Florida State University Law Review

Volume 6 | Issue 1 Article 3

Winter 1978

The Confinement of Mabel Jones: Is There a Right to Jury Trial in Civil Commitment Proceedings?

Vicki Gordon Kaufman

Follow this and additional works at: http://ir.law.fsu.edu/lr

Part of the Constitutional Law Commons, Elder Law Commons, Medical Jurisprudence Commons, and the State and Local Government Law Commons

Recommended Citation

Vicki G. Kaufman, *The Confinement of Mabel Jones: Is There a Right to Jury Trial in Civil Commitment Proceedings?*, 6 Fla. St. U. L. Rev. 103 (2014) .
http://ir.law.fsu.edu/lr/vol6/iss1/3

This Note is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

NOTES

THE CONFINEMENT OF MABEL JONES: IS THERE A RIGHT TO JURY TRIAL IN CIVIL COMMITMENT PROCEEDINGS?

VICKI GORDON KAUFMAN

I. INTRODUCTION

A recent decision by the Florida Supreme Court exposed an area of grave deficiency in Florida's mental health law. *In re Jones*[1] involved the fate of Mabel Jones, an elderly, blind woman. Indigent and on welfare, Ms. Jones was confined to a nursing home because her family could not care for her adequately. When Ms. Jones developed bedsores, she was taken to a hospital and treated for several days. Because she had been unruly at times in the nursing home, when Ms. Jones was well enough to be released from the hospital, the nursing home refused to readmit her.

Since Ms. Jones could neither remain in the hospital nor return to the nursing home, on November 3, 1975, the hospital administrator filed a petition in the state circuit court for Leon County, Florida, seeking an order for involuntary hospitalization pursuant to section 394.467(2) of the Florida Statutes.[2] On November 4, 1975,

---

1. 339 So. 2d 1117 (Fla. 1976), *cert. denied*, 97 S. Ct. 1661 (1977).
2. (1977). The statute provides:

ADMISSION TO A TREATMENT FACILITY.—A patient may be hospitalized in a treatment facility, after notice and hearing, upon recommendation of the administrator of a receiving facility where the patient has been admitted for examination or evaluation. When a patient is not an inpatient in a receiving facility, the administrator of a designated receiving facility may make a recommendation for involuntary hospitalization of a patient who has been given an examination, evaluation, or treatment by staff of the receiving facility or a private physician. The hearing may be waived in writing by the patient. The recommendation must be supported by the opinions of two physicians who have personally examined the patient within the preceding 5 days that the criteria for involuntary hospitalization are met. Such recommendation shall be entered on a hospitalization certificate, which certificate shall authorize the receiving facility to retain the patient pending transfer to a treatment facility or completion of a hearing. The certificate shall be filed with the court in the county where the patient is located and shall serve as a petition for a hearing regarding involuntary hospitalization. A copy of the certificate shall also be filed with the department, and copies shall be served on the patient and his guardian or representatives, accompanied by:

(a) A written notice, in plain and simple language, that the patient or his guardian or representative may apply at any time for a hearing on the issue of the patient's need for hospitalization if he has previously waived such a hearing.

(b) A petition for such hearing, which requires only the signature of the patient or his guardian or representative for completion.

(c) A written notice that the petition may be filed with a court in the county in

Ms. Jones' attorney filed a request for a jury determination of the factual issue involved in the commitment proceeding: whether Ms. Jones met the criteria for involuntary hospitalization. The trial court denied the request for a jury trial on November 12, 1975.[3]

This was the initial judicial ruling on the constitutional validity of Florida's statutory civil commitment procedure, which fails to provide for a jury trial when requested. After hearing testimony, the court entered an order of commitment for involuntary hospitalization.[4] Challenging the statute as unconstitutional because it failed

---

which the patient is hospitalized at the time the certificate is executed and the name and address of the judge of such court.

(d) A written notice that the patient or his guardian or representative may apply immediately to the court to have an attorney appointed if the patient cannot afford one.

The petition may be filed in the county in which the patient is hospitalized at any time within 6 months of the date of the certificate. The hearing shall be held in the same county, and one of the patient's physicians at the hospital shall appear as a witness at the hearing. If the hearing is waived, the court shall order the patient to be transferred to a treatment facility or, if he is at a treatment facility, that he be retained there. However, the patient can be immediately transferred to the treatment facility by waiving his hearing without awaiting the court order. The hospitalization certificate shall serve as authorization for the patient to be transferred to a treatment facility and as authorization for the treatment facility to admit the patient. The treatment facility may retain a patient for a period not to exceed 6 months from the date of admission. If continued hospitalization is necessary at the end of that period, the administrator shall apply to the hearing examiner for an order authorizing continued hospitalization.

FLA. STAT. § 394.467(2) (1977).

3. 339 So. 2d 1117.

4. *Id.* The statutory provisions for such hearings are as follows:

PROCEDURE FOR HEARING ON HOSPITALIZATION.—

(a) If the patient does not waive a hearing or if the patient, his guardian, or a representative files a petition for a hearing after having waived it, the judge shall serve notice on the administrator of the facility in which the patient is hospitalized and on the patient. The notice of hearing must specify the date, time, and place of hearing; the basis for detention; and the names of examining physicians and other persons testifying in support of continued detention and the substance of their proposed testimony. The judge may serve notice on the State Attorney of the judicial circuit of the county in which the patient is hospitalized, who shall represent the state. The court shall hold the hearing within 5 days unless a continuance is granted. The patient, his guardian or representative, or the administrator may apply for a change of venue for the convenience of parties or witnesses or because of the condition of the patient. Venue may be ordered changed within the discretion of the court. The patient and his guardian or representative shall be informed of the right to counsel by the court. If the patient cannot afford an attorney, the court shall appoint one. The patient's counsel shall have access to hospital records and to hospital personnel in defending the patient. One of the physicians who executed the hospitalization certificate shall be a witness. The patient and his guardian or representative shall be informed by the judge of the right to an independent expert (psychiatrist or psychologist) examination. If the patient cannot afford a doctor, the judge shall appoint one. If the court concludes that the patient meets criteria for involuntary hospitalization, the judge shall order the patient to be transferred to a

to provide for jury trial, Ms. Jones appealed directly to the Florida Supreme Court on December 11, 1975.[5] The court sustained the constitutionality of section 394.467, holding that there is no right to a trial by jury in a civil commitment proceeding. Ms. Jones was then hospitalized involuntarily at the Florida State Hospital at Chattahoochee.

Jones illustrates a needless defect in Florida's mental health law: the denial of a jury trial to resolve the issues involved in a commitment decision. With *Jones* as a starting point, this note will briefly explore the history of the jury trial in commitment proceedings and the jury trial's basis in the Federal Constitution. Florida's mental health statute and scant case law in the jury trial area also will be

---

treatment facility, or, if he is at a treatment facility, that he be retained there, or to be treated at any other appropriate facility or service on an involuntary basis. The order shall adequately document the nature and extent of a patient's mental illness. The judge may adjudicate a person incompetent pursuant to the provisions of this act at the hearing on hospitalization. The treatment facility may accept and retain a patient admitted involuntarily for a period not to exceed 6 months whenever the patient is accompanied by a court order and adequate documentation of the patient's mental illness. Such documentation shall include a psychiatric evaluation and any psychological and social work evaluations of the patient. If further hospitalization is necessary at the end of that period, the administrator shall apply to the hearing examiner for an order authorizing continued hospitalization.

(b) In the event a person is ordered into a treatment facility under the provisions of the Florida Rules of Criminal Procedure, or chapter 801 or chapter 917, the order shall adequately document the nature and extent of a patient's mental illness. No person charged with a misdemeanor shall be committed to the department solely by Rule 3.210 of the Florida Rules of Criminal Procedure, but shall be admitted for hospitalization and treatment in accordance with the provisions of this part. The treatment facility may accept and retain a patient so admitted for a period not to exceed 6 months whenever the patient is accompanied by a court order and adequate documentation of the patient's mental illness. Such documentation shall include a psychiatric evaluation and any psychological and social work evaluations of the patient and document the results of any criminal investigation on the patient. If a patient is considered to be suffering from an emotional illness to the extent that he cannot participate in his own defense, such documentation should include details regarding the evaluation which led to that conclusion. If further hospitalization is necessary, at the end of his authorized treatment period, the administrator shall apply to the hearing examiner for an order authorizing continued hospitalization.

(c) The court shall provide a court order, a psychiatric evaluation, and other adequate documentation of each patient's mental illness to the administrator of a treatment facility whenever a patient is ordered for involuntary hospitalization, whether by civil or criminal court. The administrator of a treatment facility may refuse admission to any patient directed to its facility on an involuntary basis, whether by civil or by criminal court order, who is not accompanied at the same time by adequate orders and documentation.

FLA. STAT. § 394.467(3) (1977).

5. FLA. CONST. art. V, § 3(b)(1) authorizes the Florida Supreme Court to hear an appeal from a final judgment of a trial court when the trial court rules initially on the validity of a state statute.

analyzed. Finally, reasons for granting a jury trial upon request in commitment proceedings will be discussed and recommendations for change will be suggested.

II. Historical Background

During feudal times, the king was entitled to the profits of an idiot's land, after allowing for the idiot's support. However, before this could be done, the sheriff had to submit the question of the person's sanity to the "folkmoot," a group of twelve men who determined the person's mental status.[6] This process was thought to safeguard the subjects' property from unwarranted seizure by the king.[7] The same procedure was followed for a lunatic, who was usually distinguished from an idiot. As the English viewed it at the time, "[l]unacy differed from idiocy in that insanity usually came in later life, was often only temporary, and the lunatic was popularly regarded as being possessed by an exorcisable demon."[8] In contrast, an idiot was often perceived as a "natural fool."[9] In a lunatic's case, the king held the land in trust, and the profits from the trust were applied to maintaining the lunatic and his household.[10]

In later English practice, an application was made to the chancellor for a commission of lunacy. This procedure still involved the summoning of a jury to sign the inquisition.[11] The alleged lunatic also had the right to challenge the commission's finding (traverse the return) and the right to a trial by jury. There is some indication that the chancellor may have had discretion in allowing the appeal, and this has created confusion as to whether there was an absolute right to a jury trial.[12]

These English proceedings dealt solely with control over a person's property. The proceedings differed for confinement. Usually confinement was imposed to prevent harm. Yet for many years any private person or police officer could lawfully apprehend a dangerously insane person—apparently without a warrant. In 1714, justices of the peace were given authority by statute to issue warrants for arresting and confining dangerous lunatics. In 1744, a subse-

6. Annot., 33 A.L.R.2d 1145, 1146-47 (1954); S. Brakel & R. Rock, The Mentally Disabled and the Law 3 (rev. ed 1971) [hereinafter cited as Brakel & Rock].

7. Annot., 33 A.L.R.2d 1145, 1147 (1954).

8. *Id.*

9. *Id.*

10. *Id.*; Brakel & Rock, *supra* note 6, at 2.

11. Annot., 33 A.L.R.2d 1145, 1147 (1954).

12. *Id.* at 1148.

quent statute gave two or more justices of the peace the authority to issue such a warrant. Evidently, the proper avenue of relief for the prisoner was to procure a chancellor's commission ordering an inquisition. This was done through a friend—if a friend was available.[13] If not, escape from confinement undoubtedly was difficult.

The English procedure of an inquest by jury was generally followed in the original American states.[14] In states that did not succeed to the established colonial system, generally there was no right to a jury trial on the issues of guardianship or confinement.[15] Many state courts hold that the right to a jury in civil commitment proceedings will be preserved if state common law provided for a jury trial at the time the state's constitution was adopted.[16] Furthermore, some state courts hold that the right to a jury in commitment proceedings is preserved by the constitutional provisions for juries if a statute provided for the right when the constitution was adopted.[17]

III. Federal Constitutional Basis for Jury Trials in Commitment Proceedings

The United States Constitution does not expressly guarantee a jury trial in civil commitment proceedings,[18] and the United States Supreme Court has ruled that the due process clause of the fourteenth amendment does not require any particular type of proceeding in a state court.[19] Due process requires only that the person be

13. *Id.*

14. *Id.* at 1149. For a collection of cases, see *id.* at 1149-55.

15. *Id.* at 1155. For a collection of cases, see *id.* at 1155-59.

16. Brakel & Rock, *supra* note 6, at 54 and cases cited therein.

17. *Id.* For the history of civil commitment, *see generally id.* at 1-14; K. Miller, Managing Madness: The Case Against Civil Commitment 4-8 (1976) [hereinafter cited as Managing Madness]; Schneider, *Civil Commitment of the Mentally Ill*, 58 A.B.A.J. 1059 (1972).

18. *See* Annot., 33 A.L.R.2d 1145 (1954) (discussion of the constitutional right to a jury in insanity proceedings).

19. Simon v. Craft, 182 U.S. 427 (1901). Ms. Simon was the subject of a petition for an inquisition of lunacy. Ms. Simon was notified of her trial, but the court decided that it was inconsistent with her health to have her present. A guardian was appointed, and he denied all the charges. A jury judged Ms. Simon insane. Another guardian was appointed, and Ms. Simon's real estate was sold to pay for debts, support, and maintenance. Six years later, Ms. Simon brought an ejectment action. Her counsel contended that the lunacy proceedings were invalid because Ms. Simon had not been notified to be present at the trial and because the court had left it to the judgment of the sheriff as to whether Ms. Simon would appear. The Supreme Court held that since Ms. Simon was notified of the hearing, she could have come into court to defend herself had she so chosen. Striking down Ms. Simon's other contentions, the Court held that the due process clause of the fourteenth amendment does not require a state court to provide a certain type of proceeding as long as there is notice and an opportunity to defend.

given notice and an opportunity to defend.[20]

Courts have frequently compared juvenile delinquency proceedings to civil commitment proceedings. For example, both are nonadversary and noncriminal, and the purpose of both is supposedly rehabilitative rather than punitive.[21] The United States Supreme Court recently held in *McKeiver v. Pennsylvania* that a jury trial is not required in juvenile delinquency proceedings.[22] However, three justices dissented in *McKeiver,* arguing that since the juveniles faced lengthy confinements, they should have been granted a jury trial. Justices Black, Douglas, and Marshall based their dissent in part on the belief that "[n]o adult could be denied a jury trial in those circumstances."[23]

It seems, however, that adults are denied a jury trial in even more suspect circumstances—a civil commitment proceeding where the length of the commitment may be indeterminate or even lifelong.[24] The guarantee of a jury trial provided by the sixth amendment is applicable only to criminal prosecutions.[25] Insanity is not a crime. Therefore, the sixth amendment does not apply to civil commit-

---

20. Chaloner v. Sherman, 242 U.S. 455 (1916); Twining v. N.J., 211 U.S. 78 (1908); New Orleans Waterworks Co. v. Louisiana, 185 U.S. 336 (1902); Simon v. Craft, 182 U.S. 427 (1901). The due process requirements are satisfied by FLA. STAT. § 394.467(2)-(3) (1977). For text of statute, see notes 2 and 3 *supra.*

21. Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill,* 44 TEX. L. REV. 424, 448-49 (1966). Cohen does point out, however, that the juvenile court tends to give individualized care to the child and often uses alternatives to help the child. Cohen states that a judge involved in a civil commitment does not assume the same role as a juvenile court judge.

22. 403 U.S. 528 (1971).

23. *Id.* at 560 (citation omitted).

24. *See, e.g.,* O'Connor v. Donaldson, 422 U.S. 563 (1975). Kenneth Donaldson was committed in civil proceedings against his will and remained in confinement for almost 15 years. Donaldson was not a danger to himself or to others. He was committed by his father in 1957 for "care, maintenance, and treatment." Donaldson was confined in the Florida State Hospital at Chattahoochee, which is where Mabel Jones was confined. Donaldson brought suit in the United States District Court for the Northern District of Florida under 42 U.S.C. § 1983 (1970), alleging that he had been "intentionally and maliciously" deprived of his constitutional right to freedom. The jury awarded Donaldson punitive and compensatory damages totalling $38,500. The Fifth Circuit Court of Appeals affirmed. Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974). The Supreme Court vacated and remanded on the issue of whether monetary damages were appropriate. Donaldson finally secured his release in 1971. *See also* K. DONALDSON, INSANITY INSIDE OUT (1976); MANAGING MADNESS, *supra* note 17, at 20-26.

25. White v. White, 196 S.W. 508 (Tex. 1917). *White* was a habeas corpus proceeding. Ms. White had been judged insane on the report of six commissioners, all of whom were doctors. Ms. White contended that she was entitled to a trial by jury. Since the sixth amendment applies only to criminal prosecutions, the court held that the United States Constitution does not guarantee the right of trial by jury in any noncriminal state court proceeding. The court did find, however, that Ms. White was entitled to a jury trial under Texas law because of a provision in the Texas constitution. The right to a jury trial in a lunacy proceeding existed prior to the adoption of the Texas constitution and therefore was incorporated in it.

ment proceedings.

The seventh amendment deals with jury trials in civil proceedings. However, for the seventh amendment to apply, the proceeding must be a suit at common law, and the value in controversy must exceed twenty dollars. In *Ward v. Booth,* the court found the seventh amendment inapplicable to a proceeding appointing a guardian for an insane person.[26] The Court of Appeals for the Ninth Circuit held that a guardianship proceeding bears no relationship to a suit at common law and that there is no "value" in controversy. The same rationale may be applied to a commitment proceeding. So a jury trial is not required.[27] Consequently, the seventh amendment affords no constitutional basis for a jury trial in civil commitment proceedings. Nevertheless, a state may grant a jury trial even if it is not specifically mandated by the United States Constitution.[28]

IV. Rights in Civil Commitment Proceedings in Florida

Chapter 394 of the 1977 Florida Statutes contains the Florida Mental Health Act, commonly known as the Baker Act. This act sets forth commitment procedures in Florida. The statute provides for four types of confinement. One of these four types may be considered voluntary. The others are coercive. Voluntary admission may be accomplished if the person or his guardian applies to the appropriate residential institution.[29] Evidence of mental illness must be found, and the illness must be suitable for treatment. The patient admitted voluntarily may request a discharge at any time. If the request is denied, involuntary hospitalization proceedings must be initiated.[30]

The three types of involuntary confinement are emergency admission,[31] admission for a court-ordered evaluation,[32] and involuntary hospitalization.[33] Though the procedures for and duration of these types of confinement differ, these confinements all involve the same admission criteria: the person must be "mentally ill and because of his illness is: (1) [l]ikely to injure himself or others if allowed to remain at liberty, or (2) [i]n need of care or treatment and lacks sufficient capacity to make a responsible application on his own

26. 197 F.2d 963 (9th Cir. 1952).
27. *Id.* at 967.
28. Brakel & Rock, *supra* note 6, at 54.
29. Fla. Stat. § 394.465(1)(a) (1977).
30. *Id.* § 394.465(2)(a).
31. *Id.* § 394.463(1).
32. *Id.* § 394.463(2).
33. *Id.* § 394.467.

behalf."[34] A suit brought after the decision in *Jones* challenged these criteria as vague and overbroad, but the Florida Supreme Court held that the standards were constitutionally sufficient.[35] In so holding, the court stated that the statutory criteria were not vague because the statute gave adequate warning of the type of behavior that would give rise to confinement.[36] In rejecting the claim of overbreadth as well, the court relied on section 394.453 of the Florida Statutes,[37] which recites the legislative intent that involuntary hospitalization occur only when it is necessary. The court reasoned that confinement would not be necessary if the person could safely survive in freedom.[38] Construing the criteria more broadly than necessary, the court interpreted the phrase "[l]ikely to injure himself or others"[39] to mean not only the threat of physical injury, but also that of emotional injury.[40] Additionally, the court concluded that "[lack of] sufficient capacity to act for himself" is present when there is a threat of substantial harm to a person's well-being and he cannot determine whether treatment is desirable.[41] This too is a broader standard than necessary.[42] Instead of reaching such broad conclusions, the court should have construed these threshold requirements so that involuntary confinement would be ordered in only the most serious cases. This would have been much more consistent with the clearly expressed legislative intent.

The procedural distinctions among the three kinds of involuntary admissions involve differences in who initiates the process and in the length of confinement. Emergency admission may be initiated by a judge, law enforcement officer, or physician, if he believes the

34. *Id.* §§ 394.463(1)(a), (2)(a), .467(1).

35. *In re* Beverly, 342 So. 2d 481 (Fla. 1977). Though the constitutional challenge was specifically addressed to § 394.467(1), the court's analysis would probably apply to § 394.463(1)(a) and § 394.463(2)(a) as well. The criteria in those two sections are identical to those in § 394.467(1).

Section 394.467 was not challenged as vague and overbroad in *In re* Jones, 339 So. 2d 1117 (Fla. 1976), *cert. denied*, 97 S. Ct. 1661 (1977). Ms. Jones limited her constitutional challenge to the jury trial issue.

36. 342 So. 2d at 485.

37. (1977).

38. 342 So. 2d at 486.

39. FLA. STAT. § 394.467(1)(a) (1977).

40. 342 So. 2d at 487.

41. *Id.* The court was referring to the criteria set forth in § 394.467(1)(b).

42. Dealing with several other important issues, the *Beverly* court held that the standard of proof in commitment cases is one of clear and convincing evidence, not proof beyond a reasonable doubt. This increases the likelihood of commitment in any given case. The court also held that no Miranda warnings need be given to the alleged mentally ill person and that the person has no right to counsel at an interview with a psychiatrist. Other Florida Supreme Court decisions holding § 394.467 constitutional are *In re* Alvarez, 342 So. 492 (Fla. 1977); *In re* Jackson, 342 So. 2d 492 (Fla. 1977); *In re* Scott, 342 So. 2d 490 (Fla. 1977).

person meets one of the admission criteria set forth by statute.[43] Emergency admission can last no longer than forty-eight hours. No hearing is required.[44]

In contrast, a court-ordered evaluation may be made only if a judge determines, after a hearing, that the criteria for commitment have been met. The patient must be notified of the hearing and has the right to counsel.[45] If an evaluation is ordered, it can last no longer than five days.[46] The period of confinement in an emergency or court-ordered evaluation admission is relatively short compared to an involuntary commitment.

The involuntary commitment procedure is initiated by the administrator of a hospital, who may recommend involuntary hospitalization after the patient has been examined.[47] This recommendation must be supported by the opinions of two physicians who have examined the patient. The administrator's recommendation serves as a petition for a hearing on the involuntary hospitalization. Unless waived by the patient, a hearing is held, and the judge determines if hospitalization is necessary. The patient is entitled to be represented by an attorney at this hearing. If the patient is hospitalized involuntarily, the period of confinement may not exceed six months.[48] Thereafter, the administrator must apply to the hearing examiner for an order authorizing continued hospitalization.[49] In short, the involuntary commitment procedure, which can result in a severe loss of personal freedom, provides no opportunity for the person to request a jury determination of whether the commitment criteria have been met.

The Florida Supreme Court has had only two opportunities to address the question of whether jury trials are constitutionally mandated in civil commitment proceedings. The first opportunity came in 1908 in *Ex Parte Scudamore.*[50] The plaintiff in *Scudamore* contended that failure to provide for a jury trial in commitment proceedings violated section three of the Declaration of Rights of the

43. FLA. STAT. § 394.463(1)(b) (1977).
44. *Id.* § 394.463(1)(d).
45. *Id.* § 394.463(2)(c).
46. *Id.* § 394.463(2)(e).
47. *Id.* § 394.467(2). For text of statute, see note 2 *supra*.
48. FLA. STAT. § 394.467(4)(f) (1977).
49. *Id.* § 394.467(2). Presumably Mabel Jones has now been confined in the Florida State Hospital at Chattahoochee for more than six months. Therefore, the hospital administrator should by now have applied for an order authorizing continued hospitalization. Officials at the hospital refused to say whether such an order has been sought. Records in the case are apparently sealed.
50. 46 So. 279 (Fla. 1908).

Florida constitution of 1885, which stated that "[t]he right of trial by jury shall bee [*sic*] secured to all and remain inviolate forever." The *Scudamore* court held that section three applied only to cases in which the right to a jury trial existed prior to the adoption of the constitution.[51] The right to a jury trial in civil commitment proceedings did not exist in Florida in 1885. Therefore, section three did not apply to such proceedings.[52]

The Florida Supreme Court did not face the issue again for nearly seventy years—until *In re Jones.*[53] The same provision for a jury trial is incorporated in the Declaration of Rights of the Florida constitution of 1968 as was included in the 1885 constitution.[54] A comparison reveals several important differences in the commitment process as it existed in 1908, at the time of *Scudamore,* and as it exists today under the Baker Act.[55] Rather than compare the differences in the commitment process in 1908 and 1976, however, the *Jones* court based its perfunctory opinion almost totally on the outdated *Scudamore* case.[56]

Two statutes were involved in *Scudamore*—General Statutes 1200 and 1201.[57] Statute 1200 dealt with the initial petition for commitment and required five reputable citizens to sign a petition requesting an examination of the alleged insane person. These five people, only one of whom could be a relative, had to acknowledge personally that they believed the person in question to be insane. Statute 1201 provided that two physicians and a lay person be appointed to an examining committee to ascertain the mental status of the person named in the petition. Although these lay people did not constitute a formal jury, they performed the function of a jury by providing a representative voice for the community as a whole in the commitment decision.[58]

Thus, in 1908, the community was very much involved in determining whether a person was mentally ill, and, if so, whether hospitalization was necessary. Under section 394.467(2)-(3), the hospital administrator initiates the commitment proceeding, the alleged

51. *Id.* at 283.
52. *Id.* at 279.
53. 339 So. 2d 1117 (Fla. 1976), *cert. denied,* 97 S. Ct. 1661 (1977).
54. FLA. CONST. art. I, § 22.
55. For text of statute, see notes 2 and 3 *supra.*
56. *Cf.* 339 So. 2d at 1118-19 (Boyd, J., dissenting).
57. Act of May 29, 1895, ch. 4357, §§ 1-2, 1895 Fla. Laws 123, *as amended by* Act of May 22, 1903, ch. 5264, § 1, 1903 Fla. Laws 257 (repealed 1941).
58. MANAGING MADNESS, *supra* note 17, at 107-08. Miller suggests that a jury trial is very important in introducing community values into the commitment process and that a jury trial should be mandatory on request.

mentally ill person is examined by two doctors, and the judge alone determines whether the person meets the criteria for involuntary hospitalization. There is no participation by the lay community in the commitment process in 1978, as there was in 1908. Only professionals such as doctors, lawyers, and judges are involved.[59]

As courts so often do, the *Jones* court chose the convenient course of relying on ancient precedent as the basis for its decision. Surely the court could have looked beyond precedent in the light of the substantial differences which now prevail in the commitment process. In 1908, the community was involved in Scudamore's commitment, and that may have justified the *Scudamore* decision. A jury trial may indeed have been unnecessary given the statutory requirements of the time.

But in *Jones* there was no community involvement. Her fellow citizens had no say in the fate of Mabel Jones. And perhaps this made a difference in the outcome of her case. The court could have pointed to this as a basis for distinguishing the two cases and holding that a jury trial is necessary in civil commitment proceedings today. Instead, the *Jones* court uncritically chose the easier path.

V. THE CASE FOR JURY TRIALS ON REQUEST

Eighteen states and the District of Columbia now make some statutory provision for a jury trial in civil commitment proceedings. In some states it is discretionary, while in others it is mandatory.[60]

---

59. During the 1976 session of the Florida Legislature, Senator Lori Wilson from Brevard County introduced Senate Bill 239, which provided for a jury trial in civil commitment proceedings. FLA. S. JOUR. 39 (1976). This provision was retained in a Committee Substitute for the bill but was amended out in a Committee Substitute for the Committee Substitute for Senate Bill 239. FLA. S. JOUR. 252 (1976).

60. The following state statutes provide for a jury trial in civil commitment proceedings:

ALASKA STAT. § 47.30.070(h) (1975). Upon the patient's written request, a jury of six will be summoned.

CAL. WELF. & INST. CODE § 5302 (West 1972). If the patient is to be held longer than 14 days, he has the right to demand a jury trial.

COLO. REV. STAT. § 27-10-109(3) (1973). The patient is entitled to a jury trial if after short-term treatment for five months the person in charge of treatment files a petition for long-term care.

D.C. CODE §§ 21-544 to 545 (1973). If a person is found mentally ill after an initial hearing before the Commission on Mental Health, he may demand a jury trial in the subsequent hearing before the court.

ILL. ANN. STAT. ch. 91 ½, § 9-2 (Smith-Hurd Cum. Supp. 1977). The patient may request a jury of six.

KAN. STAT. ANN. § 59-2917 (Supp. 48-101 1975). A six-person jury will be summoned on the patient's request.

KY. REV. STAT. § 202A.080 (1977). When a petition is filed for a 360 day involuntary hospitalization, the court must impanel a jury unless the patient waives his right to a jury trial.

A trend in this direction seems to be developing. Only recently, two states added this procedural safeguard to their mental health statutes.[61] Well-known commentators in the field also advocate the use of jury trials in commitment proceedings.[62] Therefore, while technically Florida follows the majority view on the question of jury trials in commitment proceedings, the majority is only a slight one, and there may be a trend to the contrary.

Civil commitment entails extremely serious consequences for the person committed, to say the least. It is altogether appropriate for the community, and not solely a handful of professionals, to make the commitment decision. Because civil commitment involves a great loss of personal freedom, community participation through the jury is necessary in this important decision.[63] The community as a

---

MD. ANN. CODE art. 59, § 15(c) (1972). After a patient has been hospitalized involuntarily, he may file a petition for release, and he may request a jury trial at that time.

MICH. COMP. LAWS ANN. § 330.1453(2) (1975). A jury will be impanelled on demand.

MONT. REV. CODES ANN. § 38-1305(6) (Cum. Supp. vol. 3, pt. 1 1975). The patient may request a jury trial.

N.J. STAT. ANN. § 30:4-42 (West Cum. Supp. 1977-1978). The judge may in his discretion call a jury.

Mental Health and Developmental Disabilities Code, ch. 279, § 11, 1977 N.M. Laws 2177. The patient has the right to a six-person jury trial for commitments of more than 17 days.

N.Y. MENTAL HYG. LAW § 31.35 (McKinney 1976). A person who is denied release or who is unsatisfied with a retention order may ask for a review of the proceedings. At that time a jury must be summoned to try the question of mental illness unless a jury trial is waived.

OKLA. STAT. ANN. tit. 43A, § 54.1(B)(8) (West Cum. Supp. 1977-1978). A jury of six may be demanded.

TEX. REV. CIV. STAT. ANN. art. 5547-48 (Vernon 1958). A jury is summoned unless a waiver is filed.

VA. CODE § 37.1-67.6 (Supp. 1977). A person who is involuntarily committed can appeal to the circuit court in the jurisdiction where he is committed. The appeal is held de novo, and the person is entitled to a jury trial.

WASH. REV. CODE § 71.05.300 (Supp. 1976). In a petition for 90 day treatment, the patient may request a jury trial.

WIS. STAT. ANN. § 51.20(12) (West Cum. Supp. 1977-1978). The patient is entitled to a six-person jury on demand.

WYO. STAT. § 25-60(i) (1957). The patient may request a jury, or the court may call a six-person jury at the request of the next of kin or the patient's attorney.

In Maine, the court makes the commitment decision, but it may order a public hearing on the request of a patient or a member of the patient's family. ME. REV. STAT. tit. 34, § 2334 (Cum. Supp. 1976-1977).

61. Montana added this provision in 1975. New Mexico added it in 1977.

62. *See* MANAGING MADNESS, *supra* note 17; Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945, 963, 970 (1959); Szasz, *Civil Liberties and the Mentally Ill*, 9 CLEV.-MAR. L. REV. 399 (1960).

63. It should be noted that FLA. STAT. § 394.467(5)(c) (1977) guarantees a jury trial to persons committed to a mental hospital because of acquittal of a crime by reason of insanity. The patient or the state's attorney may request a jury trial when the patient is to be released. The trial is solely to determine if the patient still meets the criteria for involuntary hospitalizations listed in FLA. STAT. § 394.467(1) (1977). The *Jones* court rejected an equal protection

whole will invariably be diminished by the departure and confinement of one of its law-abiding members, however mentally ill that person may be. Is it too much to ask for a community voice in the making of such a drastic decision? Were trained professionals alone capable of determining whether Mabel Jones should lose her freedom?

Historically, the function of the jury has been to prevent arbitrary decisions and to introduce community values into the decisionmaking process.[64] These two functions are as important in a commitment proceeding as in a criminal proceeding. Both proceedings involve potentially devastating consequences. Juries in criminal proceedings long have dealt with the difficult issue of whether the individual should be removed from society.[65] The basic issue in a civil commitment proceeding is the same. And, while certainly there are compelling reasons for trained professionals to participate in such proceedings, those reasons surely do not compel the absolute exclusion of the rest of the community.

Civil commitment is similar in many ways to criminal imprisonment.[66] "[T]he degree of confinement, the loss of civil rights, the

---

argument based on this jury trial provision by saying that "[t]here is a valid distinction between a regular civil commitment proceeding and a hearing which is held in connection with a criminal case wherein a defendant was acquitted for cause of insanity." *In re* Jones, 339 So. 2d 1117, 1118 (Fla. 1976), *cert. denied,* 97 S. Ct. 1661 (1977). Though the court did not elaborate on this "valid distinction," the state contended in its brief that the purpose of a jury trial before releasing a person committed because of acquittal by insanity is to protect society. The jury's purpose is to determine if the patient is fully recovered before he is allowed to return to the community. Both proceedings involve a loss of personal freedom, but it could be argued that the deprivation of freedom is *more* severe in the original civil commitment proceeding than in the criminal proceeding. In the civil proceeding, the person has not yet been hospitalized, while in the criminal proceeding, hospitalization has already occurred. *See also* O'Brien v. Superior Court, 132 Cal. Rptr. 13 (App. Dep't Super. Ct. 1976), in which a California court held that Youth Authority Wards and the mentally retarded were entitled to a jury trial in commitment proceedings on equal protection grounds because all other groups subject to involuntary commitment received this right.

64. *Developments in the Law—Civil Commitment of the Mentally Ill,* 87 HARV. L. REV. 1190, 1292 (1974) [hereinafter cited as *Civil Commitment*]. This article includes a very thorough treatment of involuntary commitment.

65. Note, *Involuntary Hospitalization of the Mentally Ill Under Florida's Baker Act: Procedural Due Process and the Role of the Attorney,* 26 U. FLA. L. REV. 508, 517 (1974). While this note does not advise mandatory jury trials, it suggests that the decision should be left to the alleged mentally ill person and his attorney.

66. A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 3 (DHEW Pub. No. [ADM] 76-176, 1975); Elliot, *Procedures for Involuntary Commitment on the Basis of Alleged Mental Illness,* 42 U. COLO. L. REV. 231, 253 (1970); Ennis, *Civil Liberties and Mental Illness,* 7 CRIM. LAW BULL. 101, 108-09 (1971). Elliot postulates that commitment proceedings are deemed "civil" rather than criminal to avoid the inconvenience of having to deal with criminal procedural protections. He suggests that the proceeding should be viewed in terms of the "interests at stake," and that the same safeguards should be employed in commitment and criminal proceedings. Ennis states that "[i]t is the belief of the Civil Liberties Union

inability of the confined to communicate easily with the outside, and the resulting social ostracism, all tend to support the law's insistence that involuntary commitment to a mental institution is by its very nature quite analogous to imprisonment."[67] "To be accused of 'mental' illness is analogous to being accused of a wrongdoing or crime, such as, say, theft, assault, or murder."[68] Thus, in many respects, and even today, being mentally ill is much like being a criminal in the eyes of society.

The most fundamental deprivation which results from civil commitment is the restriction of liberty.[69] When a person is committed, not only is he restricted to the confines of an institution, but also his movements within the institution itself may be restricted.[70] The United States Supreme Court, in dealing with the commitment of a sex offender, recognized that where such a "massive curtailment of liberty" is involved, the jury's introduction of community values into the commitment decision is important.[71] In *Duncan v. Louisiana,* the United States Supreme Court held that a person convicted of a simple battery, which carried a maximum sentence of two years, was entitled to a jury trial.[72] The court emphasized the length of the possible sentence in concluding that a jury trial was required by the sixth amendment. Though the sixth amendment does not apply to commitment proceedings, the court's reasoning in *Duncan* applies to civil commitments as well as to criminal proceedings. Many civil commitments last much longer than two years and involve the same basic loss of freedom as imprisonment.[73]

---

that before a person can be deprived of liberty because of mental illness he must be afforded substantially all of the procedural safeguards he would have received had he been accused of crime." *Compare with* Kutner, *The Illusion of Due Process in Commitment Proceedings,* 57 Nw. U.L. Rev. 383, 386-92 (1962). While Kutner acknowledges the similarities between civil commitment and criminal incarceration, he advocates the elimination of jury trials in commitment proceedings.

67. Kutner, *supra* note 66, at 386-87.

68. Szasz, *Civil Liberties and the Mentally Ill,* 9 Clev.-Mar. L. Rev. 399, 401 (1960). Szasz is a major proponent of the contention that an accusation of mental illness leads to the same consequences as an accusation of a criminal offense. He advocates a Bill of Rights for the mentally ill which would afford the same protections as those given to someone accused of a crime. *See generally* Szasz, *Involuntary Psychiatry,* 45 U. Cin. L. Rev. 347 (1976) (discussing O'Connor v. Donaldson, 422 U.S. 563 [1975]); Szasz, *A Psychiatrist Views Mental Health Legislation,* 9 Washburn L.J. 224 (1970); Szasz, *Justice in the Therapeutic State,* 3 Ind. Legal F. 20 (1969). *But cf.* A. Stone, *supra* note 66, at 18-19 (would allow abrogation of procedural safeguards when benefits are provided which "ameliorate human suffering").

69. *Civil Commitment, supra* note 64, at 1193.

70. *Id.* at 1194.

71. Humphrey v. Cady, 405 U.S. 504, 509 (1972).

72. 391 U.S. 145 (1968).

73. For all age groups in the states which publish data, the median length of stay for patients in state and county mental hospitals is from 4.5 to 8.6 years. The length of the stay

Justice Boyd, the sole dissenter in *Jones*, observed that "[t]hose whose liberty is restrained by walls, fences and guards have little concern about whether their freedom is restrained because of crime or mental illness."[74] Boyd also noted that people are civilly committed without the "constitutional safeguards granted to the most vicious criminals."[75] To remedy this "inherently unfair" situation, he argued that a jury trial should be provided on request in commitment proceedings.[76] Unfortunately his arguments were not heeded by the rest of the court.

Despite the similarity in consequences between criminal incarceration and civil commitment, persons who are imprisoned for crimes receive more due process protections than those who are committed in civil proceedings.[77] Long-term detention for a crime against the state is permitted only in conjunction with the most stringent constitutional protections.[78] Yet persons who are committed to state institutions in civil proceedings are not given all these protections, even though many times their behavior involves no offense against the state or any person.[79] The Baker Act has provided more of these protections than were provided in the past. But the most important right of all remains unsecured—the right to a jury trial.

The probable explanation for this differing treatment of those who are accused of crimes and those who are suspected of mental illness can be found in two legal theories—the police power of the state and parens patriae. The police power is inherent in the sovereignty of the state and includes the right of the state to protect itself from danger.[80] The problem of applying the police power in the area

---

increases with age. Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1108, 1113 n.16 (1972). By comparison, the average sentence served in Florida state prisons by inmates who were released in 1975-1976 was 2.38 years. Bureau of Planning, Research & Statistics, Florida Dep't of Offender Rehabilitation, Report, Comparison of Average Maximum Sentence and Average Time Served (Dec. 15, 1976). FLA. STAT. § 394.467(3) (1977) provides for an initial commitment not to exceed six months. FLA. STAT. § 394.467(4) (1977) provides for continuing hospitalization on a year-to-year basis.

74. 339 So. 2d at 1119.

75. *Id.*

76. *Id.*

77. 19 How. L.J. 205, 209-10 (1976). This case comment discusses O'Connor v. Donaldson, 422 U.S. 563 (1975), in which the Supreme Court held that a person may not be confined merely because he has a mental illness if he is not dangerous to society and if he can live safely outside the institution. *See* discussion note 24 *supra*.

78. 19 How. L.J. 205, 209 (1976).

79. Comment, *The Crime of Mental Illness: Extension of Criminal Procedural Safeguards to Involuntary Civil Commitment*, 66 J. CRIM. L. & CRIM. 255, 258 (1975). This author suggests that civil commitment and criminal incarceration have the same results.

80. Postel, *Civil Commitment: A Functional Analysis*, 38 BROOKLYN L. REV. 1, 28 (1971).

of civil commitment consists of defining the type of "danger" to which this broad power extends. Historically, the police power has been used to protect the health, safety, welfare, and morals of the people.[81] For example, the police power has been exercised to prevent the spread of disease by requiring vaccinations for school children and by quarantining people to prevent epidemics.[82] The only sanctions which the state can impose for failure to comply with the exercise of state power in such situations is deprivation of political or social privileges.[83] The state cannot compel a person to submit to treatment or to submit to restraint, as it can in the case of mental illness.

In civil commitment, the state employs the police power in part to protect its citizens from bodily harm.[84] While this is certainly a legitimate goal, science has not yet developed an accurate method for predicting dangerous behavior. Numerous studies have shown that psychiatrists tend to over-predict violence.[85] These exaggerated predictions have resulted in the needless commitment of undangerous people. The Mental Health Law Project suggests that rather than eliminating dangerousness as a ground for commitment, the process should be improved by "enhanc[ing] the accuracy of fact-finding and . . . limit[ing] both the scope and duration of commitment . . . ."[86] This seems both a worthwhile and humane suggestion.

In its exercise of the police power, the state may also be trying to protect citizens from harm other than bodily harm. This use of the police power is questionable. The societal interests at stake here are less important than preventing physical violence, and the prediction problem is even greater than that involved in predicting violent behavior.[87] "[I]nstruments for identifying persons who will cause mental disorders in others do not exist."[88] Despite the less important societal interests and the great difficulty of predicting such behav-

81. Peavy-Wilson Lumber Co. v. Brevard County, 31 So. 2d 483, 486 (Fla. 1947).

82. Postel, *supra* note 80, at 28.

83. *Id.* at 28-29.

84. Mental Health Law Project, *Legal Issues in State Mental Health Care: Proposals for Change—Civil Commitment*, in 2 MENTAL DISABILITY LAW REPORTER 77, 83 (1977).

85. For a summary of the studies, see *id.* at 83-84.

86. *Id.* at 84. The Mental Health Law Project suggests that the fact-finding process should be improved by requiring that only persons who have engaged in or threatened dangerous behavior be subject to commitment. The Project also suggests that past violence must have been recent and predicted violence imminent. Finally, the Project suggests that the commitment period should be strictly limited. For a detailed discussion, see *id.* at 84-86.

87. MANAGING MADNESS, *supra* note 17, at 66-67; Mental Health Law Project, *supra* note 84, at 86.

88. Mental Health Law Project, *supra* note 84, at 86.

ior, Florida does expressly allow commitment if "the person is likely to inflict emotional injury to another."[89] While this vague standard has been upheld by the Florida Supreme Court,[90] it nevertheless encompasses a very broad range of behavior and might allow unnecessary commitments.

The other legal theory invoked to justify civil commitment without the due process rights accorded the criminally accused is parens patriae. Parens patriae concepts are a legacy of the English constitutional system.[91] "[T]he term was used to refer to the King's power as guardian of persons under legal disabilities to act for themselves."[92] Today the parens patriae concept has come to mean that the state may exercise control over those persons "who are incapable of caring for their own interest,"[93] or who may attempt to commit suicide or inflict harm on themselves.[94]

The basis of the parens patriae theory is that the state is acting to help the mentally ill person, not to punish him. Therefore, all the rigorous safeguards of criminal procedure are supposedly unnecessary.[95] This paternalistic reasoning is clearly prejudgmental.[96] The person has not yet been found to meet the commitment criteria, but already the state insists it must "help" him. Undoubtedly, there are many instances in which the state should intervene on behalf of an individual who is simply unable to help himself. To a certain extent, both paternalism and prejudgment may indeed be necessary. But such benign intervention would seem far more just and far more legitimate if at least a fair representation of a cross section of the community were involved.

In *In re Ballay*,[97] the Court of Appeals for the District of Columbia Circuit discussed the doctrine of parens patriae when determining whether the proof of mental illness necessary for involuntary civil commitment must be beyond a reasonable doubt (as in criminal

---

89. *In re* Beverly, 342 So. 2d 481, 487 (Fla. 1977).

90. *Id.*

91. Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972).

92. *Id.* (footnote omitted).

93. Lynch v. Baxley, 386 F. Supp. 378, 391 (M.D. Ala. 1974).

94. Mental Health Law Project, *supra* note 84, at 87.

95. In Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), certain procedures for involuntary commitment were held constitutionally defective. The court traced the history of the parens patriae theory relating to commitment because of mental illness and held that regardless of this theory, procedural due process requirements must be met. *See also* O'Connor v. Donaldson, 422 U.S. 563 (1975), in which the parens patriae power was not sufficient to allow a state to confine an undangerous person who was not receiving treatment.

96. *See Involuntary Hospitalization of the Mentally Ill Under Florida's Baker Act: Procedural Due Process and the Role of the Attorney*, *supra* note 65, at 516.

97. 482 F.2d 648 (D.C. Cir. 1973).

proceedings) or merely a preponderance of the evidence (as in civil proceedings). The court held that the proper standard was proof beyond a reasonable doubt and based its decision on the great restriction of liberty involved in a civil commitment.[98] Despite the state's intent to provide treatment for the individual, the court found that a restriction of liberty was still punitive in nature:

> Measures which subject individuals to substantial and involuntary deprivation of their liberty are essentially punitive in character, and this reality is not altered by the facts that the motivations that prompt incarceration are to provide therapy or otherwise contribute to the person's well-being or reform. As such, these measures must be closely scrutinized to assure that power is being applied consistently with those *values of the community* that justify interferences with liberty for only the most clear and compelling reasons.[99]

The jury is the traditional vehicle for expressing community values.

The same prediction problems encountered with the police power are also present with parens patriae. Studies show that the need for hospitalization due to inability to care for one's self is overpredicted.[100] Even if the person is unable to care for himself, less drastic measures than commitment may be appropriate.[101] When the parens patriae power is used to prevent an individual from committing suicide or inflicting bodily harm on himself, the prediction problem is again apparent. "The literature on predicting suicide shows that mental health professionals will predict self-destruction several times more frequently than it actually occurs."[102]

Because of these predictability problems and the drastic curtailment of liberty involved in commitment, the state's police power and parens patriae power should be used only when absolutely necessary. In order to determine if state intervention is necessary, a jury should be summoned to weigh and evaluate the many factors in-

---

98. *Id.* at 650.

99. *Id.* at 667 (emphasis added).

100. National Institute of Mental Health, U.S. Dep't of HEW, Draft, Mental Health Legislative Guide, Mental Health Law Project 34D. The Guide would require that before the state can intervene there must be a serious disorder *and* a present course of conduct that is causing serious harm.

101. *See* discussion of the doctrine of the least restrictive alternative in text accompanying notes 121-27 *infra*. While the resident patient population in the nation's state mental hospitals has decreased in recent years (from 559,000 in 1955 to 308,000 in 1971), the admission and readmission rate has risen (836,000 people treated in 1971). A steadily increasing number of people are going through the state mental hospitals. MANAGING MADNESS, *supra* note 17, at 3.

102. Mental Health Law Project, *supra* note 84, at 87.

volved in the commitment process. To be sure, trained professional judgment is essential, but community values should also be considered in determining if the drastic measure of commitment is really needed.

Personal liberty is not all that is at stake in a civil commitment proceeding. Basic civil rights may also be forfeited.[103] In some states, commitment is an automatic adjudication of incompetency. An adjudication of incompetency entails the loss of some legal rights. In Florida, however, the issue of competency is separate from the issue of whether admission to a residential care facility is appropriate.[104] But section 394.467(3) of the Florida Statutes does provide that a person may be adjudicated incompetent at the same hearing at which he is committed.[105] If this nonjury procedure were followed, a person could not only be committed and suffer a loss of liberty, but also could be adjudicated incompetent and suffer an additional loss of legal rights.[106] In theory, though, a person who is civilly committed in Florida may still exercise all his legal rights unless he has been officially adjudicated incompetent.

Equally drastic is the social stigma attached to a person who has been involuntarily committed.[107] The *Ballay* court concluded that the social stigma surrounding mental illness may be even greater

103. *See Civil Commitment, supra* note 64, at 1198.

104. FLA. STAT. § 393.12 (1977). Though § 393.12 specifically refers to mental retardation, it would probably apply by analogy to mental disability as well.

105. (1977).

106. See FLA. STAT. § 744.331 (1977) for the proceedings necessary for an adjudication of incompetency and *id.* § 744.464 for the proceedings necessary for a restoration of competency. Incompetence in Florida is present when a person "is incapable of caring for himself or managing his property or is likely to dissipate his property or inflict harm on himself or others . . . ." *Id.* § 744.331(1). The standards for incompetency and the standards for involuntary commitment are quite similar, except that a person may be adjudged incompetent if he is incapable of managing his property.

An adjudication of incompetency in Florida is strong evidence, though not sufficient for a directed verdict, that the person lacked testamentary capacity. "Any person 18 or more years of age who is of *sound mind* may make a will." *id.* § 732.501 (emphasis added). Nor may a person who has been adjudged incompetent in Florida practice certain professions. *Id.* § 459.14(1)(i) (osteopathy); *id.* § 464.21(2)(a) (nursing); *id.* § 465.101(1)(d)(3) (pharmacy); *id.* § 466.24(1) (dentistry). An incompetent may not vote, FLA. CONST. art. VI, § 4; FLA. STAT. § 97.041(3)(a) (1977), serve on a jury, *id.* §§ 40.01(3), .07(3), or obtain a driver's license, *id.* §§ 322.05(5), .27(1)(c).

107. *Civil Liberties and the Mentally Ill, supra* note 68, at 407. Szasz observes that the penalty for mental illness is "social ostracism, loss of employment or friends, personal enmities." *See also* Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972); A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 646 (1974); B. ENNIS, PRISONERS OF PSYCHIATRY: MENTAL PATIENTS, PSYCHIATRISTS AND THE LAW 145-76 (1972); MANAGING MADNESS, *supra* note 17, at 10; Sarkin & Mancuso, *Failure of a Moral Enterprise: Attitudes of the Public Toward Mental Illness,* 35 J. CONSULTING & CLINICAL PSYCH. 159 (1970).

than that surrounding the commission of a crime.[108] The mental patient may be treated with "distrust and even loathing; he may be socially ostracized and victimized by employment and educational discrimination."[109] Despite society's supposed enlightenment regarding mental illness, "sanctioned incarceration" and separation from society are usually taken to mean that the person is bad or evil.[110] For example, "[l]aw enforcement officials might view a prior commitment as a reason for viewing otherwise innocuous behavior with suspicion . . . ."[111] In addition, the individual who is committed may begin to feel degraded and demeaned.[112] Institutionalization may cause him to lose self-confidence and self-esteem.[113]

The ever-present possibility of wrongful commitment is another compelling reason to grant a jury trial on request. In *Quesnell v. State*, the Washington Supreme Court observed that "the jury plays an essential role in guarding against wrongful commitment . . . ."[114] Without the procedural safeguard of a jury trial, sane people may be "railroaded" into institutions.[115] However rare wrongful commitment may be, the jury "is an additional buffer against wrongful deprivation of liberty."[116] Institutionalization can have devastating side effects on those who are not in need of treatment.[117] The assurance of a jury trial as a prerequisite to civil commitment would help avoid the need for dealing with such side effects.

---

108. 482 F.2d at 668.

109. *Civil Commitment*, *supra* note 64, at 1200.

110. Note, *Civil Commitment of the Mentally Ill*, 30 U. PITT. L. REV. 752, 768 (1969). *See also* sources cited note 107 *supra*.

111. *Civil Commitment*, *supra* note 64, at 1199.

112. Comment, *Due Process for All—Constitutional Standards for Involuntary Commitment and Release*, 34 U. CHI. L. REV. 633, 637 (1967). This author notes that involuntary commitment can produce disastrous effects in the patient. *See also In re* Ballay, 482 F.2d 648, 669 (D.C. Cir. 1973); B. ENNIS, PRISONERS OF PSYCHIATRY: MENTAL PATIENTS, PSYCHIATRISTS AND THE LAW 215 (1972) (stating that many persons committed to mental hospitals actually get worse); MANAGING MADNESS, *supra* note 17, at 10 (noting that being labelled mentally ill can set up a self-fulfilling prophecy which increases the chance of mental illness).

For an exposé on the demeaning and degrading conditions existing at Florida State Hospital at Chattahoochee where Ms. Jones was confined, see Tallahassee Democrat, March 19, 1978, § A, at 1, col. 3; *id.* at col. 4; *id.*, March 20, 1978, § A, at 1, col. 1; *id.* at col. 2; *id.*, March 21, 1978, § A, at 1, col. 4.

113. *Civil Commitment*, *supra* note 64, at 1200.

114. 517 P.2d 568, 579 (Wash. 1974). The *Quesnell* court held that where the right to a jury trial in commitment proceedings is guaranteed by the state, the jury trial cannot be waived without the consent of the person charged.

115. See 145 A.L.R. 711 (1943) for a collection of "railroad" cases.

116. 517 P.2d at 579 n.22.

117. *In re* Ballay, 482 F.2d at 667. Justice Boyd, dissenting in *Jones*, stated that "[i]t is well recognized that unsupported allegations of insanity can have a detrimental effect upon the personal lives and careers of people. It should not be left to the discretion of a single judge to make determinations of such allegations." 339 So. 2d at 1119.

The jury plays an important role in making sure that medical judgments are not the only criteria used to determine the necessity of commitment.[118] Commitment is very often a social problem rather than a medical one, as *Jones* illustrates all too well. A jury representing a cross section of the community is best qualified to view medical opinions in the light of a patient's social situation.[119] Commitment should not be based solely on whether a mental illness is present, but on whether the mental illness is severe enough to require the state to intervene. This question could best be answered by a jury.[120]

Several alternatives short of commitment may be available to the court if the jury decides a person's condition does not warrant the drastic action of commitment. Indeed, the use of the "least restrictive alternative" has actually been required in some circumstances. The leading case expounding the concept of the least restrictive alternative is *Shelton v. Tucker.*[121] In *Shelton,* the United States Supreme Court struck a statute which required every teacher to file an affidavit listing every organization to which he had belonged within the past five years. The Court stated that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[122]

Though *Shelton* dealt with the right of free association guaranteed by the due process clause of the fourteenth amendment, the *Shelton* rationale has been applied in commitment cases. For example, in *Covington v. Harris* the Court of Appeals for the District of Columbia Circuit discussed a civilly committed person's habeas corpus petition and said, "the principle of the least restrictive alternative consistent with the legitimate purposes of a commitment inheres in the very nature of civil commitment, which entails an extraordinary deprivation of liberty . . . ."[123] The rationale for the least restrictive alternative was also applied in *Lessard v. Schmidt,* in which the District Court for the Eastern District of Wisconsin said that full-time involuntary hospitalization should be used only as a last resort and that "persons suffering from the condition of

118. *Civil Commitment, supra* note 64, at 1293.

119. Ross, *Commitment of the Mentally Ill: Problems of Law and Policy,* 57 MICH. L. REV. 945, 963, 970 (1959). This author suggests that a jury trial be granted on request. *See also* Comment, *The New Mental Health Codes: Safeguards in Compulsory Commitment and Release,* 61 NW. U.L. REV. 977, 1000-02 (1967).

120. BRAKEL & ROCK, *supra* note 6, at 54.

121. 364 U.S. 479 (1960).

122. *Id.* at 488 (footnote omitted).

123. 419 F.2d 617, 623 (D.C. Cir. 1969).

being mentally ill, but who are not alleged to have committed any crime, cannot be totally deprived of their liberty if there are less drastic means for achieving the same basic goal . . . ."[124]

A less restrictive alternative might involve allowing the patient to remain in the community and live at home while receiving appropriate treatment on an out-patient basis. For a person living alone, a visiting nurse or other home service may be all that is necessary.[125] There is also the possibility of day hospital care or night hospital care, as well as foster homes and halfway homes.[126] Such community mental health programs are often very effective and can avoid the demoralizing effects of institutionalization.[127]

VI. OBJECTIONS TO THE JURY TRIAL

Ironically, a major objection to the use of jury trials in civil commitment proceedings is that the trial will have a traumatic effect on the alleged mentally ill person.[128] This objection to the use of jury

---

124. 349 F. Supp. 1078, 1096 (E.D. Wis. 1972). *See also* O'Connor v. Donaldson, 422 U.S. 563 (1975); Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966); Dixon v. Weinburger, 405 F. Supp. 974 (D.D.C. 1975); *In re* Jones, 338 F. Supp. 428 (D.D.C. 1975). *But cf.* State v. Sanchez, 457 P.2d 370, 373 (N.M. 1969), in which the New Mexico Supreme Court held that in the absence of a provision in the statute it is the duty of the court to explore alternatives in lieu of institutionalization, the court will not do so.

In Florida, *see In re* Smith, 342 So. 2d 491 (Fla. 1977), in which the patient was found mentally ill, but the supreme court remanded for a consideration of alternatives less restrictive than commitment. *But cf.* Gorchov v. State, 331 So. 2d 346 (Fla. 3d Dist. Ct. App. 1976) (rejected argument that involuntary hospitalization statute, FLA. STAT. § 394.467 [1975], is overly broad because it does not provide some relief short of confinement); Department of Health & Rehab. Servs. v. Owen, 305 So. 2d 314 (Fla. 1st Dist. Ct. App. 1974) (held that trial court does not have authority to direct department to provide treatment or supervise treatment and placement of an individual). The *Gorchov* court stated that lack of provision for alternatives was an argument for legislative rather than judicial action.

For a discussion of alternatives to commitment and constitutional imperatives of the least restrictive alternative, see Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107 (1972).

125. Chambers, *supra* note 124, at 1118.

126. *Id.*

127. See Lessard v. Schmidt, 349 F. Supp. at 1096, for a list of alternatives which that court found feasible. The number of involuntary commitments in Florida has risen in the past three years. In 1974-1975 and 1975-1976, there were 3,174 involuntary commitments in Florida. DIVISION OF MENTAL HEALTH, FLORIDA DEP'T OF HEALTH & REHABILITATIVE SERVICES, STATISTICAL REPORT OF HOSPITALS 15 (1975); DIVISION OF MENTAL HEALTH, FLORIDA DEP'T OF HEALTH & REHABILITATIVE SERVICES, STATISTICAL REPORT OF HOSPITALS 15 (1976). In 1976-1977, this number rose to 3,560. DIVISION OF MENTAL HEALTH, FLORIDA DEP'T OF HEALTH & REHABILITATIVE SERVICES, STATISTICAL REPORT ON HOSPITALS 15 (1977). (For purposes of comparison, as of February 6, 1978, there were 19,266 inmates in Florida's state prisons. Florida Dep't of Offender Rehabilitation, Inmate Population Data Report to Governor Reubin O'D. Askew [Feb. 6, 1978]). The steady increase in involuntary commitments illustrates the need for some alternatives to involuntary hospitalization.

128. Weihofen, *Hospitalizing the Mentally Ill*, 50 MICH. L. REV. 837, 848 (1952). Weihofen

trials assumes its own conclusion. The person has been deemed mentally ill before the hearing has begun—before any evidence has been presented. The argument presupposes that person will ultimately be committed.[129] As the *Ballay* court suggested, perception of the civil proceeding "as identical to a criminal trial is indeed unfortunate . . . ."[130] The purpose of a jury trial is to make sure the "accused" receives the opportunity to be heard by an unbiased group of his peers.[131]

Concern for the individual's family is another argument advanced against the use of jury trials in civil commitment proceedings. It is contended that the person's relatives will be reluctant to expose their problems before the jury—the family will feel ashamed and disgraced.[132] The purpose of a commitment proceeding is to determine if commitment is necessary in a certain individual's case. If this purpose can be accomplished more fairly through the use of a jury, the individual's relatives should not be permitted to stand in the way. The law's primary concern should be the person who faces the drastic consequences of commitment. Perhaps if the family knew the case could be tried before a jury, they would seek alternatives to commitment more actively.

"Public" commitment is another objection raised against the use of jury trials in civil commitment proceedings. It is hypothesized that when the individual recovers and returns to society, he will be subjected to much emotional stress because he was "publicly" committed.[133] This criticism, aside from again presupposing that the person will be committed, is inconsequential in view of the social stigma attached to all persons who are committed to a mental institution, regardless of whether the commitment is by a judge or by a jury. The jury should be allowed to play its proper role as interpreter of community values in the commitment proceeding, as it does in criminal trials.

Yet another common objection to the use of jury trials in civil commitment proceedings is that a lay jury is not qualified to resolve the issue of mental illness.[134] This argument relates to the function

favors doing away with the jury trial in civil commitment proceedings. It is worth noting that jury trials may have a traumatic effect on sane persons as well.

129. *In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973).

130. *Id.* at 664.

131. FLA. STAT. § 394.467(3)(a) (1977) provides that the court may serve notice on the state attorney. His appearance emphasizes the adversary nature of the proceedings, regardless of the presence or absence of a jury.

132. Weihofen, *supra* note 128, at 848-49.

133. *Id.* at 849.

134. *Id.*

of the jury itself. The jury's function in commitment proceedings is not to diagnose mental illness but rather to evaluate the diagnosis of medical experts together with all the other facts and then decide if commitment is necessary. The jurors are "not required to make a medical diagnosis of the alleged mentally ill person. They are required only to decide, on the basis of expert medical testimony, whether the condition of the proposed patient is such that his commitment is justified . . . ."[135] Juries routinely make difficult decisions. As Justice Boyd pointed out in his dissent in *In re Jones,* "[w]henever insanity is used as a defense for crime, juries evaluate and determine the question [of insanity] . . . ."[136] Why is it appropriate for a jury to make such a determination in a criminal proceeding but not in a civil proceeding?

The real reason jury trials are discouraged in civil commitment proceedings may not be concern so much for the individual, or for his family, or about the qualifications of a lay jury, but rather concern about the considerable cost of reform. Jury trials are time-consuming and expensive. The legislature may be reluctant to impose this delay and this additional expense on the public. Perhaps the *Jones* court was reluctant as well. But commitment is a legal procedure. As such, it should include the same safeguards as other legal procedures which involve the same consequences. Additionally, "[t]he notion remains firm in English and American law that juries are the best instrument for ascertaining matters when personal liberty is at stake . . . ."[137]

VII. Recommendations and Conclusions

The severe consequences of involuntary commitment—deprivation of liberty, loss of civil rights, social stigma, loss of self-esteem, possible wrongful commitment—require community participation in the commitment decision. A jury trial should be granted when requested.[138] If community values had been applied in *Jones,* per-

135. Quesnell v. State, 517 P.2d 568, 579 (Wash. 1974).

136. 339 So. 2d 1117, 1119 (Fla. 1976), *cert. denied,* 97 S. Ct. 1661 (1977).

137. *Involuntary Hospitalization of the Mentally Ill Under Florida's Baker Act, supra* note 65, at 516.

138. In the District of Columbia a jury trial may be requested if the Commission on Mental Health recommends commitment. From June 1967 to June 1968, the Commission heard 848 cases and recommended commitment in 673 cases. One hundred thirty-one of the 673 patients requested jury trials. Eighty-one of these never went to trial; thirty-nine withdrew their requests; four were released as improved. In 38 cases, the Commission reversed itself and released the individual. *Civil Commitment, supra* note 58, at 1293 n.168. These statistics lead to the inference that jury trials, or at least the opportunity to demand them, prevent some unnecessary commitments.

haps another, less drastic alternative could have been found which would have proved helpful to an elderly woman no one seemed to want. The Florida Supreme Court had an opportunity in *Jones* to correct this deficiency in the Baker Act. That opportunity was missed. Now it is up to the legislature to incorporate a provision for jury trial upon request into section 394.467 of the Florida Statutes, so that appropriate procedural safeguards will be available to those individuals such as Mabel Jones who confront the severe consequences of civil commitment.[139]

139. For examples of statutes which grant jury trials on request, see sources cited notes 59-60, 65 *supra;* Mental Health Law Project, *supra* note 84, at 131 (Model Statute).