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Due Process and the Development of "Criminal" Safeguards in Civil Commitment Adjudications

Howard R. Hawinkins, Jr.

Paul O. Sullivan

NOTES

DUE PROCESS AND THE DEVELOPMENT OF "CRIMINAL" SAFEGUARDS IN CIVIL COMMITMENT ADJUDICATIONS

I. INTRODUCTION

Despite a wealth of commentary calling for reform,[1] the question of what constitutes procedural due process in the area of the involuntary civil commitment of those alleged to be mentally ill has received scant judicial attention.[2] Recently, however, the District of Columbia Circuit has emerged as a proving ground for the rights of those faced with mandatory institutionalization because of mental disturbance.[3] Although the Supreme Court has not yet dealt squarely with this specific subject, its recent decisions expanding due process safeguards in juvenile[4] and quasi-criminal[5] cases have prompted a few jurisdictions to draw

1. E.g., B. Ennis & L. Siegel, The Rights of Mental Patients (1973); Combs, Burden of Proof and Vagueness in Civil Commitment Proceedings, 2 Am. J. Crim. L. 47, 63-64 (1973) [hereinafter cited as Combs]; Friedman & Daly, Civil Commitment and the Doctrine of Balance: A Critical Analysis, 13 Santa Clara Law. 503, 517 (1973); Ross, Commitment of the Mentally Ill: Problems of Law and Policy, 57 Mich. L. Rev. 945, 1006-07 (1959) [hereinafter cited as Ross]; Note, Hospitalization of the Mentally Ill: Due Process and Equal Protection, 35 Brooklyn L. Rev. 187, 211-12 (1969); Note, Application of the Fifth Amendment Privilege Against Self-Incrimination to the Civil Commitment Proceeding, 1973 Duke L.J. 729, 747; Comment, Civil Commitment Procedure in Louisiana, 31 La. L. Rev. 149, 63-64 (1970); Note, The Nascent Right to Treatment, 53 Va. L. Rev. 1134, 1155-60 (1967) [hereinafter cited as Note, Nascent Right]; Comment, Involuntary Civil Commitment in Oregon, 9 Willamette L.J. 63 (1973); A New Right, 46 A.B.A.J. 516, 517 (1960) (editorial).

2. In Jackson v. Indiana, 406 U.S. 715 (1972), dealing with the possibly permanent institutionalization of a defendant committed as incompetent to stand trial, Mr. Justice Blackmun observed that it was "remarkable that the substantive constitutional limitations on this power have not been more frequently litigated." Id. at 737 (footnote omitted).

3. E.g., Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966) (en banc); Dooling v. Overholser, 243 F.2d 825 (D.C. Cir. 1957); see cases cited, notes 8, 12 infra; Note, United States v. Brown: Preponderance Test for Civil Commitment Following Insanity-Based Acquittal, 35 U. Pitt. L. Rev. 168, 169-70 (1973); Comment, Involuntary Civil Commitment in Virginia: A Constitutional Perspective, 30 Wash. & Lee L. Rev. 646, 653-54 (1973).

4. In re Winship, 397 U.S. 358, 365-66 (1970); In re Gault, 387 U.S. 1, 15-31 (1967); Kent v. United States, 383 U.S. 541, 554-55 (1966); see Paulsen, Kent v. United States: The Constitutional Context of Juvenile Cases, 1966 Sup. Ct. Rev. 167 [hereinafter cited as Paulsen]; text accompanying notes 92-103 infra. But see McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971).

5. See, e.g., Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (liberty of parolee); Jackson v. Indiana, 406 U.S. 715, 737-38 (1972) (incompetency to stand trial); Robinson v. California, 370 U.S. 660, 666 (1962) (status of narcotic addiction not a crime). See also Dubin, Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility, 18 Stan. L. Rev. 322, 367-95 (1966); Singer, Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative as Applied to Sentencing Determinations, 58 Cornell L. Rev. 51 (1972).

therefrom extensive analogies to procedures regarding civil commitment.[6] In each of these areas the courts have struggled to reconcile the state interests in effective and efficient confinement and rehabilitation with the basic liberties of those restrained.[7]

In this context the United States Court of Appeals for the District of Columbia recently reversed[8] a civil commitment adjudication which had satisfied, by a preponderance of the evidence,[9] the statutory requirements[10] that the individual involved be found mentally ill and consequently dangerous.[11] In a radical departure from previous decisions,[12] *In re Ballay*[13] held that, because transcendant liberties were at stake, no civil commitment would be allowed unless proof of mental illness and dangerousness to self or to others was established beyond a reasonable doubt,[14] a standard of proof long utilized in the criminal

6. In re Ballay, 482 F.2d 648, 667-69 (D.C. Cir. 1973); Heryford v. Parker, 396 F.2d 393, 395-96 (10th Cir. 1968); Lessard v. Schmidt, 349 F. Supp. 1078, 1087 (E.D. Wis. 1972), vacated on other grounds, 94 S. Ct. 713 (1974); Dixon v. Pennsylvania, 325 F. Supp. 966, 972 (M.D. Pa. 1971).

7. Compare In re Gault, 387 U.S. 1, 12-31 (1967) with In re Ballay, 482 F.2d 648, 656-62, 667-69 (D.C. Cir. 1973) and Lessard v. Schmidt, 349 F. Supp. 1078, 1084-87 (E.D. Wis. 1972), vacated on other grounds, 94 S. Ct. 713 (1974). See also Combs 50-55; Note, Nascent Right 1138-41.

8. In re Ballay, 482 F.2d 648, 669 (D.C. Cir. 1973). In a unanimous opinion, the court also rejected a contention of mootness due to appellant's subsequent release, maintaining that the issues were still "live" and that collateral consequences of the adjudication still persisted. Id. at 651-53. See Justin v. Jacobs, 449 F.2d 1017, 1018-19 (D.C. Cir. 1971); Hudson v. Hardy, 424 F.2d 854, 856 (D.C. Cir. 1970) (per curiam). See generally Powell v. McCormack, 395 U.S. 486, 496 (1969); Sibron v. New York, 392 U.S. 40, 50-58 (1968); Cafaras v. LaVallee, 391 U.S. 234, 237 (1968).

9. 482 F.2d at 649.

10. See D.C. Code Ann. §§ 21-522-43, 21-545 (1967); id. §§ 21-521, 21-544 (Supp. V, 1972). D.C. Code Ann. § 21-545(b) (1967) provides in pertinent part: "If the court or jury finds that the person is mentally ill and, because of that illness, is likely to injure himself or other persons if allowed to remain at liberty, the court may order his hospitalization for an indeterminate period, or order any other alternative course of treatment which the court believes will be in the best interests of the person or of the public."

11. Appellant Ballay had no prior criminal or mental record. At the Capitol he first announced that he was a senator. Following commitment he appeared at the White House, evidencing first an interest in Patricia Nixon's marriage, and on his second visit, a matrimonial interest in Miss Nixon herself. Upon the application of the Secret Service, Ballay was again hospitalized, and the resulting civil commitment adjudication was the subject of his appeal. 482 F.2d at 648-49.

12. See Covington v. Harris, 419 F.2d 617, 621 (D.C. Cir. 1969); In re Alexander, 372 F.2d 925, 927 (D.C. Cir. 1967). See also Tippett v. Maryland, 436 F.2d 1153, 1158-59 (4th Cir. 1971), cert. dismissed sub nom. Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972) ("defective delinquents"); Combs, supra note 1, at 49; Elliot, Procedures for Involuntary Commitment on the Basis of Alleged Mental Illness, 42 U. Colo. L. Rev. 231, 240-43 (1970).

13. 482 F.2d 648 (D.C. Cir. 1973).

14. Id. at 650 (footnote omitted); accord, Lessard v. Schmidt, 349 F. Supp. 1078, 1093-

law.[15] The extent of the rationale behind the imposition of these so-called "criminal" safeguards and standards in the civil commitment proceeding, and the effect of the tightening due process requirements are the subjects of this Note's inquiry.

II. State Interests Regarding the Mentally Disturbed

The problem of a resolution in the conflict between the states' police powers and *parens patriae* duty on the one hand, and the protection of the individual's due process rights and safeguards on the other is the central difficulty in the involuntary civil commitment of the mentally ill. Satisfactory concepts of insanity, incompetence[16] and mental illness remain elusive,[17] and the exact definition of these terms has always been a legal rather than a medical proposition.[18]

While the civil law has dealt primarily with the problem of incompetency as an interference with contractual and testamentary capacity,[19] and the criminal law with insanity as a barrier to ability to stand trial or to be capable of guilt,[20] the confinement of those thought to be mentally ill because they *might* commit dangerous or antisocial acts has been considered alternatively as civil, criminal, and quasi-criminal.[21] However, regardless of approach, the police powers embody the chief interest of the state[22] in this area of vague definitions and uncertain rationales.

A. *The Police Powers and the Concept of Dangerousness*

The preventive protection of society against the dangerously disturbed springs initially from the police powers of the several states over health, welfare, safety

95 (E.D. Wis. 1972), vacated on other grounds, 94 S. Ct. 713 (1974); In re Pickles' Petition, 170 So. 2d 603, 614 (Fla. Ct. App. 1965); In re Perry, 137 N.J.Eq. 161, 164, 43 A.2d 885, 887 (1945). See Murel v. Baltimore City Criminal Court, 407 U.S. 355, 363-65 (1972) (Douglas, J., dissenting from dismissal of certiorari). But see Combs 65 (clear and convincing evidence); Note, Civil Commitment of the Mentally Ill: Theories and Procedures, 79 Harv. L. Rev. 1288, 1291 (1966) (clear and convincing evidence) [hereinafter cited as Note, Civil Commitment].

15. See note 56 infra.

16. Attempts at definitions are by no means all recent. In Beverley's Case, 76 Eng. Rep. 1118, 1122 (K.B. 1603), Lord Coke divided incompetents into four classes: (1) the idiot or natural fool, (2) he who was of good and sound memory, and by the visitation of God, had lost it, (3) lunatics, who are sometimes lucid and sometimes non compos mentis, and (4) those who by their own acts deprive themselves of reason, as the drunkard. See F. Lindman & D. McIntyre, Jr., The Mentally Disabled and the Law 8-12 (1961).

17. 482 F.2d at 665; see Green, Proof of Mental Incompetency and the Unexpressed Major Premise, 53 Yale L.J. 271 (1944) [hereinafter cited as Green].

18. In re Pickles' Petition, 170 So. 2d 603, 611 (Fla. Ct. App. 1965).

19. Green 273.

20. See, e.g., Jackson v. Indiana, 406 U.S. 715 (1972); Dusky v. United States, 362 U.S. 402 (1960); M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843); Note, Incompetency to Stand Trial, 81 Harv. L. Rev. 454 (1967).

21. See Denton v. Commonwealth, 383 S.W.2d 681, 682 (Ky. 1964); Note, Civil Commitment 1289-93.

22. See note 29 infra.

and morals.[23] These powers, while difficult to define,[24] operate primarily to protect the public order, and thus to preserve the free exercise of rights by a secure citizenry.[25] In regard to the mentally ill, the police powers' primary objective is to protect the rest of society against the person alleged to be disturbed.[26] As the Supreme Court observed in *Robinson v. California*:[27]

A State might determine that the general health and welfare require that the victims of [mental illness, leprosy, venereal disease] and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration.[28]

Judge Tamm, writing for the court in *In re Ballay*, directed little attention towards the police powers per se;[29] however, it cannot be doubted that the rest of society views the police power over safety as of primary importance when dealing with the mentally ill. Accordingly, danger to others is the legal foundation for the restraint of the mentally disturbed in many states and in the District of Columbia.[30] While the police power over safety is far from the only

23. See Robinson v. California, 370 U.S. 660, 666 (1962); Lessard v. Schmidt, 349 F. Supp. 1078, 1084 (E.D. Wis. 1972), vacated on other grounds, 94 S. Ct. 713 (1974); Ross, supra note 1, at 955-56; Note, Nascent Right, supra note 1, at 1138.

24. "This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 62 (1873).

25. The proposition that the protection of the public safety operates to guarantee basic liberties has been suggested in connection with the first amendment. See Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 931-35 (1963); Meiklejohn, The First Amendment Is an Absolute, 1961 Sup. Ct. Rev. 245, 259-60; Comment, Violence and Obscenity—Chaplinsky Revisited, 42 Fordham L. Rev. 141, 142 (1973).

26. See Freidman & Daly, Civil Commitment and the Doctrine of Balance: A Critical Analysis, 13 Santa Clara Law. 503, 514 (1973); Ross 955-56.

27. 370 U.S. 660 (1962).

28. Id. at 666. Mr. Justice Stewart maintained that a law which made such illnesses "status" crimes would operate as cruel and unusual punishment. Id. See text accompanying notes 84-85 infra.

29. "Focusing precisely on the state interest is a difficult task . . . . The first and dominant objective involves society's concern with anti-social conduct." 482 F.2d at 650.

30. Most states require proof both of mental illness and of dangerousness. E.g., Cal. Welf. & Inst'ns Code § 5150 (West Supp. 1973) (dangerous or "gravely disabled"); D.C. Code Ann. § 21-521 (Supp. V, 1972); Pa. Stat. Ann. tit. 50, § 4405 (1969) (emergency detention); see Note, Civil Commitment 1289. Contra, La. Rev. Stat. Ann. § 28:53 (1969); N.Y. Mental Hygiene Law § 78 (McKinney 1971) (both permitting hospitalization solely on showing of need of treatment).

Recently, in Kesselbrenner v. Anonymous, 33 N.Y.2d 161, 305 N.E.2d 903, 350 N.Y.S.2d 889 (1973), the Court of Appeals overturned as unconstitutional N.Y. Mental Hygiene Law § 29.13 (McKinney Supp. 1973) which had in effect resulted in the transfer of any civilly committed person who was subsequently found dangerous to Matteawan State Hospital, an institution primarily for mentally ill, convicted criminals. The court demanded a less drastic alternative. Id. at 8. See text accompanying notes 75-80 infra.

police power involved, the difficulty inherent in civil commitment is that there is little or no certainty as to what acts or conditions of an individual will lead to his confinement for the protection of others.[31] In this context, the terms "dangerous" and "mentally ill" have been employed by the courts almost interchangeably,[32] and the opinion in *Ballay* is no exception.[33] Thus, it currently is impossible to state when the "dangerous" condition can be deduced from acts which merely offend the public,[34] from criminal acts against property,[35] or from actual violence to persons.[36]

The court in *Ballay* made no attempt to draw a line between what a jury may or may not consider a "danger" to society, but the opinion did propose that its ruling serve to tighten the scope of that problem:

> While a more rigorous standard of proof may not allay infirmities in substantive statutory elements it certainly may, and the reasonable doubt standard is designed particularly to, partially offset them by reducing the risk of factual error.[37]

In most cases, it would seem that the finder of fact is still relegated to the role of prognosticator, to the uneasy task of confining an individual because of what he might do, not because of what he has done. This dilemma has led more than one commentator to allege that involuntary civil commitment is no more than a form of preventive detention.[38] Such a proposition would be well founded if the police power were the sole aegis under which the mentally ill were confined; however, the state also commits under its guardianship duty, a concept which has grown increasingly problematic in the treatment of the mentally ill.

B. Parens Patriae: *A Declining Doctrine*

The state long has assumed the role of guardian over those whom it has found incapable of controlling their own lives, for the sake of their own individual

31. 482 F.2d at 658; Combs 56; Note, Nascent Right 1142-43.

32. See Note, Nascent Right 1139.

33. While D.C. Code Ann. § 21-545(b) (1967) clearly speaks of injury to self or to others, the court in Ballay employs the vague term "antisocial." Compare notes 10 and 29 supra. The concept of "antisocial behavior" is a familiar one in obscenity regulation; see, e.g., Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60-61 (1973).

34. In Millard v. Cameron, 373 F.2d 468, 471 (D.C. Cir. 1966) the court required that "dangerous" be interpreted as more than an affront to public morals. See Comment, Involuntary Civil Commitment in Oregon, 9 Willamette L.J. 63, 72 (1973).

35. Sas v. Maryland, 334 F.2d 506, 509 (4th Cir. 1964). But see Director of Patuxent Institution v. Daniels, 243 Md. 16, 49, 221 A.2d 397, 416, cert. denied, 385 U.S. 940 (1966) (likely to commit any criminal act).

36. In Lessard v. Schmidt, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), vacated on other grounds, 94 S. Ct. 713 (1974) the court suggested that the dangerousness requirement could be satisfied by a "recent overt act, attempt or threat to do substantial harm to oneself or another."

37. 482 F.2d at 667.

38. B. Ennis & L. Siegel, The Rights of Mental Patients 23 (1973); Friedman & Daly, Civil Commitment and the Doctrine of Balance: A Critical Analysis, 13 Santa Clara Law. 503, 509 (1973).

health, welfare, safety, and in some instances, morals. This duty of *parens patriae*[39]—perhaps simply one aspect of the police powers—has been employed in the commitment of those found to be dangerous only to themselves, and it is applied to all those in need of institutionalized care and treatment.[40] Judge Tamm, in the *Ballay* opinion, suggested that this duty of the state to the mentally disturbed is at first viscerally persuasive,[41] but observed that the idea of beneficent guardianship has come under extensive criticism in regard to both its avoidance of rigorous procedures and its lack of dedication to meaningful care and treatment.[42] Indeed, even from a theoretical point of view, an unbridled application of *parens patriae* to the mentally disturbed is suspect, in that there is no justification for the assumption that mental illness always destroys judgment.[43]

The central application of *parens patriae* in recent years[44] has been in the rehabilitation of criminals, juvenile delinquents, and the mentally ill. Rehabilitation serves to benefit both the individual and society, so in this sense, the guardianship role is a goal of the police powers.[45] However, it has been contended strongly that the state has been more concerned with exercising the power or right of restraint than with the fulfillment of its duty of adequate care.[46] The failure to

39. According to the Court in In re Gault, 387 U.S. 1, 15-16 (1967), parens patriae developed in this country out of a concern that delinquents not be mixed with criminals. In Lessard v. Schmidt, the court maintained that the duty of care was introduced into the area of the mentally ill in this country by a Massachusetts court in 1845, 349 F. Supp. 1078, 1085 (E.D. Wis. 1972), vacated on other grounds, 94 S. Ct. 713 (1974). See Ross 957; Paulsen 173; text accompanying note 104 infra.

40. While the "right" to treatment appears to be an outgrowth of the parens patriae theory, it has been established upon a statutory basis. Rouse v. Cameron, 373 F.2d. 451, 453-54 (D.C. Cir. 1966). Recently, one federal court has elevated the right of the mental patient to treatment to the level of a constitutional guarantee of due process. Wyatt v. Stickney, 344 F. Supp. 387, 390 (M.D. Ala. 1972). See Comment, Wyatt v. Stickney and the Right of Civilly Committed Mental Patients to Adequate Treatment, 86 Harv. L. Rev. 1282, 1284 (1973) [hereinafter cited as Comment, Wyatt v. Stickney].

41. 482 F.2d at 650.

42. Id. at 659, 663.

43. Combs 50. As early as 1603, it was recognized that some "lunatics" are lucid. See note 16 supra.

44. The Supreme Court has suggested that the concept's "historic credentials are of dubious relevance." In re Gault, 387 U.S. 1, 16 (1967).

45. For the proposition that the police powers and parens patriae have complementary goals in this area see Bleicher, Compulsory Community Care for the Mentally Ill, 16 Clev.-Mar. L. Rev. 93, 102 (1967).

46. As the court recognized in Lessard v. Schmidt, 349 F. Supp. 1078, 1086-87 (E.D. Wis. 1972), vacated on other grounds, 94 S. Ct. 713 (1974), this right to treatment is difficult to enforce. Apparently the only means of reviewing the quality of the treatment is through a traditional habeas corpus proceeding, where the petitioner must prove by a preponderance of the evidence that his detention is illegal. Bolton v. Harris, 395 F.2d 642, 653 (D.C. Cir. 1968). While this is the accepted rule, see, e.g., Johnson v. Zerbst, 304 U.S. 458, 468-69 (1938), query whether one result of the Ballay decision might be that an individual committed by the reasonable doubt standard would be required later to prove his detention illegal beyond a reasonable doubt?

render proper assistance to those confined has given rise to the recognition of a "right" to treatment in those found to be mentally ill:

> The fact that a person has a mental ailment is not a crime. Therefore, if any one is voluntarily restrained of his liberty because of a mental ailment the state owes a duty to provide for him reasonable medical attention. If medical attention reasonably well adapted to his needs is not given, the victim is not a patient but is virtually a prisoner.[47]

The fulfillment of this "right" of the mentally disturbed has been the subject of much consideration,[48] but only recently have the courts sought to enforce this state obligation. In *Rouse v. Cameron*,[49] the District of Columbia Circuit demanded that the government show an " 'overwhelmingly compelling reason' "[50] why treatment is inadequate. In 1972, another federal court, in *Wyatt v. Stickney*,[51] set forth mandatory minimum standards for such treatment and rejected lack of funds as an excuse.[52] Yet, from this demand for *parens patriae* care, there has emerged a series of trenchant attacks upon *parens patriae* itself—as potentially violative of procedural due process—because of its disdain for rigid safeguards out of concern for the unfortunates involved. The guardianship role supposedly provides care benevolently, in an informal and parental atmosphere;[53] but this informality is vanishing rapidly in the face of evolving due process safeguards. By its decision in *Ballay*,[54] the District of Columbia Circuit has hastened the demise of that relaxation of procedural standards.

III. The Due Process Hierarchy: Ascendant Safeguards

The Supreme Court has applied "the essentials of due process and fair treatment"[55] to the protection, by proper procedures, of those who stand accused of criminal acts.[56] Procedural due process, however, has expanded well beyond

47. A New Right, 46 A.B.A.J. 516, 517 (1960) (editorial).

48. See note 40 supra.

49. 373 F.2d 451 (D.C. Cir. 1966).

50. Id. at 459. " 'The rights here asserted are . . . present rights . . . and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled.' " Id. at 458 (citation omitted). The use of the term "overwhelmingly" puts a gloss on the requirement of a "compelling governmental interest" which the Supreme Court has demanded if state interests are to be allowed to override fundamental liberties. See Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

51. 344 F. Supp. 387 (M.D. Ala. 1972).

52. Id. at 391-92; see note 40 supra.

53. See Note, United States v. Brown: Preponderance Test for Civil Commitment Following Insanity-Based Acquittal, 35 U. Pitt. L. Rev. 168, 169 (1973); text accompanying note 63 infra.

54. The court in Ballay was particularly concerned with procedural safeguards for the harmless or untreatable patient. 482 F.2d at 659-60.

55. In re Winship, 397 U.S. 358, 359 (1970) (citation omitted).

56. "Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property." Brinegar v. United States, 338 U.S. 160, 174 (1949); see Speiser v. Randall, 357 U.S. 513,

the criminal law.[57] Professor Van Alstyne has observed that procedural safeguards come into play most often when collateral rights are affected,[58] while another commentator has suggested that such due process is, at least in civil cases, a process of balancing interests.[59] According to the court in *Ballay*, due process must be most strictly observed when the liberties of the individual are "transcending" ones.[60] As Mr. Justice Brennan wrote in *Speiser v. Randall*,[61] "the more important the rights at stake the more important must be the procedural safeguards surrounding those rights."[62]

The demand for an expansion of due process rights in the areas of parole revocation, juvenile crimes and mental illness has come into direct conflict with the theoretical underpinnings of *parens patriae*. The concern is that the "criminal" safeguards of right to counsel, privilege against self-incrimination, and the beyond a reasonable doubt standard of proof will produce an adversary atmosphere[63] in which the juvenile, the parolee, or the mentally disturbed may conclude that he has indeed committed a crime, and that the state is more interested in retribution than in assistance. Mr. Chief Justice Burger has warned that the imposition of strict procedural standards may operate to "transform juvenile courts into criminal courts."[64] A similar argument has been made in regard to civil commitment proceedings for the mentally ill, particularly concerning those suffering from paranoia.[65] Conceding the concern that an adversary proceeding could distort the guardian role, the court in *Ballay* nevertheless

525-26 (1958); Leland v. Oregon, 343 U.S. 790, 802-03 (1952) (Frankfurter, J., dissenting).

57. "Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

58. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1453-54 (1968).

59. Note, Procedural Due Process in Government-Subsidized Housing, 86 Harv. L. Rev. 880, 891 (1973).

60. The court wrote that "the loss of liberty—the interest of 'transcending value'—is obviously as great for those civilly committed as for the criminal or juvenile delinquent. Indeed, it may be greater in the former since the statute provides for indefinite commitment." 482 F.2d at 668 (footnote omitted).

61. 357 U.S. 513 (1958).

62. Id. at 520-21 (citation omitted). Justice Brennan also addressed himself to the need for scrupulous factfinding in criminal litigation where liberty is at stake. Id. at 525-26. See also In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring).

63. See Morrissey v. Brewer, 408 U.S. 471, 475 (1972); McKeiver v. Pennsylvania, 403 U.S. 528 (1971). In the latter case, Mr. Justice Blackmun argued that an analogy between the adversary criminal trial and the juvenile proceeding "chooses to ignore, it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates." 403 U.S. at 550. See also Paulsen, supra note 4, at 191-92.

64. In re Winship, 397 U.S. 358, 376 (1970) (Burger, C.J., dissenting, joined by Stewart, J.).

65. Note, Application of the Fifth Amendment Privilege Against Self-Incrimination to the Civil Commitment Proceeding, 1973 Duke L.J. 729, 732.

concluded that because of the nature of the rights at stake in a civil commitment, the protection of liberty by rigorous standards outweighed other concerns.[66]

Recognizing that there exists, in all factfinding, a margin of error, the court in *Ballay* suggested a hierarchy of procedural safeguards.[67] Mr. Justice Harlan has observed that in most civil suits, where the stakes are monetary, minimal safeguards are sufficient, because no essential rights are in jeopardy if the factfinder lapses into error. In such suits, the proper burden of proof is satisfied by a mere preponderance of the evidence.[68] As the stakes involved become fundamental rights, such as speech, travel, or association,[69] the courts demand restraints from two directions.

The first of these is a slightly higher standard of proof, which the Supreme Court has called "clear, unequivocal and convincing" evidence.[70] This comparatively recent constitutional standard is reflected in the long-established common law concept of "clear and convincing proof."[71] If the rights involved are so vital as to be "transcending" ones, such as liberty, the court in *Ballay* concluded that only the standard which is most exacting will suffice: proof beyond a reasonable doubt.[72] It is at this juncture that the court outpaces the Supreme Court's decisions, none of which has applied the reasonable doubt standard to anything but criminal cases.

Where fundamental rights or transcending liberties are jeopardized, the courts have demanded further that the state find and pursue the least drastic means to achieve its end.[73] As the Supreme Court wrote in *Shelton v. Tucker*,[74] even when the governmental purpose is substantial, "that purpose cannot be

66. The court wrote: "The individual's perception of the proceeding as identical to a criminal trial is indeed unfortunate but the problem is fundamental to this and analogous opinions." (referring to juvenile cases). 482 F.2d at 663-64.

67. Id. at 662, citing Speiser v. Randall, 357 U.S. 513, 525 (1958).

68. In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring).

69. See, e.g., Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971) (speech); Woodby v. Immigration & Naturalization Serv., 385 U.S. 276, 285 (1966) (travel); Shelton v. Tucker, 364 U.S. 479, 485-86 (1960) (association).

70. In Woodby v. Immigration & Naturalization Serv., 385 U.S. 276 (1966), the Supreme Court employed the "clear, unequivocal and convincing" standard of proof in dealing with a deportation case, which is neither civil nor criminal. Mr. Justice Stewart wrote: "To be sure, a deportation proceeding is not a criminal prosecution. . . . But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case." Id. at 285 (citation omitted). See also Chaunt v. United States, 364 U.S. 350, 354 (1960); Combs 65-66.

71. See 9 J. Wigmore, Evidence § 2498 (3d ed. 1940). The standard has developed in a number of common law areas, including fraud, parole gifts, mutual mistake and constructive trusts. Id.

72. 482 F.2d at 662.

73. See Kesselbrenner v. Anonymous, 33 N.Y.2d 161, 305 N.E.2d 903, 350 N.Y.S.2d 889 (1973); Wormuth & Mirkin, The Doctrine of the Reasonable Alternative, 9 Utah L. Rev. 254 (1964); Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464 (1969); see note 30 supra.

74. 364 U.S. 479 (1960).

pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[75] This "less drastic means" approach has appealed to the District of Columbia Circuit in many cases regarding the mentally ill. In *Lake v. Cameron*,[76] the court endorsed the principle and placed the burden on the government to find means of treatment other than commitment.[77] Later, in *Covington v. Harris*,[78] the same court spoke of the District's commitment statute[79] in terms which ill-concealed its discontent with the preponderance of the evidence standard. Such a statute, wrote the court, "must be narrowly, even grudgingly, construed in order to avoid deprivations of liberty without due process of law."[80]

Because the purpose of society in commitment is protection rather than retribution,[81] confinement can continue only as long as illness persists. Accordingly, a fixed term set by the court would probably operate as an unconstitutional exercise of the state's police powers.[82] Thus, the result is indeterminate institutionalization, which often proves to be permanent, resulting in a complete forfeiture of liberty.[83] Further, because in many hospitals active therapeutic treatment halts after about two years,[84] the result of civil commitment comes dangerously close to imprisonment for a "status" crime.[85] As Judge Tamm recognized in *Ballay*, regardless of state motive the result of civil commitment is often "essentially punitive in character."[86]

Commitment brings with it, of course, the loss of a series of collateral rights, such as travel, association and privacy.[87] In addition, a number of statutory restrictions are imposed which follow the patient long after he is released.[88]

75. Id. at 488 (footnote omitted). See also Aptheker v. Secretary of State, 378 U.S. 500, 515-16 (1964).

76. 364 F.2d 657 (D.C. Cir.) (en banc), cert. denied, 382 U.S. 863 (1966).

77. Id. at 661.

78. 419 F.2d 617 (D.C. Cir. 1969).

79. See notes 10, 30 supra.

80. 419 F.2d at 623 (footnote omitted).

81. 482 F.2d at 658.

82. Ross 956.

83. Recently, in Jackson v. Indiana, 406 U.S. 715 (1972), the Supreme Court held that due process required that a defendant who was committed because of incompetency to stand trial be institutionalized for only a reasonable period of time and suggested that the prospect of permanent confinement with charges pending operated as a denial of equal protection. Id. at 738; see Comment, Equal Protection in Transition: An Analysis and a Proposal, 41 Fordham L. Rev. 605, 625-26 (1973). Possible violations of equal protection have been suggested in the area of civil commitment as well. See Denton v. Commonwealth, 383 S.W.2d 681, 683 (Ky. 1964); Comment, Wyatt v. Stickney 1293-94.

84. Comment, Wyatt v. Stickney 1291 n.47.

85. See note 28 supra.

86. 482 F.2d at 667, quoting Allen, Criminal Justice, Legal Values and the Rehabilitative Ideal, 50 J. Crim. L.C. & P.S. 226, 230 (1959).

87. Comment, Wyatt v. Stickney 1287.

88. 482 F.2d at 651-52. The "stigma" or collateral effect of adjudication has received much attention in the juvenile delinquent cases. See, e.g., In re Winship, 397 U.S. 358, 363

In some states these include the loss of voting rights, driver's license, and the establishment of a rebuttable presumption of continued incompetency.[89] In the face of such restraints there is support for the proposition that "to become mad is to become almost a nonperson with respect to individual rights and freedom."[90] *In re Ballay*, therefore, regarded the prospect of erroneous commitment, even if subsequently corrected, as a mistake to be avoided with the utmost care. The court quoted Professor Wigmore to the effect that:

> the mental attitude of one who is falsely found insane and relegated to life imprisonment is beyond conception. No greater cruelty can be committed in the name of the law.[91]

IV. Application of the Quasi-Criminal Analogy

A. *Safeguards in Juvenile Proceedings*

Once extremely informal, both civil commitment cases and juvenile delinquency proceedings currently encompass the constitutional right to a hearing and counsel.[92] Juvenile proceedings have long included the privilege against self-incrimination.[93] Recently, in *In re Winship*,[94] the Supreme Court held that proof beyond a reasonable doubt is required when a minor is accused of what would be a crime if committed by an adult.[95]

The *Ballay* decision relied on *Winship* and *In re Gault*,[96] two Supreme Court juvenile rights cases. In *Gault*, the Court extended constitutional due process safeguards to juvenile delinquents in a number of areas.[97] Rejecting what it

(1970); In re Gault, 387 U.S. 1, 23-24 (1967). The District of Columbia Circuit has also recognized a "stigma" in the civil commitment of a criminal defendant acquitted by reason of insanity. United States v. Brown, 478 F.2d 606, 609 (D.C. Cir. 1973).

89. 482 F.2d at 651-52. "Indeed, such an adjudication, while not always crippling, is certainly always an ominous presence in any interaction between the individual and the legal system." Id. at 652.

90. Friedman & Daly, Civil Commitment and the Doctrine of Balance: A Critical Analysis, 13 Santa Clara Law. 503, 505 (1973).

91. 5 J. Wigmore, Evidence § 1400(2).(3d ed. 1940), quoted at 482 F.2d at 664.

92. In regard to juveniles, see, e.g., In re Gault, 387 U.S. 1, 30-31 (1967); Kent v. United States, 383 U.S. 541, 553-54 (1966); Cox v. United States, 473 F.2d 334, 335 (4th Cir.), cert. denied, 411 U.S. 935 (1973); Geboy v. Gray, 471 F.2d 575, 579 (7th Cir. 1973). Regarding the mentally ill, see Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968); Bolton v. Harris, 395 F.2d 642, 651 (D.C. Cir. 1968); Dooling v. Overholser, 243 F.2d 825 (D.C. Cir. 1957); Anderson v. Solomon, 315 F. Supp. 1192, 1194-95 (D. Md. 1970).

93. See, e.g., Gallegos v. Colorado, 370 U.S. 49 (1962); Haley v. Ohio, 332 U.S. 596 (1948).

94. 397 U.S. 358 (1970).

95. Id. at 359, 368. The crucial difference between Winship and Ballay—that the former dealt with a "crime"—was stressed by appellee. Brief for Appellee at 11, In re Ballay, 482 F.2d 648 (D.C. Cir. 1973).

96. 387 U.S. 1 (1967).

97. Id. at 31-57. These included (1) notice of charges, (2) right to counsel, (3) confrontation and cross-examination, (4) appellate review, and (5) transcript of proceedings, which was deemed discretionary.

called a " 'civil' label of convenience,"[98] the Court struck a heavy blow against *parens patriae* in observing that departure from strict due process had resulted "not in enlightened procedure, but in arbitrariness."[99] The petitioner in *Gault* had been sentenced by a juvenile court for making obscene phone calls,[100] while in *Winship*, the charge against the delinquent was larceny.[101] Faced with a determination of culpability which never would have been satisfactory in an adult criminal proceeding, the *Winship* Court overturned the preponderance of the evidence standard and demanded proof beyond a reasonable doubt for "criminal" acts. *Winship* served to broaden the scope of *Gault*, advancing a series of arguments[102] in support of the reasonable doubt standard which Judge Tamm engrafted onto civil commitment in *Ballay*. The *In re Ballay* opinion stipulated that the effect of that higher standard of proof in the reduction of factual error and the resulting certainty and confidence in the outcome apply equally well to the civil commitment proceeding.[103]

B. *Defects in the Analogy*

While the results in juvenile cases and civil commitments are similar enough to provide a rational basis for comparison, Judge Tamm's wholesale importation of the *Gault-Winship* rationale overlooks primary differences between juvenile delinquents and the mentally ill. As the Supreme Court noted in *Gault*, *parens patriae* is founded on the principle that a child has a right to *custody*, not freedom, which duty of custody may be taken by the state from his natural guardians.[104] Accordingly, there is a clear cutoff point for the operation of the guardianship power over juveniles: when they reach majority.[105] The possible arbitrary employment of *parens patriae* over juveniles is thus subject to a clearly ascertainable temporal limitation not present in the case of civil commitment. Further, as Justice Harlan noted in *Winship*, the beyond a reasonable doubt standard produces greater certainty in the determination of *past* events;[106] it is apparent that *Winship* endorsed this high standard of proof because there the Court was dealing with a clearly ascertainable act which had already transpired.

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98. Id. at 50.

99. Id. at 18-19.

100. Id. at 4.

101. 397 U.S. at 360.

102. Id. at 363-64. "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." Id. at 364.

103. 482 F.2d at 663, 669.

104. 387 U.S. at 17; see Pee v. United States, 274 F.2d 556, 558-60 (D.C. Cir. 1959); Paulsen 173 ("in loco parentis"); note 44 supra.

105. People v. Smith, 11 Cal. App. 3d 513, 519, 89 Cal. Rptr. 881, 884 (1970).

106. 397 U.S. at 370 (Harlan, J., concurring). It is problematical whether Justice Harlan's construction of the beyond a reasonable doubt standard could apply to predictions of future contingencies.

No such certainty can exist when predicting *future* conduct,[107] as the law currently requires in civil commitment cases.

In further support of the beyond a reasonable doubt standard, the court in *Ballay* suggested that determinations of mental illness might be compared to the finding of *mens rea* in criminal adjudications.[108] However, the force of this analogy is weakened severely by important differences between the criminal state of mind and the mental condition of the disturbed. Although *mens rea*, like mental illness, is difficult to define,[109] the criminal principle presumes rationality and thus provides the factfinder with a series of extremely useful "logical" presumptions with which to find intent.[110] No such mechanisms can be employed confidently in the case of the mentally ill, whose conduct is so difficult to judge, especially in advance, because of a presumption of irrationality. Finally, *mens rea* generally carries with it the complementary requirement of an overt act;[111] this element too is conspicuously lacking in the case of a civil commitment.

V. The Impact of the Beyond a Reasonable Doubt Standard and an Alternative

Upon a review of the problems of expert testimony,[112] Judge Tamm found further support for adopting the higher standard. However, he failed to suggest how that standard will affect the nature of the evidence received.[113] Certainly, the evidence considered adequate[114] under the preponderance standard must

107. See United States v. Brown, 478 F.2d 606, 610-11 (D.C. Cir. 1973), where the court found that a preponderance standard for commitment following an insanity acquittal is adequate when the harmful act has occurred and the higher standard of proof has been satisfied in a criminal proceeding; note 113 infra.

108. See 482 F.2d at 664-65.

109. See J. Hall, General Principles of Criminal Law 70-77 (2d ed. 1960); R. Perkins, Criminal Law 740-41 (2d ed. 1969).

110. Professor Hall divides conduct in this context into (a) an end sought, (b) deliberate function towards that end, or intent, and (c) reasons for the goal, or motive. By reference to a workable concept of mens rea, he suggests, a large number of useful rules and doctrines become available. J. Hall, General Principles of Criminal Law 76-77 (2d ed. 1960). See also Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107, 138-40.

111. R. Perkins, Criminal Law 741-42 (2d ed. 1969).

112. 482 F.2d at 665-66. While expert testimony was once considered of minimal importance in incompetency determinations, Green, supra note 17, at 285, the role of psychiatrists in civil commitment cases has grown so immensely as to be currently almost solely dispositive of the case. See Ross 961; Note, Application of the Fifth Amendment Privilege Against Self-Incrimination to the Civil Commitment Procedure, 1973 Duke L.J. 729, 735; Note, Civil Commitment 1296.

113. At present, testimony on the question of "dangerousness" is almost exclusively prediction, and there is substantial evidence that the experts tend to overpredict. Combs 56-57; Singer, Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative as Applied to Sentencing Determinations, 58 Cornell L. Rev. 51, 84-85 (1972). One commentator has reported that medical experts in this area are in agreement only 54% of the time, while, by comparison, ballistics experts are in agreement 90% of the time. B. Ennis & L. Siegel, The Rights of Mental Patients 286 (1973).

114. See note 119 infra and accompanying text.

now be supplemented. In this context another court has asked for evidence of prior hostile or dangerous acts,[115] and Professor Ross has suggested supplementary testimony from social workers and sociologists.[116] Further, *Ballay* failed to lend its support or opposition to the proposition that both statutory language and expert testimony be phrased in laymen's language, so as to minimize the almost talismanic effect of esoteric psychological evaluations upon jurors.[117]

Yet even if all these restrictions upon evidence could be applied successfully, the finder of fact must still deal with future contingencies, and it has been contended that a finding of "dangerousness" beyond a reasonable doubt in most civil commitment cases may prove simply impossible.[118] Moreover, within the relaxed limits of the preponderance standard, testimony has been allowed and predictions evaluated on the basis of often cursory medical examination;[119] however, although it has been shown that psychiatrists have a tendency to overpredict the likelihood of danger,[120] it may well be asked whether any expert would be willing to state in the majority of commitment cases that "dangerousness" or even "mental illness" is so positive as to be beyond a reasonable doubt.

Although the preponderance standard, in the spirit of *parens patriae*, may be flexible enough to allow individualized decisions,[121] *In re Ballay* clearly established that the evidentiary and procedural abandon which that standard allows is truly unwarranted. The higher standard of reasonable doubt, on the other hand, may well prove impractical in the area of civil commitment, where vague concepts appear unavoidable.[122] Accordingly, it is unfortunate that the court in *Ballay* failed to consider the intermediate standard of "clear, unequivocal and convincing" evidence.[123] As Mr. Justice Stewart has observed, that standard is

115. Lessard v. Schmidt, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), vacated on other grounds, 94 S. Ct. 713 (1974); see note 36 supra.

116. Professor Ross also has suggested that the emphasis on medical experts can be offset by the recognition that civil commitment is essentially a community decision. Ross 963.

117. Combs 63, citing Ross 963.

118. Tippett v. Maryland, 436 F.2d 1153, 1165 (4th Cir. 1971), cert. dismissed sub nom. Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972) (Sobeloff, J., concurring and dissenting); Note, Civil Commitment 1291.

119. "Although three psychiatrists testified at Ballay's judicial hearing following his three month hospitalization pending trial, one had been with him for a total period of less than two hours, and another for a total of merely one hour." 482 F.2d at 665.

120. See note 113 supra.

121. Ross 956-60. In a recent decision under the Narcotic Addict Rehabilitation Act of 1966 (18 U.S.C. §§ 4251-55 (1970)), the Supreme Court has suggested that flexible statutory standards are reasonable where difficult and individualized decisions must be made in areas fraught with medical and scientific uncertainties. Marshall v. United States, 94 S. Ct. 700 (1974).

122. Combs 65.

123. See text accompanying notes 70, 71 supra. The Ballay opinion mentioned the standard, 482 F.2d at 662, but failed to analyze it. Lessard v. Schmidt, 349 F. Supp. 1078, 1094-95 (E.D. Wis. 1972), vacated on other grounds, 94 S. Ct. 713 (1974), rejected the standard as insufficient to protect the rights at stake. See also United States v. Brown, 478 F.2d 606,

"no stranger to the civil law,"[124] and it has been employed by the Supreme Court in a number of areas which involved the possible loss of fundamental liberties. Being a step above the preponderance standard, that middle standard should be completely adequate[125] in regard to the much-desired reformation of evidence, while it would serve to avoid the problems inherent in "beyond a reasonable doubt."

Judge Tamm closed his opinion by observing, almost wistfully, that civil commitment is a problem which rests upon social considerations and, thus, is influenced greatly by the misunderstandings and prejudices of society.[126] Yet, just as the label "mentally ill" carries with it a series of perhaps unfair and biased connotations,[127] so, especially in the legal system, "beyond a reasonable doubt" and the practices and procedures which accompany that standard are associated with criminals and the criminal law. To suggest that the bench and the bar are free from the misunderstanding surrounding the mentally disturbed may well be equivalent to disregarding one of the primary sources of the problems which *Ballay* attempts to solve. Attorneys are accustomed to the adversary process, and because civil commitment statutes have failed to specify their role, they may fall easily into that contesting approach to adjudication.[128] Finally, it is possible that the imposition of the reasonable doubt standard will result in the involuntary commitment of fewer individuals.[129] But it is also possible that those whose cases will be tried under that standard will be forced to endure a proceeding which for all intents and purposes appears to be a criminal trial. After parades of witnesses, meticulous cross-examination, and somber deliberations, those who are committed may have substantial justification for their fear that society does indeed regard them as criminals who are to be incarcerated, not for the purpose of their recovery, but for the peace of mind and convenience of the rest of society.

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609 (D.C. Cir. 1973). But cf. Note, United States v. Brown: Preponderance Test for Civil Commitment Following Insanity-Based Acquittal, 35 U. Pitt. L. Rev. 168, 178 (1973).

124. Woodby v. Immigration & Naturalization Serv., 385 U.S. 276, 285 (1966); see notes 70, 71 supra.

125. See Combs 65-66.

126. 482 F.2d at 668-69. See also notes 87-90 supra and accompanying text.

127. 482 F.2d at 669.

128. See Cohen, The Function of the Attorney and the Commitment of the Mentally Ill, 44 Texas L. Rev. 424, 441 (1966). On the ill-concealed hostility between the medical experts and attorneys in this area, see Comment, Involuntary Commitment Procedures in Missouri, 37 U.M.K.C.L. Rev. 319, 344 (1969).

129. Professor Combs maintains that the application of the "clear and convincing" standard "would mean the commitment of fewer mentally ill; with the decrease in patients, the available resources in these institutions could be more effectively utilized." Combs at 65-66.