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The Never-Never Land of Mental Health Law:

A Review of the Legal Rights of Youth Committed by Their Parents to Psychiatric Facilities in California

Sidney S. Hollar†

Traditionally, psychiatric hospitalization has been misused as a method of social control. Individuals who dared to defy societal norms were labeled deviant and were often institutionalized. The poor, children, and women, especially lesbians and women of color, suffer disproportionately from improper hospitalization. While much progress has been made in the mental health field, children, because of their lack of economic and legal power, continue to be victims of lax mental health laws which permit them to be "voluntarily" committed to private institutions by parents or guardians who have enough money or insurance to pay for the hospitalization.

This article provides an historical context and discusses some of the reasons for the upsurge in private hospitalization of children by their parents. It examines the legal rights of children "voluntarily" placed in locked public and private psychiatric hospitals in California pursuant to parental consent. This article describes three recent trial court cases in which a minor asserted his or her rights to a due process hearing prior to...

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1 See generally P. CHESLER, WOMEN AND MADNESS (1972); see also B. EHRENREICH & D. ENGLISH, FOR HER OWN GOOD: 150 YEARS OF THE EXPERTS' ADVICE TO WOMEN 128-29, 196-97 (1978).

2 This paper specifically excludes an examination of minors involuntary committed to psychiatric facilities, minors who are wards or dependents of the court and emancipated youth.
commitment in a private mental hospital, each of which brought a different result. Finally, this paper discusses the efforts which need to be made to curtail the abuse.

I. HISTORICAL PERSPECTIVE AND REASONS FOR RISE IN PSYCHIATRIC HOSPITALIZATION

The minors who are most frequently inappropriately hospitalized are described as "trouble makers," status offenders, or beyond parental control. These children are classified by California Welfare and Institution section 601 (hereinafter § 601). Pursuant to this provision minors who violate truancy, curfew or runaway laws, or who are disobedient or unruly, may become wards of the court. When this happens, a minor is supervised by a juvenile probation officer either within the home or in an unlocked out-of-home placement facility. Prior to the enactment of § 601, these minors could be placed in a locked juvenile hall by their parents or the police.

Both before and after the enactment of the § 601 system, parents with appropriate insurance or financial resources have been able to place their children in locked psychiatric hospitals. Recently, however, hospitalization has become a burgeoning practice. A number of possible reasons for this development are: (1) middle class parents do not want the perceived stigma that attaches when their children go through the § 601 procedure; (2) many juvenile probation departments rarely file § 601 petitions; (3) insurance companies do not pay for many less restrictive intervention services but readily pay for private hospitalization, which

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4 CAL. WELF. AND INST. CODE § 601 (West 1984):

Minors habitually disobedient or truant.

(a) Any person under the age of 18 years who persistently or habitually refuses to obey the reasonable and proper orders or directions of his [or her] parents, guardian, or custodian, or who is beyond the control of such person, or who is under the age of 18 years when he [or she] violated any ordinance of any city or county of this state establishing a curfew based solely on age is within the jurisdiction of the juvenile court which may adjudge such person to be a ward of the court.

Protocol developed by Los Angeles County for enforcement of rights of minors in state psychiatric hospitals specifically excludes from its definition of "mental disorder" behaviors specified under § 601. See B. Deming Lurie, Roger S. Procedures: Admission of Minors to County and County-Contract Facilities, Patients' Rights Office, Los Angeles County Department of Mental Health Draft 3 (1985).

can cost up to $1,000 per day; and (4) psychiatric hospitals aggressively advertise their facilities as a panacea for status offenses and rarely, if ever, reject a minor brought to them by a parent.

Often parents defer to the psychiatrist’s opinion, yet the incidence of low reliability and validity of psychiatric diagnoses and the tendency to err in the direction of over-diagnosis provide arguments that this deference is unwarranted. Recently, the American Medical Association cited a study which indicates that at least half of the minor patients could be treated more effectively outside of the hospital.

II. MINORS AFFORDED PROCEDURAL DUE PROCESS RIGHTS PRIOR TO HOSPITALIZATION IN STATE PSYCHIATRIC FACILITY BY PARENT

In 1977, the California Supreme Court ruled that a minor committed to a state psychiatric unit by his or her parents must be afforded procedural due process rights. The following letter from Roger S., the fourteen-year-old petitioner who was admitted against his will by his father to a state psychiatric hospital, provided the impetus for this landmark decision. In it, he stated:

Dear Tom,

I want to get out of Napa State Hospital. I don’t really feel I should be here, because it’s not really doing me any good. Please get me out! They won’t let me call you. They wrote a letter saying you can’t call me and I’m mad about that. . . . I really feel like I’m gonna [sic] run if I don’t get out of here. I want to be put somewhere where they can help me with my problems. In a group home or a foster home.

Sincerely,

/s/ Roger M—S—

6 In the experience of this author, the length of stay seems directly correlated to the amount of coverage allowed under the policy.

7 See Jackson-Beeck, supra note 3 at 159, 160. Recent advertisements include: “Defiant teenager? Is your teenager irresponsible, rebellious, or out of control? Running with the wrong crowd? Headed down a path with no future? Help your son or daughter before it’s too late!” Hospitals provide the panacea: “We teach: traditional values; respect for others; wholesome fun; appreciation; responsibility; self esteem.” SUNSET, School and Camp Directory, at 60E, 62B (March, 1989). Many of these ads fail to mention that these establishments are locked psychiatric units which mix “rebellious” youth with those who are seriously mentally ill. Further, in the experience of this author, in order for a private locked facility to refuse admittance of a minor, overwhelming evidence showing inadequacy or inappropriateness of a parent must exist.


9 Pinkney, Youth Psychiatric Hospitalization Is Up Dramatically, AM. MED. NEWS 1 (March 10, 1989), (citing a study conducted by Ira Schwartz, Director, Center of Youth Policy, University of Michigan).


11 Dillon, supra note 8 at 373, citing exhibit A to the petition for writ of habeas corpus. In re Roger S.
Apparently, someone finally allowed contact between Roger S. and his attorney, who brought this case to the attention of the California Supreme Court. The Court found that Roger's procedural due process rights were violated insofar as he was deprived of his liberty without a hearing.\(^\text{12}\) In order to avoid future constitutional problems, the Court set forth several procedural safeguards: (1) a minor has a right to a precommitment hearing before a neutral factfinder; (2) during this hearing he or she has the opportunity to be present, to be represented by counsel, to present evidence and to cross-examine witnesses; and (3) in order to be hospitalized, the hospital must show by a preponderance of the evidence that the minor is mentally ill or disordered, gravely disabled or dangerous, and that the treatment for which he or she is confined must likely be beneficial.\(^\text{13}\) The standard enunciated by the Court, while much less strict than that utilized for involuntary commitment, is fairly high.\(^\text{14}\) In addition, a record of the proceedings, adequate for appellate review, must be kept.\(^\text{15}\)

On a practical level, however, the due process requirements of *Roger S.* directly apply to few cases since only two state hospitals now exist in California. These hospitals provide few spaces for "mentally ill" minors and, by necessity, carefully screen all applicants.

### III. Mixed Results in Private Psychiatric Admission Challenges

Although minors are somewhat protected from unnecessary hospitalization by their parents in state hospitals, up until very recently the law governing those placed in private facilities was vague.\(^\text{16}\) In the absence of any explicit statute or case law precluding hospitalization, it was relatively easy for parents to hospitalize their children.

This author has recently represented a minor upon whom a hospital

\(^{12}\) *In re* Roger S., 19 Cal. 3d at 935, 569 P.2d at 1294-95, 141 Cal. Rptr. at 306-07.

\(^{13}\) *Id.* at 937-39, 569 P.2d at 1295-97, 141 Cal. Rptr. at 307-09.

\(^{14}\) In order to be committed involuntarily, the minor must be a danger to him- or herself, a danger to others or gravely disabled. *Cal. Welf. & Inst. Code* § 5000 (West 1984).

\(^{15}\) *In re* Roger S., 19 Cal. 3d at 938, 569 P.2d at 1296-97, 141 Cal. Rptr. at 308-09.

Two years later, Justice Burger delivered an opinion in stark contrast to *Roger S.*: *Parham v. J. R.*, 442 U.S. 584 (1979). *Parham* involved a challenge to a Georgia mental health law permitting minors to be committed by their parents to state mental hospitals under voluntary commitment statutes without a formal preadmission hearing. The Court held that an adversarial preadmission hearing was not necessary. *Parham*, 414 U.S. at 606-07. The Court merely required a neutral factfinder to determine the appropriateness of the hospitalization—then allowed that the factfinder could be the admitting psychiatrist. In order to avoid abusive hospitalization, the Court suggested that a parent who wrongfully confined a child in an institution could be subject to abuse or neglect proceedings. *Id.* at 602-03.

\(^{16}\) Several months after the presentation of this Article, the California Legislature passed a bill that specifies how minors may be privately hospitalized pursuant to parental consent. S. Bill 595, 1989 Reg. Sess., § 1. Unfortunately for minors, this statute provides very few protections against unnecessary hospitalization. *See part IV of this Article, infra* notes 30-68 and accompanying text.
psychologist had performed a series of tests. The psychologist's eight-page, single-spaced evaluation found "no evidence of thought disorder, impairment in reality testing, depression or any other significant psychopathology." The diagnosis was possible "oppositional defiant disorder," and the symptoms were "disobedience and negative and rebellious behavior." The psychologist's conclusions were based largely upon the fact that the minor was a seventeen-year-old girl who had a twenty-two-year-old boyfriend of whom the parents disapproved. In addition, the minor continuously denied the need for hospitalization in a locked psychiatric unit and constantly called her attorney.

In January 1988, a patients' rights advocate contacted this author regarding a means to obtain the release of Kristina, the minor admitted to the facility at her parents' request. Upon admission, she had orally demanded a hearing from the hospital to determine whether probable cause to detain her existed. She clearly stated that she did not wish to be hospitalized. The hospital staff refused her request for a hearing. Subsequently, Kristina signed a written demand for a hearing, to which the hospital failed to respond. This author met with Kristina and the hospital staff, reviewed her charts and contacted the treating professionals by telephone. Interestingly, the psychotherapist Kristina had seen prior to hospitalization strongly opposed Kristina's admittance and offered to testify in court on her behalf.

After unsuccessful negotiations, Kristina filed a writ of habeas corpus in the superior court, in which she urged the court to extend Roger S. protections to minors in private hospitals. The court issued the writ after the hospital failed to file a responsive pleading and released Kristina to her parents' custody. Immediately upon her release, however, Kristina's parents readmitted her to the hospital.

Kristina again filed a writ of habeas corpus. During this hearing, the judge heard preliminary testimony from the hospital psychiatrist, who testified that Kristina was not a danger to herself or others, nor gravely disabled. The judge agreed with the findings of the hospital psy-

18 Id.
19 Oppositional defiant disorder is the diagnosis when the child exhibits at least five of the following characteristics for a period of at least six months: (1) often loses temper; (2) often argues with adults; (3) often actively defies or refuses adult requests or rules, e.g., refuses to do chores at home; (4) often deliberately does things that annoy other people; (5) often blames others for his or her own mistakes; (6) is often touchy or easily annoyed by others; (7) is often angry and resentful; (8) is often spiteful or vindictive; (9) often swears or uses obscene language. A criterion is met only if the behavior is considerably more frequent than that of most people of the same mental age. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders: DSM-III-R 57 (3d ed. rev. 1987) [hereinafter DSM-III-R].
20 Patients' rights advocates are ombudspersons who have statutorily created access to mental patients and their records.
chologist. Before making a final decision or completing testimony, the judge requested briefing on the question of whether parents have the right to admit their minor child to a private hospital for confinement in a locked psychiatric ward even if the child is not gravely disabled.

Roger S. specifically excluded an analysis of the lawfulness of mandatory treatment in a locked private facility because that issue was not before the court. The argument in Kristina's case centered around a demand to provide due process protections, regardless of the classification of the hospital as a public or private facility, and a challenge under the privacy clause of the California Constitution. The policy considerations mandate that protections against unnecessary hospitalization be provided to minors admitted to either public or private facilities. The superior court denied the petition for a hearing. The court ruled that, because no state action was involved, the hospital did not violate Kristina's state constitutional right to due process by denying her a precommitment hearing. The court did not explicitly rule on the privacy issue. Subsequently, Kristina filed an appeal on July 17, 1989, which the court of appeals denied.

Similar cases have resulted in inconsistent outcomes. Recently, a

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21 In re Roger S., 19 Cal. 3d 921, 927 n.3, 569 P.2d 1286, 1289, n.3, 141 Cal. Rptr. 298, 301 n.3 (1977).
23 The rationale underlying Roger S., which incorporates institutional, societal, therapeutic and familial interests, applies equally to minors in private hospitals. Roger S. clearly established that minors have a fundamental constitutional right of personal liberty which includes the right to be free from bodily restraint. In re Roger S., 19 Cal. 3d at 927, 569 P.2d at 1289, 141 Cal. Rptr. at 301. Moreover: society has an interest in the future development of the child, in avoiding diagnosis and/or commitment based on erroneous information and evaluation thereof, and in assuring the child fair treatment. An erroneous conclusion by a parent that his [or her] child is mentally ill or in need of treatment in a closed mental hospital facility might well 'jeopardize the health or safety of the child, or have potential for significant social burdens,' factors recognized by the United States Supreme Court as justifying a limitation on parental authority. Id. at 930, 569 P.2d at 1291, 141 Cal. Rptr. at 303 (citation omitted).

The Court also stated that the hearing process is therapeutic to juveniles. Id. As to familial interests, if a reasonable alternative to hospitalization exists or if the minor is not in need of any treatment, the parent has no interest in forcing the minor to remain in a locked psychiatric unit. The Court indicated that the due process requirements do not impinge on the family unit. Rather, "[i]f . . . it appears that the minor is not mentally ill or disordered, or that treatment can be given without removing him from the home, the family unit may be strengthened." Id. at 930-31, 569 P.2d at 1291-92, 141 Cal. Rptr. at 303-04.

24 Kristina was released after the Department of Social Services instigated an investigation of the appropriateness of her hospitalization. She spent approximately one month locked in the psychiatric ward.

Appellees, the hospital, the treating psychiatrist and the hospital administrator, sought to dismiss the action on the ground of nonjusticiability because Kristina filed an appeal rather than a renewed writ of habeas corpus. However, the appellate court granted Kristina's request to treat the appeal as a petition for writ of habeas corpus. Appellees also argued that the court should dismiss the case as moot, which the court declined to do.

In a very brief order, however, the court denied the writ without explanation. This contravenes Cal. R. Cr. 260(c), which requires that "[a]ny order denying a petition for a writ of habeas corpus shall contain a brief recital of the reasons for the denial." More importantly,
California Superior Court in Vallejo granted a writ of habeas corpus for a minor placed in a private psychiatric hospital.\textsuperscript{26} The court found that Roger S. applied to First Vallejo Hospital, a private facility. Because the hospital failed to provide a precommitment hearing to the minor, the court ordered her released \textit{sua sponte}.\textsuperscript{27}

In at least one case, the San Francisco Superior Court has held a post-commitment hearing.\textsuperscript{28} Peter was an adopted twelve-year-old who lived with his affluent parents, a psychiatrist and psychologist. His misdeeds included smashing a computer printer and starting a fire. The latter incident occurred one evening when Peter attempted to open his parents' locked bedroom door in order to use the family video cassette recorder to do his homework assignment. He sprayed fire retardant on the door, leaving a small hole above the handle. While he was torching the hole so that he could open the other side of the locked door, his parents returned home. Obviously, this was not a very smart stunt; it should not, however, be a sufficient reason to lock him in a psychiatric ward.

In order to successfully challenge the hospitalization, the minor must have his or her own expert testimony. Peter was opposed by his two parents and three treating psychiatrists. Despite the fact that his diagnosis was "conduct disorder,"\textsuperscript{29} a rebellious youth syndrome, the commissioner and reviewing superior court judge erred on the side of caution and declined Peter's request.\textsuperscript{30}

\textsuperscript{26} Neil Levy on behalf of Naomi N. v. First Vallejo Hospital, No. VMH 3923 (Solano Super. Ct. Jan. 29, 1989).

Robert Walker, Esq., represented the petitioners, with this author as co-counsel. Interestingly, several years ago Mr. Walker filed an amicus curiae in \textit{In re Roger S.} and participated in the oral argument on behalf of Roger S. before the California Supreme Court.

\textsuperscript{27} \textit{Id.}

\textsuperscript{28} \textit{See} Peter S. v. California (San Francisco Super. Ct. 1988). The Los Angeles Superior Court also provides a post-commitment hearing, if requested by the minor, to determine the appropriateness of the hospitalization. \textit{See} procedures utilized by Judge Florence Bernstein in Los Angeles Super. Ct., Dept. 95.

\textsuperscript{29} Conduct disorder is the diagnosis when the child exhibits at least three of the following characteristics for a period lasting at least six months: (1) has stolen without confrontation of a victim on more than one occasion (including forgery); (2) has run away from home overnight at least twice while living in parental or parental surrogate home (or once without returning); (3) often lies (other than to avoid physical or sexual abuse); (4) has deliberately engaged in fire-setting; (5) is often truant from school . . . ; (6) has broken into someone else's house, building, or car; (7) has deliberately destroyed others' property (other than by fire-setting); (8) has been physically cruel to animals; (9) has forced someone into sexual activity with him or her; (10) has used a weapon in more than one fight; (11) often initiates physical fights; (12) has stolen with confrontation of a victim (e.g., mugging, purse-snatching, extortion, armed robbery); (13) has been physically cruel to people. DSM-III-R, \textit{supra} note 19, at 55.

\textsuperscript{30} Curiously, the judge refused to allow her court clerk to file Peter's writ of habeas corpus. She took the matter of whether she would grant a hearing under submission for several weeks. After the commissioner heard the matter and ruled against Peter, Peter appealed to the presiding judge of the superior court. The denial appeared on a small yellow "post-it" note. Peter initially wanted to pursue an appeal, but the hospital released him shortly thereafter, and he declined the continuation of his case.
IV. LEGISLATIVE AND APPELLATE ATTEMPTS TO AMELIORATE ABUSIVE HOSPITALIZATION PRACTICES

Challenges must be mounted on two fronts: the courts and the Legislature. Kristina appealed on the basis of an abridgement of her right to privacy. Although she lost her appeal, other cases may provide bases upon which to bring this matter to the attention of the courts. In addition, two bills were introduced in the California Legislature this term, one of which recently passed. This bill offers no protection against abusive hospitalization of youth by parental consent. In fact, it provides parents wide latitude when hospitalizing their child in a private psychiatric facility.

One's right to privacy is the strongest appellate argument for extending the Roger S. due process protections to minors in private hospitals pursuant to parental consent. The state constitution protects privacy not only against state action, but also against nongovernmental intrusion as well: “it is considered an inalienable right which may not be violated by anyone.” It has been recognized that the inalienable constitutional “right to privacy . . . applies to minors as well as adults.”

Cases which define the contours of a right to privacy reveal a constitutionally protected “zone of privacy” which encompasses a broad range of interests. By analogy, a number of these interests are implicated when parents commit their minor child to a private mental hospital unnecessarily:

(1) the right of a “mature minor” to sexual privacy;

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32 The following arguments were made in a brief filed on behalf of Kristina B. and written prior to enactment of S. 595. The effect of this legislation on the following analysis is beyond the scope of this paper.


34 The new conservative majority on the California Supreme Court recently signaled its possible reluctance to apply the privacy clause in purely private situations. Schmidt v. Superior Court, 48 Cal. 3d 370, 389 n.14, 769 P.2d 932, 944 n.14, 256 Cal. Rptr. 750, 762 n.14 (1989). In Schmidt, a case involving an age-based rule in a private mobilehome park, the court stated:

[b]ecause we conclude that the rule at issue here would not be unconstitutional even if the state action requirement were met, we have no occasion in this case to consider, under what circumstances, if any, purely private action . . . would constitute a violation of the state constitutional privacy provision.

But see Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979), aff’d 447 U.S. 74 (1980) wherein the California Supreme Court held that the California Constitution’s free speech clause, which contained no state action requirement, protected activity against a private defendant.

35 E.g., Griswold v. Connecticut, 381 U.S. 325 (1965) (right to privacy within institution of marriage); Paul v. Davis, 424 U.S. 693 (1976) (certain zone of privacy in which personal relationships or decisions are protected from government interference); New Jersey v. T.L.O., 469 U.S. 325 (1985) (protection of minor’s right to privacy against unreasonable searches).

(2) the right to refuse unwanted medical treatment. As defined by these cases, this right is based on "the inviolability of the person" and the individual's right to refuse to consent to "intrusions of his bodily integrity." Forcing a person to undergo unwanted psychiatric treatment, however, implicates that person's privacy as much as, if not more than, compelling him or her to accept treatment of physical illness. Indeed, psychiatric treatment "not only affects the patient's bodily integrity but the patient's mind";

(3) the right of "mental privacy," i.e., the "right to be free in the exercise of one's own thoughts." This includes the right to protect one's thoughts, emotions, expressions and personality from unwanted intrusion; and

(4) the right of "associational privacy," i.e., the right to choose the people with whom one lives and associates. As suggested by the foregoing California courts have held that minors are entitled to other protections based upon privacy considerations. As suggested by the foregoing

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361, 378-80 (1986); but see People v. Stockton Pregnancy Control Medical Clinic, 203 Cal. App. 3d 225, 249 Cal. Rptr. 762 (1988).


38 Bartling, 163 Cal. App. 3d at 195, 209 Cal. Rptr. at 225 (quoting Saikewicz, 373 Mass. at 742, 370 N.E.2d at 427).


As Justice Brennan explained in his concurring and dissenting opinion in Parham v. J.R., 442 U.S. 584, 626-27 (1979), commitment to a mental institution necessarily has a profound impact on the fundamental rights of the institutionalized patient:

Persons incarcerated in mental hospitals are not only deprived of their physical liberty. They are also deprived of their friends, family, and community. Institutionalized mental patients must live in unnatural surroundings under the continuous and detailed control of strangers. They are subject to intrusive treatment which, especially if unwarranted, may violate their right to bodily integrity. Such treatment modalities may include forced administration of psychotropic medication, aversive conditioning, convulsive therapy, [and] even psychosurgery. Furthermore, . . . persons confined in mental institutions are stigmatized as sick and abnormal during confinement and, in some cases, even after release.

Id. at 626-27 (footnotes omitted).


41 White v. Davis, 13 Cal. 3d 757, 774, 533 P.2d 222, 233, 120 Cal. Rptr. 94, 105 (1975). See Fults v. Superior Court, 88 Cal. App. 3d 899, 902, 152 Cal. Rptr. 210, 212 (1979) (the right not to be required "to answer questions about the most intimate aspects" of one's life).


cases, several aspects of a minor's forced hospitalization and treatment appear to intrude upon the zone of privacy protected by the state constitution. Physically confining a minor in a locked psychiatric ward for several weeks amounts to an intrusion upon his or her bodily integrity. In addition, such institutionalization infringes on the minor's right of associational privacy by removing him or her from family, friends and community, thereby curtailing the "freedom to associate with the people [the minor] choose[s]." Furthermore, the treatment the minor receives while hospitalized violates his or her privacy rights by invading the sanctity of the mind, "the quintessential zone of human privacy." The hospital subjects the minor to a battery of psychological tests which delve into the minor's thoughts and feelings and thereby intrudes upon his or her right to mental privacy. By requiring the minor to answer such questions, and using the answers to create a psychological profile of him or her, the hospital prevents the minor from "deciding for himself [or herself]... when and under what conditions his [or her] thoughts, speech, and acts should be revealed to others." In this regard, it should be emphasized that the very nature of psychiatric hospitalization itself is inherently intrusive on a minor's privacy concerns:

The decision to commit a minor has irrevocable consequences; the child is institutionalized and subjected to treatment for an indefinite period of time. In addition, the detriments of institutionalization are actually greater in the case of a minor than for an adult. The child is deprived of friends, family and community, lives in unnatural surroundings under continuous and detailed control by strangers, and is subjected to treatment and possible stigmatization.

Further support exists for the argument that forcing a mature minor to undergo inpatient psychiatric treatment restricts his or her interest in privacy. Several United States Supreme Court decisions recognize that such minors have a right of privacy under the federal constitution entitling them to make important decisions about procreation and sexual health care matters, even when such decisions conflict with parental authority. The interests recognized by these cases would appear to be

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46 Long Beach City Employees Ass'n, 41 Cal. 3d 937, 944, 719 P.2d 660, 663, 227 Cal. Rptr. 90, 93 (1986).
47 Id. at 944 n.7, 719 P.2d at 663 n.7, 227 Cal. Rptr. at 93 n.7.
49 For example, in Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976), the Court held that the right of a mature minor to decide whether or not to terminate pregnancy was paramount to the right of her parents to control the upbringing of their child. In striking down a provision of a state abortion statute that required unmarried minors to obtain parental consent prior to obtaining an abortion during the first trimester of pregnancy, the Court stated:

Any independent interest the parent may have in the termination of the minor daugh-
no more significant than the interest in avoiding forced hospitalization and psychiatric treatment. As one commentator has aptly observed:

The Court repeatedly has held that 'mature' minors have a privacy interest in decisional autonomy . . . . Arguably, the types of decisions in which the Court has extended to minors a right of privacy (for example, decisions whether to use contraception or terminate a pregnancy), are no more 'important' or 'fundamental' than is a decision whether to enter an inpatient facility. Clearly, each of these decisions has serious ramifications for the health, general well-being, and future of the minors affected.50

The right of mature minors to consent to certain types of medical treatment necessarily implies a corollary right to refuse to consent to such treatment. A number of state statutes accord minors the right to authorize medical and psychiatric treatment independent of parental consent, and protect the confidentiality of treatment records even against parental inquiries.51 Further, as noted, the United States Supreme Court has held that mature minors have a federal constitutional privacy right which entitles them to authorize treatment for themselves even where their parents object.52 The rationale of the mature minor doctrine and the above statutes is that mature minors have an interest in bodily auton-

ter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant. Id. at 75. See also Carey v. Population Services Int'l., 431 U.S. 678, 692 n.14 (1977) (minors have the right to obtain contraceptive services and devices); Akron v. Akron Center of Reproductive Health, 462 U.S. 416, 429-42 (1983) (ordinance requiring minors under the age of fifteen to obtain parental consent before obtaining abortion held unconstitutional); Bellotti v. Baird, 443 U.S. 622, 647-48 (1979) (statute may not require minor to notify her parents prior to seeking relief in court; a minor deemed by the court to be mature enough to make her own decision need not notify her parents prior to obtaining an abortion).

The United States Supreme Court recently voted to hear two cases which involved state laws requiring that parents be notified before a teenage daughter can have an abortion, both of which may seriously undermine earlier decisions. See Ohio v. Akron Center for Reproductive Health, 854 F.2d 852 (6th Cir. 1988), cert. granted, 57 U.S.L.W. 3859; Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988), cert. granted, 109 S.Ct. 3240 (1999). Practitioners are encouraged to follow a challenge made in the California courts, based in large part upon a minor's right to privacy, to a state statute which requires unemancipated minors to obtain parental consent or judicial authorization prior to an abortion. American Academy of Pediatrics v. Van de Kamp, 214 Cal. App. 3d at 831, 263 Cal. Rptr. at 372-73.

50 Weithorn, supra note 3, at 810 n. 213. See also Parham v. J. R., 442 U.S. 584, 631 (1979) (Brennan J., concurring in part and dissenting in part) ("The right to be free from wrongful incarceration, physical intrusion, and stigmatization has significance for the individual surely as great as the right to an abortion"); Tiano, supra note 48, at 136-37 (concluding that "the mature minor doctrine should apply to decisions pertaining to institutionalization as well as to decisions pertaining to procreation").

51 E.g., CAL. CIV. CODE §§ 34.5-34.10 (West 1982) (giving minors the right to consent to various types of medical and psychiatric treatment); CAL. CIV. CODE §§ 56-56.37 (West 1982) (providing a privilege of medical record confidentiality personal to the minor). See Planned Parenthood Affiliates v. Van de Kamp, 181 Cal. App. 3d at 269-70, 226 Cal. Rptr. at 372-73.

52 E.g., Planned Parenthood of Missouri v. Danforth, 428 U.S. at 72-75.
omy that entitles them to consent to certain types of medical treatment independent of parental approval. This rationale arguably supports the notion that such minors should not be compelled to submit to such treatment against their will. Several courts and commentators are in accord with this view. In Melville v. Sabbatino, the parents admitted the plaintiff, their seventeen-year-old son, to a private psychiatric facility as a "voluntary" patient. The plaintiff sought a writ of habeas corpus to secure his release. In issuing the writ, the court rejected the parents' contention that their consent was necessary before their minor child could be released. The court reasoned that, because a state voluntary commitment statute permitted minors aged sixteen and older to admit themselves for treatment, such minors must also be allowed to sign themselves out of the institution, even if the admission was originally initiated by the parents.

In sum, the right of privacy encompasses the right to refuse to continue inpatient psychiatric treatment at a private mental hospital without independent review. This right derives from: (1) state cases which broadly define the parameters of the zone of privacy protected by Article I, section 1 of the California constitution; (2) United States Supreme Court decisions recognizing the right of mature minors to make certain fundamental health care decisions, and limiting parental discretion where it conflicts with the minor's rights; and (3) the understanding that statutes and case law granting mature minors an independent right to consent to certain types of medical treatment, even over parental objections, implicitly prohibit parents from compelling minors to undergo such treatment.

In addition to the privacy considerations that were argued in the judicial system, two California legislators offered relevant bills this session. Assemblyperson Richard Polanco originally submitted extensive legislation to remedy the abuse of inappropriate hospitalization in which

54 Id. at 323-24, 313 A.2d at 889; see also In re Smith, 16 Md. App. 209, 295 A.2d 238 (1972) (where state statute gave minor the right to consent to medical treatment concerning pregnancy, minor could not be forced by her parents to accept such medical treatment); see generally Tiano, supra note 48, at 134-39.
55 Although a minor's right of privacy must be balanced against his or her parents' right to direct his or her upbringing, parental interest in ensuring the minor's mental health is not a valid justification for committing the minor if he or she does not need the treatment. In re Roger S., 19 Cal. 3d 921, 930, 569 P.2d 1286, 1291, 141 Cal. Rptr. 298, 303 (1977). However, no case exists that holds that the state institutional right of privacy has a due process component entitling the person to a hearing to protect against such private interference. The court will have to extend the right against governmental intrusion to cover private situations.
56 Although numerous bills addressing the issue of private civil commitment of minors by their parents have been introduced over the years, the first one was passed in 1989. S. 595 Reg. Sess. § 1 (1989). This is not surprising, considering the political clout of the hospital, medical and psychiatric organizations which do not want legislation restricting their lucrative businesses. In addition, the people who would be protected by this type of legislation are not constituents since their age precludes them from voting.
he sought to extend *Roger S.* to private hospitals. The bill differed from the *Roger S.* provisions in that it required a post-, rather than a precommitment hearing and did not apply to youth under age fourteen. After a flurry of amendments backed by hospital, psychiatric and medical lobbyists, Assembly Bill 2424 was drastically changed to the effect that it no longer provided youth with any substantive rights. At the end of the 1988-89 legislative term, it became a two-year bill.

Senator Robert Presley also introduced legislation in the 1988-89 term similar to the procedures set forth in *Parham* whereby an “independent” psychiatrist must conduct an informal review in order to determine the appropriateness of the hospitalization. Unfortunately, the Assembly and Senate passed this bill in September, 1989 and Governor George Deukmejian signed it into law on October 2, 1989. This legislation was drafted by medical, hospital and psychiatric associations, all of which stood to gain much economically from its passage. Child and mental health advocates, as well as civil libertarians, actively lobbied against this bill.

The Presley Bill is a drastic departure from *Roger S.* protocol. First, it does not provide for a preadmission hearing to determine the appropriateness of the hospitalization. This bill allows for passage of as many as five days before the “review” occurs. A preadmission hearing is necessary due to both the invasion of liberty of being locked in a psychiatric ward and “the potential damage that may accompany an erroneous diagnosis and placement of a minor child in a mental hospital.” A precommitment hearing is also necessary to “afford the minor the benefit of a hearing in the community where his [or her] witnesses would be readily available and alternative resources better understood.” Most importantly, due process requires that one must have a hearing before deprivation of one’s personal liberty occurs.

Secondly, the legislation substitutes the judgment of an independent

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57 This bill originally incorporated most of the *Roger S.* protections, including the exclusion of minors who exhibit § 601 behaviors. AB 2424 See § 1 of this paper, supra notes 3-8 and accompanying text. Civil libertarians and youth advocates welcomed the due process protections initially provided in this legislation.

58 *Roger S.* left open the possibility of extending the due process requirements to minors under age 14. The court stated, “[w]e have no occasion in the instant case to consider the lawfulness of the . . . admission procedure as applied to children under 14 years of age . . . .” 19 Cal. 3d at 927 n.3, 569 P.2d at 1289 n.3, 141 Cal. Rptr. at 301 n.3. In at least one case, the Superior Court of San Francisco allowed a 13-year-old to have a *Roger S.*-type hearing. See Peter S. v. California (San Francisco Super. Ct. 1988). Other areas of the law provide for medical consent of minors younger than age 14. Minors of any age may obtain pregnancy-related care or sexual assault treatment. **CAL. CIV. CODE** §§ 34.5, 34.9 (West 1982). Minors 12 years of age and older may consent to outpatient mental health treatment, infectious disease treatment, rape treatment and drug and alcohol treatment. **CAL. CIV. CODE** §§ 25.9, 34.7, 34.8, 34.10 (West 1982).


60 **In re** Roger S., 19 Cal. 3d at 937, 569 P.2d at 1296, 141 Cal. Rptr. at 308.

61 Id.

62 Id.
psychiatrist for a judicial hearing. This use of a psychiatrist, rather than a judge, raises potential conflict of interest issues. For example, the psychiatrist may be hesitant to override the admission decision of a fellow psychiatrist based upon a potential loss of referrals or professional peer pressure. In addition, psychiatrists are likely to be paternalistic and insensitive to civil liberty issues and may be overly responsive to family pressures to commit a child.63

Third, the bill provides a less stringent standard of review. It allows for hospitalization if the treatment is reasonably likely to be beneficial, whereas the Roger S. protocol requires a finding that the minor suffers from a mental disorder, and that there is a substantial probability that treatment will significantly improve the minor's mental disorder.64 Further, Roger S. protocol requires that the minor should be hospitalized only if there is no other suitable alternative, and the proposed hospitalization is the least restrictive setting necessary to achieve the purposes of the treatment. Senate Bill 595, however, allows hospitalization whenever treatment in a less restrictive setting would not be more appropriate. It fails to address the issue of whether any alternatives to hospitalization exist.

Fourth, the Presley Bill calls for a private interview between the minor and the reviewing psychiatrist, an incredibly intimidating requirement which is unheard of in an adversarial process, especially one involving minors. In contrast, a judge never speaks to a party outside the presence of his or her counsel and the opposing side.

Fifth, Senate Bill 595 fails to define a mental disorder, while the Roger S. protocol narrowly defines it and specifically excludes minors who exhibit behaviors specified under Welfare and Institutions Code § 601. Under Senate Bill 595, conduct disorder or oppositional defiant disorder, both diagnoses of behaviors which are similar to those covered under § 601 and excluded in the protocol, could be utilized as an admitting diagnosis.

Lastly, the new legislation specifically excludes the right to representation by an attorney during the review hearing.65 As the court in Roger S. stated: "[i]nasmuch as a minor may be presumed to lack the ability to marshal the facts and evidence, to effectively speak for himself [or herself] and to call and examine witnesses, or to discover and propose alternative treatment programs, due process also requires that counsel be provided for the minor."66

Two positive features of the legislation are its inclusion of a right to

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63 See Dillon, supra note 8, at 386-88.
64 S. 595 Reg. Sess. § 1 (1989), emphasis added.
65 A patients' rights advocate may "assist" the minor with the "review" process.
66 In re Roger S., 19 Cal. 3d at 939, 569 P.2d at 1296, 141 Cal. Rptr. at 308.
a writ of habeas corpus and its requirement that clinical data must be gathered by directing the Department of Mental Health to track the number of minors hospitalized, the diagnosis, the length of stay, source of payment, number of reviews, and the outcome of reviews.

Unlike California, however, other states provide significant due process rights to minors, including, among other things, a right to a judicial determination of the appropriateness of the hospitalization, appointment of counsel, appointment of an independent doctor, a finding of a mental disorder, introduction of evidence and a right to an appeal.

V. CONCLUSION

In closing, the following letter written by a twelve-year-old to a superior court judge provides insight into the reasons why minors placed in private facilities at the parent's request should be afforded the same due process protections as those placed in state facilities.

Dear Judge ——,

My name is Peter S——. I was admitted to [the hospital] on 3/3/88. I will turn 13 on Sunday the 20th and I'm in the 7th grade at Town School for Boys. I was admitted to this ward of the hospital because my parents said I was “out-of-control.” I didn't believe this was necessary at the time and I still don't think that I belong here. The reason they say that I'm out-of-control is that I ran away, but the reason I did that was because my dad slammed my head against the car and knocked half my tooth out.

Since my dad didn't admit to this my parents said I had no reason to run away. That's not the only reason my parents said they sent me here.

67 The Bill assumes the right to file a writ of habeas corpus previously existed; however, absent state action, it is unclear whether minors in private hospitals previously possessed this right. Regardless of whether state action existed prior to S. 595, the Bill now provides the basis for a finding of state action. Its language also shows evidence of an intent by the Legislature that minors be granted the right to have their writ heard by a court. In addition, the writ process brings the matter to the attention of a court and takes the focus away from the medical arena.

Practitioners are urged to provide the patients' rights advocate with all relevant information, including prior psychiatric, psychological or social work reports and school records for presentation at the “review.” During the “review,” the advocate should present testimony from other treating professionals who are of the opinion that the minor should be treated in an outpatient setting. Others who should testify include responsible adults who could provide a home for the youth if the parents refuse to take him or her back home, teachers who are familiar with the minor, and any other interested people. It is imperative that the advocate compile this record in order for the youth to prevail in the writ process.

68 Assembly Bill 2424 will be used also as a vehicle to implement Senate Bill 595 as well as to solve any unforeseen problems. Presumably if the data show large numbers of youth who are hospitalized for minor “problems,” the Legislature will be convinced of the need to draft a meaningful due process bill next term. Child and mental health advocates, as well as civil libertarians, are urged to track this process to ensure that next term's Legislature is aware of the illusory nature of Senate Bill 595.

They said I was disagreeing with them for no reason and that I was using them as "meal tickets."

I have read In re Roger S. and I think I understand my current rights. . . . To me this means that if my parents want to keep me here and I don't belong here then I have the right to a hearing to decide to keep me here or not. I know Roger S. was 14 and I'm only 12-363/365. I still believe that I have sufficient capacity to exercise due process rights. It seems as if the court did not say children under the age of 14 couldn't have a hearing. It just seemed undecided.

I'd really like a chance to prove to some neutral person (like you) that I really don't belong here. Thank you for reading over this letter and considering my request.

Sincerely,

/s/ Peter S——

Whether or not a youth receives meaningful due process rights when locked in a psychiatric unit pursuant to parental consent should not depend on the source of funding for the hospitalization. Rather, the legal system should strive to ensure that no minor is hospitalized inappropriately. This may be achieved through a change in the current legislation or via a judicial mandate. With respect to the legislation, child advocates should closely follow the statistical study ordered for 1989-90. If, as expected, statistics reveal that a significantly large number of minors are hospitalized for moderate teenage rebellion problems after failing to prevail in their "reviews," advocates should press the Legislature to enact Roger S. laws for private psychiatric institutions.

In the meantime, child advocates should provide a plethora of evidence, in the form of written documentation and live testimony during the review so that an adequate record for the writ of habeas corpus exists. Attorneys must follow through with the writ hearing. Attorneys may also challenge the legislation in court based upon an infringement of the right to privacy for minors. These privacy arguments are not precluded by the denial of the writ of habeas corpus in Kristina B. We must also continue with the publicity campaign in the news and television media in order to educate the public to this growing problem.

70 Peter S. v. California (San Francisco Super. Ct. 1988).