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## Voluntary Admission of Minors to Mental Hospitals in Texas: A Proposal.

Jane S. Snow

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## VOLUNTARY ADMISSION OF MINORS TO MENTAL HOSPITALS IN TEXAS: A PROPOSAL

Jane S. Snow

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### I. INTRODUCTION

In most states, statutes permit parents and guardians to voluntarily admit their minor children to public or private mental hospitals for treatment of severe psychiatric problems.<sup>1</sup> The constitutionality of such statutes was recognized in 1979 by the United States Supreme Court in *Parham v. J.R.*<sup>2</sup> The *Parham* Court held that due process rights of minors are not violated when parents are allowed to consent to the voluntary admission of their child to a mental hospital, as long as a "neutral factfinder" determines hospitalization is medically justified.<sup>3</sup> Relying on precedent favoring family autonomy over state intervention,<sup>4</sup> the *Parham*

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1. As of 1974, thirty-seven states and the District of Columbia allowed parents to voluntarily commit minors to mental hospitals. See Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CALIF. L. REV. 840, 840 n.1 (1974). Several of these states provide that a child's consent is also required once he reaches a certain age. See, e.g., N.M. STAT. ANN. § 34-2-2 (1953) (16 years old); PA. STAT. ANN. tit. 50, § 7201 (Purdon Supp. 1981) (14 years old); WASH. REV. CODE ANN. § 72.23.070 (Wash. Supp. 1981) (13 years old). Two states provide mechanisms for judicial review of parental admissions. See MICH. COMP. LAWS ANN. § 14.800(417) (1980) (minor at least 13 years old or other suitable person may initiate review proceedings); OHIO REV. CODE ANN. § 5122.02(c) (Baldwin Supp. 1980) (court determines whether admission in best interest of minor upon petition by counsel, next friend, or relative).

2. 442 U.S. 584 (1979).

3. See *id.* at 604.

4. See *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (parents play primary role in upbringing of children); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (child not "mere creature of the State" and parents have duty to prepare him for "additional obliga-

Court took a position which has been criticized by proponents of children's rights who argue that children committed under voluntary statutes are not admitting themselves voluntarily, but are "being volunteered" by their parents.<sup>5</sup> While the Court clarified the authority of parents as opposed to that of the state to voluntarily admit minors to mental hospitals,<sup>6</sup> it failed to directly consider whether the minor must also consent to hospitalization.<sup>7</sup> As a result, the potential conflict between the interest of parent and child in such a situation is an issue which remains largely unresolved.

After exploring the legal background of parental and juvenile rights, this comment will consider the ramifications of the *Parham* decision on the Texas statute dealing with the voluntary admission of minors to mental facilities. The issue in focus is whether parental consent is sufficient to admit a minor to a mental hospital, an area of Texas law currently in dispute. Recommendations will be proposed for future legislation which will balance the interests of the child, the parents, and society.

## II. CONSTITUTIONAL BACKGROUND: THE RELATIONSHIP BETWEEN THE FAMILY, THE CHILD, AND THE STATE

The principle of parental control within the family has been strengthened by United States Supreme Court decisions holding a child is not a "mere creature of the State" and parents have certain rights pertaining to the raising of their children.<sup>8</sup> In *Meyers v. Nebraska*<sup>9</sup> the Court held unconstitutional a state statute forbidding the teaching of modern languages in elementary schools, emphasizing the right of parents to make major decisions regarding their children, particularly in the area of education.<sup>10</sup>

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tions in life"). See generally Note, *Constitutional Collision Course: Family Autonomy and the Rights of Minors in Voluntary Commitment Proceedings*, 40 LA. L. REV. 985, 987 (1980).

5. See Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CALIF. L. REV. 840, 845 (1974). Children "voluntarily" committed by their parents, unlike patients committed involuntarily, are unable to seek their own release. Additionally, children do not have the opportunity to leave on their own will as do adult patients who commit themselves voluntarily. *Id.* at 845.

6. See *Parham v. J.R.*, 442 U.S. 584, 604 (1979) (statute comports with minimum due process requirements if provides for application for commitment by child's parent and concurrence by hospital psychiatrist).

7. See Bricker, *Children's Rights: A Movement in Search of Meaning*, 13 U. RICH. L. REV. 661, 689 (1980). The author suggests the *Parham* Court failed to address this issue because the attorneys in the case did not raise it in their arguments. *Id.* at 689.

8. See *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

9. 262 U.S. 390 (1923).

10. See *id.* at 400, 403.

Two years later, in *Pierce v. Society of Sisters*,<sup>11</sup> a state law which required parents and guardians to send children under sixteen years of age to public schools was struck down.<sup>12</sup> The *Pierce* Court found the statute unreasonably interfered with the parents' right to direct the upbringing and education of their children.<sup>13</sup> The right of parents to make critical decisions concerning their children was affirmed in *Wisconsin v. Yoder*.<sup>14</sup> In *Yoder*, a group of Amish parents, preferring to educate their children in their own community, successfully challenged a compulsory public school attendance law for children under sixteen.<sup>15</sup> Recently, in *Moore v. East Cleveland*,<sup>16</sup> the Court declared a city zoning ordinance which prohibited a woman and her two grandchildren from maintaining a common household, was unconstitutional.<sup>17</sup> The *Moore* Court concluded the ordinance violated due process by interfering with a "private realm of family life which the state cannot enter."<sup>18</sup>

The Supreme Court has also acknowledged the authority of state governments to intercede between family and child in order to protect the child.<sup>19</sup> Recognizing that rights of parenthood are subject to regulation, the Court in *Prince v. Massachusetts*<sup>20</sup> upheld a child labor law forbidding children from selling magazines in public places.<sup>21</sup> The Court noted that the state, as *parens patriae*,<sup>22</sup> may restrict parental control "by re-

11. 268 U.S. 510 (1925).

12. *See id.* at 534-35. The state's compulsory public school attendance law was challenged by private religious and military schools in Oregon. *Id.* at 531-33.

13. *See id.* at 534-35. The Court emphasized that states may not "standardize" their children by forcing them to attend public schools only. *Id.* at 535.

14. 406 U.S. 205 (1972).

15. *See id.* at 234. The parents in *Yoder* wished to remove their children from private or public schools after the eighth grade. Evidence showed the Amish provide an informal vocational education which is designed to help their children prepare for life in the Amish community. The parents believed high school attendance would endanger the Amish religion. *See id.* at 207-13.

16. 431 U.S. 494 (1977).

17. *See id.* at 505-06. The homeowner in *Moore* was convicted of violating a housing ordinance limiting occupancy of a dwelling unit to members of a single family and recognizing only a few categories of related individuals as a "family." *See id.* at 496-98.

18. *See id.* at 499. The Court also found the protection afforded to families under the Constitution was not confined to the "nuclear family." *See id.* at 504.

19. *See Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

20. 321 U.S. 158 (1944).

21. *See id.* at 174-75. The statute in *Prince*, which also penalized the furnishing of magazines and other publications to minors with knowledge of the minor's intent to sell them in public, was applied to a Jehovah's Witness who allowed her child to distribute religious pamphlets on a street corner. *See id.* at 161-62.

22. *Parens patriae* literally means "father of the county." Today, it is used to describe the state's role when acting as guardian of juveniles, the insane, and others with legal disa-

quiring school attendance, regulating or prohibiting child labor, and in many other ways."<sup>23</sup> The state's power to ensure the well-being of children was expanded in *Ginsberg v. New York*,<sup>24</sup> in which the majority validated a statute prohibiting the sale of obscene literature to minors under seventeen.<sup>25</sup> The Supreme Court found the power of the state to control the conduct of children is broader than its power to control the conduct of adults, even in the area of constitutionally protected freedoms.<sup>26</sup> Another area in which parental authority may be superseded by the state under the *parens patriae* doctrine, involves the state's power to consent to medical or surgical treatment for a child whose parents have refused such treatment based on their religious beliefs.<sup>27</sup>

The majority of courts addressing family rights issues apparently assumed the only interests at stake are those of the parents and of the state. In a few cases, however, the Supreme Court has focused directly on instances in which the interest of the parents and the child are in conflict.<sup>28</sup> Justice Douglas' dissent in *Wisconsin v. Yoder* made one of the earliest references to the competing interests of parents and children.<sup>29</sup> He insisted the views of high school aged children should be heard before the state be allowed to exempt parents from sending their children to public schools beyond the eighth grade, noting that such a decision has a vital impact on a child's future.<sup>30</sup>

The leading Supreme Court decisions involving parent-child conflicts deal with the issue of abortion. The first of these cases was *Planned*

bilities. See *Matter of Guardianship of Eberhardy*, 294 N.W.2d 540, 543 n.6 (Wis. 1980). The *parens patriae* doctrine recognizes the state's right to intervene on behalf of the child's best interest. See *Turner v. Melton*, 402 P.2d 126, 128 (Kan. 1965).

23. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

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

25. See *id.* at 639, 645. The statute did not bar parents from purchasing magazines for their children. *Id.* at 639.

26. See *id.* at 639-40.

27. See *Ex rel Wallace v. Labrenz*, 104 N.E.2d 769, 773 (Ill. 1952) (court authorized to appoint guardian for child whose parents refused to permit life-sustaining blood transfusion); cf. *In re Hudson*, 126 P.2d 765, 778 (Wash. 1942) (court may not subject child to surgery over objection of natural guardian unless child adjudicated a "dependent" of the state).

28. See *Bellotti v. Baird*, 443 U.S. 622, 644 (1979) (parental consent cannot operate as absolute veto over minor's objection); *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976) (parental consent not always required for minor's abortion).

29. See *Wisconsin v. Yoder*, 406 U.S. 205, 241-42 (1972) (Douglas, J., dissenting).

30. See *id.* at 245-46 (Douglas, J., dissenting). Justice Douglas noted children are frequently permitted to testify in custody proceedings. He also argued a 14 year old's moral and intellectual maturity is close to that of an adult, citing the works of several noted psychiatrists. See *id.* at 245 (Douglas, J., dissenting).

*Parenthood v. Danforth*,<sup>31</sup> in which the Supreme Court struck down a statute requiring prior written consent of a minor's parent as a pre-requisite to an abortion.<sup>32</sup> The Court in *Danforth* found the parents' independent interest in preventing an abortion to be no more significant than the right of privacy of a mature minor.<sup>33</sup> Three years later, in *Bellotti v. Baird*,<sup>34</sup> the Court held that when a state conditions the exercise of a minor's right to an abortion on parental consent, it must also provide alternative procedures for the minor to show she is mature enough to make an independent decision.<sup>35</sup> While the *Bellotti* Court did not retreat from the rationale of *Danforth*, it justified judicial authorization of a minor's abortion on the basis that the constitutional rights of children cannot be equated with those of adults.<sup>36</sup> The Court recently narrowed the *Danforth* holding even further by upholding a state statute requiring a physician to "notify, if possible," the parents or guardian of a minor upon whom an abortion is to be performed.<sup>37</sup> Such a statute does not violate the constitutional rights of an "immature, dependent minor," as to whom there are "greater risks of inability to give an informed consent."<sup>38</sup>

Recent Supreme Court decisions, affirming a variety of minor's rights, support the proposition that children are persons who enjoy many of the same constitutional privileges as adults.<sup>39</sup> Between 1966 and 1971, nearly all of the procedural safeguards enjoyed by adult criminal defendants were extended to minors in delinquency proceedings.<sup>40</sup> The two landmark

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31. 428 U.S. 52 (1976).

32. *See id.* at 75.

33. *See id.* at 75.

34. 443 U.S. 622 (1979).

35. *See id.* at 643.

36. *See id.* at 643. The Court identified three reasons for its conclusion: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in childrearing. *See id.* at 643.

37. *See H.L. v. Matheson*, \_\_\_ U.S. \_\_\_, \_\_\_, 101 S. Ct. 1164, 1171, 67 L. Ed. 2d 388, 388 (1981). A Utah statute, requiring parental notification only, was distinguished from statutes allowing parents to absolutely veto their daughter's decision to obtain an abortion. *See id.* at \_\_\_, 101 S. Ct. at 1171, 67 L. Ed. 2d at 398.

38. *See id.* at \_\_\_, 101 S. Ct. at 1172, 67 L. Ed. 2d at 399.

39. *See, e.g.,* *Ingraham v. Wright*, 430 U.S. 651, 674 (1977) (corporal punishment of school children implicates constitutionally-protected liberties); *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (minors have protected property interests); *Tinker v. Des Moines School District*, 393 U.S. 503, 514 (1969) (first amendment entitles school children to wear black armbands to protest Vietnam war).

40. *See, e.g.,* *In re Winship*, 397 U.S. 358, 368 (1970) (due process in juvenile delinquency cases requires proof beyond a reasonable doubt); *In re Gault*, 387 U.S. 1, 30 (1967) (minors entitled to same procedural safeguards as adults facing criminal charges); *Kent v. United States*, 383 U.S. 541, 561-62 (1966) (juvenile court has limited power to waive jurisdiction and send minor to trial as adult).

cases in this area are *Kent v. United States*<sup>41</sup> and *In re Gault*.<sup>42</sup> The *Kent* Court placed limitations on the power of juvenile courts to waive jurisdiction by sending the accused minor to trial as an adult.<sup>43</sup> The majority in *Gault* held that minors facing criminal prosecution are entitled to full procedural protection when criminal proceedings against them could lead to an order of delinquency and institutional confinement, finding such proceedings violative of the minor's due process rights.<sup>44</sup> In a subsequent decision, however, the Court refused to extend to minors all of the constitutional rights afforded adult defendants, holding that a trial by jury is not constitutionally required in a state juvenile delinquency proceeding.<sup>45</sup> Additionally, the *Gault* Court implicitly recognized parental authority through holding that both the juvenile and his parents must be notified of the charges and advised of their right to an attorney.<sup>46</sup> While *Gault* did not focus on instances in which the juvenile's interests compete with those of his parents, some courts have recognized the potential for parent-child conflict when the parent is the complainant in a proceeding to have a child declared "pre-delinquent" or "incorrigible."<sup>47</sup>

### III. *Parham v. J.R.*: WHAT PROCESS IS DUE?

In *Parham v. J.R.*, the Supreme Court was faced with problems of procedural due process in civil commitment cases as well as the relationship between the family, the child, and the state.<sup>48</sup> The issue in *Parham* was whether the state must provide an adversarial hearing to minors whose parents seek to admit them to mental hospitals.<sup>49</sup> While the general trend in recent years has been to extend the due process rights of individuals

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41. 383 U.S. 541 (1966).

42. 387 U.S. 1 (1967).

43. See *Kent v. United States*, 383 U.S. 541, 561-62 (1966).

44. See *In re Gault*, 387 U.S. 1, 30 (1967). The procedural safeguards afforded minors in *Gault* include notice of the charges, right to counsel, right to confront and cross-examine witnesses, and privilege against self-incrimination. See *id.* at 33, 41, 55, 57.

45. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

46. See *In re Gault*, 387 U.S. 1, 33, 41 (1966).

47. See, e.g., *In re Henry G.*, 104 Cal. Rptr. 585, 591 (1972) (before child can be adjudicated beyond parental control, juvenile court must hold hearing to determine whether child's behavior is manifestation of parent-child conflict); *In re Sippy*, 97 A.2d 455, 456-57 (D.C. 1953) (mother charging teen-aged daughter with being "habitually out of control" could not choose daughter's legal counsel or waive doctor-patient privilege for her); *Marsden v. Commonwealth*, 227 N.E.2d 1, 3 (Mass. 1967) (due process requires child be provided with separate counsel in delinquency proceeding).

48. See *Parham v. J.R.*, 442 U.S. 584, 624 (1979) (Stewart, J., concurring) (issues involving families and mental illness difficult for courts to decide because both involve policy problems "disguised as questions of constitutional law").

49. See *id.* at 587.

committed to mental hospitals,<sup>50</sup> the *Parham* Court declined to extend these rights to minors committed under voluntary admission statutes.<sup>51</sup>

The plaintiffs in *Parham*, children being treated in Georgia state mental hospitals, contended the Georgia voluntary commitment procedure for children under eighteen violated due process, claiming due process required at least the right to an adversary hearing.<sup>52</sup> A federal district court held the statute did violate due process because institutionalization constitutes a severe deprivation of a child's liberty, in terms of both freedom from bodily restraint and from the "emotional and psychic harm" caused by institutionalization.<sup>53</sup> The district court found the likelihood that parents would abuse the system by unnecessarily institutionalizing their children was great enough to require a formal adversary hearing prior to admitting a child to a mental hospital.<sup>54</sup>

Although the Supreme Court acknowledged the significant liberty interest involved when a child may be unnecessarily confined for medical treatment,<sup>55</sup> the Court denied that parents would abuse the commitment procedure. The Court instead based its decision on the traditional presumption that "natural bonds of affection lead parents to act in the best interests of their child."<sup>56</sup> Parents have authority to initiate psychiatric treatment for their child, subject to a review procedure by an independent physician, which need not meet the requirements of a formal or quasi-formal hearing.<sup>57</sup> In rejecting the need for such proceedings, the

50. See, e.g., *Addington v. Texas*, 441 U.S. 418, 433 (1979) ("clear and convincing" standard of proof required in civil commitment cases); *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975) (unconstitutional to confine non-dangerous individual capable of surviving on outside alone or with help of family and friends); *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (civil commitment involves "massive curtailment of liberty").

51. See *Parham v. J.R.*, 442 U.S. 584, 603 (1979).

52. See *id.* at 587-96. The Georgia procedure challenged in *Parham* provided for a minor's voluntary admission to a state hospital by application signed by the parent or guardian and acceptance by the hospital superintendent. *Id.* at 590; see GA. CODE ANN. § 88-50.1 (1975).

53. See *J.L. v. Parham*, 412 F. Supp. 112, 136 (M.D. Ga. 1976), *rev'd sub. nom.*, *Parham v. J.R.*, 442 U.S. 584 (1979).

54. See *id.* at 138. The district court acknowledged that most parents who seek admission to a mental hospital for their children do so in good faith. The court, however, relied on a witness who expressed an opinion that "some still look upon mental hospitals as a 'dumping ground.'" *Id.* at 138. In addition to ruling the Georgia admissions statute unconstitutional, the district court ordered the state to appropriate and expend such resources as would be necessary to provide alternative, non-hospital treatment for children who could benefit from it. See *id.* at 139.

55. See *Parham v. J.R.*, 442 U.S. 584, 600 (1979).

56. See *id.* at 602 (1979).

57. See *id.* at 604, 607. The Court concluded the psychiatric interview to determine the child's need for hospitalization must probe the child's background and must include an interview with the child. The psychiatrist must have authority to refuse to admit any child



*Parham* Court cited the potential for parents to be discouraged from seeking needed psychiatric help for their child if too many procedural obstacles were placed in the way.<sup>58</sup> Additionally, the Court recognized the danger that formal adversary hearings would significantly intrude into the parent-child relationship.<sup>59</sup> The majority acknowledged that some parents do not always act in the best interest of their child, and that there may be risks of error in the process,<sup>60</sup> but concluded this was not a reason for holding the Georgia statute and thirty similar state statutes unconstitutional.<sup>61</sup>

*Parham v. J.R.* failed to directly address potential conflicts of interest between parent and child concerning the issue of hospitalization. The Court, however, implied that when the parent's decision to hospitalize a child conflicts with the wishes of the child, parental authority must control.<sup>62</sup> The Court indicated that most children, even in adolescence, are incapable of making sound judgments regarding the need for medical care, thus, parents must make these decisions for their children.<sup>63</sup> The

who does not meet the medical standards for admission. Additionally, the child's continued need for hospitalization must be periodically reviewed by an independent procedure. The "neutral factfinder" need not be a judicial officer; in fact, psychiatrists are better qualified for this task. *Id.* at 606.

58. *See id.* at 605, 610. The Court noted that placing parent and child in adversarial positions may exacerbate conflicts, which ultimately would have a negative impact on the parent's ability to assist the child, both in the hospital and upon the child's return home. *See id.* at 610.

59. *See id.* at 612.

60. *See id.* at 612.

61. *See id.* at 612. In a companion case, *Secretary of Public Welfare v. Institutionalized Juveniles*, the Supreme Court held a similar Pennsylvania statute comported with due process. *See Secretary of Public Welfare v. Institutionalized Juveniles*, 442 U.S. 640, 649 (1979). In an earlier suit, *Bartley v. Kremens*, five children between the ages of 15 and 18 challenged the 1966 Pennsylvania statute, which was declared unconstitutional by a federal district court. *See Bartley v. Kremens*, 402 F. Supp. 1039, 1053-54 (E.D. Pa. 1975), *vacated and remanded*, 431 U.S. 119 (1977). The Pennsylvania legislature later amended its mental health code, placing adolescents over the age of 14 in essentially the same position as an adult for purposes of voluntary admission to mental hospitals. *See PA. STAT. ANN.*, tit. 50, § 7201 (Purdon Supp. 1978). When the case reached the Supreme Court, the Court held the claims of the named plaintiffs were moot in light of the amendment. *See Kremens v. Bartley*, 431 U.S. 119, 129 (1977). On remand, twelve new patients, nine of whom were under the age of 14, challenged the Pennsylvania statute again, and on appeal, the Supreme Court, in *Secretary of Public Welfare v. Institutionalized Juveniles*, applied the *Parham* rationale to uphold the statute, thus affirmatively settling the issue in favor of parental authority. *See Secretary of Public Welfare v. Institutionalized Juveniles*, 442 U.S. 640, 646 (1979).

62. *See Parham v. J.R.*, 442 U.S. 584, 624 (1979) (Stewart, J., concurring). Reasoning that parents tend to act in the best interests of their child, the Court concluded "the law presumes that parents possess what a child lacks in maturity, experience, and capacity for judgment." *Id.* at 602.

63. *See id.* at 603.

fact that a child does not want to be hospitalized "does not diminish the parent's authority to decide what is best for the child."<sup>64</sup> In his concurring opinion, Justice Stewart concluded there is no difference "between commitment to a mental hospital and other parental decisions which result in a child's loss of liberty."<sup>65</sup> The majority distinguished the holding in *Planned Parenthood v. Danforth* because it involved absolute parental veto power over a child's ability to obtain an abortion, while the statute in *Parham* did not give parents an absolute right to commit their children, but required an independent medical judgment.<sup>66</sup>

#### IV. CHILDREN'S RIGHTS: THE OPPOSING VIEW

Critics of the legal precedent established in *Parham v. J.R.* charge that minors admitted to mental hospitals by their parents under voluntary admission statutes have the rights of neither voluntarily nor involuntarily committed adult patients.<sup>67</sup> Thus, they receive "the worst of both worlds."<sup>68</sup> It is argued that children have the right to be heard in matters which significantly affect their lives, and since hospitalization deprives children of their liberty, the law is obligated to consider their opinions before permitting them to be committed.<sup>69</sup>

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64. See *id.* at 603.

65. See *id.* at 624 (Stewart, J., concurring). Justice Stewart cited *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), as authority for the common law principle that "parents speak for their minor children." See *Parham v. J.R.*, 442 U.S. 584, 621 (1979) (Stewart, J., concurring).

66. See *id.* at 603. *But see Parham v. J.R.*, 442 U.S. 584, 631 (1977) (Brennan, J., concurring and dissenting). The dissenting opinion found the case to be governed by the rule in *Danforth*, since the right to be free from institutionalization is equally important as the right to abortion. *Id.* at 631 (Brennan, J. concurring and dissenting). The opinion also distinguished *Danforth* by pointing out that while abortion involves a "personal substantive constitutional right," the plaintiffs in *Parham* did not have a similar right not to be hospitalized. *Id.* at 624 n.6 (Stewart, J., concurring).

67. See Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CALIF. L. REV. 840, 845 (1974) (voluntary adult patients have right to leave hospital on their own while involuntary patients have right to hearing prior to admission); Comment, *Due Process for Minors "Voluntarily" Committed to Mental Institutions: Does Father Know Best? Recommendations for Illinois*, 1980 S. ILL. U. L.J. 171, 181 (Supreme Court decision in *Parham* denies due process protection to minors facing voluntary commitment).

68. See *Kent v. United States*, 383 U.S. 541, 556 (1966) (minor in juvenile court waiver proceeding gets neither constitutional protections afforded adults nor "solicitous care" afforded children).

69. See *J.L. v. Parham*, 412 F. Supp. 112, 118 (M.D. Ga. 1976) (minor's constitutional rights violated by statute authorizing hospitalization without being afforded opportunity to be heard), *rev'd sub. nom.*, *Parham v. J.R.*, 442 U.S. 584 (1979). Adversarial hearings regarding hospitalization, like hearings to determine child custody in divorce cases, require the judge to consider the child's opinion. The judge makes the ultimate determination according

Not all persons believe in the presumption that parents always act "in the best interests of the child."<sup>70</sup> Various psychological theories indicate that often the problems which lead parents to seek hospitalization for their children can be traced to family problems, unrelated to the child's mental illness.<sup>71</sup> Parents often decide to admit their child at a time when emotional stress is great; therefore, the decision may be made without thoroughly considering possible alternatives such as outpatient treatment or less-restrictive group home placements.<sup>72</sup> For similar reasons some parents may view psychiatric hospitals as "dumping grounds" for unwanted or unmanageable children.<sup>73</sup>

The requirement for an independent decision by a "neutral factfinder" acts as a buffer against the inappropriate placement of children by parents in mental hospitals.<sup>74</sup> The psychiatrist's effectiveness, however, may be weakened by uncertainty over whether he or she represents the child or the parent, and thus, the psychiatrist may not always screen out unwarranted admissions.<sup>75</sup> Additionally, psychiatrists may have a tendency

to what is in "the best interests of the child." See TEX. FAM. CODE ANN. § 14.07(c) (Vernon Supp. 1982) (court in custody proceeding may interview child to ascertain child's wishes as to conservator, but results of interview "shall not alter or diminish the discretionary power of the court").

70. See *Parham v. J.R.*, 442 U.S. 584, 632 (1979) (Brennan, J., concurring and dissenting) (presumption that parents act in best interests of child not appropriate to commitment proceedings).

71. See *id.* at 632 (Brennan, J., concurring and dissenting); Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CALIF. L. REV. 840, 860 (1974). The psychological theories involved include "scape-goating" the child when his problems may be only a symptom of family problems as a whole, and "pseudo-mutuality," which makes it difficult for outsiders to assess the family situation. See Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CALIF. L. REV. 840, 860-61 (1974).

72. See Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CALIF. L. REV. 840, 851-52 (1974). The admissions process in many hospitals, however, has a built-in safeguard against the inability of parents to determine the need for hospitalization, in that children are usually referred by other mental health professionals after alternative treatment has failed. Interview with Carl M. Pfeifer, M.D., Executive Director of San Antonio Childrens' Center, in San Antonio, Texas (Sept. 3, 1981).

73. See *J.L. v. Parham*, 412 F. Supp. 112, 138 (M.D. Ga. 1976), *rev'd sub. nom.*, *Parham v. J.R.*, 442 U.S. 584 (1979). The Supreme Court in *Parham v. J.R.* pointed out, however, that no specific evidence of such "dumping" was found in the record. See *Parham v. J.R.*, 442 U.S. 584, 598 (1979).

74. See *Parham v. J.R.*, 442 U.S. 584, 612-13 (1979). The Court noted the unlikelihood that parents could succeed in institutionalizing a normal, healthy child without detection by the interviewing psychiatrist. *Id.* at 611.

75. See Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CALIF. L. REV. 840, 867-68 (1974). While the psychiatrist's role is traditionally that of agent for the patient, in the case of a juvenile voluntary patient, the psychiatrist may over-identify with the parents, thereby becoming the agent of the parents. *Id.* at 868.

to overdiagnose during the admissions interview,<sup>76</sup> and may find it difficult, at times, to objectively assess the need for hospitalization because of the parent's control over the situation.<sup>77</sup>

Justice Brennan, writing for the dissent in *Parham*, found parental rights in our society are limited by the rights and interests of children, referring to cases and statutes authorizing state intervention on behalf of abused children and curtailing parental authority to withhold necessary medical treatment.<sup>78</sup> Noting some type of due process hearing is necessary to protect the minor's rights, but acknowledging that pre-commitment hearings might delay treatment for those children who require immediate care, the dissent proposed postponing formal hearings for a limited period of time after hospitalization.<sup>79</sup> A pre-commitment proceeding would benefit those minors who do not require hospitalization, but who could be referred to less restrictive treatment settings.<sup>80</sup> While adversary proceedings are not constitutionally required, under *Parham*, a state is free to conduct such hearings when there is conflict between parent and child over the need for hospitalization.<sup>81</sup>

Several states have compromised on the consent issue by setting an arbitrary age limit above which the minor's consent to hospitalization is required.<sup>82</sup> Such statutes recognize that a minor's capacity to make choices will vary with age.<sup>83</sup> With respect to pre-adolescents, generally re-

76. See *id.* at 864-66. Acknowledging the fallibility of psychiatric diagnosis, the Court in *Parham* did not agree that the "shortcomings" of specialists could be avoided by shifting the admissions decision to an "untrained judge or . . . officer after a judicial-type hearing." See *Parham v. J.R.*, 442 U.S. 584, 609 (1979).

77. See Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CALIF. L. REV. 840, (1974). Although the admissions procedure typically involves an interview with the child alone, it is argued that parents may have already swayed the psychiatrist by their own presentation of the problems. See *id.* at 861.

78. See *Parham v. J.R.*, 442 U.S. 584, 630 (1979) (Brennan, J., concurring and dissenting).

79. See *id.* at 632-36 (Brennan, J., concurring and dissenting). At a later hearing, observations supporting need for commitment or discharge would be made by the hospital staff, rather than parents, thus preserving family cohesiveness. *Id.* at 635 (Brennan, J., concurring and dissenting).

80. See *J.L. v. Parham*, 412 F. Supp. 112, 139 (M.D. Ga. 1976), *rev'd sub. nom.*, *Parham v. J.R.*, 442 U.S. 584 (1979); Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CALIF. L. REV. 840, 890 (1974).

81. See *Parham v. J.R.*, 442 U.S. 584, 606 (1979).

82. See, e.g., HAW. REV. STAT. § 334-60 (1976) (15 years old); PA. STAT. ANN. tit. 50, § 7201 (Purdon Supp. 1977) (14 years old); WASH. REV. CODE ANN. § 72.23.070 (Supp. 1981) (13 years old).

83. See PA. ANN. STAT. tit. 50, § 7201 (Purdon Supp. 1977) (person 14 or over may consent to psychiatric hospitalization); Note, *The Mental Hospitalization of Children and the Limits of Parental Authority*, 88 YALE L.J. 186, 206 (1978). But see Wilkins, *Children's Rights: Removing the Parental Consent Barrier to Medical Treatment of Minors*, 1975

garded as children under the age of thirteen or fourteen years, parental authority to seek hospitalization is justified in light of psychological evidence which indicates children of this age group are not competent to make their own choices.<sup>84</sup> The situation is more complex for the adolescent, however. Psychological changes which occur in the quality of a child's thought at the time of adolescence, usually between the ages of thirteen and eighteen, enable the youngster to see the practicalities of real-life situations and to anticipate and evaluate the consequences of his own conduct.<sup>85</sup> By age fourteen, the typical adolescent will have acquired a basic capacity for intelligent choice.<sup>86</sup> Thus, many states treat adolescents essentially the same as adults for purposes of admission to mental hospitals.<sup>87</sup>

### V. THE LAW IN TEXAS

Approximately 3,000 children under the age of eighteen were admitted to public and private mental hospitals in Texas in 1980.<sup>88</sup> Statutory au-

ARIZ. ST. L.J. 31, 39 (15 is age at which most courts will find minor mature enough to consent to own medical treatment).

84. See Note, *The Mental Hospitalization of Children and the Limits of Parental Authority*, 88 YALE L.J. 186, 209 (1978).

85. See, e.g., D. ELKIND, CHILDREN AND ADOLESCENTS 99-102 (2d ed. 1974) (adolescents can construct ideals and conceive of ideal families, religions, and societies); Kohlberg & Gilligan, *The Adolescent as a Philosopher: The Discovery of the Self in a Postconventional World*, 100 DAEDALUS 1051, 1059-65 (1971) (adolescent has cognitive capacity to move from conventional to reflective view of values and society); Piaget, *The Relation of Affectivity to Intelligence in the Mental Development of the Child*, 26 BULL. MENNINGER CLINIC 129, 137 (1962) (adolescent acquires capacity to play role in society that he has chosen himself and to regulate his own values).

86. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 206 n.3 (1972) (Douglas, J., dissenting) (moral and intellectual maturity of 14-year-old is close to that of adult); B. INHELDER & J. PIAGET, *THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE* 335-47 (1958) (formal operational thought achieved between 11 and 15 years of age); E. PEEL, *THE NATURE OF ADOLESCENT JUDGMENT* 20-22, 31-33, 36-38, 45-48 (1971) (studies show capacity for "explanatory judgment" achieved by about 14 1/2 years); cf. TEX. FAM. CODE ANN. § 14.07(a) (Vernon 1975) (child 14 or older may choose managing conservator, subject to approval by court).

87. Compare HAWAII REV. STAT. § 334-60 (1976) (minor 15 years old must consent to hospitalization) and UTAH CODE ANN. § 64-7-29 (1977) (16 year old must consent to admission) with LA. REV. STAT. ANN. 28:51 (West 1969) (any mentally ill person may apply for admission to mental hospital) and MINN. STAT. ANN. § 253A.03 (West Supp. 1974) (any person, regardless of age, may voluntarily admit himself to hospital).

88. In fiscal year 1980, the Texas Department of Mental Health and Mental Retardation (MHMR) discharged 1,490 patients under age 18. The number of discharged patients is roughly equivalent to the number of patients admitted. One thousand, two hundred and eighty-three of these patients were in the 14-18 age group, while 207 were under age 14. Telephone interview with Charles Roberts, Texas Department of Mental Health and Mental

thority for admitting a minor to a mental hospital as a voluntary patient is given by article 5547-23 of the Texas Mental Health Code, which provides that application of a person "shall be in writing and signed by the voluntary patient if he is legally of age or by his parent, legal guardian, or county judge, with his consent, if he is not legally of age".<sup>89</sup> For many years the Texas Department of Mental Health and Mental Retardation (MHMR) interpreted the statute to require the minor's consent for voluntary admission.<sup>90</sup> Because the language of the statute is ambiguous, however, in 1980 the Commissioner of MHMR requested an opinion from the Texas Attorney General, asking whether the statute could be construed as requiring the minor's consent only when he is admitted upon application of the county judge.<sup>91</sup> The attorney general interpreted the statute to require the "informed consent"<sup>92</sup> of a minor, regardless of his age, for voluntary admission to a mental hospital.<sup>93</sup> Addressing the effect of *Parham v. J.R.* on the Texas admissions policy, the attorney general found the Supreme Court in *Parham* was considering "only the minimum constitutional standards" required for the admission of a minor to a

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Retardation (Sept. 16, 1981). In addition to public mental hospitals, there are several private psychiatric hospitals which treat children. Approximately 1,500 patients 18 and under were admitted to these facilities in 1980. See National Association of Private Psychiatric Hospitals, Directory of Member Hospitals (1980-1981). This figure does not include children admitted to residential treatment centers, which, while similar to psychiatric hospitals, treat children who are slightly less disturbed. See Note, *The Mental Hospitalization of Children and the Limits of Parental Authority*, 88 YALE L.J. 186, 186-87 n.3 (1978).

89. TEX. REV. CIV. STAT. ANN. art. 5547-23 (Vernon 1958); cf. *id.* art. 5547-24(a) (patient must be advised, upon admission, of right to leave hospital 96 hours after filing written request for release, signed by patient or someone in his behalf); *id.* art. 5547-25 (voluntary patient of legal age shall be released within 96 hours of filing written request, unless request withdrawn or application for involuntary commitment filed).

90. See TEX. ATT'Y GEN. OP. NO. MW-180 (1980). MHMR has always required the minor's consent, in addition to that of the parents, prior to admission to any state in-patient facility, in order to protect the patient's rights. Telephone interview with Kent Johnson, Chief of Legal Services, Texas Department of Mental Health and Mental Retardation (Sept. 21, 1981).

91. See TEX. ATT'Y GEN. OP. NO. MW-180 (1980). MHMR apparently requested the opinion in expectation that, based on *Parham v. J.R.*, the attorney general would rule the minor's consent is not required. Telephone interview with Kent Johnson, Chief of Legal Services, Texas Department of Mental Health and Mental Retardation (Sept. 21, 1981).

92. One author has defined informed consent in the following manner: "a physician may not treat a patient until he has explained to the patient the risks and material facts concerning the treatment and its alternatives, including nontreatment, and has secured thereafter the patient's competent, voluntary, and understanding consent to proceed." See G. ANNAS, *THE RIGHTS OF HOSPITAL PATIENTS* 57 (1975); Foster, *Informed Consent of Mental Patients*, in *LAW AND MENTAL HEALTH PROFESSIONS: FRICTIONS AT THE INTERFACE*, 90 (W. Barton & C. Sanborn ed. 1978).

93. See TEX. ATT'Y GEN. OP. NO. MW-180 (1980).

mental hospital.<sup>94</sup> Thus, the opinion concluded that *Parham* has "little relevance" for admission procedures in Texas.<sup>95</sup>

This interpretation effectively removes from parents and physicians the right to make a medical decision concerning the child, and theoretically places the decision in the hands of the child.<sup>96</sup> If the child refuses to consent, the only recourse left to the parents is to institute involuntary commitment proceedings in an appropriate court, a process which delays administration of effective treatment.<sup>97</sup> The attorney general's construction of the Texas statute has been highly criticized by mental health professionals across the state, who are in the position of determining what constitutes "informed consent" when an emotionally disturbed child is involved.<sup>98</sup> These professionals and others have disagreed with the attorney general's statement that the Texas Legislature, which has not amended the statute since 1957, must be "presumed to have been aware of the Department's interpretation," and thus accepted this interpretation as evidenced by their failure to amend the statute.<sup>99</sup>

As a result of dissatisfaction with the current voluntary admissions law, various groups lobbied for a change in the Texas statute.<sup>100</sup> During the

94. *See id.*

95. *See id.*

96. Taken to an extreme, this interpretation of the statute requires even three or four year-old children to consent to hospitalization. The difficulties involved are more pronounced when a minor requests to be discharged and his parents refuse to take him home. This has occurred several times during the past few years, requiring the hospital to refer the minor to the Department of Human Resources as an "abandoned child." Telephone interview with Kent Johnson, Chief of Legal Services, Texas Department of Mental Health and Mental Retardation (Sept. 21, 1981).

97. *See* TEX. REV. CIV. STAT. ANN. arts. 5547—31,—39 (Vernon 1958). A person may be temporarily committed for up to 90 days upon application made by any adult person and filed in county court. Before the hearing, two physicians who have examined the proposed patient within the past five days must file a Certificate of Medical Examination for Mental Illness, stating the person is mentally ill and requires observation and/or treatment in a mental hospital. The county judge must then set a hearing within 14 days, of which the proposed patient must be notified. The person has the right to appointment of counsel. The hearing itself is held before the judge, and if the court finds the proposed patient is "mentally ill and requires observation and/or treatment in a mental hospital for his own welfare and protection or protection of others," the court may issue an order for commitment. *Id.* arts. 5547—31,—39.

98. Telephone interview with William Allan, M.D., J.D., Medical Director, Adolescent Unit, Spring Shadows Glen, Houston, Texas (Nov. 10, 1981); Interview with Carl M. Pfeifer, M.D., Executive Director, San Antonio Children's Center, in San Antonio, Texas (Sept. 5, 1981).

99. *See* TEX. ATT'Y GEN. OP. NO. MW-180 (1980).

100. The Texas Society of Child Psychiatrists was strongly in favor of the amended statute, and several psychiatrists from across the state testified in its behalf. Telephone interview with Pike Powers, Attorney at Law for Texas Society of Child Psychiatrists, Ful-

1981 legislative session House Bill 1504 was introduced, which would have amended article 5547-23 to delete the requirement for a minor's consent to voluntary hospitalization.<sup>101</sup> The house of representatives passed the bill and it was cleared for floor action in the senate; however, it was never acted upon by the senate.<sup>102</sup> The amended statute's application to all minors under age eighteen, rather than only pre-adolescents, apparently was a factor in the bill's lack of success.<sup>103</sup>

As a result of the legislature's failure to revise Texas law regarding voluntary admission of minors to mental hospitals, facilities across the state are caught in a dilemma. On the one hand, they must apply a statute which is ambiguous, while on the other hand, they are faced with an attorney general's interpretation which appears ill-conceived in light of the Supreme Court's decision in *Parham v. J.R.*<sup>104</sup> In addition to ignoring *Parham's* deference to parental authority in making a decision to hospitalize a child, the attorney general's opinion appears to have erroneously construed the statute to require the "informed consent" of a minor of any age.<sup>105</sup> The statute itself speaks only to "consent," a concept less stringent than "informed consent," which requires a capacity to understand and appreciate the nature and consequences of the admission.<sup>106</sup> It is unreasonable to expect children, especially young, mentally disturbed chil-

bright and Jaworski, Austin, Texas (Nov. 11, 1981).

101. See H.B. 1504, Tex. Legis., 67th Sess. (1981). Article 5547-23 would have been amended to require a minor's consent only when a county judge applies for the minor's hospitalization, clarifying that in the case of a minor patient, it is the parent, legal guardian, or county judge that is agreeing to submit the patient to hospitalization. The bill would have also amended art. 5547-23 to allow a parent, legal guardian, or county judge who made application for a minor's admission to consent to the release of a minor patient from the hospital without also requiring the consent of the minor. *Id.*

102. One reason H.B. 1504 was not acted upon was that it was placed on the Senate calendar late in the session and became tied up procedurally. Telephone interview with Hector Uribe, Senator, 27th District, Brownsville, Texas (Sept. 14, 1981).

103. Telephone interview with Martha Boston, Attorney at Law, Patients' Rights Advocate, Austin, Texas (Sept. 21, 1981). Ms. Boston and other patient's rights advocates were also concerned that the statute, as amended, would permit parents to "warehouse" their children in mental hospitals. *Id.*

104. See *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (parents possess what children lack in maturity and capacity for judgment, and will act in best interests of child).

105. See TEX. ATT'Y GEN. OP. NO. MW-180 (1980).

106. See Foster, *Informed Consent of Mental Patients*, in LAW AND MENTAL HEALTH PROFESSIONS: FRICTION AT THE INTERFACE 86 (W. Barton & C. Sanborn ed. 1978). Informed consent exists when the prospective mental patient is "aware of the relevant circumstances surrounding his admission or retention and the purposes thereof and either assents or raises no objection thereto." *Id.* at 90. The U.S. Supreme Court has defined informed consent as, "the giving of information to the patient as to just what would be done and as to its consequences." See *Planned Parenthood v. Danforth*, 428 U.S. 52, 67 n.8 (1976).



dren, to give an informed consent.<sup>107</sup> Thus, those who are unable to give informed consent because of age, lack of maturity, or mental instability will be denied treatment.<sup>108</sup>

A more reasonable interpretation of the Texas statute would require a minor's consent to hospitalization only when he is admitted upon application of the county judge.<sup>109</sup> The language of the statute distinguishes between those who are and who are not "legally of age," and clearly appears to dispose of the consent requirement for those not legally of age.<sup>110</sup> The words "with his consent" modify application for admission by the county judge, rather than by parent or guardian.<sup>111</sup> Since an attorney general's opinion is not binding on the courts,<sup>112</sup> it is doubtful whether the attorney general's interpretation of this statute need be followed by private institutions.

#### VI. RESOLUTION: BALANCING THE INTERESTS OF PARENT AND CHILD

Clearly, Texas law on voluntary admission of minors to mental hospitals needs to be revised. The statute authorizing hospitalization must be flexible enough to provide easy access to treatment for mentally ill children, yet rigid enough to prevent erroneous commitment of children not requiring hospitalization. Both psychological<sup>113</sup> and legal<sup>114</sup> principles uphold the authority of parents to make this crucial decision for their child, up to a certain age, at which time the minor's own desires should be taken into consideration.

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107. *Cf.* *Bellotti v. Baird*, 428 U.S. 132, 147 (1976) (greater risks of inability to give informed consent where minor is concerned).

108. *See* Brief for Texas Society of Child Psychiatry at 3-4, TEX. ATT'Y GEN. OP. NO. MW-180 (1980).

109. *See id.* at 2.

110. *See* TEX. REV. CIV. STAT. ANN. art. 5547-23 (Vernon 1958) (application for admission shall be signed by voluntary patient "if he is legally of age" or by parent, guardian, or county judge, "if he is not legally of age").

111. *See id.*

112. *See, e.g.,* *Jones v. Williams*, 121 Tex. 94, 98 45 S.W.2d 130, 131 (1931) (attorney general opinions not binding on judiciary); *Salas v. State*, 592 S.W.2d 653, 655 (Tex. Civ. App.—Austin 1979, no writ) (attorney general opinions not controlling); *City of Houston v. Southern Pacific Transp. Co.*, 504 S.W.2d 554, 557 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref. n.r.e.) (attorney general opinions may be considered but do not have force of law).

113. *See* J. GOLDSTEIN, A. FREUD, & A.J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 648-49 (1973).

114. *See, e.g.,* *H.L. v. Matheson*, \_\_\_ U.S. \_\_\_, \_\_\_, 101 S. Ct. 1164, 1172, 67 L. Ed. 2d 388, 399 (1981) (greater risks of inability of minors to give informed consent); *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (parental role implies substantial authority over children); *In re Sumey*, 621 P.2d 108, 110 (Wash. 1980) (parents have constitutional right to care, custody, and companionship of children).

In light of both empirical evidence and legal precedent,<sup>115</sup> future legislation in Texas on voluntary admission to mental hospitals should require the consent of a minor only if he is over the age of fourteen.<sup>116</sup> While *Parham v. J.R.* found a full pre-commitment adversary hearing is not required, some type of hearing before an impartial body is apparently necessary to safeguard the interests of a mature adolescent who does not agree with his parent's decision to hospitalize him.<sup>117</sup> Even in situations in which an adolescent consents to hospitalization, a hearing may be necessary when the minor's ability to give competent consent is questionable due to the severity of his emotional illness.<sup>118</sup>

A post-commitment hearing, occurring within five to ten days of hospitalization, would ensure that adolescents who do not need in-patient treatment are channeled to more appropriate resources.<sup>119</sup> Postponement of the proceeding would prevent the problems inherent in pre-commitment hearings, such as delaying treatment for those minors over fourteen who require immediate care.<sup>120</sup> Additionally, a major problem inherent in pre-commitment hearings—pitting the child against the parent—would be largely avoided.<sup>121</sup> At a later hearing, recommendations for hospitalization would be made by hospital staff, rather than the parents; thus, direct challenges to parental authority and judgment would be minimized.<sup>122</sup> The hearing itself would be much like current involuntary commitment

115. See, e.g., *In re Roger S.*, 19 CAL. 3d 921, 931, 569 P.2d 1286, 1292 (1977) (14 is appropriate age to assert "due process rights"); *Peacock v. Adams*, 199 S.E.2d 254, 254 (Ga. 1973) (in custody dispute between parents, choice of child at least 14 years old controlling); *Buckholz v. Leveille*, 194 N.W.2d 427, 429 (Mich. App. 1971) (child 14 or over may sue without parental consent or even against parent's wishes); cf. TEX. FAM. CODE ANN. § 14.07(a) (Vernon 1975) (child 14 or over may choose managing conservator, subject to approval by court).

116. See *Parham v. J.R.*, 442 U.S. 584, 604 (1979) (parental consent and approval by psychiatrist sufficient to admit minor to mental hospital).

117. See Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CALIF. L. REV. 840, 910-14 (1974).

118. See Foster, *Informed Consent of Mental Patients*, in *LAW AND THE MENTAL HEALTH PROFESSION: FRICTION AT THE INTERFACE* 82 (W. Barton & C. Sanborn ed. 1978) (patient's consent to hospitalization not required where patient is out of touch with reality or otherwise incapable of making rational decision).

119. See *Parham v. J.R.*, 442 U.S. 584, 633 (1979) (Brennan, J., dissenting) (state may postpone commitment hearings but may not dispose of them altogether).

120. See *id.* at 635 (Brennan, J., dissenting).

121. See *id.* at 635 (Brennan, J., dissenting) (post-admission hearings unlikely to disrupt family relationships).

122. See *id.* at 635 (Brennan, J., dissenting). Justice Brennan pointed out that, at a post-commitment hearing, the child's advocate does not need to dispute the parent's decision to seek hospitalization for the child, nor their observations of the child's behavior. Instead, the advocate could argue that the child had improved sufficiently during the hospital stay to warrant discharge. *Id.* at 635 (Brennan, J., dissenting).

proceedings.<sup>123</sup> The minor should have the right to be represented by counsel, to cross-examine witnesses, and to present testimony and evidence.<sup>124</sup> The decision to commit should be made only if the statutory standards for admission have been met by clear and convincing evidence.<sup>125</sup>

## VII. CONCLUSION

Historically, the law has distinguished between the privileges and duties of adults and those of minors.<sup>126</sup> Minors, unlike adults, are presumed incompetent to determine and safeguard their own interests.<sup>127</sup> Because of their lack of capacity, minors should receive special treatment under the law, including protection from their own poor judgment.<sup>128</sup> It is both unfair and unrealistic for minors to assume full responsibility for their own lives. Ultimately, decisions must be made for them by either their parents or the state.<sup>129</sup> According to the United States Supreme Court, the decision to seek voluntary admission to mental hospitals is a decision

123. See TEX. REV. CIV. STAT. ANN. art. 5547-44 (Vernon Supp. 1982) (proposed patient shall receive notice of hearing); *id.* art. 5547-48 (Vernon 1958) (proposed patient has right to trial by jury); *id.* art. 5547-49 (Vernon 1958) (hearing should be held in physical setting not likely to have harmful effect on mental condition of patient).

124. See *J.L. v. Parham*, 412 F. Supp. 112, 139 (M.D. Ga. 1976) (minors entitled to due process at voluntary commitment hearing), *rev'd sub. nom.*, *Parham v. J.R.*, 422 U.S. 584 (1979); Model Statute for the Psychiatric Hospitalization of Minors 8-9 Commentary (American Academy of Child Psychiatry, 1981) (child entitled to notice of hearing, appointment of counsel, right to cross-examination, and right to present testimony and evidence); Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CALIF. L. REV. 840, 910 (1974) (minors should receive all procedural safeguards at commitment hearing).

125. See *Addington v. Texas*, 441 U.S. 418, 427 (1979) (due process requires proof in civil commitment case to be "more substantial than a mere preponderance of the evidence"); *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979) (adopted "clear and convincing evidence" standard of proof for civil commitment cases); *cf. In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980) ("clear and convincing evidence" standard of proof in involuntary parent-child termination).

126. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

127. See *Parham v. J.R.*, 422 U.S. 584, 621 (1979) (Stewart, J., concurring) (parents speak for their minor children); J. GOLDSTEIN, A. FREUD, & A.J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 3 (1973).

128. See *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (legal restrictions on minors important to child's chances for full growth and maturity); Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youths to Their "Rights"*, 1976 B.Y.U. L. REV. 605, 650.

129. See Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youths to Their "Rights"*, 1976 B.Y.U. L. REV. 654-55. Ironically, reducing parental authority to make the decision regarding hospitalization is likely to increase state involvement in the matter. *Id.* at 655.

which parents alone may make.<sup>130</sup>

Under Texas law, minors are subject to parental authority in many areas.<sup>131</sup> The current statute on voluntary admission to mental hospitals, if interpreted to require the minor's consent, appears inconsistent with such authority. Revision of the statute is needed in order to permit parents to seek hospitalization of a pre-adolescent child. The decision to admit the child should then rest with qualified professionals of the institution where admission is sought.<sup>132</sup>

Mental hospitalization of children should be considered only when other treatment methods have failed to alleviate the child's symptoms. The purpose of relying on parents and legal guardians to make the decision is not to encourage the use of hospitalization over other forms of treatment, but simply to make hospitalization available when it is deemed to be in the child's best interest. Under the current Texas statute, many minors may be denied treatment because of their inability to consent. A revised statute would resolve this problem, thus ensuring that the primary consideration is, indeed, "the best interests of the child."

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130. See *Parham v. J.R.*, 442 U.S. 584, 604 (1979).

131. See TEX. FAM. CODE ANN. § 12.04(6) (Vernon Supp. 1982) (parents have power to consent to medical, psychiatric, and surgical treatment for child).

132. See TEX. REV. CIV. STAT. ANN. art. 5547-22 (Vernon 1958). Under Texas law, the director of a mental hospital may admit a voluntary patient if that patient "has symptoms of mental illness and will benefit from hospitalization." See *id.* The Texas Society of Child Psychiatrists has advocated more specific admission criteria for a minor's admission to mental hospitals developed by each psychiatric hospital. See Brief for Texas Society of Child Psychiatry at 8-9, ATT'Y GEN. OP. No. M-W 180 (1980). The following criteria have been proposed:

- 1) The child is dangerous to self or others;
- 2) The magnitude of the child's mental illness has resulted in deviant behavior no longer tolerable to the patient or society;
- 3) The child is in need of treatment that cannot be initiated or continued in other than a hospital setting;
- 4) The child suffers from a medical condition which requires hospital care, but the psychological component cannot be handled on other services;
- 5) Ambulatory treatment or other approaches have not been successful in halting or reversing the child's mental illness.
- 6) A diagnostic work-up cannot be achieved in any other way.

See *id.* at 8-9.

APPENDIX I

Proposed Revisions and Amendments to the Texas Mental Health Code<sup>133</sup>

**Art. 5547-23. Application for Voluntary Admission**

The application for admission of a person minor to a mental hospital as a voluntary patient:

- (a) Shall be in writing and signed by the voluntary patient if he is legally of age fourteen years of age or older; or by his parent, legal guardian, or the county judge, with his consent, if he is not legally of age if he is under fourteen years of age;
- (b) Shall be filed with the head of the mental hospital to which admission is sought; and
- (c) Shall state that the patient agrees to submit himself to the custody of the mental hospital if he is fourteen years of age or older; or the parent, legal guardian, or the county judge agree to submit the patient under fourteen years of age to the custody of the mental hospital for diagnosis, observation, care and treatment for an initial period of no less than ten (10) days unless sooner discharged, and thereafter and to remain in the mental hospital until he is discharged or until the expiration of ninety-six (96) hours after written request for his release is filed with the head of the hospital.

**Art. 5547-24. Advising of Patient's Rights**<sup>134</sup>

Upon admission of a voluntary patient minor to a mental hospital, the head of the hospital shall inform the patient and any relative or friend who accompanies him to the hospital, in simple, non-technical language concerning:

- (a) The right of the patient to leave the hospital ninety-six (96) hours after filing with the head of the hospital a written request for his release, signed by the patient or someone on his behalf and with his consent, if he is fourteen years of age or older;
- (b) The right of habeas corpus, which is not affected by his admission to a mental hospital as a voluntary patient;
- (c) The fact that his civil rights and legal capacity are not affected by his admission to a mental hospital as a voluntary patient; and

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133. See TEX. REV. CIV. STAT. ANN. art. 5547-23 (Vernon 1958). This section of the proposed statute would amend Art. 5547-23 to require parental consent to hospitalization of minors under the age of fourteen.

134. See TEX. REV. CIV. STAT. ANN. art. 5547-24 (Vernon 1958).

(d) The "Rights of Patients" set forth in this Code.

**Art. 5547-25. Right to Release<sup>135</sup>**

A voluntary patient shall be released within ninety-six (96) hours after written request for his release is filed with the head of the hospital, signed by the patient or someone on his behalf and with his consent, if he is fourteen years of age or older, or by his parent or legal guardian if he is under fourteen years of age, unless prior to the expiration of the ninety-six (96) hour period:

- (a) Written withdrawal of the request for release is filed, or
- (b) Application for Temporary Hospitalization or Petition for Indefinite Commitment is filed and the patient is detained in accordance with the provisions of this Code.

**Art. 5527-25A. Objection to Hospitalization of Minor<sup>136</sup>**

- (a) A minor patient under the age of fourteen years who is voluntarily committed to a mental hospital by his parent or legal guardian may object to hospitalization by filing such objection with the court, in writing, not more than 30 days after hospitalization. Objection may be made subsequently at any three-month interval following the date of the original objection, or if an original objection was not made, at any three-month interval following the date of hospitalization.
- (b) If the patient informs the hospital that he desires to object to his hospitalization, the hospital shall assist him in properly submitting the objection to the court.
- (c) Upon receipt of an objection, the court shall schedule a hearing to be held within seven days, excluding Sundays and holidays. The court shall notify the patient, the person who executed the application, and the director of the hospital of the time for the hearing.
- (d) The hearing shall be governed by those provisions of Articles 5547-31 to 5547-67, including the appointment of counsel and an independent medical evaluation, which the court deems necessary to ensure that all pertinent information is brought to its attention, and by the provisions of this Article.
- (e) Unless the court sustains the objection and orders the discharge of the patient, the hospital may continue to hospitalize the patient,

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135. See TEX. REV. CIV. STAT. ANN. art. 5547-25 (Vernon 1958). In the proposed statute, only minors fourteen years of age or older could file a request for release. Request for release of minors under age fourteen could be made only by the patient's parent or legal guardian.

136. This sections of the proposed statute is based on legislation currently in effect in the state of Michigan. See MICH. COMP. LAWS ANN. § 14.800 (417) (1980).

no court order shall be entered, and the objection shall be terminated.

(f) The court shall sustain the objection and order the discharge of the patient if the patient is not in need of the treatment which is available at the hospital or if a treatment program which does not involve hospitalization is available and appropriate for the patient.

(g) If a hospital has officially agreed to hospitalize a minor fourteen years of age or older, but hospitalization has been deferred until a subsequent date, an objection to hospitalization may be made prior to hospitalization of the minor and shall be governed by this Article. If the objection is sustained by the court, the minor shall not be hospitalized.<sup>137</sup>

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137. See MICH. COMP. LAWS ANN. § 14.800 (418) (1980).

## APPENDIX II

HOUSE BILL 1504<sup>138</sup>

## A BILL

## TO BE ENTITLED

AN ACT, relating to the voluntary admission of minors to and the right to release from mental hospitals, and eliminating the ten-day minimum hospitalization period for the voluntary admission to mental hospitals; amending Articles 5547-23, 5547-24, and 5547-25, Vernon's Texas Civil Statutes.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. Section 23, Chapter 243, Acts of the 55th Legislature, Regular Session, 1957 (Article 5547-23, Vernon's Texas Civil Statutes), is amended to read as follows: "The application for admission of a person to a mental hospital as a voluntary patient:

- (a) Shall be in writing and signed by the voluntary patient if he is legally of age or by his parent, legal guardian, or the county judge, ~~with his consent~~ if he is not legally of age. The county judge may make application for voluntary admission of a person not legally of age only at the request and with the consent of such person;
- (b) Shall be filed with the head of the mental hospital to which admission is sought; and
- (c) Shall state that the patient agrees to submit himself to the custody of the mental hospital if he is legally of age or the parent, legal guardian, or the county judge agrees to submit the patient not legally of age to the custody of the mental hospital for diagnosis, observation, care and treatment for an initial period of no less than ten (10) days unless sooner discharged, and thereafter to remain in the mental hospital until he is discharged or until the expiration of ninety-six (96) hours after written request for his release is filed with the head of the hospital."

Section 2. Section 24, Chapter 243, Acts of the 55th Legislature, Regular Session, 1957 (Article 5547-24, Vernon's Texas Civil Statutes), is amended to read as follows:

"Upon admission of a voluntary patient to a mental hospital, the head of the hospital shall inform the patient and any relative or

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138. See H.B. 1504, 67th Legis. (1981). House Bill 1504 was passed by the House of Representatives and was not acted upon in the Senate prior to the end of the session. The bill was sponsored in the Senate by Senator Hector Uribe, 27th District.



friend who accompanies him to the hospital, in simple, non-technical language concerning:

- (a) The right of the patient to leave the hospital ninety-six (96) hours after filing with the head of the hospital a written request for his release, ~~signed by the patient or someone on his behalf and with his consent as provided by this Code;~~
- (b) The right of habeas corpus, which is not affected by his admission to a mental hospital as a voluntary patient;
- (c) The fact that his civil rights and legal capacity are not affected by his admission to a mental hospital as a voluntary patient; and
- (d) The "Rights of Patients" set forth in this Code. Acts 1957, 55th Leg., p. 505, ch. 243, § 24."

Section 3. Section 25, Chapter 243, Acts of the 55th Legislature, Regular Sessions, 1957 (Article 5547-25, Vernon's Texas Civil Statutes), is amended to read as follows:

A voluntary patient who is legally of age shall be released within ninety-six (96) hours after written request for his release is filed with the head of the hospital signed by the patient or by someone on his behalf and with his consent. A voluntary patient who is not legally of age shall be released within ninety-six (96) hours after written request for his release is filed with the head of the hospital signed by the patient's parent, legal guardian, or the county judge who made application for his voluntary admission. A voluntary patient shall not be released if prior to the expiration of the ninety-six (96) hour period:

- (a) Written withdrawal of the request for release is filed, or
- (b) Application for Temporary Hospitalization or Petition for Indefinite Commitment is filed and the patient is detained in accordance with the provisions of this Code.

Section 4. The importance of this legislation and the crowded conditions of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.