

VI FAMILY LAW

THE INVOLUNTARY COMMITMENT OF MINORS: WHERE TO DRAW THE LINE ON PARENTAL AUTHORITY

*In re Roger S.*¹ The United States Supreme Court decision of *In re Gault*² established that minors are entitled to due process protections in state-initiated criminal and quasi-criminal proceedings that threaten their liberty. *In re Roger S.* concerned a fourteen-year-old minor's petition for the same procedural protections in a parent-requested admission to a state mental hospital. Under the California voluntary admission statute, parents and guardians could commit children in their custody with the approval of only a few state mental health professionals.³ In its analysis, the California Supreme Court focused on the doctrinal implications of the parent's formal initiation of the admission process. It found the constitutional privilege of parents to direct the upbringing of children extensive enough to deny petitioner the full range of protections he requested.⁴ But Justice Wright, writing for the majority, concluded that countervailing interests of the child and of society were sufficient to require the state to provide at least an administrative hearing and representation by counsel for those minors, fourteen and over, who do not give a knowing and voluntary waiver of their rights, before they can be admitted to a state hospital for the mentally disordered.⁵

1. 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977). This citation refers to the case on rehearing where Justice Wright's original opinion for the majority was reprinted in full. Justice Clark expanded his dissent to criticize the majority for founding its decision on both the fourteenth amendment of the United States Constitution and article 1, § 7(a) of the California Constitution. He argued that the use of both constitutional provisions insulated the decision from review by either the state legislature or the United States Supreme Court. *Id.* at 945-46, 569 P.2d at 1301, 141 Cal. Rptr. at 312. Justice Richardson concurred in this aspect of the dissent. *Id.* at 947, 569 P.2d at 1302, 141 Cal. Rptr. at 314.

2. 387 U.S. 1 (1967).

3. CAL. WELF. & INST. CODE § 6000 (West Supp. 1977). The section reads in pertinent part:

Pursuant to the rules and regulations established by the State Department of Health, the medical director of a state hospital for the mentally disordered or mentally retarded may receive in such hospital, as a boarder and patient, any person who is a suitable person for care and treatment in such hospital, upon receipt of a written application for the admission of the person into the hospital for care and treatment made in accordance with the following requirements:

(b) In the case of a minor person, the application shall be made by his parents, or by the parent, guardian, or other person entitled to his custody to any of such mental hospitals as may be designated by the Director of Health to admit minors on voluntary applications.

Similar statutes can be found in most states. Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CALIF. L. REV. 840, 840-41 n.1 (1974).

4. 19 Cal. 3d at 934, 569 P.2d at 1294, 141 Cal. Rptr. at 306.

5. *Id.* at 937, 569 P.2d at 1296, 141 Cal. Rptr. at 308.

Although the holding of *In re Roger S.* substantially improves existing law, the court exaggerated the deference due the parental decision to commit the child and did not accurately assess the dangers of institutionalization or the effect of the child's commitment on the parent-child relationship. As a result, it failed to protect the child adequately from indefinite, nontherapeutic commitment. This Note will first discuss the facts of the case and the court's resolution of the issues. Next, the arguments justifying a hearing in this situation will be analyzed. Finally, the procedural protections and the substantive criteria appropriate for such a hearing will be explored.

I. The Court's Treatment of the Case

a. Facts and Issues

Fourteen-year-old Roger S. sought his release from Napa State Hospital by petition to the California Supreme Court for a writ of habeas corpus.⁶ He had been admitted to the mental institution upon the application of his mother under the California voluntary admission statute.⁷ That statute permitted a parent to admit a child in the same way adults may admit themselves.⁸ The minor's consent was not necessary, and there were no provisions for the minor to challenge the factual basis of the decision or to appeal to a disinterested third party. In accordance with admission procedures, Roger's commitment was preceded by an initial screening and referral conducted by a community health professional,⁹ who recommended admission after making the required findings that no appropriate alternative placements were available in the community and that hospitalization was necessary. The county mental health worker then contacted an official at the state institution who agreed that hospitalization would be "suitable."¹⁰

6. Habeas corpus is the statutorily designated means for challenging civil commitment in California generally, CAL. WELF. & INST. CODE § 7250 (West Supp. 1977), and under the Lanterman-Petris-Short Act, *id.* § 5275 (West 1972). See note 12 *infra*. Petitioner had originally sought the writ in superior court, but it was denied. The supreme court found that the superior court remained the most appropriate forum for factual adjudication of the case. Therefore the petition was dismissed without prejudice to a reapplication to the lower court. 19 Cal. 3d at 941, 569 P.2d at 1298, 141 Cal. Rptr. at 310.

7. CAL. WELF. & INST. CODE § 6000 (West Supp. 1977).

8. The passage of § 6000 has apparently encouraged the hospitalization of minors. Between 1954 and 1969 the population of those under 21 in California state mental hospitals increased from 1.3% to 9.2%. Ellis, *supra* note 3, at 845 (citing CAL. ASSEMBLY SELECT COMM. ON MENTALLY ILL AND HANDICAPPED CHILDREN, REPORT ON SERVICES FOR THE HANDICAPPED AND MENTALLY DISORDERED CHILDREN 146 (1970)).

9. CAL. WELF. & INST. CODE § 5651(f) (West Supp. 1977) requires that "[n]o mentally disordered person shall be admitted to a state hospital prior to screening and referral by an agency designated by the county Short-Doyle plan to provide this service." The Short-Doyle Act, CAL. WELF. & INST. CODE §§ 5600-5769 (West 1972 & Supp. 1977) directs each county to develop a plan for community mental health services.

10. See CAL. WELF. & INST. CODE § 6000 (West Supp. 1977). The court's description of the contact between the local official and the staff of the state hospital suggests that actual screening by the hospital staff is minimal, perhaps limited to discussing the case on the

Petitioner's preadmission psychiatric history included allegations of verbal and physical aggression towards his mother and threats of suicide, all of which he denied. Two of the specialists who conducted his routine evaluation prior to admission to the hospital found that he was "clearly not psychotic," and two other physicians felt that physical restraint of any kind was unwise in his case. Despite these opinions, the state hospital staff considered hospitalization suitable. The staff diagnosed Roger's condition as "latent schizophrenia," and treated him with an antipsychotic drug during the several months of his confinement.

In his petition, Roger complained of the jaillike conditions of his ward life, including homosexual advances from other patients. Some patients with whom he was confined were severely disturbed; two had recently attempted suicide. The state, as respondent, admitted that Roger had acted neither aggressively nor self-destructively for several months. In addition, it admitted that he was "not gaining from further hospitalization."¹¹

Petitioner sought procedural safeguards equivalent to those provided under the Lanterman-Petris-Short Act (LPSA),¹² which governs the evaluation and involuntary commitment of adults and minor wards of the court. The LPSA permits the involuntary hospitalization of only those persons found to be gravely disabled or dangerous to themselves or others due to mental illness.¹³ Procedural rights under the LPSA include the right to counsel, a judicial hearing, and a jury trial.¹⁴ Petitioner argued that due process and equal protection entitled him to similar protections.¹⁵ In defense of existing procedures, the state argued that it was acting under its *parens patriae* power to aid parents in raising their children. Further protections for the child were not necessary for due process and would restrict a parent's freedom to direct the child's upbringing.¹⁶

telephone prior to an evaluation after commitment. 19 Cal. 3d at 932, 569 P.2d at 1292, 141 Cal. Rptr. at 314.

11. 19 Cal. 3d at 936, 569 P.2d at 1295, 141 Cal. Rptr. at 307.

12. CAL. WELF. & INST. CODE §§ 5000-5404 (West 1972 & Supp. 1977). The Lanterman-Petris-Short Act (California Mental Health Act of 1967) was enacted to establish standards and procedures for civil commitments to California state mental hospitals. Ch. 1667, § 36, 1967 Cal. Stats. 4074. See Comment, *Civil Commitment of the Mentally Ill in California: The Lanterman-Petris-Short Act*, 7 LOY. L.A.L. REV. 93, 99-103 (1974) for an outline of the LPSA procedures.

13. CAL. WELF. & INST. CODE § 5150 (West Supp. 1977). The term "gravely disabled" means roughly that the subject is unable to care for himself. The California Supreme Court has said that courts interpreting the standard must make allowances for a minor's age. See *In re Michael E.*, 15 Cal. 3d 183, 192 n.12, 538 P.2d 231, 237 n.12, 123 Cal. Rptr. 103, 108-109 n.12 (1975).

14. CAL. WELF. & INST. CODE §§ 5302, 5350 (West 1972 & Supp. 1977).

15. Roger S.'s claims were based on both the fourteenth amendment of the United States Constitution and article I, § 7(a), (b) of the California Constitution. 19 Cal. 3d at 926-27, 569 P.2d at 1289, 141 Cal. Rptr. at 301.

16. *Id.* at 934, 569 P.2d at 1294, 141 Cal. Rptr. at 306.

b. The Court's Resolution

The court attempted to reconcile the conflicting interests of parent and child; it recognized both the child's liberty interest, made "conditional" by the continuation of parental authority, and the parent's interest in controlling the child's upbringing. In defining the child's liberty interest, the court relied primarily on cases protecting the rights of children against state encroachment.¹⁷ It reaffirmed the doctrine that the liberty interest of minors is constitutionally protected. Since the state is significantly involved in confining the child, the child would normally be entitled to due process. But the court also affirmed the constitutional right of parents to be free of state interference in raising their children. It described the parents' "right to direct [their] child's upbringing . . . as 'a compelling one, ranked among the most basic of civil rights,'"¹⁸ and as one that includes the power "to curtail a child's exercise of the constitutional rights he may otherwise enjoy."¹⁹

This conflict of doctrines presented the issue of whether parental authority is so expansive that parents can waive those protections to which a child is otherwise entitled. The court discussed some of the dangers inherent in civil commitments: the loss of liberty, the possible stigma of being identified as mentally ill, and the inaccuracy of psychiatric diagnosis. It concluded that these dangers are significant enough that the child's right to due process cannot be waived by the parent. If minors are "mature enough to participate intelligently in the decision to independently assert [their] right to due process in the commitment decision [they] must be permitted to do so."²⁰

The court found additional support for this apparent inroad on the traditional authority of the parent in society's interest in the child. The state has an interest in protecting the child from harm, in guiding him toward becoming a useful citizen as an adult, and, as a corollary, in maintaining the family. Furthermore, the state has a duty to treat the child fairly.²¹ Thus, parental authority could be limited in this case because "it appears that

17. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975) (suspension of high school students for allegedly disruptive behavior requires a hearing); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (state cannot require Amish children to attend school beyond eighth grade when state interests can be achieved without infringing on children's first amendment right to free exercise of religion); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (wearing black armbands to high school in protest of the Vietnam war protected expression under the first amendment); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (free exercise clause applies to minors: state cannot require children to pledge allegiance to the flag).

18. 19 Cal. 3d at 934, 569 P.2d at 1294, 141 Cal. Rptr. at 306, quoting *In re B.G.*, 11 Cal. 3d 679, 688, 523 P.2d 244, 250, 114 Cal. Rptr. 444, 450 (1974).

19. 19 Cal. 3d at 922, 569 P.2d at 1280, 141 Cal. Rptr. at 299.

20. *Id.* at 929, 569 P.2d at 1290, 141 Cal. Rptr. at 302.

21. See *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972).

parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.'"²²

The court reasoned that granting the child due process was an appropriate limitation on parental authority. Procedural safeguards may be therapeutic for the child as a demonstration of fair treatment. Review by an impartial third party of the parental decision to commit may help the child accept treatment and prevent parents from committing children inappropriately. The court pointed out that due process may strengthen rather than weaken a family already "so fundamentally in conflict."²³

Existing admission procedures, however, were found to be inadequate for due process. The court recognized that indefinite confinement of the child in a state mental hospital must be reasonably related to certain legitimate purposes.²⁴ It determined that parents have the authority to admit only those children who are gravely disabled or imminently dangerous, and those who are mentally ill and who would benefit from hospitalization.²⁵ Therefore, a child must be given "a fair opportunity to establish that (1) he is not mentally ill or disordered, or that, (2) even if he is, confinement in a state mental hospital is unnecessary to protect him or others and might harm rather than improve his condition."²⁶

The court concluded that a hearing before a neutral and detached adjudicator is necessary to avoid faulty factfinding and erroneous diagnosis that can lead to an inappropriate and damaging commitment. It also decided that the advantage of holding a preadmission hearing outweighs any benefits of delaying the hearing until after an initial period of confinement for evaluation.²⁷ A preadmission hearing protects the child from the potential

22. 19 Cal. 3d at 928, 569 P.2d at 1290, 141 Cal. Rptr. at 302, *quoting* *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

23. 19 Cal. 3d at 930-31, 569 P.2d at 1291, 141 Cal. Rptr. at 303, *quoting* *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976).

24. 19 Cal. 3d at 935, 569 P.2d at 1294, 141 Cal. Rptr. at 306. Although the court did not rely on analogies to other commitment proceedings, it did admit that the Constitution requires "that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.* *quoting* *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

25. 19 Cal. 3d at 921, 569 P.2d at 1286, 141 Cal. Rptr. at 298. The only purpose the court mentioned for committing nondangerous minors is treatment for mental disorders should alternative facilities not be available. *Id.* at 935, 569 P.2d at 1294, 141 Cal. Rptr. at 306. Since § 6000 is presently the only means of committing minors who are not wards of the court to state hospitals, the court was concerned that parents whose county has no alternative treatment facilities and who could not afford private care would be foreclosed from arranging any psychiatric treatment at all for their children. By contrast, juvenile court judges have the authority to place wards in private facilities at the state's expense. CAL. WELF. & INST. CODE §§ 739(c), 888, 900 (West Supp. 1977).

26. 19 Cal. 3d at 935, 569 P.2d at 1295, 141 Cal. Rptr. at 307.

27. *Id.* at 938, 569 P.2d at 1296, 141 Cal. Rptr. at 308. Other courts have delayed the final hearing until after in-house evaluations. *Bartley v. Kremens*, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded on other grounds*, 431 U.S. 119 (1977); *see Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1276 (1974) (hereinafter cited as *Developments*). In *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), the Court allowed a temporary

trauma of being unnecessarily removed from the home and placed in a mental institution. Moreover, minors are assured of having the hearing in the home community, where witnesses are available and alternative community services are more familiar.²⁸

The procedures of the hearing prescribed by the court are designed to maximize the accuracy of the decisionmaking process. In order for the decisionmaker to establish the facts reliably, minors must be given written notice,²⁹ the right to appear and present evidence, and the right to confront and cross-examine witnesses. The court also required a record adequate for judicial review.³⁰ Furthermore, because of the presumed inability of minors to prepare effectively for the hearing and assert their own interests, they are provided appointed counsel.³¹

The court denied petitioner's equal protection and due process claims to the full range of procedures established under the LPSA. It reasoned that, for the purposes of equal protection analysis, the ongoing authority of parents who initiate the admission process for children in their custody

evaluation period before the hearing to determine a potential defendant's competence to stand trial. Similarly, under the LPSA anyone can file an affidavit attesting to facts supporting the necessity for commitment and a judge may order a 72-hour confinement for evaluation based on an ex parte hearing. CAL. WELF. & INST. CODE § 5150 (West Supp. 1977).

The court's choice might be justified; temporary confinements necessary for in-house evaluations have been criticized as harmful. See Ellis, *supra* note 3, at 868-70. Still, the utility of these evaluations was demonstrated by *In re Roger S.* itself, since some of the evidence supporting the necessity of petitioner's release came from his postadmission evaluation. 19 Cal. 3d at 936, 569 P.2d at 1295, 141 Cal. Rptr. at 307.

28. 19 Cal. 3d at 937, 569 P.2d at 1296, 141 Cal. Rptr. at 308.

29. Given the variety of grounds that might be used to justify hospitalization, e.g., the minor is beyond control of the parents, dangerous to himself or others, in need of intensive treatment, or no alternative placements exist, notice should specify the goal of treatment and the facts supporting its necessity. A vague factual summary would not enable the minor to prepare for the medical issue in the case. An additional benefit of complete notice is the development of a record on the purpose of confinement. Once this specific purpose is met, there would be no continuing justification for hospitalization. Cf. Jackson v. Indiana, 406 U.S. 715 (1972) (confinement "until sane" of a criminal defendant after a judge's finding of incapacity to stand trial equivalent to indefinite commitment and violative of due process).

30. 19 Cal. 3d at 937-39, 569 P.2d at 1296, 141 Cal. Rptr. at 308. The lack of a sufficient record for review in juvenile cases has often been criticized. See, e.g., Chaffin v. Frye, 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (2d Dist. 1975); Mnookin, *Child Custody Cases: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROB., no. 3, at 226, 254 (1975).

31. 19 Cal. 3d at 938, 569 P.2d at 1296, 141 Cal. Rptr. at 308. The United States Supreme Court considered counsel critical for juvenile court proceedings in Kent v. United States, 383 U.S. 541 (1966), in part because of the presumed inability of children to represent themselves at the hearing.

Justice Clark dissented in *In re Roger S.*, arguing that the adversarial model is not suitable for resolving this particular due process problem. He criticized the majority for "developing a messianic image" of the judiciary. 19 Cal. 3d at 944, 569 P.2d at 1300, 141 Cal. Rptr. at 312. He found existing procedures adequate to satisfy the demands of due process with only minor modifications. In particular, he argued that both the neutral factfinder and the minor's representative in this case should be mental health professionals, and that a hearing after admission would be more appropriate to assure the safety of both the minor and others. *Id.* at 942-44, 569 P.2d at 1299-1300, 141 Cal. Rptr. at 311-12.

under the voluntary admission statute distinguishes minors like Roger S. from adults and minor wards of the court, who are committed by the state under the LPSA.³² The court also reasoned that since a child's liberty interest is made conditional by parental control, it is similar to that of a probationer or parolee. By analogy to cases holding that due process requires only an administrative hearing for probation and parole revocation,³³ the court decided that no more is required before commitment. It defended this result by arguing that the accuracy of a neutral and detached adjudicator is no less than that of either a jury or a judge. Accordingly, it concluded that the provisions of the LPSA mandating a judicial hearing and the opportunity for a jury trial are not constitutionally necessary for minors admitted by their parents. Moreover, because the rights of the child and the state extend only to preventing the parent from hospitalizing a child when it is clearly inappropriate, the reasonable doubt standard is inapplicable; findings need only be supported by a preponderance of the evidence.³⁴

The scope of the decision was limited to the factual situation before the court: the admission of minors over the age of thirteen to state mental hospitals. For those fourteen and older, the new procedures are invoked automatically unless the child makes a full and knowing waiver with the aid of counsel.³⁵

II. Limiting Parental Authority

a. The Court's Analysis

Implicit in the court's discussion of what procedural protections children must be given before being admitted into a state mental hospital is its deference to the authority and trustworthiness of the parents. The court assumed that "the great majority of parents are well motivated and act in what they reasonably perceive to be the best interest of their children"³⁶

32. 19 Cal. 3d at 934, 569 P.2d at 1294, 141 Cal. Rptr. at 306.

33. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (revocation of probation); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (revocation of parole). But see note 70 *infra* for a criticism of this analogy.

34. 19 Cal. 3d at 938-39, 569 P.2d at 1297, 141 Cal. Rptr. at 309.

35. *Id.* at 931, 938 n.10, 569 P.2d at 1292, 1296 n.10, 141 Cal. Rptr. at 304, 308 n.10. Having decided that Roger S. and others like him had been improperly admitted to state mental hospitals, the court considered the appropriate means for their claims to be heard. Until the California legislature responds to *In re Roger S.* the only available forums are the superior courts by way of writ of habeas corpus. Minors are to remain in the hospitals unless they can show they are not mentally ill or that they are not dangerous and continued treatment "is not reasonably likely to be of benefit to" them. The first group of these cases was heard in December, 1977. Telephone Conversation with Ezra Herndon, Deputy State Public Defender, in San Francisco, California (February 2, 1978).

The court stated that, until the legislature creates a new admissions mechanism, minors who are gravely disabled or imminently dangerous may be committed under the LPSA despite the contrary provisions of the Act. 19 Cal. 3d at 940 n.11, 569 P.2d at 1296 n.11, 141 Cal. Rptr. at 308 n.11.

36. 19 Cal. 3d at 935, 569 P.2d at 1295, 141 Cal. Rptr. at 307.

when they choose to place their children in a state mental hospital for care and treatment. Rights otherwise due children were limited by the traditional judicial respect for the autonomy of the parents as decisionmakers for their children.

Judicial recognition of parents' authority has a longer history than judicial acknowledgment of the individual interests of children independent of the family.³⁷ In earlier cases, the family was treated as a unit, with a constitutional right to be free of state interference only slightly less compelling than that of an individual adult.³⁸ Underlying this respect for familial autonomy is the quasi-constitutional principle that, in a pluralistic society, parents' decisions for their children must for the most part be free of governmental or judicial interference. Absent a powerful countervailing interest, the state's interest in the child cannot override the parent's right to "the companionship, care, custody, and management of his or her children."³⁹ In particular, parents have the right to direct the child's education,⁴⁰ religious training,⁴¹ most medical treatment,⁴² and preparation for adult moral and social life.⁴³ Thus, the holding of *In re Roger S.* that parents have the authority to commit their children if it is not clearly harmful to do so is consistent with a strong line of doctrine.

37. The parents' interest in directing the upbringing of their children has been protected against all but compelling state intrusions on family autonomy. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 400 (1923). *See also* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

38. The state's interest in the welfare of the child and in his development into a useful citizen justifies more far-reaching intrusions into the freedom of children, and the authority of parents, than would be permissible to restrict adults. *See, e.g.,* Ginsberg v. New York, 390 U.S. 629 (1968) (definition of obscenity for children can be constitutionally more encompassing than for adults); Prince v. Massachusetts, 321 U.S. 158 (1944) (state can prevent the sale by children of proselytizing materials on public streets at night); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state has legitimate interest in requiring some form of education); The Child Labor Tax Case, 259 U.S. 20 (1922) (state, not Congress, can regulate employment of children).

39. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

40. Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). *But see* Wisconsin v. Yoder, 406 U.S. at 241 (Justice Douglas dissenting).

41. Wisconsin v. Yoder, 406 U.S. 205 (1972); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

42. *See generally* Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Authority*, 86 YALE L.J. 645, 661 (1977); *but see* Application of the President and Directors of Georgetown College, 331 F.2d 1000, (D.C. Cir. 1964).

43. Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). In the words of Doe v. Irwin, 428 F. Supp. 1198, 1205-06 (W.D. Mich. 1977):

The family is the primary and essential cell of our society. By nature it is anterior, both in idea and in fact, to the State. The family therefore must have independent rights and responsibility prior to those of the State; it must not be absorbed by the State. This freedom of the family should be permitted as far as possible without jeopardizing the common good. The result of this freedom of independent rights and responsibilities is moral, mental and physical strength in the individual and in the family unit.

The supreme court decided, however, that parents could not commit children without some review independent of the parents and the state officials who approve the parents' decision. The court's innovation was to examine more closely the child's interests independent of the family. The United States Supreme Court has faced the question of possible conflict of interests between parent and child only once, in *Planned Parenthood v. Danforth*.⁴⁴ There, the Court established that a minor can assert a constitutional right that will supplant the compelling interest "in safeguarding the authority of the family relationship."⁴⁵ But the California court did not apply *Danforth* in its reasoning. Rather, it reached the novel result of recognizing the independent interests of children even if they do not actively dispute the parental decision.⁴⁶

In doing so, the court was careful to focus on factors peculiar to psychiatric institutionalization that call for the independent protection of minors' interests. Commitment to a mental institution completely sacrifices the minor's liberty.⁴⁷ The child is removed from home and communi-

44. 428 U.S. 52 (1976). The issue of children having constitutional rights to disagree with certain parental decisions was first raised in Justice Douglas' dissent in *Wisconsin v. Yoder*, 406 U.S. 205, 241 (1972). The majority refused to consider Justice Douglas' contention, not specifically raised by the record, that Amish parents would not have the right to withdraw their children from public school after the eighth grade against the children's wishes. *Id.* at 231.

In *Danforth* the Court rejected a state statute enforcing parental authority in the form of a veto power over a minor's decision to have an abortion. *Danforth* can be distinguished from *In re Roger S.* on the grounds that the abortion cases involved statutes intervening in a child's decision on behalf of the parents, and also in that the interest involved was a privacy right of the child (derived from the doctrine of *Griswold v. Connecticut*, 381 U.S. 479 (1965)) which has been construed as an individual right by *Eisenstadt v. Baird*, 405 U.S. 439 (1972). After *In re Gault*, 387 U.S. 1, 41-42 (1967), it was not clear that the due process rights of minors did not adhere to the family as a whole and were not therefore waivable by the parents.

45. 428 U.S. at 73-74.

46. The issue in *Danforth* was whether a statute that made parental consent a prerequisite for an abortion violated a minor's right to privacy. *Roe v. Wade*, 410 U.S. 113 (1973), established an adult's privacy right to decide to have an abortion without regulation by the state in the first 24 weeks of pregnancy. The Court in *Danforth* concluded that any minor mature enough to conceive must be free to choose, with a doctor's guidance, whether to carry the fetus. 428 U.S. 52, 74 (1976). A companion case, *Bellotti v. Baird*, 428 U.S. 132 (1976), made it clear that the state can enforce parental interests to the extent of requiring notice to and consultation with the parents prior to an abortion but may not place an undue burden on the minor's freedom of choice. This interpretation was upheld in the per curiam decision of *Guste v. Jackson*, 429 U.S. 399 (1977). See also *Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975); *Population Servs. Int'l v. Wilson*, 398 F. Supp. 321 (S.D.N.Y. 1975); *State v. Koome*, 84 Wash. 2d 901, 530 P.2d 260 (1973).

47. Both federal and California cases have recognized that confinement in a mental institution can be as great or greater a restriction on liberty as penal incarceration. *Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *Specht v. Patterson*, 386 U.S. 605 (1967); *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Conservatorship of Roulet*, 20 Cal. 3d 653, 663, 574 P.2d 1245, 1251, 143 Cal. Rptr. 893, 899 (1978) (Bird, C.J., dissenting), rehearing granted (March 30, 1978); *People v. Burnick*, 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975). Normally such a deprivation of liberty would have to serve a compelling state interest, either under the police power or under the *parens patriae* power. See *Developments*, *supra* note 27, at 1212-53.

ty, confined indefinitely in a regimented environment,⁴⁸ and unable to compel release until reaching the age of majority.⁴⁹ Although the director of a mental hospital can order a patient's release if further treatment is inappropriate, many authorities suggest that in practice hospital staffs cannot or do not adequately review a patient's condition.⁵⁰ The court also noted the conflict of opinions in psychiatric diagnosis, and the stigma that may attach to and remain with a child into adulthood.

As the court recognized, the United States Supreme Court has established that due process requires substantial procedural protections for similar state-initiated threats to minors' liberty interests. In particular, a series of decisions has mandated a revolution in the procedures that must be followed at the adjudicatory stage of juvenile hearings.⁵¹ In the leading case of *In re Gault*,⁵² the Court determined that neither the desire for informality in juvenile hearings nor their allegedly nonadversarial nature justified the risks of arbitrary and inappropriate confinement or treatment.⁵³ The same concerns were expressed by the California court. Indeed, these decisions have a particular bearing on *In re Roger S.*, since the standard of decision for both juvenile court and the court-mandated commitment hearings is the

48. These comparatively drastic measures are taken despite the evidence that a community hospital environment is almost always better for treatment. See Wexler, *Foreword: Mental Health Law and the Movement Toward Voluntary Treatment*, 62 CALIF. L. REV. 672, 672 (1974); Comment, "Voluntary" Admission of Children to Mental Hospitals: A Conflict of Interest Between Parent and Child, 36 MD. L. REV. 153 (1976).

49. Under § 6000 the parent must approve the release, until the child reaches majority. CAL. WELF. & INST. CODE § 6000 (West Supp. 1977).

50. See, e.g., Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 717-19 (1974); Rosenhan, *On Being Sane in Insane Places*, 13 SANTA CLARA LAW. 379 (1972). See also O'Connor v. Donaldson, 422 U.S. 563, 579 (1975); J.L. v. Parham, 412 F. Supp. 112, 138 (M.D. Ga. 1976), *prob. juris. noted*, 431 U.S. 936 (1977); People v. Burnick, 14 Cal. 3d 306, 326, 535 P.2d 352, 365, 121 Cal. Rptr. 488, 501 (1975).

Rosenhan conducted an experiment to study this phenomenon. Eight "sane" people were admitted to twelve hospitals with nonspecific symptoms of existential discontent. The overall experience of the subject patients was one of neglect and misdiagnosis; treatment was almost nonexistent. Rosenhan, *supra* at 381, 393. The extent of the problem may vary from time to time and hospital to hospital. Hospital staffs may well try to release children as quickly as safety permits because of their realization that due to staff shortages the children are not being treated, and the fewer the children there are, the better their treatment will be. Interview with Dr. Robert Schreiber, practicing psychiatrist at Berkeley, California (January 30, 1978).

51. See, e.g., Breed v. Jones, 421 U.S. 519 (1975) (superior court trial for offense previously tried in juvenile court violates double jeopardy clause); *In re Winship*, 397 U.S. 358 (1970) (reasonable doubt standard applies to juvenile court hearings where issue is commission of acts that would constitute a crime if committed by an adult); Kent v. United States, 383 U.S. 541 (1966) (waiver of juvenile court jurisdiction to court of general criminal jurisdiction requires a hearing); Gallegos v. Colorado, 370 U.S. 49 (1962) (fifth amendment bar against self-incrimination applies to juvenile court).

52. 387 U.S. 1 (1967).

53. *Id.* at 30-31. The Court did leave substantial discretion with juvenile court judges at the dispositional stage of the proceedings, however, justifying its decision by the need to consider all relevant information. *Id.* at 31 n.48.

child's best interest, and the goals of both programs are treatment and rehabilitation.

But these decisions protecting a child from the state do not necessarily justify protecting a child from the parent. The court in *In re Roger S.* summarily determined that the dangers of inappropriate confinement for the child were too substantial to allow the parent to make the decision to commit without some procedural review. Although other courts have struggled with the issue, the court simply stated that the parent did not have the power to waive the child's rights.⁵⁴ It partially justified the protection of the child's interests in this case by application of the *Wisconsin v. Yoder*⁵⁵ standard supporting state intervention between parent and child "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."⁵⁶ The court found that the standard was met and without explanation suggested that since the state would be justified in intervening, the parent's authority could be limited by the child's interests independent of the state. In effect, the court concluded that the interests of state and child impose the same restrictions on parental control.

b. The Impropriety of Deference to Parents' Decision to Commit

Although the court required some check on totally arbitrary commitment by parents, it continued to respect the parents' judgment. It held that the interests of children are sufficient to prevent parents from committing them only when hospitalization is clearly inappropriate. The court may have been influenced by its sense of the limited competence of the judicial system in resolving parent-child disputes. The court might, understandably, have been particularly hesitant to generalize about or interfere with the psychological complexities of troubled families. But the most significant factor in the court's result was its deference to parental authority, and this deference was misplaced. The court's misjudgment fundamentally distorted its analysis of what procedures are constitutionally dictated.

54. The United States Supreme Court implied that a parent has the power to waive the child's right to counsel in juvenile proceedings. *In re Gault*, 387 U.S. 1, 41-42 (1967). Although implicit in the Court's discussion was its treatment of parent and child as like-minded allies against the state's attempt to remove the child from the home for delinquency, several courts have considered the Supreme Court's dicta a problem when discussing commitments. *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968); *J.L. v. Parham*, 412 F. Supp. 112, 137 (M.D. Ga. 1976), *prob. juris. noted*, 431 U.S. 936 (1977). Other courts noted the issue but found the potential conflict of interest between parent and child sufficient to invoke the independent right to a counsel to protect the child's interests. *Bartley v. Kremens*, 402 F. Supp. 1039, 1047-48, 1050 (E.D. Pa. 1975), *vacated and remanded on other grounds*, 431 U.S. 119 (1977); *New York Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973); *Horacek v. Exxon*, 357 F. Supp. 71 (D. Neb. 1973). See N. KITTRIE, *THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY* 86 (1971); Ellis, *supra* note 3, at 857.

California has recognized the child's need for independent counsel in juvenile court hearings. CAL. WELF. & INST. CODE §§ 633, 634 (West 1972).

55. 406 U.S. 205 (1972).

56. *Id.* at 233-34.

The court's deference to parental authority rested on two assumptions. The court did not question the trustworthiness and authority of the parent to choose to place a child in a state mental institution. It also accepted that parents themselves independently make the decision to commit. Neither premise is supported by the facts. A closer analysis leads to the conclusion that any deference to the parents is inappropriate in this context.

The court distinguished between admissions under the voluntary admission statute and those under the LPSA on the grounds that in the latter, the state rather than the parents formally initiates the proceedings. In practice, the significance of this distinction is questionable. The children who are most likely to be committed are those who are troublesome to their parents or the state. In many such cases, juvenile courts gain jurisdiction over the child for a misdemeanor status offense, like incorrigibility. A judge may condition release of the child on the parent's agreement to commit the child to a state mental hospital for some suspected psychological or emotional problem.⁵⁷ Moreover, the parents of children who are truly mentally ill and in need of hospitalization are likely to require assistance from the state's mental health professional before making a decision to commit.⁵⁸ Thus, the signature of the parent on the admission forms often hides the influence of the state in the admissions process; it does not significantly distinguish Roger S. from minor wards of the court who are committed directly by a judge.

This confusion over the role of the state in the civil commitment of minors in their parents' custody makes the *In re Roger S.* opinion sometimes difficult to interpret. The court's indirect use of the *Yoder* standard suggests that the state needed to justify the additional review of the parents' decision necessitated by petitioner's claim. The state was in fact resisting the claim. And it was already so inextricably involved in the decisionmaking process through the participation of the state mental health officials that no further justification for intervention was necessary. Moreover, the state interferes with the essential family structure just as fundamentally by offering the parent the opportunity of confining the child outside the home as by not questioning the parent's choice.⁵⁹ The state's role is not limited to merely aiding the family in securing treatment for the child, and the parent's approval of commitment does not relieve the state of the duty to treat the child fairly.

Perhaps the most crucial of the court's unjustified assumptions was that the decision to commit a child is one in which deference to the parent is

57. Interview with Dr. Bernard Diamond, Professor of Law and Criminology, and Clinical Professor of Psychiatry, at Boalt Hall School of Law, University of California at Berkeley (January 18, 1978). The judge's decision is often supported by a staff of social workers.

58. Bennett, *Allocation of Child Medical Care Decision-Making Authority: A Suggested Interest Analysis*, 62 VA. L. REV. 285, 312 (1976).

59. Burt, *Developing Constitutional Rights Of, In, and For Children*, 39 L. & CONTEMP. PROB., no. 3, at 118, 125 (1975).

appropriate. The parent has a constitutionally protected right to manage the child's day-to-day life, to shape the influences acting on the child, to control the child in the home, and to enjoy the benefits of intrafamilial companionship and love. But the parent cedes these rights by giving over the daily care and management of the child to a state mental hospital. Furthermore, the parent may well have motives other than the child's welfare. By admitting the child to a hospital, the parent may be removing a difficult child from the home in the belief that strain on other family members will be reduced. As the court remarked, this hope will often be misplaced, for psychiatric studies suggest that the child's mental disorder can be a symptom of a family problem rather than an individual one.⁶⁰ There may also be a financial motive: by institutionalizing a child the parent may be relieved of the common law and statutory duties of support.⁶¹

Regardless of the parent's motivations, however, the familial bond becomes attenuated with the child's confinement in a mental hospital. Hence there is less justification for deference to parental decisionmaking authority. Most of the court decisions upholding constitutional parental rights have involved stable families.⁶² Even in situations like *Danforth*, involving disputes between parent and child over abortion decisions, the inherent disruption of family life is probably less severe than that engendered when the parent wishes to commit the child. Intrafamilial conflict and disruption was the basis of the *Danforth* decision, and has been the analytic focus of many courts facing cases like *In re Roger S.*⁶³

Therefore, an analysis of the standard for court intervention used when the justifications for parental authority have broken down is more appropriate here than a straightforward acceptance of the parental right. Parents' power over their children is not unlimited. The language used in California neglect cases echoes the constitutional doctrine, theoretically upholding intervention in the family relationship to protect the child only in "a fairly extreme case."⁶⁴ In practice, however, trial courts exercise substantial

60. 19 Cal. 3d at 938 n.9, 569 P.2d at 1296 n.9, 141 Cal. Rptr. at 308 n.9. See Ellis, *supra* note 3, at 859-62.

61. The parents remain legally liable for support, CAL. WELF. & INST. CODE § 7275 (West 1972), to the extent of their ability, *id.* at § 7276 (West Supp. 1977), as they would if the court committed the child. *Id.* at § 903 (West 1972). In practice, however, the county will usually pay the bills under the Short-Doyle Act, or Medical will pay instead of the parents. On the other hand, parents are also liable for any tortious or destructive behavior of their children if the damage is found to be the result of negligent supervision.

62. See note 17 *supra* for a list of cases. In particular, the United States Supreme Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), emphasized the stability of Amish families and the Amish community in exempting Amish children from state compulsory education laws after the eighth grade, reasoning that the community lifestyle would prevent these children from becoming social burdens as adults despite the foreshortening of their formal education.

63. See note 54 *supra*.

64. *In re Raya*, 255 Cal. App. 2d 260, 265, 63 Cal. Rptr. 252, 255 (3rd Dist. 1967); see also note 117 *infra*; Wald, *State Intervention on Behalf of Neglected Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975). Indeed, the purpose of the juvenile court laws generally is "to preserve and strengthen the minor's family ties whenever possible, removing

discretion in the decision to intervene because of the vague standards in juvenile cases.⁶⁵ Despite the obscurity in the area, several underlying judicial considerations emerge. Intrusion on behalf of the child is justified when a conflict of interest is implicit in a parent's decision,⁶⁶ when the home has already been disrupted,⁶⁷ and when the child's interests are considered so important that a partial emancipation from parental authority is protected by the legislature or the courts.⁶⁸ These three reasons for restricting a parent's

him from the custody of his parents only when necessary for his welfare or for the safety and protection of the public." CAL. WELF. & INST. CODE § 502 (West Supp. 1977). This section points out the state's dual role in this case, as supporter of the parent but with the result of separating parent and child, and as in some sense guardian for the child.

65. The California neglect statute allows children to be removed from the stable home against the will of the parent under CAL. WELF. & INST. CODE § 300 (West Supp. 1977) only if the child lacks proper and effective parental care, is destitute, is physically dangerous to the public, or if the home is unfit because of the neglect, cruelty, depravity, or physical abuse of the parents; or if the child is beyond the control of the parent, or is found to have committed a crime. *Id.* §§ 600, 601. See S. KATZ, *WHEN FAMILIES FAIL: THE LAW'S RESPONSE TO FAMILY BREAKDOWN* 80-82 (1973) for a discussion of the inherent ambiguity of such a standard.

66. See note 54 *supra*. This justification has until recently arisen almost exclusively in sporadic cases involving a parent's choice to risk the health of one child for the sake of another, when hospitals seek declaratory judgments in support of their medical decisions in order to avoid liability. See, e.g., *Bonner v. Moran*, 126 F.2d 121 (D.C. Cir. 1941); *Hart v. Brown*, 29 Conn. Supp. 368, 289 A.2d 386 (Super. Ct. 1972); *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. 1969). See also Note, *Nielson v. The Regents: Children as Pawns or Persons*, 2 HASTINGS CONST. L.Q. 1151 (1975); Note, *Experimentation on Minors: Whatever Happened to Prince v. Massachusetts?*, 13 DUQUESNE L. REV. 919 (1975). Similarly, in *In re Henry G.*, 28 Cal. App. 3d 276, 285, 104 Cal. Rptr. 585, 591 (2d Dist. 1972), the court concluded that if a parent attempts to institutionalize a child on the allegation that the child is beyond the control of the parents, the court must investigate the possibility that the child's behavior is the result of an intrafamilial dispute.

67. The state becomes involved in adoption proceedings and in hearings over custody of a child after a divorce, for example. It should be noted that children are given the opportunity to assert their own interests and are not simply the pawns of the state. CAL. CIV. CODE § 225 (West 1954) provides that children over twelve must consent to any court-ordered adoption. See Mnookin, *supra* note 30, at 244-48. Similarly, courts at custody hearings are required to give due weight to the choice of a child of "sufficient age and capacity to reason so as to form an intelligent preference" between two separating parents. CAL. CIV. CODE § 4600 (West Supp. 1977).

68. For example, a juvenile court can intervene to protect a child from the physical abuse of a parent. CAL. WELF. & INST. CODE § 300 (West Supp. 1977). An area where the emancipation of children is increasingly recognized is in the right to receive medical treatment. California has fairly representative legislation granting minors the power to choose courses of treatment that are sufficiently important enough either individually (life and death) or socially (venereal disease). CAL. CIV. CODE §§ 25.5, 34.5, 34.6, 34.7 (West Supp. 1977). See Bennett, *supra* note 58; Curran & Brecker, *Experimentation in Children: A Reexamination of Legal and Ethical Principles*, 210 J. AM. MED. ASSOC. 77, 77-81 (1969); Goldstein, *supra* note 42, at 647-48.

Other settings have prompted courts to recognize at least a partial emancipation of the child. See generally H. FOSTER, A "BILL OF RIGHTS" FOR CHILDREN (1974); Katz, Schroeder & Sidman, *Emancipating Our Children—Coming of Legal Age in America*, 7 FAM. L.Q. 211 (1973); Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383 (1974). Emancipation is often implied when a particular parental choice raises a substantial possibility of disrupting the home, as is the case when a child is being committed. Ellis, *supra* note 3, at 854-55. Emancipation in the sense of allowing the child freedom of choice and responsibility is more common when the home has already been disrupted. See, e.g., CAL. CIV. CODE § 34.6 (West Supp. 1977).

decisionmaking autonomy are all operative when a parent attempts to place a child in a mental institution.

The *In re Roger S.* court's uncritical reliance on traditional doctrine led it to defer unduly to parental decisionmaking and to overemphasize the importance of the parent's formal initiation of the admission process. These two factors were the crux of the court's rationale for distinguishing minors like petitioner from minor wards of the court, a distinction used to defeat petitioner's equal protection claim.⁶⁹ More significantly, the court applied the same reasoning to limit the procedural safeguards available to minors when their admission to state mental hospitals is contested.⁷⁰ As a result, the court mandated protections insufficient to offset the significant threat posed by civil commitments.

III. Challenge to the Legislature

The California Supreme Court faced a subtle and novel issue in *In re Roger S.* The court's requirement that children be given formal procedural safeguards prior to commitment is a significant step toward assuring that the children who are committed are those who will benefit from hospitalization. But the specific procedures outlined by the court fail to take adequate account of the dangers facing the child. It may be, however, that preadmission procedures alone are only part of the solution, for if the conditions of mental hospitals were improved the danger to those placed in them would be reduced. The quality of these facilities must be considered in determining the safeguards necessary to protect those facing involuntary commitment. Yet the court barely alludes to institutional shortcomings in its opinion.

Although the court accepted the purpose of confining nondangerous

69. Although the court's distinction is not convincing, some distinction between minor wards of the court and children in their parents' custody may be justified by the continuing potential relationship between parent and child, since the parent has the authority to have the child released and would then regain custody. But this distinction is not relevant to the issue of what procedures are necessary to assure that children are appropriately treated. Therefore, it is not a sufficient distinction for the purposes of equal protection. See *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966).

70. This led the court to describe the minor's liberty as "conditional" in that it is limited by the continuing authority of the parent. Therefore, the court found other hearings involving conditional liberty interests to be appropriate analogies. See, e.g., *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (revocation of probation); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (revocation of parole). The analogy to parole and probation revocation hearings is inapt. The state here participates *de novo* to deprive the child of his liberty and of parental care. The child's liberty is by no means conditional in relation to the state. The nominal ongoing parent-child relationship does not make it so. The parent does not have the authority to commit, as the court implicitly recognized by framing the standard for decision as the propriety of treatment. This standard automatically displaces some of the parent's interests affecting the decision, such as the burden on the parent, the quality of home life, and any other reason for removing the child from the home.

individuals in a mental hospital to be treatment,⁷¹ and assumed that inpatients are in fact treated, empirical evidence indicates that psychiatric inmates, including children, may not actually receive such treatment. Some critics have questioned whether patients are treated at all. They argue that mental hospitals often serve as holding tanks, forced because of inadequate resources and interest to use pacifying drugs and physical restraint to keep the inmates from bothering those outside.⁷² The living conditions of psychiatric inpatients have been described as damaging in themselves,⁷³ a claim supported by petitioner's own experience. Thus, the minor's interests are even greater than the court recognized, for institutional confinement threatens physical and emotional harm in addition to severely limiting the child's liberty.

Both courts and legislatures have appreciated and responded to the hazards of civil commitment. Indeed, two courts have upheld causes of action against confinement in mental institutions based on the cruel and unusual punishments clause.⁷⁴ In addition to the cases concerning the commitment of adults, a number of recent constitutional decisions have required significant procedural protections to assure the necessity of commitment of minors.⁷⁵ The California legislature similarly protected adults with the passage of the LPSA.⁷⁶ Its provisions differ little from what courts have required under the Constitution, except that it grants the right to a jury trial. Initially, all minors were excluded from the coverage of the

71. 19 Cal. 3d at 933, 569 P.2d at 1293, 141 Cal. Rptr. at 305. Without holding that there is a constitutional right to treatment, the United States Supreme Court has held that adults cannot be confined in a psychiatric institution just because of mental illness unless they are dangerous or unable to live safely outside, and cannot be confined simply to improve their living conditions except to protect them from actual harm. *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975). See note 113 *infra*.

72. See, e.g., *Humphrey v. Cady*, 405 U.S. 504, 509 (1972); *Wyatt v. Aderholdt*, 503 F.2d 504, 509 (5th Cir. 1974); *Ennis & Litwack*, *supra* note 50, at 711-19; *Goldstein*, *supra* note 42, at 661.

73. *J.L. v. Parham*, 412 F. Supp. 112, 136-37 (M.D. Ga. 1976), *prob. juris. noted*, 431 U.S. 936 (1977); *Horacek v. Exon*, 357 F. Supp. 71 (D. Neb. 1973); *Ellis*, *supra* note 3, at 868-70; *Roth, Dayley & Lerner, Into the Abyss: Psychiatric Reliability and Emergency Commitment Statutes*, 13 SANTA CLARA LAW. 400, 425-33 (1972). See also note 47 *supra*.

74. *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974); *Horacek v. Exon*, 357 F. Supp. 71 (D. Neb. 1973).

75. See, e.g., *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968) (minor has right to counsel in civil commitment proceeding initiated by mother but prosecuted by the state); *Saville v. Treadway*, 404 F. Supp. 430 (M.D. Tenn. 1974) (parental admission of mentally retarded child to state hospital requires procedural protections); *In re Arthur N.*, 16 Cal. 3d 226, 545 P.2d 1345, 127 Cal. Rptr. 641 (1976) (liberty interest of minor protected when state initiates quasi-criminal proceeding leading to possible confinement).

In addition, two three-judge district court panels have faced substantially the same issue as was presented in *In re Roger S.*, and both decisions required significant procedural protections for minors in Roger's position. *J.L. v. Parham*, 412 F. Supp. 112 (M.D. Ga. 1976), *prob. juris. noted*, 431 U.S. 936 (1977); *Bartley v. Kremens*, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded on other grounds*, 431 U.S. 119 (1977). See also *Poe v. Weinberger*, Civ. Act. 74-1800 (D.D.C. Aug. 28, 1975); *Kidd v. Schmidt*, 399 F. Supp. 301 (E.D. Wis. 1975).

76. See note 12 *supra*.

LPSA, but a 1971 amendment has since been construed to include minors who are wards of the court.⁷⁷ Despite this precedent recognizing the due process rights of both minors and adults, the legislature has, until now, allowed all minors in their parents' custody to be committed through the voluntary admission statute. This statute protects parental authority by requiring parental permission, but it fails to give the child the protections ordinarily due in juvenile proceedings and involuntary commitment hearings.

By rejecting the admission procedures under the voluntary admission statute, the court has forced the legislature to react. The court's mandate outlined only the most minimal procedures needed given the nature of the confinement involved. Its failure to do more may have been justified, however. The court was limited by the nature of the claim to considering what kind of procedural safeguards are necessary. The legislature has other options. Although one court has ordered the complete restructuring of a state's mental health facilities and programs,⁷⁸ the legislature is better able to address the complicated and significant societal decisions involved in such an effort.⁷⁹ Indeed, the vagueness of the *In re Roger S.* opinion is an invitation for the legislature to act, and the relatively minimal protections afforded the child can be viewed as an effort to leave the legislature as much

77. *In re Michael E.*, 15 Cal. 3d 183, 538 P.2d 231, 123 Cal. Rptr. 103 (1975). The court discussed the constitutional underpinnings for the statutory provisions involved, but it based its decision on statutory construction. It specifically held that the LPSA applies only to those juveniles who are wards of the court and that it would not then decide whether nonward minors are equally protected by the Constitution. *Id.* at 191 n.10, 538 P.2d at 236 n.10, 123 Cal. Rptr. at 108.

78. *Wyatt v. Stickney*, 325 F. Supp. 781, 334 F. Supp. 1341 (M.D. Ala. 1971) (treatment in state mental institutions found to be inadequate), 344 F. Supp. 373, 344 F. Supp. 387 (1972) (standards for treatment set by court), *aff'd in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

The *Wyatt* court ordered a reorganization of several Alabama state institutions for the mentally ill or retarded. The changes demanded by the court were designed to set out minimum constitutional standards for the treatment of involuntarily confined mental patients and were to be instituted regardless of cost to the state. If the state legislature did not respond quickly, apparently by calling a special session, the court would mandate the funding necessary to speedily remedy what it considered unjustifiable conditions. 344 F. Supp. at 378 n.8, 394 n.14. Among the changes ordered were more trained staff members, reduced staffing ratios, less restrictive conditions, freedom from excessive medication, privacy in communication, individualized treatment plans, no psychosurgery, shock treatments, or experimentation without informed consent, a human rights committee paid for by the state to monitor the reforms, and a complete revamping of the housekeeping arrangements. *Id.* at 379-86, 395-407.

79. One of the difficulties for a court in deciding commitment and juvenile constitutional claims is the lack of reliable information on the nature of the problem. Paternalistic and self-congratulatory program goals can further obscure any data of how children and psychiatric inpatients are treated, challenging courts' ability to grasp the social realities and reach a satisfactory result. Despite these difficulties, the United States Supreme Court used empirical evidence to debunk the justifications for granting only an "informal" hearing in juvenile courts. The state claimed that it was acting for the child's welfare, but the Court determined that in practice the child, far from benefitting from the relaxed procedures, was being treated arbitrarily. *In re Gault*, 387 U.S. 1, 19 (1967). See also note 95 *infra*.

flexibility as possible to develop the most appropriate solution.⁸⁰ It can choose to revamp the internal reviewing mechanisms of mental hospitals, to improve the living conditions of psychiatric inpatients, and to expend the resources necessary to assure some level of treatment for those confined.⁸¹ Any of these courses of action may be a more productive channel for resource allocation than an unnecessarily elaborate hearing. Whatever the conditions of mental hospitals, however, children should be substantially protected from inappropriate confinement. Furthermore, the protections assured children should not be relaxed out of an undue respect for the parents' participation in the decision to commit. The legislature can respond creatively to the challenge posed by *In re Roger S.* by reevaluating its purposes in allowing the institutionalization of children and filling the gap left by the LPSA.

a. The Need for a Hearing

The court correctly concluded that the existing screening by state mental health officials fails to satisfy minimum due process and mandated a hearing to cure the violation. The potential for arbitrary action by these officials fully justifies requiring further review. State officials will tend to believe the parent rather than the child, and may be overly sympathetic to the parent's interests in the decision to commit.⁸² State officials might also allow commitment to state mental hospitals to remove the child from the home when his parents are unable to care for him for any reason. In addition, mental health professionals are likely to have a bias in favor of the medical model. They therefore will more readily interpret troubling behavior as the result of psychological disorder; for the same reason they may overvalue the need for and effectiveness of treatment.⁸³

80. Deciding what psychological treatment children should receive poses unusual problems, and may require an entirely different kind of procedure from the traditional hearing the California Supreme Court rather reflexively required. See Morris, *Institutionalizing the Rights of Mental Patients: Committing the Legislature*, 62 CALIF. L. REV. 957 (1974).

81. The court's deference to a legislative solution is reasonable, but that solution should be subject to strict judicial scrutiny. Under *People v. Olivas*, 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976), any substantial deprivation of liberty requires a compelling state interest, even if the alleged purpose of the confinement is the rehabilitation of a juvenile. "There are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned . . . and where the presumption is resorted to only to dispense with a proceeding the ordinary dictates of prudence would seem to demand for the protection of the individual from arbitrary action." *Skinner v. Oklahoma*, 316 U.S. 535, 544 (1942) (Chief Justice Stone, concurring) (sterilization of those found to have committed two or more dangerous felonies unlawful).

82. *J.L. v. Parham*, 412 F. Supp. 112, 133 (M.D. Ga. 1976) *prob. juris. noted*, 431 U.S. 936 (1977); NATIONAL JUVENILE LAW CENTER, ST. LOUIS UNIVERSITY SCHOOL OF LAW, LEGAL CHALLENGES TO THE "VOLUNTARY" ADMISSION OF CHILDREN TO MENTAL INSTITUTIONS at 54-62 (undated pamphlet); Ellis, *supra* note 3, at 867-68; Tribe, *Childhood, Suspect Classifications, and Conclusive Presumptions: Three Linked Riddles*, 39 L. & CONTEMP. PROB. no. 3, at 8 (1975).

83. See generally A. STONE, MENTAL HEALTH AND THE LAW: A SYSTEM IN TRANSITION (1975); T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY (1963).

A hearing reduces the likelihood of arbitrariness, and can serve to help the child receive the best treatment available. Perhaps the most significant function of a hearing is to ensure that the child's interests can be asserted. Also, creation of a record forces articulation of a clear justification for commitment, besides allowing judicial review.⁸⁴ There is little danger that a hearing will screen out some children actually in need of commitment if the standard for decision is sufficiently precise and the burden of proof is properly weighted. On the other hand, hearings have transaction costs in money and the time of the officials involved. Whether there are emotional costs as well is a matter of speculation, although there is some evidence that a child's attitude towards treatment improves after a hearing to determine the need for that treatment.⁸⁵

In practice, however, the particulars of the hearing outlined by the court offer children little protection. The vagueness of the standard for committing a child⁸⁶ gives the adjudicator a substantial degree of discretion to decide if institutionalization is suitable, especially when the finding need only be supported by a preponderance of the evidence. The court even suggested that the child may have the burden of persuasion to show that hospitalization is inappropriate.⁸⁷ In the informal hearing mandated by the court, it may not be significant where this burden is placed. But the court's suggestion evidences the extent to which the participation of the parents lessens the protections for the child. Insuring representation of the child by counsel and holding the hearing in the home community before a neutral and detached adjudicator does enhance the opportunity for all relevant facts to be heard. The court expressed doubt about whether the previous procedures worked to do so.⁸⁸ But in effect, the hearing granted by the court gives the child an opportunity to prevent commitment only when the parent and state mental health officials are unable to justify their decision. The interests of the child merit far greater assurances of the appropriateness of commitment, and these can be given without greatly increasing the costs of the hearing.

b. The Appropriate Procedures

As the court noted, a judicial proceeding is the norm for proposed deprivations of liberty such as the child suffers from commitment.⁸⁹ Yet,

84. Requiring a clear justification for commitment on record may be a useful step towards enabling children who have been "cured" or who are not being treated at all to gain their release.

85. See *In re Gault*, 387 U.S. 1, 26 (1967).

86. The vagueness of the standard for decision given by the court and various proposals for making it more precise are discussed in the text accompanying notes 109-116 *infra*.

87. The court described the standard for decision in several ways, all somewhat different. Two of the versions are ambiguous, but one suggests that if the parent shows the child to be mentally ill but fails to show a grave disability, the child must show that hospitalization will not be beneficial. 19 Cal. 3d at 935, 569 P.2d at 1295, 141 Cal. Rptr. at 307.

88. *Id.* at 936, 569 P.2d at 1295, 141 Cal. Rptr. at 307.

89. *Id.* at 939, 569 P.2d at 1297, 141 Cal. Rptr. at 309. The guarantees of a judicial hearing

consistent with the deference shown elsewhere, the court ambiguously required only a "neutral and detached decision maker."⁹⁰ This leaves the decision of who is appropriate to the legislature.⁹¹ Any adjudicator, including an experienced judge, will have difficulty in determining a child's best interests.⁹² A state official cannot instantly develop the understanding and dialogue with a child to truly act in loco parentis.⁹³ The decision will inevitably be influenced by the adjudicator's personal judgment of what constitutes harm, because society lacks both the empirical evidence and the consensus of values to resolve the doubts about how children are best raised.⁹⁴ These problems are unavoidable, but they can be mitigated by giving the adjudicator instructions that are as precise as possible.

Given the human shortcomings affecting any adjudicator, the question is what kind of expertise is necessary. Superior court judges presently preside over LPSA hearings, while juries make the decisive findings.⁹⁵

would substantially benefit the child without reducing the efficiency of the hearing. *In re Gault*, 387 U.S. 1, 26-29 (1967). Other courts have applied the rules of evidence for criminal cases, including the hearsay rule. *See, e.g., Lynch v. Baxley*, 386 F. Supp. 378, 394 (M.D. Ala. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1103 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974). *See also In re Gault*, 387 U.S. 1, 56-57 n.98 (1967).

90. Although Justice Clark in dissent construed the majority to mean a hearing would be held before an administrative hearing officer, 19 Cal. 3d at 941, 569 P.2d at 1299, 141 Cal. Rptr. at 311, it is not clear what the majority meant. The opinion cited *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) and *Morrissey v. Brewer*, 408 U.S. 471 (1972), which authorized the use of neutral prison officials as adjudicators at hearings for the revocation of probation and parole. On the other hand, in its discussion the court did use among other terms the technical phrase "hearing officer," the term used for administrative adjudicators in CAL. GOV'T CODE §§ 11500, 11502 (West 1966 & Supp. 1977).

91. The more immediate effect of the *In re Roger S.* decision is to require superior court judges to hear these cases on habeas corpus petitions. *See note 35 supra*. The court also suggested that children could be committed under the LPSA if gravely disabled or imminently dangerous. 19 Cal. 3d at 939 n.11, 569 P.2d at 1297 n.11, 141 Cal. Rptr. at 309 n.11.

92. The best interests test has been criticized as an ineluctably indeterminate prediction of what will benefit or harm a child for which there are no clear standards. Courts have far less competence to administer such a test than they have for their more common role of factfinding. Goldstein, *Psychoanalysis and Jurisprudence*, 77 YALE L.J. 1053, 1059 (1968); Mnookin, *supra* note 30, at 255.

93. Parents are favored as decisionmakers for children because of their greater knowledge and understanding. *Guardianship of Smith*, 42 Cal. 2d 91, 95, 265 P.2d 888, 891 (1954) (Justice Traynor concurring). *See also Wisconsin v. Yoder*, 406 U.S. 205, 232-35 (1972). The state suffers from its inevitable institutional ineptness in handling individual human problems. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 31-34, 49-52 (1973); Goldstein, *supra* note 42, at 650-58. Thus, under CAL. CIV. CODE § 4600 (West Supp. 1977), a parent will be given custody even if found to have been neglectful, unless completely unfit. Courts are particularly reluctant to deprive a parent of custody for emotional neglect without a showing of physical abuse. Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 348-50 (1972).

94. Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973); Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Context*, 39 L. & CONTEMP. PROB., no. 3, at 38 (1975); Tribe, *supra* note 81, at 25.

95. CAL. WELF. & INST. CODE §§ 5302, 5350 (West 1972 & Supp. 1977). Minors have no constitutional right to a jury trial, even in quasi-criminal proceedings. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *People v. Superior Court (Carl W.)*, 15 Cal. 3d 271, 539 P.2d 807, 124

Juvenile court judges are experienced in making dispositional decisions about children. On the other hand, State Department of Health officials may have more familiarity with the various psychiatric programs available. There is the danger, however, that these officials will not adequately protect the child since members of the same agency participate in the commitment proceedings.⁹⁶ The most effective solution may be to create a pool of specialized administrative law judges, or even a medical board, with knowledge of the available facilities and the ability to judge conflicting psychiatric evidence.

The other aspects of the hearing should reflect the practical difficulties faced by the child in a hearing. Many of those in the best position to contradict a parent's version of a child's personality and behavior—neighbors, friends and members of the family—may well be reluctant to appear on behalf of the child. Fear of alienating the parents, and natural reluctance to interfere with an intrafamilial matter, pose major obstacles for a neutral adjudicator or the child's advocate attempting to establish an alternative to the parent's version of the facts. Therefore, the parties to the hearing should have the power of subpoena.⁹⁷ In addition, in order to develop expert testimony the adjudicator and the child should have access to mental health professionals other than those who have already agreed with the parents that institutionalization is the best course.⁹⁸

As the court recognized, the disadvantages suffered by the child whose interests conflict with both the parent and the state can be partially offset by appointing counsel to vigorously represent the child's interests.⁹⁹ A lawyer's knowledge of the adversary process is essential to develop the factual and psychiatric evidence at issue, whether the child chooses to dispute his

Cal. Rptr. 47 (1975). But many states do provide for jury consideration of the necessity for institutionalization. *Developments*, *supra* note 27, at 1294-95. The jury does serve to involve the values of the community at large in the decision to commit. *Humphrey v. Cady*, 405 U.S. 504, 509 (1972).

96. See *In re Gault*, 387 U.S. 1, 35-36 (1967); *Dixon v. Attorney Gen.*, 325 F. Supp. 966 (M.D. Pa. 1971); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439 (1974); Ennis & Litwack, *supra* note 50, at 708-19, 724-26.

Many states do use psychiatric experts to review commitments either solely or in conjunction with the courts. *Developments*, *supra* note 27, at 1376-85.

97. The power of subpoena would usually be available for administrative hearings. CAL. GOV'T CODE § 11510 (West Supp. 1977).

98. The failure to assure alternative psychiatric evaluations puts an immense burden on the child's representative to either find experts willing to testify or to attempt to impeach the opposing expert testimony. Such experts were provided for the subject's aid in *Dixon v. Attorney Gen.*, 325 F. Supp. 966, 974 (M.D. Pa. 1971). A superior court judge has the discretion of appointing a forensic psychiatrist in hearings on allegedly imminently dangerous subjects. CAL. WELF. & INST. CODE § 5303.1 (West Supp. 1977).

99. S. BRAKEL & R. ROCK, *THE MENTALLY DISABLED AND THE LAW* 62 (1971 Ed.); Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424 (1966); Litwack, *The Role of Counsel in Civil Commitment Proceedings: Emerging Problems*, 62 CALIF. L. REV. 816 (1974).

commitment or is not competent to assert his own interests.¹⁰⁰ Although an appointed counsel, particularly an overworked public defender who is not familiar with commitment proceedings,¹⁰¹ may not be able to be a fully effective advocate, the active participation of the adjudicator in the hearing will alleviate some inadequacies. Counsel can certainly be effective in seeking out alternatives and in negotiating with parents and Department of Health personnel.¹⁰² A Department of Health official cannot fulfill all these functions.

The legislature should recognize that however effective the treatment program is in a mental hospital, minors face indefinite confinement and the danger of being socialized to institutional life, a particularly strong influence for children in the process of maturing.¹⁰³ Thus, the burden should be clearly placed on the state and parent to justify commitment.¹⁰⁴ This can be done by forcing them to bear a burden of persuasion greater than a prepon-

100. The court gave minors the power to waive their rights, perhaps after counsel ensures the waiver is voluntary. 19 Cal. 3d at 938 n.10, 569 P.2d at 1296 n.10, 141 Cal. Rptr. at 308 n.10. This puts counsel in a crucial and powerful role as a temporary surrogate parent, *i.e.* guardian ad litem. One commentator argues that there is no practical distinction between voluntary and involuntary commitments of children, who may be pressured by parents and cannot release themselves freely from the institution. Ellis, *supra* note 3, at 845-47.

The California court did not grant counsel the power to waive the child's rights, as another court has done. *Cf. Lynch v. Baxley*, 386 F. Supp. 378, 396 (M.D. Ala. 1974) (counsel can waive for good cause the hearing for an incompetent child with the court's approval). Thus, the hearing is actually mandatory for those most likely to need commitment, those who are least competent to choose for themselves and who may be unable to dispute the parent's decision. This seems practically unavoidable if the only alternative is to place undue decisionmaking power in an attorney.

101. Public defenders are presently acting as counsel in the habeas corpus hearings. See note 35 *supra*.

102. The release of all of the children removed thus far from Napa State Hospital in the wake of *In re Roger S.* has come about by arranging alternative placements through negotiations between the San Francisco State Public Defenders Office and State Department of Health officials. Telephone Conversation with Ezra Herndon, Deputy State Public Defender, at San Francisco, California (February 2, 1978).

103. See J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *supra* note 93, at 40.

104. The court's opinion is ambiguous as to who carries the burden of proof. See note 87 *supra*.

An issue related to that of who must bear the burden of proof, also unresolved, is whether the minor can invoke a beneficial right to silence. The court does not specifically consider the question. When the state prosecutes the case the state clearly must prove the necessity of commitment, making a subject's silence effective at least until the state establishes a *prima facie* case. See, *e.g.*, *Lessard v. Schmidt*, 349 F. Supp. 1078, 1100-02 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974), in which the court applied the language of *In re Gault*, 387 U.S. 1, 49-50 (1967). The court in *Lynch v. Baxley*, 386 F. Supp. 378, 394 (M.D. Ala. 1974), established the right of silence based on the fifth amendment right against self-incrimination, finding no meaningful distinction between civil commitment and imprisonment for criminal acts. This view is supported by some commentators. A. DEUTSCH, *THE MENTALLY ILL IN AMERICA* (2d Ed. 1949); Comment, *The "Crime" of Mental Illness: The Extension of "Criminal" Procedure Safeguards in Involuntary Civil Commitment*, 66 J. CRIM. L. & CRIMINOLOGY 255, 268-69 (1975); see also note 47 *supra*.

derance of the evidence.¹⁰⁵ The standard of proof serves "to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."¹⁰⁶ Given the child's interests, the "necessity of commitment should be proved by evidence having the highest degree of certainty reasonably attainable."¹⁰⁷ In this case the clear and convincing evidence standard is appropriate;¹⁰⁸ if the state and parent cannot meet this minimal burden, the child probably does not belong in a mental hospital.

c. Guidelines for the Admission of Children to Mental Hospitals

The standard enunciated by the court for deciding whether to commit the child reflects constitutional doctrine and is not useful as a practical guide for decisionmaking. The court accepted the legislative judgment embodied in the LPSA that it is appropriate to commit a child found to be gravely disabled or imminently dangerous. It further reasoned that since the purpose of confining nondangerous individuals in a mental hospital is treatment for mental illness, commitment is not suitable if the child is not judged to be mentally ill; therefore the decision of the parent must be overridden. For those children found to be mentally ill but not gravely disabled, however, the issue is whether commitment will be beneficial, a vague standard approximately equivalent to the child's best interests test. This standard can give little guidance, for in addition to the imprecision of determining what is in a child's interests, psychiatric diagnosis and choice of treatment are often subject to inherent inaccuracy and professional dispute.

The formulation of practical admission criteria is crucial in order to

105. The court chose a preponderance of the evidence standard by analogy to the dispositional phase of delinquency proceedings and to dependency hearings. 19 Cal. 3d at 939, 569 P.2d at 1297, 141 Cal. Rptr. at 309. The analogy ignores two significant distinctions. Whereas in juvenile dispositions a judge will be choosing between a number of alternative placements of a child, in an *In re Roger S.* hearing the adjudicator will decide simply whether to hospitalize or not. This narrow question more closely parallels the adjudicatory stage of juvenile proceedings. See notes 51-53 and accompanying text *supra*. Secondly, the juvenile court does not establish jurisdiction until after sufficient facts are shown to justify intervention, while such facts are precisely the issue at a minor's commitment hearing.

106. *In re Winship*, 397 U.S. 358, 370 (1970).

107. *Lynch v. Baxley*, 386 F. Supp. 378, 393 (M.D. Ala. 1974).

108. *Bartley v. Kremens*, 402 F. Supp. 1039, 1052 (E.D. Pa. 1975), *vacated and remanded on other grounds*, 431 U.S. 119 (1977); *Lynch v. Baxley*, 386 F. Supp. 378, 393 (M.D. Ala. 1974); *Conservatorship of Roulet*, 20 Cal. 3d 653, 574 P.2d 1245, 143 Cal. Rptr. 893 (1978), *rehearing granted* (March 30, 1978) (clear and convincing evidence standard appropriate for finding of grave disability under LPSA). But see note 110 *infra*; *Conservatorship of Roulet*, 20 Cal. 3d at 663, 574 P.2d at 1251, 143 Cal. Rptr. at 899 (Bird, C.J., dissenting, reasoning that the effects of finding of grave disability equivalent to or more debilitating than criminal conviction, and arguing for the reasonable doubt standard); Ellis, *supra* note 3, at 909 (recommending the application of the beyond a reasonable doubt standard for the admission of children in their parents' custody). The due process required in civil commitments is as yet unsettled, and the exact burden of persuasion may make little difference in a decision in which the issues resist precise definition. *Developments*, *supra* note 27, at 1296-97 n.190.

apply uniformly those factors that are properly part of the commitment decision, and to reflect the requirements of the Constitution. "[T]he nature and duration of commitment [must] bear some reasonable relation to the purpose for which the individual is committed."¹⁰⁹ The court permitted the hospitalization of three distinct groups of minors. The purpose for commitment in each case may be different, and the guidelines should reflect the differences.

Two of the groups, composed of those found to be imminently dangerous or gravely disabled, could be committed only under the stringent procedures of the LPSA if the children were minor wards of the court. Under the court's scheme, an adjudicator making this finding need only support the conclusion with a preponderance of the evidence. For the children labelled imminently dangerous, this standard may well be unconstitutional given the quasi-criminal nature of the charge and the likely consequences to the child.¹¹⁰ Furthermore, it is more practical to delay the hearing for these children until after confinement since the state is acting under the police power for the protection of others rather than justifying commitment by treatment of the child.¹¹¹ Therefore, the legislature should establish a separate mechanism for admitting children thought to be imminently dangerous.

On the other hand, there is no reason to distinguish those children found to meet the LPSA gravely disabled standard from those children found to be mentally ill but not gravely disabled. The state's rationale for committing gravely disabled minors is that they are unable to care for themselves. Therefore, under the *parens patriae* power the state may care for

109. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

110. See *Developments*, *supra* note 27, at 1228-45. Some courts have applied elements of criminal procedure, such as the reasonable doubt standard, to hearings on mental illness and dangerousness. See, e.g., *In re Ballay*, 482 F.2d 648, 650, 656 (D.C. Cir. 1973) (beyond a reasonable doubt standard constitutionally necessary for findings of both mental illness and dangerousness in civil commitment hearings); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1095 (E.D. Pa. 1975) (same); *People v. Burnick*, 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975) (beyond a reasonable doubt standard and right to jury trial necessary, by statutory interpretation, for finding of Mentally Disordered Sex Offender); cf. *In re Winship*, 397 U.S. 358, 365 (1970) (nature of confinement rather than label for hearing determines relevant burden of persuasion and other procedures; beyond a reasonable doubt standard necessary when child accused of what would be crime if committed by an adult).

The California Supreme Court recently found the distinction between hearings for the gravely disabled and the quasi-criminal proceedings involving the more specifically defined imminently dangerous standard significant for equal protection. It concluded that three-quarters of a jury could make the finding of grave disability in the "civil" hearings for establishing conservatorships under the LPSA, despite CAL. WELF. & INST. CODE § 5303 (West 1972), which requires a unanimous jury verdict for the finding of imminent dangerousness. *Conservatorship of Roulet*, 20 Cal. 3d 653, 662-63, 574 P.2d 1245, 1250-51, 143 Cal. Rptr. 893, 898-99 (1978), *rehearing granted* (March 30, 1978).

111. Under the LPSA, a court may order a confinement for a 72-hour evaluation period without a hearing and for another fourteen-day confinement if the evaluation staff find the subject dangerous to himself or others. The subject may demand a hearing on this second confinement period. CAL. WELF. & INST. CODE §§ 5150, 5250 (West 1972 & Supp. 1977).

the child, either in the interests of the child himself or to help the parent.¹¹² In either case the justification for commitment is the care and treatment the state can offer; in fact these children may have a constitutional right to treatment.¹¹³ Thus, there is no reason to find a child gravely disabled in this hearing other than for the purpose of finding him mentally ill.¹¹⁴ For all minors who are mentally ill, including those who are gravely disabled, the issue to be decided is the propriety of institutionalization for treatment.

Unfortunately, the group of children who can be found to be mentally ill is a broad and varied one. "Mentally ill or disordered" is not a highly restrictive term, particularly for adolescents.¹¹⁵ Hence, the group of minors that meets this threshold test is likely to include many who should not be hospitalized. Given the vagueness of the issues to be decided, perhaps no more selective standard can be articulated. But the legislature must devise more specific guidelines for the decision to counteract the high risk of inappropriate and damaging confinement.

112. Both the child and the parent may be in need of assistance from the state in this situation. The state may apply its *parens patriae* power for the welfare of the populace when the police power is not invoked. See note 38 *supra* for examples. But the *parens patriae* power does not justify assuring the individual of fewer protections from arbitrary state action. See generally Note, *The Parens Patriae Theory and its Effect on the Constitutional Limits of Juvenile Court Powers*, 27 U. PITT. L. REV. 894 (1966); *Developments*, *supra* note 27, at 1212-22; note 79 *supra*.

113. Cases have raised the possibility of a constitutional right to treatment. A good discussion of the issue can be found in *Welsch v. Likins*, 373 F. Supp. 487, 492-94 (D. Minn. 1974). See also *Donaldson v. O'Connor*, 493 F.2d 507, 521 (5th Cir. 1974), *aff'd in part*, 422 U.S. 563 (1975); *Covington v. Harris*, 419 F.2d 617, 625 (D.C. Cir. 1969); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1967); *Wyatt v. Stickney*, 344 F. Supp. 387, 390 (M.D. Ala. 1972), *aff'd in part sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Schwitzgebel, The Right to Effective Mental Treatment*, 62 CALIF. L. REV. 936 (1974). The classic article in the field is *Birnbaum, The Right to Treatment*, 46 A.B.A.J. 499 (1966).

The United States Supreme Court refused to decide the point in *O'Connor v. Donaldson*, 422 U.S. 563 (1975). Chief Justice Burger, in an opinion none of the other justices subscribed to, offered his belief that there is no such right. *Id.* at 580-89. Thus, the issue remains in some doubt.

114. A finding of grave disability would allow the child's commitment in two versions of the standard for decision the court articulated, while in the other version the court did not mention such a finding at all. A *per se* rule allowing commitment on this basis overlooks the court's statement that the constitutional justification for confinement is treatment. The court may have been echoing the legislated standard of the LPSA. But the LPSA requires that the finding of grave disability be made only after a hearing with far more elaborate procedural protections for the child than the court required for Roger S. Moreover, the legislature requires a finding that the intensive care facility can provide the proposed treatment. CAL. WELF. & INST. CODE §§ 5250, 5275 (West 1972).

115. See NATIONAL JUVENILE LAW CENTER, *supra* note 82, at 54-60; text accompanying note 121 *infra*. Roger S. was diagnosed as a latent schizophrenic, the most common diagnosis for children in mental hospitals, implying a potential for mental illness rather than an ascertainable presence of a disorder. Diagnoses are derived from the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, the American Psychiatric Association's listing of accepted categories of mental illness. For a discussion of the vague and inevitably arbitrary nature of some of these terms, see the comments on the presently proposed revisions to the Manual being considered by the Association in Coleman, *Who's Mentally Ill?*, PSYCHOLOGY TODAY, Jan. 1978, at 34. See also N. KITTRIE, *supra* note 54, at 50-101; Comment, *supra* note 12, at 103-14.

The guidelines the legislature formulates should reflect the reasons to commit as well as the realities of mental hospitals. An important criterion for commitment is whether other treatment facilities are available which do not so completely restrict a child's liberty. The state's purpose in opening mental hospitals to children in their parents' custody is to assure parents that some form of treatment is available. It follows that the state has no justification for committing children who are eligible for and would benefit from less drastic treatment programs. Use of the least restrictive alternative may in fact be a constitutional requirement.¹¹⁶ Therefore the adjudicator must consider all available programs, as well as whether treatment could as effectively be given in the home or to the family as a whole. He should not consider the quality of the child's home life, the burden on the family, or the parent's ability to care for the child. Ultimately, the guidelines should specifically direct the adjudicator to focus only on the child's condition, and on whether that condition necessitates treatment in a state mental hospital.

Another aspect of the court's standard—whether hospitalization will be beneficial—suggests another important consideration. Predicting the efficacy of institutionalized psychiatric treatment is inescapably difficult. An adjudicator can, however, look behind official claims that a hospital invariably offers treatment. Commitment to a hospital not capable of treating children because of a shortage of trained staff is a wholly different matter from commitment to a hospital with an effective treatment program and an internal reviewing procedure. Therefore, the guidelines should take into account the characteristics of the particular state mental hospital into which a child is to be placed.¹¹⁷ As a corollary, a child who can prove lack of treatment should be able to compel release.

Finally, returning the child to the home should not be viewed as an unthinkable alternative. The California Supreme Court has established that a single statutory standard will govern all dispositional and child custody proceedings.¹¹⁸ The statute provides that the child should remain in the

116. 19 Cal. 3d at 931, 569 P.2d at 1292, 141 Cal. Rptr. at 304. The court notes that *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966), was cited with apparent approval by the United States Supreme Court in *In re Gault*, 387 U.S. 1, 28 n.41 (1967). *Lake* was the beginning of a series of cases in the District of Columbia Circuit Court of Appeals which eventually placed the least restrictive alternative doctrine on constitutional grounds. See *Covington v. Harris*, 419 F.2d 451 (D.C. Cir. 1969); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1967). The issue has yet to be clearly decided by the Supreme Court. See *Developments, supra* note 27, at 1245-47.

Among the alternatives available in this setting are placement in a less confining treatment center, counseling for the family as a whole when appropriate, and removal from the home and placement elsewhere, although the last alternative could only be ordered after a separate judicial hearing. CAL. WELF. & INST. CODE §§ 300, 601, 602 (West 1972 & Supp. 1977).

117. Chief Justice Bird recently considered the actual conditions at the state mental hospitals to which conservatees are most often sent in determining that the necessity for the establishment of conservatorships should meet the reasonable doubt standard. *Conservatorship of Roulet*, 20 Cal. 3d 653, 667-68, 574 P.2d 1245, 1253-54, 143 Cal. Rptr. 893, 901-02 (1978) (dissenting opinion), *rehearing granted* (March 30, 1978).

118. The standard in CAL. CIV. CODE § 4600 (West Supp. 1977) was held to apply to all

home except in unusual circumstances. The basis for continuing to respect the parents as the most competent decisionmakers, even after the state has intervened because of child neglect, is twofold. First, the parent has an unequalled opportunity to understand the child's needs in most decisions.¹¹⁹ Second, remaining in the home permits a continuing beneficial relationship for the child, in contrast to the isolation of institutionalization and the disruption of placement elsewhere.¹²⁰ Even when it is not feasible to return the child to the home, the state has the authority, and may have the duty, to use a variety of resources in place of a mental hospital to care for the child.¹²¹

d. Expanding the Scope of the Decision

The court narrowed the scope of *In re Roger S.* to prevent commitment to a state mental hospital only when it can be shown that a child over fourteen is not mentally ill or that hospitalization would harm the child and release would not endanger either the child or others. Otherwise, parental authority remains paramount. The court emphasized its assumption that most parents act in good faith. The due process the court required may have been designed in part to protect the child when this assumption is not justified. In this light, the court's choice of the age of fourteen as a threshold for the recognition of minors' rights makes some sense. Although the court may have simply chosen to limit the scope of its opinion to the facts before it, it may also have felt that it is during adolescence that the interests of parent and child begin to diverge.¹²² If fourteen is seen as an arbitrarily chosen shorthand for adolescence, one that can be changed by the legislature's judgment, the standard fits the reasoning of the court.¹²³ The court's

custody hearings by *In re B.G.*, 11 Cal. 3d 679, 695-99, 523 P.2d 244, 114 Cal. Rptr. 444 (1974). Section 4600 provides that parents will be favored as custodians and that "[b]efore the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child, and the award to a nonparent is required to serve the best interests of the child."

119. See note 93 *supra*.

120. The United States Supreme Court has recognized that a child has a right reciprocal to the parent's right to control, *i.e.* the right to the benefits of parental custody and care. *Stanley v. Illinois*, 405 U.S. 645, 652 (1972). See Goldstein, *supra* note 42, at 646.

121. Ellis, *supra* note 3, at 890-94.

122. G. KISKER, *THE DISORGANIZED PERSONALITY* 213-15 (1964). See B. ENNIS & L. SIEGEL, *THE RIGHTS OF MENTAL PATIENTS* 38 (1973); Ellis, *supra* note 3, at 851.

123. The court actually claimed not to consider the issue of what procedures were due minors under fourteen, 19 Cal. 3d at 927 n.3, 569 P.2d at 1289 n.3, 141 Cal. Rptr. at 301 n.3, but the opinion suggests that fourteen was an absolute limit to the decision's effect. This was justified rather cryptically with a reference to the California statute setting fourteen as the age of criminal responsibility. The only explanation for why this is relevant to *In re Roger S.* was that "[i]t would be anomalous indeed if [children] were not also presumed to have sufficient capacity to exercise due process rights at that age." *Id.* at 931, 569 P.2d at 1292, 141 Cal. Rptr. at 304. A similar arbitrary line has been recognized elsewhere, however. For example, Pennsylvania recently enacted legislation which would treat minors fourteen and older as adults for the

references to the maturity of the child are only relevant in an abstract sense, however, for as the court recognized, the child's rights must be protected unless the child voluntarily and knowingly waives them.¹²⁴

The legislature may wish to extend preadmission procedural protections beyond the scope of *In re Roger S.* There is no clear reason to limit the effect of the decision to minors fourteen and older.¹²⁵ None of the interests of either state, parent, or child is significantly affected by the age of the child. Any line drawn on the basis of age is arbitrary, and the interests of children younger than fourteen may also conflict with those of their parents. If anything, the interests of children under fourteen are greater, since their potential confinement until majority is for a longer period.¹²⁶

Because of the state action requirement of the fourteenth amendment, *In re Roger S.* does not affect the admission of minors to private facilities,¹²⁷ unless the regulation and licensing of private mental hospitals is sufficient to substantiate a finding of state action. The state's licensing power does give it the capability of preventing the worst abuses. And at present there are several possible means available for a child to challenge his confinement in a private institution.¹²⁸ Nevertheless, the legislature may

purposes of voluntary commitments while children under fourteen can still be admitted by their parents. *See* *Kremens v. Bartley*, 431 U.S. 119, 126-27 n.8-9 (1977).

124. 19 Cal. 3d at 938 n.10, 569 P.2d at 1296 n.10, 141 Cal. Rptr. at 308 n.10. Thus, children need not assert their rights, and cannot be presumed to waive them by inaction, or by incompetence.

125. Such a cutoff would be appropriate only if used to establish an easily administered presumption of competence. *See* Tribe, *supra* note 82, at 25. Age might be useful for setting an upper limit to the parent's power to commit under the voluntary admission statute, as the National Institute of Mental Health suggests. NIMH, MODEL DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL 19-20 (Public Health Service Publ. No. 51 1951) (suggesting the age of 16; the LPSA would have to be amended to implement a new age cutoff in California). Neither of the three-judge district court panels which faced this issue made any distinction based on age. *J.L. v. Parham*, 412 F. Supp. 112 (M.D. Ga. 1976); *prob. juris. noted*, 431 U.S. 936 (1977); *Bartley v. Kremens*, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded on other grounds*, 431 U.S. 119 (1977).

126. There is a substantial number of such children who are committed. Nationally, the number of children under 15 in mental hospitals has risen more steeply than the number of patients between 15 and 24. Ellis, *supra* note 3, at 845 citing Harris, *Mental Illness, Due Process and Lawyers*, 55 A.B.A.J. 65, 67 (1969).

127. 19 Cal. 3d at 927 n.3, 569 P.2d at 1289 n.3, 141 Cal. Rptr. at 301 n.3. There was no dispute over the presence of state action in this case. It is not clear, however, whether regulations and subsidies for private mental hospitals involve sufficient state action to apply *In re Roger S.* One appellate court found that they are not. *In re John S.*, 66 Cal. App. 3d 343, 355-56, 135 Cal. Rptr. 893, 901 (2d Dist. 1977). The California Supreme Court granted a hearing, refused review, and thus expunged the opinion of the case pursuant to California Supreme Court Rule 976(d), thereby prohibiting the citation of the case in the opinions of California courts. *But see* NATIONAL JUVENILE LAW CENTER, *supra* note 82, at 93-94 (pointing out that the "public function" doctrine of *Marsh v. Alabama*, 326 U.S. 501 (1946), might apply to mental hospitals).

128. In California a minor can actively seek partial emancipation from parental authority. *See, e.g., Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 488 P.2d 1, 96 Cal. Rptr. 697 (1971). This method could be used to gain release from a mental hospital. *See* *Melville v. Sabbatino*, 30 Conn. Supp.

determine that the quality of private facilities is such that more protection from potentially damaging captivity away from the home is necessary for children. The dangers to children are just as immediate in private as in state-operated hospitals, and the advantages of wealth should not include the power to confine one's children unnecessarily in an institution for the mentally ill.

Conclusion

In *In re Roger S.* the California Supreme Court reached a courageous result in a difficult area. The decision is another step in a series of cases that have required that children be procedurally protected from arbitrary treatment by the state. *In re Roger S.* is particularly significant in its recognition that the constitutional right of parents to direct their children's lives is not so extensive that a parent's decision to commit a child is immunized from review by a disinterested third party. But the court made three mistaken assumptions. It implicitly assumed that minors do receive treatment in state mental hospitals, despite evidence to the contrary in petitioner's experience. It exaggerated the significance of the parents' initiation of the admission procedure by assuming that parents make the decision to commit by themselves. Most importantly, the court did not question whether a family in the process of institutionalizing a child for a mental disorder deserves the traditional judicial deference to parental authority. A more critical analysis would have led the court to mandate more stringent preadmission safeguards for children.

The frustrating and ironic aspect of *In re Roger S.* is that precommitment procedures simply cannot assure psychiatric inpatients of adequate treatment. Underlying any formulation of due process for committing children who are in their parents' custody is an understanding of conditions in state mental hospitals and of the internal relationships of families who hospitalize their children. Courts may be unable to reach this understanding because of the multiplicity of facts and the variety of value-laden judgments implicated. But in spite of the uncertainty involved, the interests of children facing indeterminate commitment to imperfect treatment programs are compelling enough to demand substantial assurances that commitment is necessary.

The full effect of the *In re Roger S.* decision cannot be known until the legislature responds to it. The court left the legislature a great deal of flexibility to remedy the procedural gap left by the exclusion of minors from the provisions of the LPSA. In response, the legislature must recognize the

320, 313 A.2d 886 (Super. Ct. 1973). A minor can also be released from a private mental hospital by a petition of habeas corpus claiming abuse of parental authority in the most extreme cases. *In re John S.*, 66 Cal. App. 3d 343, 357, 135 Cal. Rptr. 893, 902 (2d Dist. 1977) (but record expunged, see note 126 *supra*).