUT, supra note 156, at 142.
163. A study of 687 persons referred by organizations asked to nominate all known mentally retarded persons reported that more than 30 percent of the group had some or great difficulty with speech, and more than four percent could not speak at all. Some 15 percent had difficulty with ambulation and nearly the same had difficulty with arm-hand use. Twelve percent had noncorrectable visual problems and nine percent some or much difficulty with hearing. J. MERCER, LABELING THE MENTALLY RETARDED 70 (1973).
While this study does not provide comparable data for the nonretarded population, the incidences reported seem higher than those found in the population as a whole.
See also Helsel, The Helsel's Story of Robin, in PARENTS SPEAK OUT, supra note 156, at 94-115.
164. Morton, supra note 162, at 144.
165. Hersh, Changes in Family Functioning Following Placement of a Retarded Child, 15 SOCIAL WORK 93, 100 (1970).
166. Sternlicht & Merritt, Variables Related to Obtaining Natural Parents' Consent for Family Care Placement, in RESEARCH TO PRACTICE IN MENTAL RETARDATION: CARE AND INTERVENTION 275 (P. Mittler ed. 1977) and sources cited therein.
sistent finding is that residential care is not sought solely for the reason of mental retardation. In some negative way, a retarded person presents problems beyond the coping ability of the family.\textsuperscript{167}

This conclusion is supported by a study of sixty-nine families who were asked why they had institutionalized a child.

The major reasons convey the helplessness and difficulty of the parents in dealing with the situation created by the retarded child. These parents exhibit their helplessness by stating "he needed more care than I could give him," and "we had other children and I could not give all of the children the care they needed." The difficulty of the situation is revealed by such statements as "there was too much strain in the house," "he was having harmful effects on his brothers and sisters," and "he was too hard to handle."\textsuperscript{168}

These observations do not suggest that parents are ill-motivated or unconcerned about the needs of their retarded child. But the evidence clearly shows that they make a decision for the retarded child in a situation of considerable personal and familial stress and with a real need to ameliorate an unacceptable situation. Objective evaluation of other possibilities is difficult or impossible because of what has gone before.\textsuperscript{169} It also seems clear that parents have their own interests in the commitment decision, which are quite independent of the child’s.\textsuperscript{170} While that step may, for some parents, be hard emotionally to reach, it carries with it the promise of great and often total relief from severe emotional and physical burdens. Commitment seems the end of a travail and frequently becomes just that. There is reason to think that, whatever their motives in securing the

\begin{itemize}
\item \textsuperscript{167} R. Scheerenberger. Deinstitutionalization and Institutional Reform 133 (1976). (Dr. Scheerenberger is superintendent of the Central Wisconsin Colony and Training School and is the current president of the American Association on Mental Deficiency.)
\item \textsuperscript{169} Cf. Ellis, Volunteering Children: Parental Commitment of Minors to Mental Institutions, 62 Calif. L. Rev. 840, 863 (1974). Another student of the subject has observed:
\begin{quote}
The intensity of parental reactions to the diagnosis has often been construed to characterize the parents of the retarded as psychologically disturbed individuals. When parents are viewed, instead, as actors in a reality crisis situation, their behavior takes on rationality. The disorganized behavior which occurs frequently reflects the upset in the equilibrium of the families involved.\end{quote}
\end{itemize}
child's institutionalization, many or most of the parents do not maintain contact after confinement. A serious attempt to contact all of the parents at one large state facility to solicit their evaluation of and suggestions for treatment found that only 749 of the 5,110 families contacted would even answer the letter and, of these, only 77 were willing to consider removing the child from the institution when this suggestion was offered. ¹⁷¹

Many of the sources cited above, it should be said, describe parents with sophistication and deep attachment to their children. In some cases less sophistication and more complicated motives may operate. It is important to note that, in many or even most cases, the initial impetus to commitment is the conviction by parents that their child is not behaving "normally." Often that may mean that he throws temper tantrums, engages in bizarre behavior, or is not attentive, obedient, punctual, or industrious. Just as these and other characteristics in an authentically retarded child create difficulty at home and in the community, so the same behaviors create difficulties for the family of the child who is not mentally retarded. Parents of children who act badly may well want to relieve themselves of the responsibility and unpleasantness of their presence in the home, particularly as they grow older. "Difficult adolescents cause problems in families. They often cause strain in a parent's relationships with other adults, provide 'bad' models for younger siblings, and limit parental ability to move upward." ¹⁷² Some such children become the subject of an incorrigibility petition, as the parents seek either additional force in dealing with the child or the child's removal from the family. ¹⁷³ Others may be viewed by their parents as mentally retarded, with removal principally in mind. It may be, therefore, that commitment to mental


A liberal interpretation of this finding suggests the retarded child is "sacrificed." He is placed at an early age and forgotten as though he had died. The parents visit the child infrequently, if at all, like visits to a grave. The child is figuratively "buried" in the institution and the body is never brought home for a visit.

Downey, supra note 168, at 153. For a more sympathetic view of parents' motives in opposing their child's release, see Turnbull & Turnbull, supra note 170, at 19; Avis, Deinstitutionalization Jet Lag, in Parents Speak Out. supra note 156, at 168, 170-73.

¹⁷². Mahoney, supra note 124, at 164.
¹⁷³. Id. at 163-66.
retardation facilities serves as an alternative to juvenile court—and its procedural requirements—for parents of children with behavioral problems but who are not retarded.\footnote{174}

b. The Professionals. The parents who seek commitment of their children as mentally retarded must obtain the support of physicians or other professionals for the proposed placement. At first glance, it might appear that the involvement of such professionals would provide sufficient check on ill-advised parental action and that additional procedural protections would be unnecessary. However, as is the case with parental commitment of children as mentally ill,\footnote{175} the professionals involved do not adequately perform the function of screening out children who are inappropriate for institutionalization.

Because of the strain under which parents are operating when they seek their child’s commitment and because of the conflicting interests which the parents’ actions may reflect, the current system places extraordinary weight upon the quality of advice which parents receive from the professionals they consult—frequently physicians other than psychiatrists in the first instance. On many occasions, this consultation occurs almost immediately after the birth of a child who is identified by the doctor as mentally retarded. The extent to which parents rely upon such physicians (e.g., pediatricians, obstetricians, general practitioners) is indicated in a study by Centerwall and Centerwall:

In 100% of the cases the reason which the parents gave for desiring placement in the neonatal period was that the doctor advised it. Several individual case histories indicate that some doctors have very strong feelings about this, as the families evidently were advised also to tell their children and friends that the baby had died at birth. Some doctors may routinely advise immediate placement; others, when realizing that the parents strongly desire this, are glad to give their professional support to the plan.\footnote{176}

\footnote{174} Indeed, this may be a more attractive alternative in some ways for parents. Incorrigibility proceedings involve a series of informal and formal hearings, see Andrews & Cohn, supra note 83, 50-53, the possibility of having to testify against the child, and—perhaps most important—the likelihood of little change. While commitment is relatively common in such cases, probation or informal disposition is even more so, \emph{Id.} at 73, and the former implies not only the child’s return but the necessity of dealing with a probation officer. “Voluntary” commitment, by contrast, places relatively few demands on the parents and provides a long-term resolution of their problems.

\footnote{175} Ellis, \textit{supra} note 169, at 863-70.

\footnote{176} Centerwall & Centerwall, \textit{A Study of Children With Mongolism Reared in the Home Compared to Those Reared Away from the Home}. 25 \textit{PEDIATRICS} 678, 683 (1960).
Even when the child is older, the advice of physicians plays a major role in the parental decision to institutionalize the child.

The kind of advice parents receive is a function of the knowledge and attitude of the physician concerning mental retardation. Accounts by parents who are themselves professionals attest to the weak basis of the advice many physicians give parents. These anecdotal accounts have been confirmed by a recent study in a midwestern city which has one of the best and most elaborate systems of noninstitutional services for mentally retarded people. The study found that the physicians involved had very little knowledge of the community services available, and yet still felt free to recommend institutional placement of retarded children—even the moderately retarded.

Although professionals advise that physicians should not recommend institutionalization, but instead should discuss all alternatives with the parents and leave the decision up to them, the physicians surveyed for this study, with one exception, felt that it was their responsibility to recommend institutionalization.

When the doctors were asked under what conditions they would recommend institutionalization, the two most frequent responses were "If the family is unable to cope with the child at home" (91%) and "If a parent will not accept the child" (66%). A companion survey of parents revealed that only 10 percent had received information about mental retardation from the physician they consulted. Perhaps even more remarkable is the fact that the parent survey included only families whose child was not institutionalized at the time of the survey (i.e., was receiving services in the community). Nevertheless, 40 percent of the parents had been advised by the doctor to institutionalize their child, and of those 86 percent had been advised to do so immediately or within a year after retardation was diagnosed. The results of this study indicate that physicians cannot systematically be relied upon to act as a check upon parental desire to institutionalize a child.

177. Turnbull & Turnbull, supra note 170, at 16; Roos, supra note 159, at 17-18.
179. Id. at 10.
180. Id. at 12.
181. Id.
182. Id. at 11.
183. Id. at 10.
Several reasons have been suggested for physicians' poor performance as advisors in this area: lack of training about mental retardation in medical school curricula, failure adequately to inform practicing physicians about new developments in the field, disinterest of some doctors, and attitudes of hopelessness toward retardation. But whatever the cause, it greatly increases the likelihood that children will erroneously be placed in institutions.

It must also be said that all professionals—whether practitioners sought out by the parent or admitting officials at an institution—are limited by the instruments and information they have to work with. As has been noted earlier, the objective tests of intelligence are subject to considerable error, and the information provided by parents may not be totally reliable in describing behavior. Many institutions have great difficulty attracting sufficiently qualified staff members, and this too weakens their effectiveness as screening agents.

The conclusion to be drawn from this inquiry into the current mode of commitment would seem to be that the process by which parents and professionals make decisions about the institutionalization of children is one which contains serious possibility for error in individual cases. Even where the child is correctly diagnosed as to the degree of his retardation, the parents and the physician or professional they consult may not be equipped to explore the alternatives to commitment which might relieve the family's burden and at the same time spare the child the possible harms of institutionalization.

184. See e.g., id. and sources cited therein; Roos, supra note 159, at 15.
185. See notes 145-146 and accompanying text supra.
187. The harsh reality of this kind of diagnostic error and its consequences can be illustrated by an individual known by the authors of this article. This man was admitted to a mental retardation facility by his parents when he was nine years old. He was released when it was discovered that he was not mentally retarded—55 years later. Intelligence tests administered during his confinement purported to find him retarded, but tests administered after his release show him to have normal intelligence. The tragic delay in discovering this error appears to have been caused by the "institutionalized" behavior the individual adopted as a young child and the fact that the institutional staff simply wasn't looking for people who were not mentally retarded. Graham, After 55 Years. He's Finally Free. Albuquerque Tribune (August 3, 1977).
3. THE LIKELIHOOD THAT ADDITIONAL PROCEDURES WOULD REDUCE ERRORS

All will agree that cases of erroneous decisions to institutionalize children are tragic, but the second element of the Eldridge test requires further inquiry as to whether additional procedural safeguards would actually reduce the likelihood of such errors.188

Once again, there are no quantifiable answers to this question. Since procedural safeguards have not been traditionally required before a child is institutionalized, we have no data from which to measure the effectiveness of such procedures in reducing errors. But the traditional purposes of procedural safeguards seem relevant to these cases. The availability of an adversarial due process hearing would put the professionals proposing the commitment to their proof. Subjecting their reasons for proposing the placement to impartial examination will tend to reduce errors in much the same way as delinquency proceedings or criminal trials: by forcing careful evaluation of the relevant evidence.

But this impartial examination of the facts supporting the contention that the child is retarded constitutes only part of the utility of hearings. For many children, the real issue will not be whether they are retarded, or even whether they need habilitation and residential services outside their family homes. The real question in these cases is whether care in an institution is required or whether there is some less restrictive alternative which would better meet the individual's needs.189

Basing their efforts largely on the Scandinavian experience with deinstitutionalization, American communities have begun to develop a range of services within the community for mentally retarded children and adults.190 Some of these involve day programs in which

188. A full discussion of the elements of the hearing which may be constitutionally required is beyond the scope of this article. Clearly an impartial tribunal and assistance of counsel would be essential. Experience has shown the importance of access to one's own expert witness. Beyond these minimal elements, it might be appropriate to allow the states some room for experimentation so procedures can be designed which are tailored to the needs of the children and their families.


the client lives in his family's home. Many involve alternative forms of residential living, such as foster placement, halfway houses, and group homes. In these facilities, retarded persons can obtain the services they need—including residential services outside the family home—and still avoid the damaging effects of confinement in a total institution.

The existence of these services is relevant because the exploration of their appropriateness for an individual child is a function of the hearing process which can meet the needs of both the child and his parents. For some parents, the provision of supportive services in the home or respite care to allow them occasional relief from the strains the child brings to their lives may suffice. But even where the family is unable to keep the child in the home under any circumstances, the hearing process may identify a less restrictive residential program for the child. The existence of these alternatives means that the placement choice is not a "zero-sum game" in which either the parents or child must "lose." Rather, independent review of the child's needs, the family's needs, and the options available to them may enhance the lives of each. As one authority has noted, "No parent should be forced to have his retarded child or adult returned home if the situation is not appropriate."191 The hearing process can be designed in such a way that this goal can be accomplished while unnecessary institutionalization of the child is avoided.192

Thus, while no statistical evaluation is available, it seems most likely that provisions of procedural safeguards through some system of hearings will avoid unnecessary institutionalization in a number of cases.

C. The State's Interest in Avoiding Additional Procedures

Under the Eldridge formula the individual interest involved and the likelihood of error must be weighed against the government's interest in avoiding the provision of additional procedures. In the case of

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191. R. Scheerenberger, supra note 167, at 168.
192. For example, one statute allows the court to order alternative placement of the child when it finds he does not need institutionalization but that return to the family home is inappropriate. N.M. Stat. Ann. § 34-2A-15H (1976-1977 Inter. Supp.). This provision allows the alternative placement of the child without the necessity of finding that the child is dependent or neglected.
the institutionalization of children as mentally retarded, the state's interest seems quite small. The cost of the hearings themselves, although no dollar figure can be assigned to them at this time, cannot be high enough to warrant their avoidance. There is no reason to believe that they would be more costly than delinquency hearings or civil commitment hearings and, in each of those instances, the individual interest involved and the risk of error, which closely resemble those in the case under consideration, were sufficient to outweigh the state's interest in frugality.

Another factor which must be considered in analyzing the financial consequences of enhanced procedure is the offsetting cost savings which would be realized if unnecessary institutionalization were avoided in some cases. The cost of institutional care of a child will frequently be in the range of tens of thousands of dollars per year.\[^{193}\] Community alternative programs cost considerably less. In addition, by avoiding the infliction of "learned helplessness" on a child,\[^{194}\] the state may avoid creating a permanently dependent individual who will be a lifelong drain on the state's resources.

D. Parental Interest in Avoiding Additional Procedures

Traditional 
\textit{Eldridge} analysis would stop at this point and weigh the three elements discussed above. If this were the end of the inquiry, the result would be fairly easy to reach: the child's individual interest is extremely important, the risk of erroneous decision is relatively high and might well be reduced by additional procedures, and the government's interest in avoiding procedures is weak. The balance would clearly produce a greater set of protections for the children involved. But the calculus described so far leaves no room for weighing the interests of the parents in the balance. We have seen that an independent constitutional interest in the parents will not negate the child's liberty interest under these circumstances. However, the 
\textit{Eldridge} test may allow for balancing nonconstitutional interests (such as cost to the state) in determining what procedures are required. In cases involving parents and children, the real party in interest wishing to avoid a hearing is the parents and not the gov-

\[^{194}\] See notes 133-134 \textit{supra} and accompanying text.
ernment. Therefore, it may be necessary to adapt the Eldridge test to provide a parallel to the state's interest: the parental interest in avoiding a procedure which would adjudicate their dispute with their child.

The parents in this case can advance several substantial interests. The first is their desire to obtain services which they deem necessary for their child—i.e. institutionalization. But to the extent that the parents are merely advancing their view of the child's best interest (as contrasted to their independent and possibly conflicting interests), they can only be concerned that the child receive those services most appropriate to his needs. An impartial determination can only advance that interest by exploring all alternatives.

The parents may also suggest their own interest in having a manageable household in which they and their other children can live in peace. This again is a legitimate and substantial interest. But it is an interest appropriately weighed in the balance against the child's interest by an impartial decision-maker rather than left to the parents' own judgment. Their needs can and should be considered, but they should not automatically prevail when this could mean serious harm to the child.

The final interest the parents may advance is their desire to maintain the privacy of their family and avoid intrusions by outsiders (lawyers, judges) into their family business. Part of this could be accomplished by making such proceedings confidential, as is now often done in juvenile court. But even in such circumstances, the intrusion remains real. This privacy appeal was implicitly rejected in Danforth, and should be rejected here too. The parents are seeking the assistance of the state in removing the child from their household and, at that point, the child has a right to some form of governmental protection from the possibly ill-advised wishes of his parents.195

195. The foregoing discussion should not be taken as an argument that all mental retardation institutions are bad or that placement of children in them is always inappropriate. There appears to be a growing consensus among leading mental retardation professionals that a relatively small number of clients will continue to need institutional care—particularly some clients who are profoundly retarded and multiply-handicapped. R. Scheerenberger, supra note 167, at 188-92. One need not believe that institutions should be abolished in order to conclude that hearings should be provided to avoid the risk of harm they present to individual children.
Conclusion

Determination of the procedural requirements for intervention by the state in the lives of children, at the request or with the agreement of parents, presents novel and troublesome constitutional questions. Special problems arise in the definition of the liberty interests of minors and in determining how much process is due given an infringement of those interests. These problems cannot be resolved by resort to the categorical assumptions of either traditional theory or "children's liberation." Close examination of the interests held by parents, children, and state, and of the process by which those interests are affected, will be required.