Washington Law Review

Volume 49
Number 2 *Symposium: Recent Washington Legislation*

2-1-1974

Progress in Involuntary Commitment

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COMMENT

PROGRESS IN INVOLUNTARY COMMITMENT

> The mental condition of one whose mind is so deranged as to require imprisonment for his own and others good is indeed pitiable. But 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.[1]

The past decade has witnessed a gradual awakening to the magnitude of the "mental illness"[2] problem.[3] The judiciary and various state

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1. 5 J. WIGMORE, EVIDENCE § 1400, at 146 (3d ed. 1940), *quoted* in *In re* Ballay, 482 F.2d 648, 664 (D.C. Cir. 1973).

2. One commentator recently has proposed eliminating the terms "mental illness" and "mental disease" from legal tests in order to "rationalize psychiatric-legal proceedings and to reduce the confusion in communications and roles among psychiatrists, lawyers, judges, and clients." Hardisty, *Mental Illness: A Legal Fiction,* 48 WASH. L. REV. 735, 736 (1973). Professor Hardisty criticizes the use of the terms "mental illness" and "mental disease" because the terms no longer have any generally accepted medical meaning and because they lead to "an inappropriate analogy to physical disease." *Id.* at 737 n.11. Professor Hardisty states:

> In fact, psychiatrists generally have concluded that such phrases as "mental illness" are relatively useless as medical terms. Psychiatrists still employ the words "mental illness" but do so not to describe a medical condition but rather to achieve social purposes.
>
> . . . People employ "mental illness" for its rhetorical power. They use it in achieving social objectives such as suggesting dangerousness and placing the labeled person in the same role as the *physically* ill.

Id. at 737–38 (emphasis in original) (footnotes omitted). *See generally* T. SZASZ, THE MYTH OF MENTAL ILLNESS (1961).

This comment will avoid the use of both terms. The phrase mental abnormality has been inserted as an alternative. In a similar vein, this comment substitutes the phrase "involuntary commitment" for the more commonly used "civil commitment" in an attempt to avoid the implications attached to the use of the label "civil." *See* notes 74–76 and accompanying text *infra.*

3. One out of every 12 individuals will be subjected to institutional care at some time during his life. An even larger percentage will require some mental care outside the institutional setting. *Hearings on the Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 91st Cong., 1st & 2d Sess., 1–3 (1969–70).

> Analyzed somewhat differently, one in three American families is likely to be disrupted by the commitment of one of its members. The absolute figures are equally striking. In 1966 there were approximately 580,000 resident patients in public and private mental hospitals and an additional 657,000 receiving care through outpatient clinics. Nearly 922,000 were admitted to the inpatient clinics and nearly 630,000 to the outpatient, a substantial majority of which were involuntary. This approximates if not exceeds the number of criminals sentenced and institutionalized in the United States during the same period.

Ballay, 482 F.2d at 654 (footnotes omitted).

legislatures have evidenced increasing concern with the threat that an involuntary commitment poses to the individual's fundamental rights. This awakening has assumed the posture of revolutionary change within the past year, largely due to the separate actions of three courts and the Washington State Legislature.

The most sweeping judicial change to date came late in 1972. In *Lessard v. Schmidt*[4] a three-judge federal district court panel held that Wisconsin's commitment procedures violate the fourteenth amendment's due process clause. The *Lessard* court recognized that: "The power of the state to deprive a person of the fundamental liberty to go unimpeded about his or her affairs must rest on a consideration that society has a compelling interest in such deprivation."[5] The court thus posited a substantive limitation on involuntary commitment: state action is justified only where considerations of public health, welfare or safety outweigh an individual's fundamental right to liberty. Even within this narrow area of legitimate state action, the massive side effects which attend commitment mandate adherence to strict procedural safeguards.[6] Under *Lessard* these procedural safeguards include: notice of the charges and of a right to jury trial, a timely hearing, representation by adversary counsel, the exclusion of hearsay evidence, a right to cross examination, a right to invoke the privilege against self-incrimination and a requirement that the state prove beyond a reasonable doubt that the defendant is *both* mentally abnormal *and* dangerous. Further, the court ruled that even if all the required proce-

4. 349 F. Supp. 1078 (E.D. Wis. 1972). Judge Sprecher's *Lessard* opinion seems destined to be a classic. The lengthy opinion traverses virtually the entire spectrum of issues (with the notable exception of a right to treatment) in the involuntary commitment area. The opinion's treatment of the existing case law and legal commentary is extremely thorough. Many of the textual and footnote references found in this comment are quoted and discussed in *Lessard*. To avoid undue repetition, source materials which were cited or quoted in *Lessard* will generally not be so indicated in this comment.

5. *Id.* at 1084.

6. *Id.* at 1094. The court there noted the extensive deprivations occasioned by involuntary commitment and commented:

> It is certainly true that many people, maybe most, could benefit from some sort of treatment at different periods in their lives. However, it is not difficult to see that the rational choice in many instances would be to forego treatment, particularly if it carries with it the stigma of incarceration in a mental institution, with the difficulties of obtaining release, the curtailments of many rights, the interruption of job and family life, and the difficulties of attempting to obtain a job, driver's license, etc., upon release from the hospital.

dural safeguards were satisfied, commitment should be ordered only after a full consideration of other alternatives.[7]

The *Lessard* court required that proof of both mental abnormality and dangerousness be established beyond a reasonable doubt.[8] A recent District of Columbia Circuit Court of Appeals decision, *In re Ballay*,[9] is in accord. The *Ballay* court, in considering whether the trial court's instruction that "a preponderance of the evidence" was the appropriate burden of proof, observed that given "the immense individual interests involved, it is questionable whether a rather significant margin of error should be tolerated."[10] After weighing the relevant state interests in an involuntary commitment against the accused's interest in liberty, and considering the inadequacy of current treatment programs and the lingering societal stigma attached to commitment, the *Ballay* court aligned itself with *Lessard*, holding that "proof of mental illness and dangerousness in involuntary civil commitment proceedings must be beyond a reasonable doubt."[11]

Neither *Ballay* nor *Lessard* considered the issue of a post-commitment "right to treatment," constitutional or otherwise. In *Wyatt v. Stickney*[12] a federal district court in Alabama recognized a constitutional right to treatment for the first time. The court stated:[13]

> There can be no legal (or moral) justification for the State of Alabama's failing to afford treatment—and adequate treatment from a medical standpoint—to the several thousand patients who have been civilly committed . . . for treatment purposes. To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.

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7. As possible alternatives the court suggested voluntary or court ordered outpatient treatment, day treatment in a hospital, night treatment in a hospital, placement in the custody of a friend or relative, placement in a nursing home, referral to a community mental health clinic and home health aide services. *Id.* at 1096.

8. *Id.* at 1095. *See* note 119 *infra*, discussing *In re* Levias, 83 Wn. 2d 253, ____ P.2d ____ (1973).

9. 482 F.2d 648 (D.C. Cir. 1973).

10. *Id.* at 650.

11. *Id.*

12. 344 F. Supp. 373 (M.D. Ala. 1972), *enforcing* 325 F. Supp. 781 (M.D. Ala. 1971) (Plaintiffs have a constitutional right to treatment). *Wyatt* has been consolidated for appeal with Burnham v. Dept. of Public Health, 349 F. Supp. 1335 (N.D. Ga. 1972) (No constitutional right to treatment), *appeal docketed*, No. 72-3110. 5th Cir., October 4, 1972. For a detailed discussion of the case and the constitutional right to treatment, see Comment, *Wyatt v. Stickney and the Right of Civilly Committed Mental Patients to Adequate Treatment*, 86 HARV. L. REV. 1282 (1973).

13. 325 F. Supp. at 785.

The *Wyatt* court went beyond acknowledgment of the existence of a right to treatment; the court established specific standards as constitutional minima,[14] and retained jurisdiction to assure Alabama's compliance.

Against this background of increased judicial scrutiny, the Washington State Legislature overhauled Washington's involuntary commitment procedures early in 1973. The new Act,[15] which is clearly the most progressive state enactment to date, could serve as a paradigm for future state legislation. Its passage provides a timely opportunity for a detailed analysis of the recent judicial trends in the involuntary commitment area and an evaluation of the Washington Legislature's treatment of the various constitutional problems inherent in such commitment. After briefly outlining the provisions of the new Washington Act, this comment discusses the general limitations, both substantive and procedural, which due process imposes on a commitment proceeding. Finally, there is an examination of the rights and duties which attach during the post-commitment period of detention.

I. WASHINGTON'S INVOLUNTARY COMMITMENT ACT

The objectives underlying the recent Washington commitment legislation were stated summarily by the Legislature:[16]

> 1) To end inappropriate, indefinite commitment of mentally disordered persons and to eliminate legal disabilities that arise from such commitment;
>
> 2) To provide prompt evaluation and short term treatment of persons with serious mental disorders;
>
> 3) To safeguard individual rights;

14. The defendants were enjoined from failing to fully and speedily implement all of the standards, including: a right to privacy, outside communication, compensation for labor, freedom from unnecessary restraint or medication and freedom from experimentation. Further, the court set out requirements for many institutional standards ranging from staff-patient ratio minimums to sanitation and nutrition. 344 F. Supp. at 379–86.

15. Ch. 142, [1973] Wash. Laws, 1st Ex. Sess., *amending* WASH. REV. CODE §§ 71.12.560, 71.12.570, 72.23.010, 72.23.070, 72.23.100, *adding new sections* 71.05.010–.920 (Supp. 1973). The Act took effect January 1, 1974. *Id.* § 71.05.930.

16. WASH. REV. CODE § 71.05.010.

4) To provide continuity of care for persons with serious mental disorders;

5) To encourage the full use of all existing agencies, professional personnel, and public funds to prevent duplication of services and unnecessary expenditures;

6) To encourage, whenever possible, that service be provided within the community.

Any individual may initiate the involuntary commitment process against another by making a complaint to a designated county mental health professional.[17] Section 20 directs the mental health professional to evaluate thoroughly the information received and to assess the "reliability and credibility" of the individual submitting the complaint.[18] The mental health professional may order initial detention of the individual complained against for evaluation and treatment[19] upon a finding that as a result of a mental disorder the individual is (1) dangerous ("presents a likelihood of serious harm to others or himself") or (2) "gravely disabled."[20]

"Likelihood of serious harm" is defined as a "substantial risk that physical harm will be inflicted by an individual" upon himself or others as evidenced by attempted suicide or other physical self-harm, injury to another or behavior which places another in "reasonable fear of sustaining such harm."[21] Any individual who falls within this dangerousness category can be held for a 17-day period (three days of initial evaluation and treatment plus an additional 14 days if ordered at

17. A person who provides information which initiates the involuntary commitment procedure and the actual applicant for detention, normally the mental health officer, are exempted from all criminal and civil liability "where the making and filing of such application was in good faith." *Id.* § 71.05.500.

18. *Id.* § 71.05.150(2).

19. There is only one situation in which the mental health professional is not the vehicle for detention. The Act allows a police officer to detain an individual and take him to an evaluation and treatment facility if such person "is subject to lawful arrest and as a result of mental disorder presents an imminent likelihood of serious harm to others or himself." *Id.* § 71.05.150(3).

20. *Id.* § 71.05.150(1)(a). These categories provide the only allowable bases for detention. The Act emphasizes this by providing that epileptics, mentally deficient, mentally retarded, or senile persons:

> shall not be detained for evaluation and treatment or . . . committed solely by reason of that condition unless such condition causes a person to be gravely disabled or constitutes a likelihood of serious harm to others.

Id. § 71.05.040.

21. *Id.* § 71.05.020(3).

a probable cause hearing).[22] However, if the individual is dangerous only to himself and not to others, he must be released at the end of this 17-day period, because further detention can be ordered only if the individual is dangerous to others.[23]

Dangerousness towards others is divided into two categories. For the purposes of imposing an additional 90 days of detention (beyond the initial 17-day period), dangerousness towards others can be established by showing at a full hearing that *either* the individual was *initially taken into custody* as a result of conduct in which he attempted to inflict or inflicted physical harm upon another,[24] *or* that the individual has evidenced such conduct *after being taken into custody*.[25] However, for the purposes of imposing any detention beyond this 107-day period (17 plus 90 days), dangerousness towards other can be established *only* by relying upon conduct occurring *after* the person is taken into custody.[26] This added period of detention cannot exceed an additional 180 days; however, 180-day periods of detention can be renewed indefinitely provided a full hearing is held prior to each renewal.[27]

The end result of this new statutory "dangerousness" scheme is as follows: A person who is dangerous only to himself can be held a maximum of 17 days; a person who was initially apprehended because of dangerous conduct directed towards others but who has not evidenced such conduct while in detention can be held a maximum of 107 days; a person who has evidenced dangerous conduct towards others while in detention can be held for 107 days plus additional six-month periods, provided there is a full hearing prior to each six-month extension.

The mental health professional may also order evaluation and treatment of "gravely disabled" persons. Gravely disabled is defined as

22. The initial evaluation and treatment period cannot exceed 72 hours. *Id.* § 71.05.200(1). After a probable cause hearing the maximum judicial commitment allowable is 14 days. *Id.* § 71.05.230.
23. *Id.* § 71.05.280.
24. *Id.* §§ 71.05.280, 71.05.320(1).
25. *Id.* §§ 71.05.280, 71.05.320(1).
26. *Id.* § 71.05.320(2). This requirement poses an interesting dilemma. Treatment may well include the use of drugs to calm the patient and deter him from dangerous acts towards others. In order to continue detention beyond one hundred and seven days, hospital staff may be forced to discontinue treatment at some point to allow the violent action that can justify further detention. Query whether this would violate the mandate that a patient receive "adequate care and individualized treatment." *Id.* § 71.05.360(2).
27. *Id.* § 71.05.320(2).

a condition in which the individual "as a result of a mental disorder is in danger of serious physical harm resulting from a failure to provide for his essential human needs."[28] As in the case of individuals who are dangerous only to themselves, detention of one who is gravely disabled cannot exceed 17 days.[29]

The Act imposes a detailed set of procedural safeguards at each stage of confinement. Initial detention for evaluation and treatment is valid only for 72 hours, at which time the individual must either be released or afforded a probable cause hearing,[30] with a wide range of due process protections. Sections 25 and 30 set out these procedural rights which include, in addition to written and oral notice of the nature of the hearing, the following rights: to communicate with an attorney immediately upon detention, to be represented by counsel at the hearing, to remain silent, to present evidence and to cross-examine adverse witnesses, to have the hearing governed by the rules of evidence and to view and copy all petitions and reports in the court file.[31] The Act also stipulates that the detainee may refuse all but life-saving medication beginning 24 hours prior to any judicial proceeding.[32] At the conclusion of the probable cause hearing, the court may order additional detention for 14 days of treatment if the individual meets the substantive statutory criteria for detention.[33]

If the treatment facility seeks a 90-day commitment beyond this 14-day period, the detainee must receive a full hearing with all the procedural protections of the probable cause hearing. In addition to the more limited statutory criteria for detention,[34] the detainee

28. *Id.* § 71.05.020(1). The serious constitutional questions raised by this category are discussed in notes 70 & 71 and accompanying text *infra*.

29. *See* note 22 *supra*.

30. WASH. REV. CODE §§ 71.05.180, 71.05.200(1)(a).

31. *Id.* §§ 71.05.200, 71.05.250.

32. *Id.* § 71.05.210. This adheres to the stipulation in *Lessard* that an individual "can have no meaningful opportunity to be heard" if incapacitated by medication. 349 F. Supp. at 1092. A recent Washington State Court of Appeals case, State v. Maryott, 6 Wn. App. 97, 492 P.2d 239 (1971), applied similar reasoning in a criminal setting. The court held that the state could not over the defendant's objection "administer drugs . . . at the time of trial." *Id.* at 97, 492 P.2d at 240. The defendant has a cognizable due process right to the unfettered use of his mental, as well as physical, faculties.

33. To be held for this initial 14-day period, the individual, as a result of mental disorder, must be either dangerous to himself, dangerous to others, or gravely disabled. *See* notes 20–29 and accompanying text *supra*.

34. Only dangerousness toward others is sufficient. *See* notes 24–26 and accompanying text *supra*.

must be accorded the added procedural protections of a right to jury trial[35] and a more stringent burden of proof to be met by the state.[36] Additional commitment for 180 days is allowed only if the detainee is afforded another full hearing, accompanied by the procedural safeguards enumerated above and an even narrower statutory criterion for commitment.[37] Thereafter, another full judicial hearing must be accorded each time the state petitions for an additional six-month commitment.[38]

Prior to every involuntary commitment order, the court is required to consider whether there are "less restrictive alternatives to detention in the best interest of such person or others."[39] If no viable alternative exists and commitment is ordered, the ensuing confinement gives rise to a set of post-commitment rights. Foremost among these is the right to "adequate and individualized treatment."[40] This right should assure that the detention facility will not function in a purely custodial capacity. Further, detention in jails or correctional institutions is specifically prohibited.[41]

Legislative concern for privacy and human dignity during commitment is evidenced by a "patient's bill of rights" which details those privileges guaranteed the detainee within the institutional setting.[42] Legal competency is preserved, as is the ability to contract and to transfer property.[43] All records and information are confidential, subject to release only for certain limited purposes.[44]

35. WASH. REV. CODE § 71.05.300.

36. At the probable cause hearing the burden is by "a preponderance of evidence." *Id.* § 71.05.240. All subsequent hearings require proof by "clear, cogent and convincing evidence." *Id.* at §§ 71.05.310, 71.05.320. For a discussion of the burden of proof issue, see notes 108–19 and accompanying text *infra*.

37. Only dangerousness towards others, as evidenced by actions occurring while under hospital care is sufficient. *See* note 26 and accompanying text *supra*.

38. WASH. REV. CODE § 71.05.320(2).

39. *Id.* §§ 71.05.230, .240, .290, .320. *See also* note 7 *supra* and notes 144–49 and accompanying text *infra*.

40. WASH. REV. CODE § 71.05.360(2).

41. *See id.* § 71.05.020(16) which defines those institutions which can qualify as an "evaluation and treatment facility."

42. For a listing of the specific rights retained after commitment, see text accompanying notes 153–57 *infra*.

43. WASH. REV. CODE §§ 71.05.370(8), .450.

44. *Id.* § 71.05.390. Also, § 71.05.440 specifically sanctions a civil damage action for $1000 or treble the actual damages, whichever is greater, against any individual who has "willfully and knowingly released confidential information or records concerning him in violation of . . . this chapter . . . ."

II. THE EMERGING DUE PROCESS DOCTRINES: AN END TO ARBITRARY STANDARDS

The 14th amendment decrees that no state shall "deprive any person of life, liberty, or property without due process of law."[45] While due process is clearly applicable to an involuntary commitment proceeding,[46] the absence of a definitive Supreme Court decision in this area makes it impossible to predict exactly what substantive and procedural standards will be applied. In a recent criminal insanity case, the Supreme Court, reflecting on the state's power to commit the mentally abnormal, stated: "Considering the number of persons affected [by criminal insanity commitment], it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated."[47] The lack of substantive due process limitations in the involuntary commitment area is equally surprising.

A. Substantive Due Process Limitations on Involuntary Commitment

Substantive due process is a concept most courts attempt to avoid,[48] yet substantive limitations on state power undoubtedly exist. There are protected areas in which the very existence of state regulation has been found violative of due process: A state cannot segregate the races in its public school system;[49] nor can it purport to affect a woman's

45. U.S. CONST. amend. XIV, § 1.

46. As the *Ballay* court stressed:

> There can no longer be any doubt that the nature of the interests involved when a person sought to be involuntarily committed faces an indeterminable and, consequently, potentially permanent loss of liberty and privacy accompanied by the loss of substantial civil rights (the loss of which frequently continues even if his liberty is restored) is "one within the contemplation of the liberty and property language of the Fourteenth Amendment."

482 F.2d at 655, *quoting* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (footnote omitted).

47. Jackson v. Indiana, 406 U.S. 715, 737 (1972) (footnotes omitted) (Indiana statute which sanctioned prolonged, indefinite detention of a criminal defendant judged mentally incompetent to stand trial without treatment and without invocation of civil commitment proceedings violates due process). *Ballay* quoted this language and observed: "Indeed, it may not be totally inaccurate to observe that the recent surge of interest in civil commitment may occasionally focus on procedure to the ultimate detriment of substance." 482 F.2d at 654 (footnotes omitted).

48. *See generally* P. FREUND, A. SUTHERLAND, M. HOWE, & E. BROWN, CONSTITUTIONAL LAW, CASES AND OTHER PROBLEMS 1321–39 (1967).

49. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

decision to terminate her pregnancy within the first three months.[50] Such substantive limitations evidence a "respect for those personal immunities which . . . are 'so rooted in the traditions and conscience of our people as to be ranked fundamental,' . . . or are 'implicit in the concept of ordered liberty.' "[51] The breadth of procedural protections is of no consequence when a substantive limitation prohibits state action; the state is explicitly prohibited from undertaking the forbidden action.

Two substantive rationales, police power and *parens patriae,* traditionally have been relied upon to legitimize state action leading to involuntary commitment. The original justification for detention of the mentally abnormal was the state's police power.[52] As with the handling of criminal matters, the state has a legitimate interest in protecting its citizens from persons whose mental abnormality causes violent outbursts inimical to the public welfare. But any simplistic analogy to the state's protective function vis-á-vis criminal activity ignores considerations which are unique to involuntary commitment. Commitment under the police power is based on a percentage probability of future violent action. In ordinary criminal litigation, incarceration results from a finding that the defendant committed a specific violent or antisocial act. As one commentator noted,[53] no court would base a criminal conviction upon a medical expert's prognostication that the defendant was eighty percent likely to commit a felonious act. Yet the same eighty percent prediction regarding one suffering from a severe psychosis will almost invariably lead to commitment. Absent a specific violent act by the individual, severe questions arise as to the viability of analogy to the criminal system and, therefore, to the va-

50. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

51. Rochin v. California, 342 U.S. 165, 169 (1952), *quoting* two opinions written by Mr. Justice Cardozo: Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) and Palko v. Connecticut, 302 U.S. 319, 325 (1937).

52. *See generally* AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 1–14 (S. Brakel & R. Rock ed. 1971) [hereinafter cited as AMERICAN BAR FOUNDATION STUDY] for an historical summary of commitment in this country. During the 17th and 18th centuries facilities for the specific treatment of mentally ill persons were unknown, primarily due to the dearth of medical knowledge. Hence, all involuntary commitment was practiced under the state's power to protect its citizens. *See* ch. 31, [1788] N.Y. Laws, authorizing restraint and incarceration of "furiously madd" persons.

53. *See* Note, *Civil Commitment of the Mentally Ill: Theories and Procedures,* 79 HARV. L. REV. 1288, 1290 (1966) [hereinafter cited as *Civil Commitment Theories*] for a discussion of the various bases for detention.

lidity of state action under the police power rationale. The absence of evidence of a specific dangerous act makes the inference unavoidable that the defendant is being committed because of his "status"—mentally abnormal and *potentially* dangerous. Punishment for mere status is constitutionally suspect.[54]

Following this trend of analysis, *Lessard v. Schmidt*[55] required that prediction of future dangerousness be based "upon a finding of a recent overt act, attempt, or threat to do harm to oneself or another."[56] The Washington Act invokes this same substantive limitation for any commitment *beyond* 17 days, and further requires that nay such acts, attempts or threats must have been directed toward *others*.[57] The Washington Act is thus in accord with the trend of recent judicial decisions.

The second traditional commitment justification, the *parens patriae* rationale,[58] is based upon the theory that when the individual needs care, the state is acting in his best interests by forcing hospitalization. Formulated during the late 19th century, *parens patriae* has been the single commitment theory for nonviolent, mentally disturbed persons.[59]

The recent decisions recognize the validity of state action under the *parens patriae* rationale in some circumstances.[60] The problem has been to delineate the circumstances where state paternalism is accept-

54. In Robinson v. Cal., 370 U.S. 660 (1962), the Supreme Court reversed a conviction under a California statute which made narcotic addiction a criminal offense. This was held to be cruel and unusual punishment under the 8th and 14th amendments. *See* notes 74–76 and accompanying text *infra* for a discussion of the special problems *Robinson* causes in the involuntary commitment setting.

55. 349 F. Supp. 1078 (E.D. Wis. 1972). *See* the discussion of *Lessard* in text accompanying notes 4–7 *supra*.

56. 349 F. Supp. at 1095. *See also* Cross v. Harris, 418 F.2d 1095, 1102 (D.C. Cir. 1969) (commitment under sexual psychopath law for dangerousness must be predicated upon a substantial likelihood that the defendant will inflict injury upon another).

57. WASH. REV. CODE § 71.05.280.

58. *In re* Josiah Oakes, 8 L. Rptr. 123 (Mass. 1845) is often cited as the prime illustration of the advent of *parens patriae* commitment. Oakes was detained solely on the basis of frequent hallucinations and an inability to conduct his business affairs. There was no allegation that he was violent. In recognizing the validity of his detention, the Massachusetts court noted the state's right to detain those persons who fell victim to any mental affliction. The right was grounded in "that great law of humanity, which makes it necessary to confine those whose going abroad would be dangerous to themselves or others." *Id.* at 124. Since Oakes was not prone to violence, it is obvious that dangerousness to self meant more than mere suicidal tendencies.

59. AMERICAN BAR FOUNDATION STUDY, *supra* note 52, at 1–14, 34–35.

60. *See Ballay*, 482 F.2d at 659; *Lessard*, 349 F. Supp. at 1085; *Wyatt*, 325 F. Supp. at 785.

able. Commitment has been sanctioned in instances where the individual is either suicidal or poses an active, physical danger of self-harm.[61] Of course, detention to prevent self-harm interferes with a person's right to embark on a course of action inimical to his own welfare. The American legal system presents inconsistent answers to this "individual volition versus restraint in one's own interest" dichotomy.[62] Attempted suicide is often treated as a crime,[63] yet we do not question a person's right to court death in the name of "sport." At this time there is no discernible judicial trend towards denying state action to prevent a mentally abnormal individual from committing suicide.[64]

Judicial concern increasingly has focused upon the legitimacy of *parens patriae* commitment where the individual poses no immediate physical danger to himself. Under such circumstances, commentators have argued against commitment absent a specific finding that the subject lacks the mental capacity to make his own decisions.[65] Recent cases have begun to accept these arguments. The Second Circuit Court of Appeals in *Winters v. Miller*[66] conditioned the state's right to commit and treat under the *parens patriae* doctrine upon a finding of "legal incompetency." The District of Columbia Circuit Court of

61. For example, *Lessard* approved commitment for the individual's own benefit if that individual was shown to be mentally ill and in immediate danger of perpetrating physical self-harm. 349 F. Supp. at 1093 n.24. Although the two are often lumped together, dangerousness to self is theoretically distinct from dangerousness to others, and should be recognized as justifying state action only within the realm of *parens patriae*, and not under the police power. *Ballay*, 482 F.2d at 658. *See also Civil Commitment Theories, supra* note 53, at 1293.

62. *See Civil Commitment Theories, supra* note 53, at 1294.

63. *See, e.g., In re* Estate of Brooks, 32 Ill. 2d 361, 205 N.E. 2d 435 (1965), *cited* in *Civil Commitment Theories, supra* note 53, at 1294.

64. However the new Washington Act does *limit* that right. Detention because of possible self-harm, including suicidal tendencies, is limited to a maximum of 17 days. Further detention is allowed only upon a showing of dangerousness to others. WASH. REV. CODE §§ 71.05.280–.320.

65. *See Civil Commitment Theories, supra* note 53, at 1295. *See also* Comment, *Involuntary Civil Commitment of the Nondangerous Mentally Ill: Substantive Limitations*, 18 S.D. L. REV. 407, 416–17 (1973) [hereinafter cited as *Involuntary Civil Commitment*]. Note that a finding of incompentency of this nature is more serious than the normal finding that a person is not competent to manage his property or business affairs. An incompetency determination in this instance constitutes a transfer of almost total decision making power from the individual to the state. Any such transfer should be made *only after* a determination by a separate, impartial, and adversarial proceeding. *Civil Commitment Theories, supra* note 53, at 1295

66. 446 F.2d 65 (2d Cir. 1971).

Appeals in *Lake v. Cameron*[67] recognized the issue and inquired whether there was an "implied prerequisite [to state action] that one who is found likely to injure himself also be found to lack capacity to choose . . . between the risks of freedom and the safety of hospitalization."[68] The *Lessard* court is in apparent agreement; although insisting upon a finding of actual dangerousness to self, the court suggested in dicta that, as a prerequisite to commitment, the person should also be "unable to make a decision about hospitalization because of the nature of his illness."[69] The "gravely disabled" category of the new Washington Act[70] appears to run contrary to the recent decisions on this topic because there need be no specific finding of incompetency prior to commitment.[71] Should the current judicial trend continue, the "gravely disabled" category may not survive a constitutional challenge.

B. Procedural Due Process

Customarily, due process connotes procedural safeguards.[72] In involuntary commitment proceedings, procedural due process is designed to afford the defendant a reasonable opportunity to contest the state's assertion of mental disorder. Yet, traditionally the courts have been reluctant to impose strict due process standards in this area, pri-

67. 364 F.2d 657 (D.C.Cir. 1966).

68. The court requested that the issue be discussed in the parties' supplemental briefs. *See* Brief of Appellant on rehearing en banc, Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966), *quoted* in *Involuntary Civil Commitment, supra* note 65, at 418, and in *Civil Commitment Theories, supra* note 53, at 1294.

69. 349 F. Supp. at 1094.

70. The term is defined as one who "as a result of a mental disorder is in danger of serious physical harm resulting from a failure to provide for his essential human needs." WASH. REV. CODE § 71.05.020(1). *See* text accompanying notes 28–29 *supra*. While the "gravely disabled" category can only justify detention for the first 17 days, it must be remembered that the stigma and other deprivations attending involuntary commitment are not dependent upon the *length* of incarceration, but upon the *fact* of incarceration.

71. WASH. REV. CODE § 71.05.450 states that "[c]ompetency shall not be determined or withdrawn by operation of, or under the provisions of this chapter." Further, the statute specifically protects the patient's right to manage his property and business affairs. *Id.* § 71.05.370(8). Yet the "gravely disabled" category takes an individual who is legally "competent," able to manage his business affairs, and admittedly not violent or physically dangerous to himself or others and robs him of the most fundamental "competency" without requiring any specific finding regarding his inability to choose between hospitalization and the risks of freedom.

72. "The history of liberty has largely been the history of observance of procedural safeguards." McNabb v. United States, 318 U.S. 332, 347 (1943).

marily because of a classic medical-legal conflict– the desire to help, treat, and cure on the one hand and concern with preventing unjust deprivations of liberty on the other. This conflict has perpetrated a medical-legal dichotomy wherein each profession views the other with suspicion.[73] The early solution to this conflict was to label the proceeding "civil" in nature and to hold that the procedural safeguards present in criminal proceedings do not apply.[74] Recent cases have rejected the notion that the "civil" label controls and have placed increasing emphasis on procedural due process protections,[75] reasoning that "commitment is not simply a medical decision but also a legal one involving the deprivation of an individual's liberty, a step not to be taken without all the protection afforded by due process of law."[76]

When the state acts under its police power in a commitment proceeding, modern courts have found little justification for extending less than the full scope of due process protections found in a criminal proceeding. As in the criminal process, the state is alleging that the individual is dangerous to the extent that he must not remain at large. Such a decision necessarily involves a determination, under the full panoply of due process, that "his potential for doing harm . . . is great enough to justify such a massive curtailment of liberty."[77] Moreover, the deprivations of involuntary commitment are at least equal to

73. For an excellent statistical study of this problem, see Kumasaka & Gupta, *Lawyers and Psychiatrists in the Court: Issues on Civil Commitment*, 32 MD. L. REV. 6 (1972).

74. The origin of this civil-criminal distinction appears to be dicta in Robinson v. California, *supra* note 54, wherein the court seemed to suggest that a "civil" proceeding with adequate medical treatment might justify relaxed due process standards. 370 U.S. at 666.

75. This emphasis stems from the Supreme Court's rejection of the argument that a "civil" label justified relaxed due process procedures in the juvenile delinquency area. *In re* Gault, 387 U.S. 1, 50–51 (1967). *See also In re* Winship, 397 U.S. 358, 365–66 (1970) (proof beyond a reasonable doubt is the appropriate burden in the juvenile delinquency setting; "civil" label does not control). "Thus, the relevant inquiry after *Gault* is directed to the substance and not the form of the proceedings." Comment, *Application Of The Fifth Amendment Privilege Against Self-Incrimination To The Civil Commitment Proceeding*, 1973 DUKE L.J. 729, 731. *Lessard*, relying on *Gault* and *Winship*, rejected the "civil" label as a justification for relaxed due process procedures in the involuntary commitment setting and specifically rejected the *Robinson* dicta discussed in note 74 *supra*. 349 F. Supp. at 1088.

76. Abrams, *Legislative Efforts to Reform Civil Commitment*, 1 MD. L.F. 12, 16 (1971), *quoted* in Editor's Forward, *Lawyers and Psychiatrists in the Court*, 32 MD. L. REV. 3 (1972).

77. Humphrey v. Cady, 405 U.S. 504, 508 (1972) (sex offender's claims that he was denied a jury trial, adequate hearing, and effective assistance of counsel at original commitment and renewal proceedings and that he received no treatment after detention were "substantial constitutional claims").

those attending a felony conviction. *Lessard* emphasized that: "In some respects . . . the civil deprivations which follow civil commitment *are more serious* than the deprivations which accompany a criminal conviction."[78] Also, as previously noted, involuntary commitment under the police power is always based, to a certain extent, upon a prediction of future violence.[79] The uncertainty inherent in prediction makes incarceration more tenuous than that of the criminal system.[80] Finally, a felon knows upon conviction for what approximate length of time he will be detained; a mental patient does not. This undefined, potentially permanent loss of liberty alone would seem to justify application of stringent procedural safeguards.[81]

Even when the state legitimately acts under the *parens patriae* rationale, the "paternal relationship" is not an "invitation to procedural arbitrariness."[82] All the disabilities engendered by involuntary commitment are still present—loss of liberty, indeterminate period of detention and heavy societal stigma. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands."[83] Commitment proceedings involve fundamental interests, which by their nature mandate reducing any margin of error to an absolute minimum. To ensure a minimal margin of error, recent decisions have compelled strict application of due process safeguards even under the *parens patriae* reasoning.[84]

78. 349 F. Supp. at 1089 (emphasis added).

79. *See* notes 53–57 and accompanying text *supra*.

80. In Cross v. Harris, *supra* note 56, the D.C. Circuit Court of Appeals said of police power based commitment:

> It may be that in some circumstances preventive detention is in fact permissible. If so, such detention would have to be based on a record that clearly documented a high probability of serious harm, and circumscribed by procedural protections as comprehensive as those afforded criminal suspects.

418 F.2d at 1102 (footnotes omitted).

81. The *Ballay* court stressed that the individual's interest in liberty was one of "transcending value" and was arguably greater than the interest of a criminal or juvenile delinquent due to the possibility of indefinite incarceration. 482 F.2d at 668.

82. Kent v. United States, 383 U.S. 541, 554 (1966) (juvenile court waiver of jurisdiction over 16-year-old charged with robbery and rape invalid for failure to conduct a "full investigation" to include a hearing and access by counsel to all relevant records).

83. Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (parolee has due process right to written notice and hearing prior to parole revocation), *quoted* in *Ballay*, 482 F.2d at 655.

84. *Lessard* examined the history of *parens patriae* as a justification for relaxed procedural protections and then stated:

> Even a brief examination of the effects of civil commitment upon those adjudged

While it is now certain that due process requires procedural safeguards in involuntary commitment proceedings, the exact scope of those safeguards is undefined. Because the Supreme Court has not yet passed on the issue, only speculation, albeit intelligent speculation based on recent judicial pronouncements, can be offered.

C. *Specific Procedural Safeguards: How Much Is Enough?*

1. *Notice and Opportunity to Be Heard*

Notice and an opportunity to be heard are the procedural safeguards over which there is the least debate, for they are the most basic in nature.[85] Under *Lessard* due process mandates a hearing on the necessity of detention.[86] Washington's Act is in accord; it requires a hearing for all periods of initial and continuing detention.[87] Indeed, the state's interest may justify prehearing detention only if the individual poses an active physical threat to himself or to others.[88] Any prehearing detention should not exceed the time necessary to arrange for a probable cause hearing; Washington's Act requires a probable cause hearing within 72 hours and *Lessard* required a hearing within

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mentally ill shows the importance of strict adherence to stringent procedural requirements and the necessity for narrow, precise standards.
349 F. Supp. at 1088.

85. One court, speaking of involuntary commitment, early noted: "Notice and opportunity to be heard lie at the foundation of all judicial procedures. They are fundamental principles of justice which cannot be ignored." *In re* Wellman, 3 Kan. App. 100, 103, 45 P. 726, 727 (1896).

86. 349 F. Supp. at 1091. The court noted that due process required a hearing before an individual was "deprived of any significant property interest," *citing* Boddie v. Connecticut, 401 U.S. 371, 379 (1971), and then stated: "The individual's interest in liberty is even more compelling than his interest in property rights; it follows that no significant deprivation of liberty can be justified without a prior hearing on the necessity of the detention." 349 F. Supp. at 1091.

87. WASH. REV. CODE § 71.05.240 (the individual must receive a probable cause hearing before 14 day detention); *id.* §§ 71.05.310, .320 (a full hearing before 90 day detention); *id.* (a full hearing before all subsequent 180 day commitments).

88. "We think . . . that the state may . . . have a compelling interest in emergency detention of persons who threaten violence to themselves or others for the purpose of protecting society and the individual." *Lessard*, 349 F. Supp. at 1091. Washington's statute generally stipulates the same limitation, allowing prehearing detention when the individual presents "an imminent likelihood of serious harm" to himself or others. WASH. REV. CODE §§ 71.05.150(2), .150(3). But note that if a "gravely disabled" person fails to respond when requested to come in for a 72 hour evaluation and treatment period, the mental health officer can order him taken into custody. *Id.* § 71.05.150(1)(d). This appears violative of *Lessard*'s mandate requiring an active threat of violence.

48 hours.[89] Minimal procedural requirements at the probable cause hearing include presence of the accused, representation by counsel, and adequate notice of the reasons for detention and the individual's rights.[90] Should probable cause for detention be found, under the Washington Act the patient can be held only 14 days pending a full judicial hearing with the increased procedural protections detailed below.[91] Of course, prior to any hearing due process requires that notice "must be given sufficiently in advance . . . so that a reasonable opportunity to prepare will be afforded."[92] Both *Lessard* and the Washington Act set out the elements of adequate notice with specificity.[93]

2. *Right to Counsel*

Recent judicial decisions and the Washington Act emphasize the individual's right to legal representation. The *Lessard* court held that due process required representation by adversary counsel "as soon after proceedings are instituted as is realistically feasible."[94] Appointment of a guardian ad litem was insufficient to satisfy this require-

89. WASH. REV. CODE §§ 71.05.150, .170, .180 (72 hours); 349 F. Supp. at 1091 (48 hours). The statutory limitations vary greatly. Ohio allows up to 60 days emergency detention without further legal steps for hospitalization. More commonly five to ten days are allowed. Several states do not specify a time limit, permitting detention until the medical examination is completed. *See* AMERICAN BAR FOUNDATION STUDY, *supra* note 52, at 44.

90. 349 F. Supp. at 1092. WASH. REV. CODE § 71.05.200. Both *Lessard* and the Washington Act stipulate a right to refuse all but life-saving medication within 24 hours of the hearing. *See* note 32 *supra*.

91. WASH. REV. CODE § 71.05.240. *See also Lessard*, 349 F. Supp. at 1092.

92. 349 F. Supp. at 1092, *quoting In re* Gault, 387 U.S. at 33. It is doubtful that the 24 hours allowed by Michigan and Oklahoma would be adequate. MICH. STAT. ANN. § 14.811 (Supp. 1973); OKLA. STAT. ANN. tit. 43A, § 55 (Supp. 1972–73). In 1971 notice to the patient was required in only 26 of the 42 states that have judicial hospitalization procedures. In nine states it was not necessary if notice would be "harmful" to the patient's condition. Several states provide for notice to someone acting in the patient's behalf, and the rest have no statutory provisions dealing with the subject. AMERICAN BAR FOUNDATION STUDY, *supra* note 52, at 52 & Table 3.2.

93. 349 F. Supp. at 1091. Adequate notice includes notice of date, time and place of hearing, notice of the basis for detention, right to jury trial, standard upon which detention is allowed, names of adverse witnesses and the substance of their proposed testimony. The court rejected the classical arguments that notice and hearing would be harmful to the patient, pointing out that (1) there had been no judicial finding as to the need for hospitalization, and (2) the societal stigma attaches no matter how short the actual detention. Washington's provisions are equally complete. *See* WASH. REV. CODE § 71.05.200.

94. 349 F. Supp. at 1099. Representation at the preliminary hearing, with adequate preparation time, was deemed essential.

ment.[95] However, the court stopped short of compelling counsel's presence at psychiatric interviews, indicating that written records of the interviews would be sufficient.[96] Similarly, in *Heryford v. Parker*[97] the 10th Circuit Court of Appeals stressed that an individual's liberty was at stake and placed upon the state "the inescapable duty to vouchsafe due process, and this necessarily includes the duty to see that a subject . . . is afforded the opportunity to the guiding hand of legal counsel at every step of the proceedings, unless effectively waived . . . ."[98] Realistically, it is doubtful that there could be an "effective waiver" of the right to counsel by one who is allegedly so deranged as to require involuntary commitment.[99]

Washington's Act requires that whenever a person is detained he shall be advised "[t]hat he has a right to communicate immediately with an attorney," and this right adheres both "before and at the probable cause hearing."[100] Other sections of the Act provide for access to counsel during all subsequent proceedings.[101]

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95. *Id. See generally* Gupta, *New York's Mental Health Information Service: An Experiment In Due Process,* 25 RUTGERS L. REV. 405, 438 (1971).

96. We are unable at this point, however, to be so certain that assistance of counsel will prove materially beneficial at the psychiatric interview as to be able to determine that the right to effective aid of counsel outweighs the interests of the state in meaningful consultation.

349 F. Supp. at 1100.

97. 396 F.2d 393 (10th Cir. 1968) (denial of due process if alleged mentally deficient person is not afforded legal counsel at the hearing which resulted in commitment; unclear if a guardian ad litem is sufficient or if adversary counsel is required).

98. *Id.* at 396.

99. One commentator has perceptively analyzed the possibility of an effective waiver by the subject of an involuntary commitment proceeding:

Intelligent waiver by a criminal defendant is acceptable, but when the defendant is by hypothesis a person whom the state claims to be mentally ill, the likelihood that any waiver will be found 'intelligent' is probably so small that an inquiry into the question would be a waste of time.

Civil Commitment Theories, supra note 53, at 1292.

100. WASH. REV. CODE § 71.05.200. *See also id.* § 71.05.460. The statute does not dictate expressly, as did *Lessard,* that a guardian ad litem cannot serve as the attorney. However, after this comment went to print, the Washington State Supreme Court held in *In re* Quesnell, 83 Wn. 2d 224, __P.2d __ (1973), that an attorney can serve as both guardian ad litem and adversary counsel. The Washington court reached this result by redefining the role of the guardian ad litem in involuntary commitment proceedings, specifying that the guardian ad litem must serve:

for the benefit of and to protect the rights and best interests of the alleged incompetent to whom he is assigned. For these purposes, it is essential that he act as an advocate in behalf of the accused.

83 Wn. 2d at 235–36, __ P.2d at __ (citations omitted). The court defined adequate adversarial representation as including: complete investigation of the charges and their factual bases, meaningful consultation with the client, thorough examination of all available records and witnesses, and the active protection of the client's rights through the offering of

3. *Right to Jury Trial*

Thirteen jurisdictions require jury trial in involuntary commitment proceedings, if demanded by the patient or someone acting on his behalf.[102] Several other states leave the issue solely to the judge's discretion.[103] However, since a majority of the states constitutionally provide for jury trial in both civil and criminal cases, the individual may retain this right in involuntary commitment proceedings.[104] *Lessard* noted the Wisconsin statutory right to a jury trial in a commitment proceeding and required that notice thereof be given to the patient. However, had Wisconsin denied a jury trial, it is possible that the court would have found a due process violation. *Lessard's* rejection of the civil-criminal label seems to require this result and to clear the way to a sixth amendment jury trial guarantee.[105]

The Washington Act provides a right to jury trial if commitment beyond the 14 day period is sought. Care is taken to assure that the detainee receives notice of this right.[106] A jury trial, if requested, must

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all relevant legal claims and defenses. Additionally, the *Quesnell* court held that an alleged incompetent has the right to: (1) be represented by a private adversary counsel rather than a court-appointed guardian ad litem, or (2) replace the guardian ad litem at any stage of the proceedings. It should be noted that the *Quesnell* court made no mention of the new involuntary commitment statute.

101. WASH. REV. CODE §§ 71.05.300, .320, .460.

102. The AMERICAN BAR FOUNDATION STUDY, *supra* note 52, at 53 & Table 3.3, cites the following jurisdictions: Alaska, California, District of Columbia, Illinois, Iowa, Kansas, Michigan, New York (after expiration of 60 day certification procedures), Oklahoma, Texas, Washington, Wisconsin and Wyoming.

103. *Id., citing* the states of Alabama, Arkansas and New Jersey.

104. *Id.* at 54. However, it should be emphasized that any such "right" would be decided by each individual state, without any constitutional compulsion. It is noteworthy that many states have chosen not to extend the right to jury trial in juvenile proceedings. McKeiver v. Pennsylvania, 403 U.S. 528, 548–49 (1971) (no constitutional right to a jury trial in state juvenile delinquency proceeding).

105. The sixth amendment, unlike the seventh, has been applied to the states. Duncan v. La., 391 U.S 145 (1968) (sixth amendment applied to states through the 14th); *see also* Sharpe v. State *ex rel.* Okla. Bar Ass'n, 448 P.2d 301 (Okla. 1968), *cert. denied*, 394 U.S. 904 (1968) (seventh amendment does not apply to states under the 14th). Note, however, that in order to justify strict procedural safeguards, *Lessard* analogized involuntary commitment to a juvenile delinquency proceeding, relying on the Supreme Court decisions in *Gault* and *Winship*. The right to a jury trial is not, however, constitutionally required in the juvenile delinquency setting. McKeiver v. Pa., 403 U.S. 528 (1971). Therefore the *Lessard* analogy may be of no assistance, and a finding of a sixth amendment right probably would be based on a strict analogy to the jury trial right in the criminal setting. This may be a difficult analogy to establish.

106. WASH. REV. CODE § 71.05.240. The person detained is notified at the probable cause hearing that he has a right to a full hearing or jury trial for any detention beyond 14 days. Under *id.* § 71.05.300 he receives another notice after a petition for 90 day commitment is filed.

commence within ten judicial days after notification (to the detainee) of the request for the 90 day commitment.[107]

4. *Burden of Proof*

The burden of proof issue concerns the degree to which a judge or jury must be convinced that an individual meets the statutory criteria for commitment. Three standards exist, each of which has found favor in a court or state legislature. Traditionally, the appropriate burden of proof standard in involuntary commitment proceedings was "by a preponderance of the evidence."[108] At the other extreme, two courts within the past year have adopted the criminal "beyond a reasonable doubt" standard.[109] Between these standards is the "clear, cogent, and convincing evidence" burden chosen by the Washington Legislature.[110]

Ballay and *Lessard* rejected the preponderance of the evidence standard;[111] both courts were concerned with the massive deprivations of freedom flowing from a commitment order. Observing that the Supreme Court required "proof beyond a reasonable doubt" in juvenile delinquency proceedings, the *Lessard* court stressed that parallel interests compelled such a standard for involuntary commitment proceedings. The court concluded that the deprivations attending commitment were not to be tolerated "upon no higher degree of proof than applies in a negligence case."[112]

The telling consideration which led the *Ballay* court to adopt the criminal burden was the possibility and effect of mistaken commitment.[113] The findings of a recent study add credence to the *Ballay* court's concern.[114] Eight "sane" people gained admission to 12 dif-

107. *Id.* § 71.05.310. This section purports to assure that no undue delay occurs because of a jury trial request. The practical problems of commencing a jury trial within this time limit could be significant.

108. *See* Tippett v. Md., 436 F.2d 1153, 1159 (4th Cir. 1971); *In re* Alexander, 372 F.2d 925, 927 (D.C. Cir. 1967); Parks v. State, 226 Md. 43, 171 A.2d 726, 728 (1961).

109. *Ballay*, 482 F.2d at 669; *Lessard*, 349 F. Supp. at 1094–95; *See also* Denton v. Commonwealth, 383 S.W.2d 681 (Ky. 1964).

110. WASH. REV. CODE § 71.05.310.

111. 482 F.2d at 650; 349 F. Supp. at 1094.

112. 349 F. Supp. at 1094, *citing* Woodby v. Immigration and Naturalization Serv., 385 U.S. 276, 285 (1966) ("clear, cogent, and convincing evidence" appropriate burden in a deportation setting).

113. *See* notes 1 & 10 and accompanying text *supra*.

114. *See* Rosenhan, *On Being Sane in Insane Places*, 179 SCIENCE 250 (1973).

ferent hospitals without knowledge of the staff.[115] To gain admission each "pseudopatient" feigned symptoms of mild schizophrenia.[116] Once admitted, their task was to convince the hospital staff of their sanity. Each pseudopatient ceased all signs of mental abnormality. The results were staggering:[117]

> Despite their public 'show' of sanity, the pseudopatients were never detected. Admitted, except in one case, with a diagnosis of schizophrenia, each was discharged with a diagnosis of schizophrenia 'in remission' . . . the evidence is strong that, once labeled schizophrenic, the pseudopatient was stuck with that label. If the pseudopatient was to be discharged, he must naturally be 'in remission'; but he was not sane, nor, in the institution's view had he ever been sane.

If the study proves representative,[118] it indicates that wrongful commitment will not be detected at the detention facility. This possibility places increased pressure on the judicial process, as the *Ballay* court recognized, to ensure against error in the judicial commitment proceeding.

Although both *Lessard* and *Ballay* required the criminal burden of proof, the standard of "clear, cogent, and convincing evidence" has also found recent support, principally in the Washington Act. Very recently, in *In re Levias*, the Washington court upheld use of the "clear, cogent, and convincing" standard in involuntary commitment proceedings, declaring it to be the civil equivalent of the "beyond a reasonable doubt" criminal standard.[119]

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115. *Id.* at 251. The hospitals were located in five different states on the East and West Coasts.

> Some were old and shabby, some were quite new. Some were research-oriented, others not. Some had good staff-patient ratios, others were quite understaffed. Only one was a strictly private hospital. All of the others were supported by state or federal funds or, in one instance, by university funds.

116. *Id.* at 252. Name, vocation, and employment were also falsified. These were the only alterations of personal history made.

117. *Id.* Length of hospitalization ranged from seven to 52 days, with an average stay of 19 days.

118. Another experiment was arranged to reverse the process. The staff of a large research and teaching hospital was informed that in the ensuing three months various pseudopatients would attempt to gain admittance. The staff was asked to evaluate each patient on a ten point scale with a one or two evaluation reflecting the staff member's "high confidence" that the individual was really a pseudopatient. At least one staff member said that the patient was a fraud in over 25% of the 193 cases evaluated. Actually *no* pseudopatients sought to gain admission. *Id.*

119. 83 Wn. 2d 253, 256, ___ P.2d ___, ___ (1973). This result seems questionable in light of *Ballay*. The *Levias* court also held that in a commitment proceeding, even under the old statute, the state must prove *both* mental illness *and* dangerousness, *citing Lessard* and WASH. REV. CODE § 71.05.310. 83 Wn. 2d at 257–58, ___ P.2d at ___.

5. Privilege Against Self-Incrimination

The fifth amendment privilege against self-incrimination poses particularly difficult problems when applied to the commitment process. The contradictory considerations are: "It is essentially . . . cruel to make a man the instrument of his own condemnation,"[120] but if a potential patient refuses to speak there may be no opportunity for proper diagnosis and treatment, which is crucial, since recovery is usually the sole criterion for early release.[121] The *Lessard* court, citing Supreme Court pronouncements in the juvenile setting, adopted the view of Mr. Justice Douglas that whenever there is a "deprivation of liberty" the privilege applies.[122] The Washington Act is in accord.[123]

There are distinct difficulties with the approach of *Lessard* and the Washington Act. First, it is not clear that an analogy to juvenile delinquency proceedings is appropriate. A juvenile delinquency inquiry determines the commission of a specific act; it does not probe the individual's mental state. Mental examinations, on the other hand, are directed toward a person's overall psychological make-up, and the questions will usually be directed toward this end. Second, legitimate action under the state's power to detain mentally abnormal persons may give rise to a postcommitment right to treatment,[124] and a patient's refusal to communicate would almost certainly defeat attempts at treatment. Since holding a mental patient without treatment is constitutionally suspect,[125] detainees might be able to defeat commitment by simply refusing to communicate with the hospital staff.

A thoughtful approach to this general problem was articulated by Judge Sobeloff, concurring and dissenting, in *Tippett v. Maryland*.[126] Regarding application of the privilege in a defective delinquency proceeding, the judge noted: "Because of the unusual nature of the neces-

120. Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 CALIF. L. REV. 89, 95 (1965).

121. *See Civil Commitment Theories, supra* note 53, at 1293.

122. 349 F. Supp. at 1101, *quoting* McNeil v. Director Patuxent Institution, 407 U.S. 245, 250 (1972) (Douglas, J., concurring).

123. A person detained under involuntary commitment procedures must be informed "[t]hat he has the right to remain silent and that any statement he makes may be used against him." WASH. REV. CODE § 71.05.200.

124. *See* notes 158–71 and accompanying text *infra*.

125. *See* notes 162–68 and accompanying text *infra*.

126. 436 F.2d 1153 (4th Cir. 1971) (Maryland's Defective Delinquent Act provided adequate procedural safeguards to protect constitutional rights of persons committed under its provisions).

sary inquiries, the legitimate objectives of the legislation could be frustrated were the inmates permitted to refuse cooperation."[127] Judge Sobeloff recommended immunity for any criminal acts discovered as a result of the interviews, strictly limiting use of the results of the inquiries to commitment and treatment.[128] This recommendation may be useful in the involuntary commitment setting, where communication is essential to a reliable analysis of the individual's condition.[129]

The Washington Act requires strict confidentiality.[130] The patient's knowledge that all information obtained during examination will be used solely for care and treatment, and that it is strictly confidential, should effect positive reinforcement. The availability to counsel of written results of all interviews[131] and his participation as an adversary in the commitment proceedings should adequately guard the patient's interests. Meaningful consultation could thus be assured with only a minimal loss of procedural safeguards under the *Tippett* analysis.

6. *Right to be Proceeded Against by the Rules of Evidence*

Lessard seemingly prohibits the admission of hearsay evidence in an involuntary commitment proceeding.[132] The new Washington Act states that the alleged mentally abnormal person has a right "[t]o be proceeded against by the rules of evidence" at judicial proceedings.[133]

127. *Id.* at 1162.

128. *Id.* at 1161–62 & n.6. The inquiry with alleged defective delinquents focuses on past crimes and specific antisocial behavior; thus it is much closer to the inquiry inherent in the criminal process than the involuntary commitment interview.

129. *Id.* at 1162, *citing* United States v. Albright, 388 F.2d 719 (4th Cir. 1968). Though *Albright* dealt with a criminal insanity defense, Judge Sobeloff noted that the opinion spotlighted the fact that the individual's cooperation is imperative in obtaining a reliable diagnosis.

130. WASH. REV. CODE § 71.05.390. *See* note 44 and accompanying text *supra*.

131. *Lessard* required that written transcripts of psychiatric interviews be provided to counsel. 349 F. Supp. at 1100.

132. *Id.* at 1102–03. The court relied solely on footnote language in *In re* Gault, *supra*, as indicative that the Supreme Court disapproved of hearsay in a juvenile delinquency proceeding. However the *Gault* Court specifically stated that it reached no opinion regarding hearsay and other issues considered by the lower court. 387 U.S. at 11. Further, *Lessard* held that counsel must have access to all reports "which will be introduced at the hearing on commitment." 349 F. Supp. 1099–100. This implies that at least this form of hearsay was viewed as admissible by the court.

133. WASH. REV. CODE §§ 71.05.250, .310. This right applies at both the probable cause hearing (prior to the initial 14 day detention) and at the full hearing (prior to a 90 or 180 day detention).

While this statutory language could be construed as an implied bar of hearsay, the legislative intent is not clear.[134] Three distinct lines of analysis do, however, support the admission of hearsay evidence in the commitment proceeding. First, *Lessard* recognized that: "To the extent that exceptions to the hearsay rule permit the admission of hearsay into evidence [at other proceedings] the same evidence may be admitted in a civil commitment hearing."[135] Second, the classical statement of the hearsay rule bars only evidence that is "offered . . . to show the truth of the matters asserted therein . . . ."[136] Utterances by an alleged mentally abnormal person usually are not offered "to show the truth of the matters asserted therein."[137] Finally, even in the criminal setting, hearsay testimony is allowed at the "dispositional" or sentencing stage of the proceedings.[138] Thus, psychiatric reports, social workers' studies and other relevant material probably should be admissible during court consideration of the actual need for treatment, possible alternatives to commitment, and other "dispositional" aspects of the proceeding.

III. POST COMMITMENT RIGHTS: SIGNIFICANT REFORM

Historically, the only right retained after commitment was the "right to be forgotten."[139] Commitment adumbrated the end of meaningful existence. The value of substantive limitations and procedural safeguards is lost if the state is free to conduct a purely custodial de-

134. The language could equally be intended to interject an element of formality into what are traditionally informal proceedings. This question may be answered by the Washington State Supreme Court, which is required by WASH. REV. CODE § 71.05.570 to "adopt such rules as it shall deem necessary with respect to the court procedures and proceedings provided for by this chapter."

135. 349 F. Supp. at 1103. Possible relevant exceptions would include business records, admissions of a party or hearsay admitted without objection.

136. *See* MCCORMICK ON EVIDENCE 584 (2d ed. E. Cleary 1972).

137. Thus, traditionally a statement showing "insanity" has been admissible as nonhearsay. *See id.*, at 592–93. *See also* R. MEISENHOLDER, 5 WASHINGTON PRACTICE 389 (1965).

138. *See* Williams v. N. Y., 337 U.S. 241 (1949) (judge's consideration of out of court evidence, including probation reports, background, and other information in imposing the death sentence held not violative of due process).

139. *Hearings on the Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st & 2d Sess., at 3 (1969–70).

tention system designed only to expedite society's indifference toward this substantial minority.[140] The scope of modern concern has gone beyond identifying the proper subjects for state action; it has attempted to insure continued state effort directed toward facilitating recovery by focusing on three specific areas of reform. First, even when the state acts within the area of its substantive interest and complies with procedural guidelines, commitment should be considered only as a last resort. This "consideration of alternatives" requirement is being imposed with increasing frequency.[141] Second, within the institutional setting, those alternatives which least restrict individual liberty and self-respect should be chosen. A conscious effort should be made to assure that the patient retains a definite sense of "identity."[142] Third, the Supreme Court has recently stated that: "At the very least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[143] An obvious purpose of involuntary commitment is to return the patient to society. Procedures during detention thus should bear "some reasonable relation" to this end.

A. The Required Consideration of Alternatives

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberty when the end can be more narrowly achieved . . . by less drastic means for achieving the same basic purpose.[144]

140. *See* note 3 *supra*.
141. *See* notes 144–49 and accompanying text *infra*.
142. There is good reason for concern, for, as one commentator has noted:
> In response to his stigmatization and to the sensed deprivation that occurs when he enters the hospital, the inmate frequently develops some alienation from civil society . . . . This alienation can develop regardless of the type of disorder for which the patient was committed, constituting a side effect of hospitalization that frequently has more significance for the patient and his personal circle than do his original difficulties.

E. GOFFMAN, ASYLUMS, 355–56 (1962). For an excellent description of mental hospitals, jails and other "total" institutions, see Goffman, *Characteristics of Total Institutions*, in Walter Reed Army Institute of Research, Symposium on Preventative and Social Psychiatry, at 43, 1957.
143. Jackson v. Indiana, 406 U.S. at 737.
144. Shelton v. Tucker, 364 U.S. 479, 488 (1960), *quoted* by *Lessard*, 349 F. Supp. at 1095. *See also* Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

In *Lake v. Cameron,*[145] the District of Columbia Circuit Court of Appeals first applied this logic to involuntary commitment, holding that the state must bear the burden of exploring the alternatives.[146] *Lessard* expanded upon this idea and formulated a three-pronged requirement, stipulating that the committing authority bear the burden of proving: (1) what alternatives were available, (2) what alternatives were investigated and (3) why the investigated alternatives were not deemed suitable.[147]

Consistent with this judicial trend and its stated purpose to encourage services and treatment within the community, the Washington Act requires consideration of alternatives to commitment as a prerequisite to any detention. The petition seeking detention must state facts supportive of the conclusion that "there are no less restrictive alternatives to detention in the best interests of such person or others."[148] Should an alternative course of treatment be found feasible and instituted, it cannot exceed the time limitation for detention imposed by the relevant commitment section.[149] These requirements place increased emphasis upon individual liberty and promote understanding of an historically taboo subject.

B. Retention of Rights After Commitment

Underlying the *Lessard* court's decision was a concern with the nearly total deprivation of civil rights flowing from commitment under the Wisconsin statute. These deprivations included a rebuttable presumption of incompetency, a restriction of contractual rights and the capacity to sue or be sued, professional licensing restrictions, and denial of the right to vote, to serve on a jury or to drive a car.[150]

Washington has insured against such deprivations by detailing the preservation of civil and personal rights after commitment. Section 41 of the Act announces a broad general policy that the committed person shall retain "all rights not denied him under this chapter and

145. 364 F.2d 657 (D.C. Cir. 1966).
146. *Id.* at 661. The court noted that the state, and not the patient, possessed the resources and expertise to determine the alternatives available.
147. 349 F. Supp. at 1096.
148. WASH. REV. CODE §§ 71.05.230(4), .240, .290, .320.
149. *Id.*§§ 71.05.230, .320, .340.
150. 349 F. Supp. at 1088–89.

which follow [sic] from such denial by necessary implication."[151] Specific rights are delineated, limited only as they present an "imminent" danger to the patient or others.[152] The Act preserves rights of privacy and individuality normally lacking in an institutional setting: wearing one's own clothes, keeping certain amounts of money for general expenses, storage space for private use and phone and letter writing facilities and privileges.[153] While ordinarily not thought of as basic civil rights, these attempts to maintain individuality seem consistent with an increased respect for the liberty of committed persons and with a truly therapy-oriented program. Further, the Act preserves contractual rights[154] and the ability to dispose of property.[155] Shock treatment and nonemergency surgery can be performed only under a court's auspices, absent consent of the patient.[156] There is an absolute right to refuse lobotomy.[157]

C. *A Constitutional Right to Treatment*

An examination of recent cases reveals a progression toward recognition of a constitutional right to treatment. In *Rouse v. Cameron,*[158] the District of Columbia Circuit Court of Appeals held that an acquital by reason of insanity, which then required mandatory com-

151. WASH. REV. CODE § 71.05.360 (1). The quoted passage contains an apparent error. It is suggested that the language should read that the patient retains "all rights not denied him . . . and which *do not* follow from such denial by necessary implication." Without the *do not* insertion, the passage would postulate a patent absurdity; the patient would retain those rights that logically flow from those that have been specifically denied. In any case, the phrase is diluted from its original form which provided for retention of all rights that were not specifically denied. It is difficult to envision what rights might be denied by necessary implication other than the obvious denial of complete individual liberty. Section 11 retains the original language, leading to internal inconsistency unless corrected.

152. *Id.* § 71.05.370.

153. *Id.*

154. *Id.* § 71.05.370(8).

155. *Id.*

156. *Id.* § 71.05.370(7). Apparently the patient is presumed to retain competency to give or refuse consent in the same way he is presumed competent to contract and dispose of property. The validity of this assumption is open to question. *See* note 99 *supra* discussing the problems inherent in an attempted waiver of the right to counsel in an involuntary commitment proceeding.

157. *Id.* § 71.05.370(9). This guarantee reflects the concept that no matter how compelling the state's interest or how severe the apparent need of the individual, there are certain acts which cannot be perpetrated upon the patient's person absent his approval. It is an *absolute* right. However, the problem of a mentally abnormal individual's *capacity* to consent after commitment remains. *See* note 156 *supra.*

158. 373 F.2d 451 (D.C. Cir. 1966).

mitment, carried a right to treatment. The court based its holding upon a statutory right and thus avoided what it deemed "serious constitutional questions."[159] While the question of a constitutional right to treatment was not before the *Lessard* court, it left the strong impression that, absent meaningful treatment during detention, due process would be violated regardless of the procedural protections afforded during the commitment proceedings.[160] Additionally, the United States Supreme Court has indicated a pro-treatment orientation in a variety of recent criminal insanity cases.[161]

In 1971, *Wyatt v. Stickney* recognized a due process right to adequate treatment which attaches to an involuntary commitment.[162] The court specifically held that confinement pursuant to the *parens patriae* rationale violated due process absent adequate treatment,[163] a holding that was later reinforced by the *Ballay* court.[164] To enforce the right, the *Wyatt* court specified standards of treatment covering subjects ranging from the patient's right to privacy to detailed doctor-patient ratios, and ordered development of individual treatment programs subject to periodic review by a permanent committee. Lack of financial resources could not be used to avoid compliance.[165]

A more difficult issue involves a right to treatment flowing from commitment under an exercise of the state's police power, because the rationale of the police power is to protect society, not necessarily to

159. *Id.* at 455.

160. 349 F. Supp. at 1086, *quoting* Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1140 (1967):

> Accepting that due process does not forbid involuntary detention for the purpose of rendering care and treatment under the *parens patriae* role, it is still clear that such detention does not meet due process requirements if, in actual practice, treatment beneficial to the patient is not rendered.

See also Comment, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 94 (1968).

161. *See* Jackson v. Indiana, *supra* note 47; Humphrey v. Cady, *supra* note 77; Murel v. City of Baltimore Criminal Courts, 407 U.S. 355, 358 (1972) (defective delinquent's commitment should be reviewed on basis of "criteria, procedures, and treatment afforded").

162. 325 F. Supp 781 (M.D. Ala. 1971), discussed in note 12 *supra*. *Contra*, Burnham v. Dep't of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972) and N. Y. Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973), holding there is no constitutional right to treatment.

163. 325 F. Supp. at 785. *See* note 13 and accompanying text *supra*.

164. The *Ballay* court stated: "Without some form of treatment the state justification for acting as *parens patriae* becomes a nullity." 482 F.2d at 659 (citations omitted).

165. 344 F. Supp. at 377.

benefit the individual. However, the *Wyatt* court implied that treatment was constitutionally mandated in this situation also: "Adequate and effective treatment is constitutionally required because, absent treatment, the hospital is transformed 'into a penitentiary where one could be held indefinitely for no convicted offense.' "[166] This concern is identical with that voiced by the Supreme Court in *Jackson v. Indiana*.[167] When the state commits under the police power, withholding treatment will mean that the patient has little chance of recovery. Since recovery is the main criterion for obtaining release, lack of treatment could lead to indefinite detention for no convicted offense. Alternatively, even if the state exercises its police power pursuant to a finding that the defendant committed a specific violent act, indefinite commitment without treatment could constitute a violation of equal protection. An involuntary commitment could be tantamount to a life sentence, while a criminal conviction could result in only a short sentence with early parole.[168]

Recently adopted legislative schemes have indicated increasing awareness of the need to provide adequate treatment. The underlying purpose of California's statute, adopted in 1969, was to insure that: "A citizen of California, the victim of sickness of the mind or spirit, shall, without stigma or loss of liberty, receive prompt assistance to match his need."[169] The new Washington Act takes tremendous strides towards implementing the right to treatment. Section 41(2) of the Act dictates that: "Each person involuntarily detained, certified, or committed pursuant to this chapter shall have the right to adequate care and individualized treatment."[170] Various sections repeat the

166. 325 F. Supp. at 784, *quoting* Ragsdale v. Overholser, 281 F.2d 943, 950 (D.C. Cir. 1960).

167. 406 U.S. 715. *See* note 47 and accompanying text *supra*.

168. Several other theories support a constitutional right to treatment when the state acts under the police power: (1) Involuntary commitment without treatment may constitute confinement for mere status, which was prohibited by Robinson v. California, note 54 *supra*, under the eighth and 14th amendments; (2) Commitment without treatment might violate the "least restrictive alternative" requirement by tending to prolong incarceration; (3) Viewed from a policy standpoint, the best interests of both society and the individual mandate treatment. Society benefits from the return of a productive unit and relief from the financial burden; the benefit to the individual is obvious.

169. SUBCOMMITTEE ON MENTAL HEALTH SERVICES, CALIFORNIA LEGISLATIVE ASSEMBLY INTERIM COMMITTEE ON WAYS AND MEANS, THE DILEMMA OF MENTAL COMMITMENTS IN CALIFORNIA (1965), *quoted* in Comment, *California's New Mental Commitment Legislation: Is it Legally Sufficient?* 6 CALIF. W. L. REV. 146, 147 (1969).

170. WASH. REV. CODE § 71.05.360(2).

requirement.[171] Furthermore, the statute is firmly couched in terms of the patient's best interests, rather than the availability of facilities. This statutory directive appears to meet and surpass present case law requirements.

IV. CONCLUSION

A definitive analysis of the constitutionality of any involuntary commitment statute is presently impossible because of the lack of a recent Supreme Court decision in the area. Ideally, a high court decision would focus on the three specific issues outlined in this comment and would: (1) define the substantive limitations on state action, (2) set out the procedural due process protections guaranteed to the individual and (3) determine whether there is a constitutional right to treatment.

Each of these issues speaks to an independent legal right. Substantive due process installs the parameters within which the state can legitimately act. Procedural due process seeks to guard an individual's fundamental right to liberty by assuring that he is an appropriate subject for state action. A constitutional right to treatment either forces the state to fulfill its obligation as *parens patriae* or, if acting under its police power, to provide the individual with the catalyst to recovery and freedom.

Washington's new involuntary commitment Act reflects both the letter and spirit of the recent judicial decisions in the involuntary commitment area. The Act takes giant strides towards restructuring the legal status of mentally abnormal individuals. While a few problem areas remain, such as the "gravely disabled" category and the "clear, cogent, and convincing" burden of proof, the new Act puts Washington State at the forefront of the "mental illness" reform movement.

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171. *Id.* §§71.05.210, .310.

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