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OPINION	:	No. 80-812
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The Honorable Adrian Kuyper, County Counsel of the County of Orange, requested an opinion on a question we have rephrased as follows:

Does a minor have a constitutional procedural due process right to a hearing on the need for treatment before being confined in a private mental facility by the minor's parents at their expense?

CONCLUSION

A minor does not have a constitutional procedural due process right to a hearing on the need for treatment before being confined in a private mental facility by the minor's parents at their expense.

ANALYSIS

Section 1 of the Fourteenth Amendment to the United States Constitution provides: in part: ". . .; nor shall any State deprive any person of life, liberty, or property, without due process of law, . . ."

Article 1, section 7, of the California Constitution provides in part: "(a) A person may not be deprived of life, liberty, or property without due process of law . . . ."

"Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitutions." (*People* v. Olivas (1976) 17 Cal. 3d 236, 251.) A principal ingredient of personal liberty is freedom from bodily restraint. (*In re Roger S.* (1977) 19 Cal. 3d 921, 927.) Minors as well as adults are "persons" entitled to protection of their liberty interest under both constitutions, though the liberty interest of a minor is not coextensive with that of an adult. (*In re Roger S., supra*, at pp. 927–929.)

The prohibition of the Fourteenth Amendment is expressly directed at state action. That amendment "erects no shield against merely private conduct, however discriminatory or wrongful." (*Shelley v. Kraemer* (1948) 334 U.S. 1, 13.) The due process clause of the California Constitution is not expressly directed at state action. However, in *Kruger v. Wells Fargo Bank* (1974) 11 Cal. 3d 352, 366–377, our Supreme Court, analyzing section 7's similarly worded predecessor,[1] held:

> Article I, section 13, was adopted in 1849 and reenacted in 1879. It follows the exact language of the due process clause of the Fifth Amendment to the federal Constitution. From *Barren v. Baltimore* (1833) 32 U.S. (7 Pet.) 243 to the present, courts have uniformly interpreted that clause of the Fifth Amendment to limit only the actions of the federal government. Thus these decisions afford no ground for a conclusion that the drafters of article I, section 13, of our state Constitution intended by that enactment to impose a different limitation on the power of the state government. To construe article I, section 13, to apply to private action would involve a judicial innovation which, as of this date, is without precedent."

[1] At the time the *Kruger* one was decided the due process clause of the California Constitution was found in article I, section 13 which provided in part "No person shall . . . be deprived of life, liberty, or property without due process of law."

In *Garfinkle v. Superior Court* (1978) 21 Cal. 3d 268, 272, the court held that the California procedure for the nonjudicial foreclosure of deeds of trust on real property did not involve state action and were therefore exempt from the requirements of the due process clauses of both the federal and state Constitutions.

> The question presented here, as in all actions challenged under the Fourteenth Amendment, is whether 'there is a sufficiently close nexus between the State and the challenged action . . . so that the action . . . may be fairly treated as that of the State itself.' (*Jackson v. Metropolitan Edison Co.* (1974) 419 U.S. 345, 351.) Thus, the threshold question which we must determine is whether the state is significantly involved in the nonjudicial foreclosure procedure so as to bring that procedure within the reach of the due process clause." (*Id*., at p. 276.)

In *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal. 3d 458, 468 the court observed:

> "In *Kruger v. Wells Fargo Bank* (1974) 11 Cal. 3d 352, 366–367, however, in analyzing the reach of section 7, subdivision (a)'s predecessor provision, which similarly contained no explicit state action requirement, our court explained that the history of the constitutional provision offered no suggestion that the provision was intended to apply broadly to all purely private conduct. In *Kruger*, we rejected plaintiffs suggestion that we interpret the constitutional provision as applicable without regard to any state action doctrine whatsoever."

The court went on to hold in the *Gay Law Students* case that employment discrimination by a privately owned public utility which enjoyed a state-protected monopoly involved sufficient state action to violate article I, section 7 of the state Constitution. Thus the "state action" requirement of the state Constitution's due process clause appears to be alive and well in spite of an expanding view of what constitutes state action.

Our initial task is to determine whether the confinement of a minor in a private mental facility at the request and expense of the minor's parents involves sufficient state action to invoke due process protections.[2] *In re Roger S.*, *supra*, 19 Cal. 3d 921, held that the confinement of a 14–year-old minor in a state mental hospital at his parent's request

[2] We do not attempt to analyze herein what other rights a minor might have if he is confined in a mental hospital, nor do we attempt to analyze what type of state involvement in individual cases might be sufficient to invoke due process protection.

involved state action which gave rise to due process protection for the minor.[3] In footnote 3 of *In re Roger S.* the court added:

> "We have no occasion in the instant case to consider the lawfulness of the section 6000, subdivision (b) admission procedure as applied to children under 14 years of age, nor do we consider here whether parents may compel minors 14 years of age or older to submit to medical and/or psychiatric treatment in a closed private facility, or on an outpatient basis."

Thus our Supreme Court has expressly left the precise legal question presented to us unresolved,

We proceed to reexamine the "state action" cases for some insight regarding the kinds of state involvement our courts have considered significant in resolving the state action question. The subject is treated in some depth in *Kruger v. Wells Fargo Bank*, *supra*, 11 Cal. 3d 352 and that case provides a springboard for this inquiry. In *Kruger* the bank exercised its right of setoff to pay the plaintiffs Master Charge delinquency by removing state disability benefits she had put in her checking account. The court rejected plaintiffs claim that this procedure deprived her of property without due process because it did not involve state action.

The court observed that although a recent line of cases had extended due process protections to debtors whose property was taken pursuant to legislatively established summary creditor remedies, in almost all such cases the remedies had required some official ministerial act which obviously constituted state action.

> "The present case, in contrast, involves the act of a private party bereft of any action of state officials. Plaintiff seeks, therefore, to discover some other foundation on which to erect a structure of state action. The many arguments she advances can be organized into two contentions. (1) that since the right of setoff derives from state statutory or court-made law, it should be deemed state action; and (2) that even if setoff by an ordinary creditor is not state action, the banking industry is so highly regulated, and performs so important a function, that the act of a bank should be treated as the aet of the state itself. We discuss each contention in turn; we initially address ourselves to the proposition that since state statutes or state court decisions necessarily generated the right to setoff it must be considered state action.

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[3] This protection includes a hearing with the same procedural due process guaranteed to parolees in a parole revocation procedure by *Morrissey v. Brewer* (1972) 408 U.S. 471 and *Gagtion v. Scarpeo* (1973) 411 U.S. 778.

"As we pointed out earlier, the bank's action in the present case finds authorization not in the banker's lien law (Civ. Code, § 3054) but in the equitable principle of setoff. In 1872 this principle was partially codified in Code of Civil Procedure section 440. That statute, as of the date of setoff in the instant case, asserted that 'When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other.' Plaintiff contends that the authority conferred by this statute transforms the private action of the bank into state action.

"Those cases predicating state action upon the impact of a statute on private behavior fall generally into three categories. The first, which is not apposite here, consists of cases which adjudicated statutes that *compelled* private action. The second category encompasses those statutes which, while nor compelling private action, endorse and encourage that action as state policy. The third group comprises the decisions in which the statutes create a private right of summary seizure.

"The leading case in the second group, allegedly espousing the 'encouragement' theory, *Reitman v. Mulkey* (1967) 387 U.S. 369 struck down a California initiative that both replaced all laws banning racial discrimination in housing and also established a state constitutional right to discriminate. Plaintiff would interpret *Reitman* broadly to hold that a legislative enactment that authorizes private acts renders those acts a form of state action, arguing by analogy that the legislative enactment of section 440 renders setoff a form of state action.

"The essence of the *Reitman* decision is that an action of the state which is not merely permissive of discrimination but a significant encouragement of it, and a consequent involvement of the state in it, does constitute state action. The Supreme Court of the United States stated that the California Supreme Court had found that the design of Proposition 14 was to overturn previous laws that banned discrimination and '"to forestall future state action that might circumscribe this right."' (387 U.S. at p. 374.) Our court held that the proposition achieved this aim, and formulated a right, sanctioned by the state to engage in private discrimination. Not only did Proposition 14 erect a state-supported right to discriminate but the enactment itself stripped the Legislature or any agency of the state of the power, forever thereafter, of taking any steps whatsoever to affect or forestall the 'right' of

the private seller and renter to discriminate. Hence discrimination was enshrined in the Constitution of the state in perpetuity. (See Burke & Reber (1972) 46 So. Cal. L. Rev. 1003, 1078–1082.)

"Moreover, our court rendered a finding, relied upon by the United States Supreme Court, that the initiative *would* in fact actively encourage discrimination. (See *Mulkey v. Reitman* (1966) 64 Cal. 2d 529, 540 *Reitman v. Mulkey* (1967) 387 U.S. 369, 376.) Consequently *Reitman* was interpreted. in subsequent cases, as declaring the proposition that permissive legislation transforms private conduct into state action if the purpose and effect of the legislation is to approve and encourage that private action as designed in Proposition 14. (See discussion of *Reitman* in *Jojola v. Wells Fargo Bank* (ND. Cal. 1973); *Kirksey v. Theithig* (D. Cob. 1972) 351 F. Supp. 727, 731.)

"Former section 440, on the other hand, took a neutral stance. Recognizing the established principle in equity that either party to a transaction involving mutual debts and credits can strike a balance, holding himself owing or entitled only to the net difference, the statute merely establishes a procedure for asserting such a setoff under the code pleading system of California. Since it does not alter the substantive law of setoff, we see no basis for finding that section 440, or its successor section 431.70 was intended to, or did, encourage banks or other creditors to exercise their right of setoff without notice to the debtor. *(Jojola v. Wells Fargo Bank* (N.D. Cal. 1973).)

"Finally the third category of cases that find state action are those based upon statutes, rather than decisions at common law or private contracts, that create the private right of summary seizure. (See *Klim v. Jones* (N.D. Cal. 1970) 315 F. Supp. 109, 114 [innkeeper's lien]; *Hall v. Garson* (5th Cir. 1970) 430 F.2d 430, 439 [landlord's lien].) (6) But as was pointed out by Judge Weigel in *Jojola v. Wells Fargo Bank* (ND. Cal. 1973), 'The right of setoff, while recognized by the statute, was not created by it. The right is grounded in general principles of equity. "In equity, a setoff . . . depends, not upon the Statutes of Set-off, but upon the equitable jurisdiction of the Court over its suitors" *Hobbs v. Duff*, 23 Cal. 596, 629 (1963). . . . Thus, if Section 440 never had been enacted, the Bank would still have had the right to balance off mutual obligations.' A statute which neither adds new rights nor permits private conduct prohibited under the common law, does not raise the conduct to the level of state action. (*Jojola v. Wells Fargo Bank*, *supra*.)

"As a rejoinder to the observation that section 440 creates no rights plaintiff offers the sweeping suggestion that all private action undertaken pursuant to the decisions of the common law constitutes state action; that the common law is simply the law as rendered by court decision; since courts are themselves agents of the state, judicial enforcement of common law principles constitutes state action. This rejoinder rests upon *Shelley v. Kraemer* (1948) 334 U.S. 1, which held that judicial enforcement of racial covenants constituted unconstitutional state action. Carrying that decision to a logical extreme, plaintiff argues that whenever a court invokes common law principles of tort or contract, private tortious or contractual conduct magically changes into state conduct.

"The United States Supreme Court has declined to carry the principle of state action to such extremes. For example, in *Evans v. Abney* (1970) 396 U.S. 435 the Georgia Supreme Court applied the common law doctrine that a testator, in establishing a trust, may circumscribe the beneficiaries of that trust on racial or otherwise arbitrary lines. All of the justices of the United States Supreme Court appear to agree that state recognition of this doctrine did not convert the testator's racial decision into state action; they disagreed as to whether use of this doctrine to annul the bequest constituted a form of state affirmative enforcement of private discrimination prohibited under *Shelby*. By analogy, in the present case, a court order affirmatively requiring an unwilling party to exercise a right of setoff would be a form of state action, but mere judicial recognition of the equitable principles of setoff would not present sufficient state involvement to bring the bank's private act under the Fourteenth Amendment.

"Our review of the cases discussing the constitutionality of prejudgment remedies further confirms our conclusion that the courts have not accepted plaintiff's claim that judicial acceptance of common law remedies constitutes state action. Of those many decisions declaring particular creditors' remedies unconstitutional, none found their rulings upon such a theory; those decisions that hold that common law self-help remedies lie beyond the scope of the Fourteenth Amendment likewise reject, either expressly or by implication, plaintiff's contention.

"We turn therefore to plaintiff's second major contention—that the exercise of the right of setoff by a *bank* constitutes unconstitutional state action. Banking corporations owe their legal existence to state law, drive their right to practice banking from government license, are subject to extensive state and national regulation, fulfill important economic functions

> often performed by government agencies, and exert great influence upon the economic health of the nation. They are among those businesses affected with a public interest. (See *Hiroshima v. Bank of Italy* (1926) 78 Cal. App. 362, 377; see generally *Tunkl v. Regents of University of California* (1963) 60 Cal. 2d 92, 97–98.)
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> "As concepts of state action evolve to correspond more closely to economic reality, we may arrive at judicial recognition that such institutions and enterprises should be considered agents of the state, so that those who deal with them will receive the protection not only of decisional law but of constitutional due process." (*Id*., fns. omitted.)

The *Kruger* court concluded that current authority did not warrant an extension of the state action doctrine to banks:

> "The conclusion that the bank is not a state instrumentality involved in the transaction of setoff finds its final confirmation in the contrast between the role of the bank here and the role of the restaurant in *Burton v. Wilmington Pkg. Auth.* (1961) 365 U.S. 715. The court there held that a private restaurant, which leased its facility from a state parking authority, could not constitutionally refuse to serve blacks. The court's opinion comprehensively reviewed the relationship between the lessee and the parking authority, and concluded that the state 'so far insinuated itself into a position of interdependent . . . that it must be recognized as a joint participant in the challenged activity.' (365 U.S. at p. 725.)
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> "The present case, unlike *Burton*, involves the private decision of a private business operating on private property. No state or federal regulation compels the bank to assert its right of setoff. 'There is no evidence that Section 440 was a regulatory enactment pertaining to the banking industry, nor that banks exercise the power of setoff in furtherance of some state policy. The Bank is not publicly financed. The fact that it is generally regulated under federal law is insufficient to show state involvement in the particular action of setoff.' (*Jojola v. Wells Fargo Bank* (N.D. Cal. 1973); accord, *Bichel Optical Lab., Inc. v. Marquette Nat. Bk. of Mpls.* (8th Cir. 1973) 487 F.2d 906, 907.) We conclude that under the Fourteenth Amendment a bank retains the same right of setoff as does any private creditor." (*Id*.; fns. omitted.)

The factual situation in *In re Roger S., supra*, falls within the obvious category of state action referred to in *Kruger* where some state official takes an active part in the challenged

conduct. *Roger S.* was confined in a state hospital by state officers and employees. But where the minor is confined in a private mental facility by his parents at their expense there is no action by state officials and state action, if any, must be founded upon some other basis. Looking over the possibilities suggested by *Kruger*, *supra*, we will examine first the nature of the right to confine a minor in private mental facilities to see if the state is involved, and second whether the private mental facility is so highly regulated and performs so important a function that the acts of those operating a private mental facility should be considered as the acts of the state itself.

A parent entitled to the custody of a minor has a responsibility to obtain for the minor that care which the parent reasonably believes necessary to the proper upbringing of the child. This parental duty and right is subject to limitation by the state only if it appears that parental decisions will jeopardize the health or safety of the child or have a potential for significant social burdens. The parents have powers greater than those of the state to curtail a child's exercise of the constitutional rights he may otherwise enjoy. This parental power and responsibility is part of the parent's own constitutional protected liberty to direct the upbringing and education of children. (*In re Roger S., supra*, 19 Cal. 3d at p. 928.) Thus the right of the parent to place a minor child in a private mental facility is not derived from any statute or other form of state action but stems from the liberty of the parent to direct the upbringing of the child. Viewed in isolation the exercise by the parent of the right to place the minor child in a private mental facility cannot be said to involve state action.

Although the *Roger S.* court found that the parent's right must be balanced with the child's right to avoid incarceration not justified by his treatment needs (at least when the child is 14 years or older), the procedural due process requirements imposed by the court were required because of the state's involvement in the minor's confinement (because it was in a state hospital, not because of any purported general state authorization of such confinement.

While the parent's right to direct the upbringing of the child is not derived from state action, nevertheless it may be argued that, if the exercise of that right by the parent in a particular manner is influenced by the approval and encouragement of the state, such approval and encouragement itself may constitute sufficient state action for due process to attach. (See *Kruger v. Wells Fargo Bank, supra*, 11 Cal. 3d at p. 362; *Reitman v. Malkey* (1967) 387 U.S. 369.) We will consider this argument together with the question of whether private mental facilities are so highly regulated and perform such an important function that their activities should be considered those of the state since both involve an examination of California statutes relating to mental health facilities.

No health facility may be operated in California without a state license. (Health & Saf. Code, § 1253.) Among the health facilities requiring state licensing are "acute psychiatric hospitals" with an organized staff which provides 24 hour impatient care for mentally disordered patients (Health & Saf. Code, § 1250(b)) and "psychiatric health facilities" which provide 24 hour inpatient care and psychiatric services to mentally disordered patients in a non-hospital setting for patients whose physical health needs can be met in an affiliated hospital or in outpatient settings (Health & Saf. Code, § 1250.2). Health and Safety Code section 1275.1 provides in part:

> "(a) Notwithstanding any rules or regulations governing other health facilities, the regulations developed by the state department for psychiatric health facilities shall prevail. The regulations applying the psychiatric health facilities shall prescribe standards of adequacy, safety, and sanitation of the physical plant, of staffing with duly qualified licensed personnel, and of services based on the needs of the persons served thereby.
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> ". . . . . .
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> "(f) Standards for involuntary patients shall include provisions to allow for restraint and seclusion of patients. Such standards shall provide for adequate safeguards for patient safety and protection of patient rights.
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> ". . . . . .
>
> "(i) It is the intent of the Legislature to encourage the establishment of public and private psychiatric health facilities because such facilities can provide acute psychiatric care of quality equal to that which can be provided in a hospital setting at a significantly lower cost.

For many years the state has operated state mental hospitals under the jurisdiction of the State Department of Mental Health. (Welf. & Inst. Code, § 4000 *et seq*.) A major revision of the basic system for care of the mentally ill was made by the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5000 *et seq*.) enacted in 1967. Section 5120 in that act declared: "It is the policy of this state . . . that the care and treatment of mental patients be provided in the local community . . ." The Short-Doyle Act (Welf. & Inst. Code, § 5600 *et seq*.) was enacted in 1968 "to organize and finance community mental health services for the mentally disordered in every county through locally administered and locally controlled community mental health programs." (Welf. & Inst. Code, § 5600.) One of the results of these two acts is a reduction in the number of state mental hospitals under the jurisdiction of the State Department of Mental Health from fourteen to two. Welfare and Institutions Code section 4100 provides:

"It is the intent of the Legislature that, to the extent feasible, new and expanded services requested in the county Short-Doyle plan shall provide alternatives to inpatient treatment. It is furthermore the intent of the Legislature that, to the extent feasible, counties that decrease their expenditures for inpatient treatment in any year below the costs of inpatient treatment in the previous year shall receive the amount of such decrease for new and expanded services requested in the county plan."

Chapter 5 (Welf. & Inst. Code, §§ 5450–5466) was added to the Lanterman-Petris-Short Act in 1978 and was extensively amended in 1979 to provide for a community residential treatment system for mentally disordered persons. Sections 5450, 5462.1 and 5465 of chapter 5 provide:

"§ 5450.

"It is the intent of the Legislature to establish a system of residential treatment programs in every county which provide, in each county, a range of available services which will be alternatives to institutional care and are based on principles of residential, community-based treatment."

"§ 5462.1.

"The Director of the Department of Mental Health shall appoint three individuals with expertise in the provision of services to children and adolescents to assist the advisory committee in screening proposals for services to children and adolescents. At least one of these members shall be a parent of a child or adolescent who is or has been a recipient of mental health services."

"§ 5465.

"It is the intent of the Legislature that programs serving children and adolescents shall be established under this chapter. Such programs shall follow the guidelines and principles set forth in this chapter and in addition shall meet the following criteria unique to the population to be served.

"(a) The programs shall, to the maximum extent feasible, be designed so as to reduce the disruption and promote the reintegration of the family unit of which the child is a part.

"(b) The programs shall have an education focus and shall demonstrate specific linkage with community education resources.

"(c) The programs shall contain a specific followup component."

Welfare and Institutions Code section 5600.9 provides:

(Text continued on page 721.2)

"Each county shall utilize available private mental health resources and facilities in the county prior to developing new county operated resources or facilities when such private mental health resources or facilities are of at least equal quality and cost as compared with county-operated resources or facilities. All such available local public or private facilities shall be utilized before state hospitals are used."

While these statutes clearly demonstrate state encouragement and action to care for the mentally disordered in local facilities (private as well as public) instead of state institutions, it does not follow that the state encourages parental placement of minors in private mental facilities. On the contrary, a principal objective of the Lanterman-Petris-Short Act was to "end the inappropriate, indefinite and involuntary commitment of mentally disordered persons." (Welf. & Inst. Code, § 5001 (a).) Welfare and Institutions Code section 5115 provides:

"It is the policy of this state that mentally and physically handicapped persons are entitled to live in normal residential surroundings and should not be excluded therefrom because of their disability."

(Welf. & Inst. Code, § 5663.)

We conclude that state law does not encourage the parent to confine a minor child in a private mental facility upon which a finding of state action giving rise to due process protections might be predicated. Nor do we find state regulation of private mental facilities so pervasive that it may be said that the actions of those operating a private mental facility should be considered as the acts of the state. Such regulation is no more pervasive than that of banks which the court in *Kruger*, *supra*, found insufficient to constitute state action.

Gay Law Students Assn. v. Pacific Tel. & Tel. Co., supra, 24 Cal. 3d. 458 may be considered as a case where the state regulation of a private business is so pervasive that its actions must be considered as those of the state for the purposes of article 1, section 7, of the California Constitution. Throughout that opinion the court stressed the fact that

the telephone company was a closely regulated public utility which enjoys a state protected monopoly. There is no monopoly in the case of private mental facilities, nor is there such regulation of rates and services as our law provides in the case of public utilities.

(Text continued on Page 722)

In *Kruger*, *supra*, at page 365 the court noted that concepts of state action were evolving as new decisions are handed down and then stated:

> "We must, however, apply to the facts of this case the current law as announced by the decisions. The law of state action will evolve, as it has by measured steps, with one appropriate decision building upon another. A decision at this time subjecting banks and other public service enterprises to the requirements of constitutional due process would be unwarranted in the light of present authority."

The facts presented concern the private decision of a parent placing his or her minor child in a private mental facility without the involvement of any state agency. Such conduct does not constitute state action under any rationale in any cases we have discovered to date. We conclude therefore that a minor has no right to a hearing on the need for treatment before being confined in a private mental facility at the request of the minor's parents under the procedural due process clauses of the state and federal Constitutions.

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