A Footnote to *Parham:* Was J. L. a Casualty of the Mental Health Bar?

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Those who followed the development of the lead cases on the civil commitment of minors observed not only changes in the opinions but also changes in the case names. In the federal district court in Pennsylvania there was *Bartley v. Kremens*,[1] which was decided in favor of giving the minor mentally ill and mentally retarded plaintiffs similar due process consideration to that given adults in civil commitment proceedings, that is, notice, counsel, a probable cause hearing, and so on. Then in *Kremens v. Bartley*,[2] the U.S. Supreme Court declared the claims of the plaintiffs moot in view of intervening legislation that changed Pennsylvania civil commitment statutes. On remand the case was refiled in the federal district court as *Institutionalized Juveniles v. Secretary of Public Welfare*,[3] and largely decided as previously, giving the classes of mentally ill and mentally retarded minors similar due process consideration as that given adults.

In the meantime, *J.L. and J.R. v. Parham*[4] was filed in the federal district court in Georgia, claiming that mentally ill minors who were voluntarily placed in state psychiatric facilities by their parents or guardians without a judicial hearing had been denied due process. The court agreed. On appeal, the U.S. Supreme Court[5] reversed and remanded, finding that the initial placement of these minors into state facilities without a judicial hearing was constitutionally permissible as long as there was an independent examination of the need for hospitalization, which examination could be medical. The Supreme Court then used this holding in its decision, reversing and remanding *Secretary of Public Welfare v. Institutionalized Juveniles*.[6] At the Supreme Court level the *Parham* case was called simply *Parham v. J.R.*,[7] and a footnote to the decision stated: "Pending our review one of the named plaintiffs before the District Court, J.L., died."[8] J.L. was a boy named Joey Lister. This presentation tells the story of Joey Lister and raises the question whether in some sense Joey was a casualty to the cause of the mental health or patient's bar.

Joey's Story[9]

Joey was born out of wedlock October 1, 1963. When he was eight hours old, Dr. Joe Mack Lister, then a Milledgeville, Georgia, dentist brought Joey home for adoption without adequate time for psychological preparation on Mrs. Lister's part. Apparently the adoption was an attempt to help

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save a shaky marriage. The marriage dissolved three years later, and the adoptive mother took custody of Joey. She remarried when Joey was five, and she and her new husband soon had a natural child.

In early 1970, when Joey was six years old, he and his mother and stepfather began outpatient treatment at Central State Regional Hospital in Milledgeville because of problems with Joey: he was overactive, at times aggressive, and he was hard to manage. Methylphenidate was prescribed. Within two months Joey had been expelled from school because he was uncontrollable, and his mother requested his inpatient admission, which occurred in May 1970. At admission he was diagnosed as having a hyperkinetic reaction of childhood.

Joey's mother and step-father participated in family therapy during the hospitalization. Short home stays for Joey were attempted, but his behavior was erratic, and after several months the parents requested that the visits be stopped. Joey's full-time hospitalization then continued until 1972, when he was nine. At that time Joey was discharged to live with his mother and step-father while still attending school at the hospital, but there were problems with Joey that caused serious family difficulties. The hospital social worker stated that on one occasion Joey picked up and threw his baby half-sibling against the wall.[10] Within two months the hospital was asked to and did take Joey back.

In 1973, hospital personnel recommended to the Department of Family and Children's Services that Joey be removed from the hospital and placed in specialized foster care. But he was not eligible to have the state or federal government pay for such care as he was not eligible for aid to families of dependent children or Social Security funds. In 1974, his adoptive mother and adoptive father undertook proceedings to voluntarily relinquish their parental rights to Central State Regional Hospital, apparently in an attempt to make Joey eligible for public placement monies. Nonetheless, it was not easy to place Joey, and in 1975 he was still in the hospital. A progress note by the psychiatrist and ward nurse in June 1975 stated:

> He is an insecure child who feels he must have your attention by his endless request [sic]. The older he gets and the more hopeless he feels, he has begun to be physically aggressive both to the staff and to other children.
>
> Joey has adjusted fairly well to the fact that he is to go in foster care. He stated last year that "he'd rather have someone kill him than have no place to go" [sic]. He has been on a few visits. While these visits have revealed no major problems, none of the homes have invited him back.[11]

A psychological evaluation in July 1975 stated:

> Joey expressed considerable anxiety about his relationship with his parents. He stated, "I know their names, but I don't want to know them. I don't talk about them anymore." When asked about his father, Joey said, "I never seen my real father." He then hid his head and began to cry.[12]

On October 24, 1975, *JL and JR v. Parham* was filed to secure Joey's release from the hospital and to obtain an injunction restraining the opera-

tion of the state statute permitting minors to be voluntarily admitted to mental hospitals by their parents or guardians.[13] The court convened November 19, 1975.[14]

Also in November 1975 there was a custody hearing regarding Joey and his father, Dr. Lister; Dr. Lister's prior attempt at voluntary relinquishment had not been properly done. Dr. Lister was ordered to pay $200 per month child support to any foster family who would take Joey in. But again, a foster home was not soon found.[15]

Then on February 26, 1976, the District Court ruling was handed down. *Inter alia*, the opinion ordered:

> the defendant to proceed as expeditiously as is reasonably possible (1) to provide necessary physical resources and personnel for whatever non-hospital facilities are deemed by them to be most appropriate for these children and (2) to place these children in such non-hospital facilities as soon as reasonably appropriate.[16]

They also declared voluntary admissions by parents or guardians violative of the due process clause of the Fourteenth Amendment and ordered that within sixty days the state must commence constitutionally adequate commitment proceedings or completely remove these children from their custody.[17]

A motion was filed to stay the order and judgment pending direct appeal to the U.S. Supreme Court. Among the grounds were that the stay was "necessary in order to prevent irreparable injury to members of the *plaintiff* class during the appeal of the court's decision."[18] The stay was denied, citing, among other reasons, "The court's considered opinion that *every minute* [emphasis added] of unnecessary or inappropriate confinement and detention of a child in a mental hospital is a deprivation of liberty which affects him adversely and from the harmful effects of which he may never recover."[19]

After the court's decisions more efforts were made to place Joey, but then Dr. Lister came forward and asked for custody, even though he had not had custody of Joey for some ten years and had not otherwise shown much interest in Joey's welfare.[20] Dr. Lister was then remarried, had other children, and was living in another part of the state. After an assessment of his home the Department of Family and Children's Services determined that the best placement available for Joey was with his adoptive father. In April 1976, apparently before expiration of the sixty days allowed by the court, Joey was placed with Dr. Lister.[21]

Some four months after release from the hospital, on August 4, 1976, Joey was found hanged in a bedroom closet, his body showing multiple minor contusions and apparent rope markings around the wrists and ankles.[22] Although his death was considered a suicide, his father was tried for criminal abuse. At the trial witnesses testified to abuses such as Dr. Lister's making Joey run for hours in the hot sun and then refusing him water. Dr. Lister himself acknowledged having tied Joey to a bed on three occasions.

Dr. Lister was found guilty and received a five-year sentence.[23]

Discussion

Although this story might stop here, satisfying our curiosity about what happened to a participant in a landmark case, maybe there is another issue than the tragedy already presented: maybe Joey Lister was an involuntary casualty to the sometimes overly zealous mental health bar. The mental health bar (and the bench) have often been of considerable help in improving mental hospital facilities and treatment, exposing inappropriate commitment, and in developing other aspects of patients' rights and treatment,[24] but perhaps with Joey Lister, they went too far. Not that "the bar" (or District Court) directly caused Joey's tragedy, but maybe they helped create the conditions that allowed it to occur. Perhaps they "made law" and pushed for Joey's release beyond what the mental health *or* legal systems could properly handle under the circumstances while still protecting Joey's most fundamental right, to life.

To put this issue of "making law" at Joey's expense in focus, some aspects of Joey's case will be reviewed. First, although the hospital had recommended Joey's release in 1973, the fact is that at the time of the District Court's opinion in February 1976 Joey had not been released. There were several reasons for this, but they included the difficulty of finding a place outside the hospital for a child described by the Supreme Court as having "severe emotional disturbances."[25] (Recall that Joey had visited potential placement homes but was never invited subsequently to stay in them.[26])

The three-judge panel that heard the case at the district court level visited the hospital Joey was in.[27] During this visit one of the judges is reported to have said of the hospital that, "Any place is better than this place,"[28] an evaluation apparently incorporated into their denial of the motion to stay their order and judgment and an evaluation that subsequently was unfortunate for Joey.

And while this case was pending (in late 1975) at a time when Joey was especially troubled about his lack of relationship with his parents and unaccepted by tentative foster homes, his guardian *ad litem* took him home for two weeks. On the first day that Joey was with his guardian *ad litem* and his wife, Joey asked them if they were going to adopt him and was told they were not going to do so.[29] This close attachment between Joey and his attorney — surely one of the most important people in Joey's life at the time — soon was completely severed when Joey moved to another part of the state to live with Dr. Lister.

When Joey's attorney was asked if Joey would have been better off if he had not been involved in this litigation, the response was, "No, institutions are such that no one should stay there."[30] A similar conclusion was voiced by another attorney in the law office involved in representing the *Parham* juveniles. When he was asked if Joey would have been better off had they

not been involved with him, he responded that, "Joey was absolutely better off: difficulties with what occurred next [after Joey's release] were not related to issues about the institution. I don't believe we'll change facilities if we use that kind of approach."[31]

Likely more important were similar ideas by John L. Cromartie, a senior attorney involved in initially bringing Joey's case to court and the attorney who argued the case for the minors before the United States Supreme Court. He is quoted as saying, "I had trouble coming up with anything more horrible than the idea of committing a child to a mental institution."[32] And when he was arguing before the Supreme Court, he was questioned by Justice Thurgood Marshall about ways to free inappropriately confined minors, with bringing a *habeas corpus* being one such method. Justice Marshall stated, "But you did not do it," and Cromartie replied, "No, your Honor, we did not. We feel that preventing inappropriate hospitalization would not be accomplished by a case-by-case *habeas* approach."[33] Had Joey thought that the general issue of "inappropriate hospitalization" was more important than his individual case?

Joey's story illustrates the tragic outcome of what can occur if an attorney's attitude has such an antiinstitutional bias that a client gets swept along in the attack on the institution. This form of client *mis*representation is related to what has been called "the myth of advocacy"[34] in the mental health area, where zealous advocacy on one side does not have the requisite counterbalance of equal advocacy for other parties. For example, did anyone really advocate *for* Joey?

With Joey's representation in mind, one can wonder about adherence to some of the ethical canons of the American Bar Association.[35] For example, canon five reads, "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." Was such judgment carefully exercised for Joey? It is certainly arguable that Joey's interest was regarded as less important than that of the larger group if it was considered more important to prevent inappropriate confinement than to pursue the simple and direct remedy of *habeas corpus* that might have addressed itself to Joey's case. And what about canon nine, "A Lawyer Should Avoid Even the Appearance of Professional Impropriety"? To try too hard to "change the system" at the cost of those who should be served by the system seems like "professional impropriety."

There is another problem here in representing a minor, namely the meaning and importance of the relationship between a minor and the guardian *ad litem*. This subject itself warrants a detailed presentation, but at least some of its facets can be discussed here relative to Joey. A knowledgeable mental health professional could have predicted the development and intensity of Joey's adoption fantasies and the possible effects of their disappointment. Was Joey's attorney cognizant these fantasies would occur? Were Joey's adoption fantasies and wishes an important part of the basis for his cooperating in this legal action where "it was more important to

prevent inappropriate confinement" than merely obtain his release? Was Joey more interested in this legal action to secure his release from the hospital and its staff, who had been his most enduring "family," or did he primarily want someone who would want him and be interested in him in a continuing way and not only for the pendency of a suit, no matter how well intentioned the person might be? These questions on possible complications of the attorney-client relationship with minors generally and with Joey specifically are all easier to ask than answer, but they clearly warrant asking.[36]

It may appear unfair to retrospectively review the tragedy of Joey's death, because had this outcome been anticipated, matters regarding Joey would probably have been handled otherwise by many or all of those involved. But Joey's tragic story of what occurs after release from a nonideal mental hospital is not an isolated one. In fact, most of us who have been involved for some time with the treatment of serious mental disorders have our horror stories of patients who "died with their rights on." Another such example that reached the U.S. Supreme Court was *Baxtrom v. Herold.*[37] Although Johnnie Baxtrom may well have wanted release from Dannemora State Hospital, and made law thereby, he died in status epilepticus soon after his release when he was unable to obtain the medication so easily available in the hospital.[38] Another example of someone who "died with their rights on" is found in the somewhat mistitled book, *Prisoners of Psychiatry.*[39] The book advocates "nothing less than the abolition of involuntary hospitalization."[40] Although only some dozen cases are discussed in detail, in one of these cases "the legal system" "was successful"[41] in obtaining the release of a depressed woman from the hospital and a week later she "threw herself in front of a subway train and died."[42] Some success!

Psychiatrists are sometimes accused of (and sometimes do) inappropriately overzealously treat patients; in an analogous way members of the mental health bar sometimes overzealously advocate and "make law" at their clients' expense. Maybe Joey Lister was a casualty of such overzealous advocacy. We hope we can all learn caution from this example. At the very least, if there are going to be "martyrs to the cause," let them be knowing and consenting competent adults.

References

1. *Bartley v. Kremens*, 402 F. Supp. 1039 (E.D. Pa. 1975)
2. *Kremens v. Bartley*, 431 U.S. 119, 97 S.Ct. 1709, 52 L.Ed. 2d 184 (1977)
3. *Institutionalized Juveniles v. Secretary of Public Welfare*, 459 F. Supp. 30 (E.D. Pa. 1978)
4. *J.L. and J.R. v. Parham*, 412 F. Supp. 112, 412 F. Supp. 141 (M.D. Ga. 1976)
5. *Parham v. J.R.*, 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979)
6. *Secretary of Public Welfare v. Institutionalized Juveniles*, 442 U.S. 640, 99 S. Ct. 2523, 61 L. Ed. 2d 142 (1979)
7. *Parham v. J.R.*, 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979)
8. Id. n 1
9. Joey's life story up to the time of the lower court decision is collated from the published *Parham* decisions (412 F. Supp. 112, 1976, at 117 and 61 L. Ed. 2d 101, 1979, at 110), the U.S. Supreme Court records and briefs in the case (case number 75-1690), particularly the "Revised Statement of Facts,"

pp. 62-64, in Vol. 1 Appendix, and Exhibits 2-B-1 (Summary Progress Note, 6/75) and 5-A-2, Psychological Evaluation, 6/75 [*sic* July, 1975], and other material as cited.

10. The hospital social worker, Ms. Carolyn Grant, communicated this information on Joey's aggressiveness (personal communication, Oct. 21, 1981)
11. U.S. Supreme Court brief, Vol. I, Exhibit 2-B-2-3, (Progress Note, June, 1975), pp. 96 and 97. The portion of the quote attributed to Joey, "He stated last year that he'd rather have someone kill him than have no . . ." is illegible at p. 97 and is taken from the Atlanta Journal, May 5, 1977, p. 2-A
12. Id. Exhibit 5-A-1 (Psychological Testing, June, 1975 [*sic*, July 1975]), p. 108
13. 412 F. Supp. 112 (1976): Joey and the other plaintiffs were represented by the Georgia Legal Services Program.
14. Id
15. Atlanta Journal, May 5, 1977, p. 2-A
16. 412 F. Supp. 112 (1976) at 139
17. Id. at 140
18. Id. at 142
19. Id. at 145
20. U.S. Supreme Court brief, Exhibit 2-B-1, p. 95 and passim; Ms. Grant (personal communication, Oct. 21, 1981); and Atlanta Constitution, May 28, 1979, p. 1-C
21. Atlanta Journal, May 5, 1977, p. 2-A
22. Georgia Crime Laboratory, Record of Medical Examiner, W. McCollum, M.D., No. 76-17519, Aug. 5, 1976
23. *Superior Court of Thomas County, Ga. v. Lister*, Case No. 5852, 1976, Judge Marcus B. Calhoun; Atlanta Journal, May 5, 1977, p. 2-A
24. This literature will not be reviewed, but at a minimum it can start with the *Wyatt* (*Wyatt v. Stickney*, 344 F. Supp. 373, 1972), and *Donaldson* (*Donaldson v. O'Connor*, 493 F. 2d 507, 1974) opinions. It is also arguable that to some extent there is a mental health or patients' bench, at least as represented by certain judges, which has been helpful with certain decisions, such as with these *Wyatt* and *Donaldson* decisions, but at other times is more problematic, such as the District Court for Joey Lister in the case under discussion.
25. 61 L. Ed. 2d 101 (1979) at 124, n 19
26. U.S. Supreme Court brief, Exhibit 2-B-3 (p. 97) and Deposition of Ann Etheridge of the Baldwin County Dept. of Family and Children Services, Dec. 5, 1975, at 665 and 678
27. 412 F. Suppl. 112 (1976) at 118
28. Reported by Ms. Grant (personal communication, Oct. 21, 1981)
29. The visit at his attorney's home, Mr. David Goren, is reported in Atlanta Journal, May 5, 1977, p. 2-A, and was confirmed in a personal communication with Mr. Goren, where the comment on adoption was obtained (Nov. 24, 1981). There is at least minor irony here: The case was brought to attempt to prevent parents and guardians from voluntarily putting their children into the state hospital, but after two weeks with his guardian *ad litem*, whom Joey hoped would be his father, Joey was "voluntarily" put back into the hospital.
30. David Goren (personal communication, Nov. 24, 1981)
31. John Zimering, Georgia Legal Services, Atlanta, Georgia, (personal communication, Oct. 28, 1981)
32. Atlanta Constitution, May 28, 1979, p. 1-C
33. Oral Argument in the Supreme Court of the United States, *Parham v. JL and JR*, No. 75-1690, Dec. 6, 1977, pp. 44-45, University Publications of America, Frederick, Maryland. This source does not identify the Justice, who is identified in Atlanta Journal, Dec. 7, 1977, p. 3-A
34. Stone A: The myth of advocacy. Hosp Community Psychiatry 30:819-22, 1979
35. Committee on Ethics and Professional Responsibility, Model Code of Professional Responsibility and Code of Judicial Conduct, American Bar Assoc., Chicago 1979
36. The psychological complexities and complications of attorney-client relationships are a crucial problem for legal education in and out of law school. These issues have been addressed in varying degrees by a number of writers: Watson A. Lawyers and professionalism: a further psychiatric perspective on legal education. Univ Michigan J Law Reform 8:248-85, 1975; Lacoursiere RB. Mental health consulation in a law school clinic. Am J Psychiatry 134:1422-4, 1977. Cf. Lacoursiere RB: A fish out of water? A psychiatrist in a law school. Bull Am Acad Psychiat Law 8:387-400, 1981
37. 383 U.S. 107 (1966)
38. Slovenko R. Psychiatry and Law. Boston, Little Brown and Co., 1973, p. 226, n 11
39. Ennis BJ: Prisoners of Psychiatry: Mental Patients, Psychiatrists, and the Law. New York, Harcourt Brace Jovanovich, 1972: most of the patients discussed are more prisoners of the law than of psychiatry.
40. Id. at 232
41. Id. at 188
42. Id. at 188

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