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CIVIL COMMITMENT—DUE PROCESS AND THE STANDARD OF PROOF

John Ballay appeared at the Capitol in Washington, D.C., on January 19, 1971, contending to be the United States Senator from Illinois. Later, on June 7 and June 29, 1971, he attempted to enter the White House claiming that he was not only a United States Senator but that he was also the husband of the President's daughter. Following each visit he was taken to St. Elizabeth's Hospital, a public mental health facility in Washington. The procedures followed to effect Ballay's involuntary commitment after the June 29th incident were examined by the United States Court of Appeals for the District of Columbia in *In re Ballay*.¹ After being brought to the facility by a Secret Service agent, Ballay was examined by a psychiatrist and a request for his continued hospitalization was made to the district court as required by statute.² The order was issued on June 30, 1971, authorizing the hospital to hold Ballay for an additional seven days. He was actually held for nearly one month pursuant to another section of the statute³ until an administrative hearing was held before the Commission on Mental Health. The Commission recommended that Ballay be committed and their finding was sent to the district court. A jury trial was demanded by Ballay and, when the jury agreed with the Commission's findings, Ballay was committed.⁴

The appeal from the jury's finding was based on an alleged constitutional defect in the instructions given to the jury. The jury had been instructed that if it found by a preponderance of the evidence that Ballay was "mentally ill and, because of that illness, [was] likely to injure himself or other persons if allowed to remain at liberty . . ." ⁵ then it should order his commitment. On appeal, Ballay claimed that the standard of proof enunciated in the instructions, that is, a preponderance of the evidence, is constitutionally insufficient for the purpose of depriving a person of his or her liberty. He contended that due process requires the application of the criminal evidentiary standard, proof beyond a reasonable doubt, before an involuntary commitment is constitutional.

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1. 482 F.2d 648 (D.C. Cir. 1973).
 2. D.C. CODE ANN. § 21-523 (1973).
 3. *Id.* § 21-528.
 4. *Id.* § 21-545.
 5. *Id.* § 21-545(b).

The court of appeals declared that it is necessary to apply the more stringent standard of proof to mental health commitment as a requirement of procedural due process. In rendering such a decision, the court found the protected interest in mental health commitment similar to that found by the United States Supreme Court in *In re Gault*,⁶ a case involving juvenile delinquency proceedings, and in *Morrissey v. Brewer*⁷ concerning parole violation hearings. These cases held that due process must be given to those persons within the class in question who stood to lose their liberty even though the proceedings involved did not constitute criminal trials.

The application of this principle to the mental health commitment process by the court of appeals in *Ballay* has significance for both mental health commitment and constitutional law. When applied in commitment proceedings, the standard adopted in *Ballay* would require the committing authority to prove with much more certainty that commitment is necessary. The decision also signals an extension of the due process clause to another class of persons whose rights have traditionally been given inadequate protection by the judiciary. After briefly discussing the development of modern mental health commitment, this Note will explore the reasoning of the *Ballay* court and, in conclusion, will attempt to show why the standard of proof adopted by the District of Columbia Circuit represents a positive step toward improving the lot of the patient in the commitment process.

To understand the framework within which the modern mental health commitment system operates, it is necessary to examine the doctrine of *parens patriae*.⁸ It has long been recognized that persons suffering from mental illnesses or defects would occasionally invite the intervention of the state into their lives either because of anti-social behavior or an inability to care for themselves.⁹ Since the conduct could be attributed to the alleged infirmity and was often not of a criminal nature or only in-

6. 387 U.S. 1 (1967).

7. 408 U.S. 471 (1972).

8. 482 F.2d at 650. See also R. ROCK, HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL 7-8 (1968) [hereinafter cited as ROCK]; T. SZASZ, LAW, LIBERTY AND PSYCHIATRY 151-53 (1963). Not all commitments are based solely on the doctrine of *parens patriae*. Commitments effected under sexual psychopath statutes, the detention of those incompetent to stand trial or the commitment of those who have been found likely to be dangerous to others may be justified in part by the state's police power. See Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945, 955-56 (1959) [hereinafter cited as Ross]. However, since the standards of civil commitment generally apply to proceedings commenced under these circumstances, they may also be included within the scope of this note.

9. See, e.g., *Beverley's Case*, 76 Eng. Rep. 1118 (K.B. 1603); 1 W. Blackstone, Commentaries *303-07.

volved a minor criminal offense, it seemed inappropriate for the state to invoke the full force of the police power against the ill person. However, disruption of the community or family and the concern for the well-being of the individual did require some official action and to answer this need the doctrine of *parens patriae* was formulated.¹⁰ The classes most often subject to this form of the state's power include juveniles, the mentally ill and those who are mentally or physically incompetent to manage their own affairs.¹¹

Since the latter years of the nineteenth century, the state legislatures, which have the primary responsibility for establishing the standards and procedures for mental health commitment in the United States,¹² have been aware of the need to protect the party subject to commitment from the arbitrary action of the courts or from "railroading" by relatives or others.¹³ The jury was initially seen as the panacea needed and until recently, the use of the jury was mandatory in some states.¹⁴ Experience has shown that the jury alone would not prevent abuses, so other statu-

10. Some authors have contended that the motives for the formulation of the doctrine are less than humanitarian and that it was designed to serve as an undemocratic method of social control. See R. LEIFER, *IN THE NAME OF MENTAL HEALTH* 83-84 (1969) [hereinafter cited as LEIFER]. Modern judicial cynicism in the same vein is found in *In re Gault*, 387 U.S. 1, 15-19 (1967).

11. See Prerogative Regis, 17 Edw. 2, c. 9 & 10 (1324); An Act for the Better Care and Maintenance of Lunatics, being Paupers or Criminals in England, 48 Geo. 3, c. 96, § 19 (1808). For an excellent summary of the historical development of mental health commitment see S. BRAKEL & R. ROCK, *THE MENTALLY DISABLED AND THE LAW* 1-14 (rev. ed. 1971) [hereinafter cited as BRAKEL & ROCK]. Mental illness can be distinguished from mental incompetence by noting that incompetence is generally a legal determination that the party is unable to conduct his own affairs and is in need of a guardian or conservator. A person may be mentally ill without being incompetent even where that person has been civilly committed. See, e.g., ILL. REV. STAT. ch. 91½, § 9-11 (1973); Ross, *supra* note 8, at 949-50.

12. The courts have in recent years begun to take a more active role by providing detailed requirements for commitment where the legislative action has been incomplete or constitutionally inadequate. *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972); *Dixon v. Pennsylvania*, 325 F. Supp. 966 (M.D. Pa. 1971). See also *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971) where the court mandated extensive changes in the operation of the state mental hospital system.

13. Thomas Szasz, a psychiatrist and prolific writer on the relationship of law and psychiatry including involuntary commitment, has contended throughout his writings that commitment as we know it is antithetical to our basic legal heritage and should be abolished altogether: "I believe that, like slavery, the entire oppressive-coercive pattern inherent in present-day involuntary mental hospitalization is an evil which must be done away with." T. SZASZ, *LAW, LIBERTY AND PSYCHIATRY* 56 (1971). His thesis is fully explained at *id.*, 57-71.

14. Kentucky was the last state to repeal its mandatory jury provision when it did so in 1968. BRAKEL & ROCK, *supra* note 11, at 53-54.

tory protections were developed. Today an enlightened state mental health commitment statute includes some or all of the following provisions: notice to the alleged ill person, the right to counsel, the right to a jury, the right to present and cross-examine witnesses and the right to appeal.¹⁵ In spite of the awareness and concern of some legislatures for the rights of the alleged ill person, the nature of the hearing has always been perceived as essentially civil in nature with a standard of proof identical to that required in a tort or contract action—the party seeking commitment, the state, need only establish its case by a preponderance of the evidence—even though the verdict of the judge or jury could result in the loss of the patient's liberty as though he or she had been a convicted defendant in a criminal trial.

Just as the legislatures have never seen fit to include a stricter standard of proof in the statutes, the courts have preferred to rely on such characterizations of the proceedings as "civil" or "special chancery proceedings"¹⁶ in reaching decisions concerning the standard of proof to be applied. By applying these labels in their commonly accepted form, the courts have stated that only a preponderance of the evidence¹⁷ is needed to commit a person, or have held only that the evidence be "clear and convincing."¹⁸ While the language of some decisions indicates that the judge was perhaps uneasy about the preponderance standard, few courts were willing to acknowledge the need to protect the patient's interests by requiring the stricter reasonable doubt standard, and none were so willing before 1945. Even though no state statute requires that a determination of the need for commitment be made "beyond a reasonable doubt," four other courts prior to *In re Ballay* recognized with varying emphasis that the more stringent standard should be applied in mental health commit-

15. See B. ENNIS & L. SIEGEL, *THE RIGHTS OF MENTAL PATIENTS*, 93-282 (1973) for a summary of all state statutes. The authors indicate that forty states require notice to the patient at some stage in the proceedings and that thirty-seven allow or guarantee counsel for the patient. Only eleven states will offer a jury trial if requested. BRAKEL & ROCK, *supra* note 10, at 66-132 offers charts which may not be fully current but which are useful as they provide citations to specific sections of the various statutes. A liberal model statute is proposed in Elliott, *Procedures for Involuntary Commitment on the Basis of Alleged Mental Illness*, 42 U. COLO. L. REV. 231, 269 (1970).

16. *People v. Janssen*, 263 Ill. App. 101, 103 (1931).

17. See, e.g., *In re Alexander*, 372 F.2d 925, 927 (D.C. Cir. 1967); *Dixon v. Pennsylvania*, 325 F. Supp. 966, 974 (M.D. Pa. 1971); *People v. English*, 31 Ill. 2d 301, 304, 201 N.E.2d 455, 457-58 (1964); *Myers Estate*, 395 Pa. 459, 150 A.2d 525 (1959); *Thompson v. Moore*, 227 S.C. 417, 88 S.E.2d 354 (1955).

18. *Titcomb v. Vantyle*, 84 Ill. 371, 373 (1877); *Dorchester v. Dorchester*, 3 N.Y.S. 238 (1888), *rev'd on other grounds*, 121 N.Y. 156, 23 N.E. 1043 (1890).

ment hearings.¹⁹ The *Ballay* decision is the most emphatic and specific statement concerning the issue of standard of proof to date and is the only decision where the standard is the central issue.²⁰ If the reasoning of the Court of Appeals for the District of Columbia were to be accepted by other courts and state legislatures, it would further reduce the procedural arbitrariness of the *parens patriae* doctrine while leaving the state room to exercise its proper humanitarian concerns.

To understand the reasoning of *Ballay*, it is necessary to examine the recent willingness of the Supreme Court to sweep aside the inequities caused by the blind adherence to legal labels. Just as the Court has blurred the distinction between "rights" and "privileges" vis-à-vis governmental activities affecting the individual,²¹ there has also been a concerted effort by the Court to look beyond the "civil" and "criminal" labels which have obscured the substance of judicial action,²² particularly where the *parens patriae* doctrine has been applied. Instead of being content to allow the label to determine the degree of due process to be accorded a party, the Court has begun to examine the potential result of judicial action before determining what procedural protections are due. This concept was initially formulated in *Speiser v. Randall*:²³

There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.²⁴

19. *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972); *In re Pickles*, 170 So. 2d 603 (Fla. Ct. App. 1965); *Denton v. Commonwealth*, 383 S.W.2d 681 (Ky. Ct. App. 1964); *Ex parte Perry*, 137 N.J. Eq. 161, 43 A.2d 885 (1945). See also *Murel v. Baltimore City Criminal Court*, 407 U.S. 355, 358-65 (1972) (Douglas, J., dissenting); *Tippett v. Maryland*, 436 F.2d 1153, 1165-66 (4th Cir. 1971) (Sobeloff, J., concurring and dissenting).

20. This is also the first federal court of appeals to consider this question. The Court of Appeals for the District of Columbia has made other decisions affecting mental health commitment which are regarded as landmarks. See *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966).

21. See *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Slochower v. Board of Educ.*, 350 U.S. 551 (1956).

22. *Specht v. Patterson*, 386 U.S. 605 (1967); *Baxstrom v. Herold*, 383 U.S. 107 (1966).

23. 357 U.S. 513 (1958).

24. *Id.* at 525-26 (footnote omitted).

This basic philosophy has been given substance by the Court in a line of cases headed by *In re Gault*²⁵ and these cases were in turn cited by the *Ballay* court to support the decision.

In *Gault*, the Court extended the protection of the Constitution to juveniles, because, in spite of the admirable motives of the state in providing special juvenile courts, the actual effect of an adverse judgment in juvenile court proceedings was often deprivation of liberty whether or not criminal conduct was involved.²⁶ The Court looked to the potential result of an adverse judgment before determining what procedures were required, and it held that safeguards such as notice,²⁷ the right to an attorney,²⁸ the right to confront and cross examine witnesses,²⁹ and the fifth amendment protection against self-incrimination³⁰ were required in juvenile court proceedings. In addition, the Court found that the state need not be entirely deprived of its special concern for juveniles. Rather, it held only that the exercise of the state's power must be tempered by the recognition that juveniles also enjoy certain basic Constitutional rights.

The same template of reasoning has been applied to other forms of state power, and through these other cases the Court has formulated a guideline to be applied. Simply stated, the Court held in *Morrissey v. Brewer*³¹ that when a state acts against an individual, that action must satisfy a two-pronged test: First, does the state action require due process for that action to be lawful, and second, if due process is required, what specific safeguards are due? The court in *Ballay* used the *Morrissey* guideline to provide the framework for its decision. The controversy in *Morrissey* concerned the state's power over alleged parole violators. The Supreme Court found that in determining whether an alleged violator should be returned to prison, the state was acting *parens patriae*.³² As in other situations where the state action came under this heading, the actual administration of the power was typically arbitrary and perfunc-

25. 387 U.S. 1 (1967).

26. Where criminal conduct is involved, the term of years spent in a state institution often exceeds the time spent in prison by an adult found guilty of the same conduct. 387 U.S. at 27.

27. *Id.* at 33.

28. *Id.* at 41.

29. *Id.* at 56.

30. *Id.* at 55.

31. 408 U.S. 471, 481 (1972).

32. *Id.* at 475. In light of the Court's almost bitter denunciation of the doctrine in *In re Gault*, the use of the *parens patriae* label here foreshadowed the eventual holding in favor of the parolees.

tory.³³ The Court found that while the parolee did not stand to lose the degree of liberty that a non-convict might lose,³⁴ he did have an interest to protect that required a commensurate degree of due process in order to deprive him of that liberty.³⁵

The court of appeals in *Ballay* recognized the need for a review of the constitutional rights of the alleged mentally ill and used the *Gault* and *Morrissey* decisions to provide the framework for its holding. The court first found that a person committed under a court determination of mental illness suffered not only an immediate loss of liberty but also other effects ranging from deprivation of civil rights³⁶ to the imposition of the social stigma generally associated with mental illness and commitment.³⁷ Accordingly, in answering the first prong of the *Morrissey* test, it was deemed necessary by the court of appeals to afford due process to the party alleged to be in need of commitment.

The second inquiry required by the *Morrissey* test—what protections are necessary—was met by adopting the Supreme Court's reasoning in *In re Winship*,³⁸ holding that the "beyond a reasonable doubt" standard of proof must be used to convict a juvenile accused of conduct which would be criminal if ascribed to an adult. The analogy was clear to the *Ballay* court: "[T]he loss of liberty—the interest of 'transcending value'—is obviously as great for those civilly committed as for the criminal or juvenile delinquent."³⁹ The alleged criminal has long had the benefit of the "beyond a reasonable doubt" formulation, and in *Winship*, the accused juvenile also gained this procedural protection. It was but a short step for the *Ballay* court to conclude "that the forcefully committed civil pa-

33. *Id.* at 476. The arbitrary and, especially, the perfunctory nature of commitment proceedings has been noted by many authors. ROCK, *supra* note 8, at 121-211; Kutner, *The Illusion of Due Process in Commitment Proceedings*, 57 NW. U.L. REV. 383, 386-89 (1962); B. ENNIS, PRISONERS OF PSYCHIATRY, 77 (1972).

34. 408 U.S. at 482. A parolee in accepting parole is subject to restrictions not only on his civil rights, but also on the more personal choices such as marriage or changing jobs usually available to a citizen.

35. *Id.* at 489.

36. See BRAKEL & ROCK, *supra* note 11, at 315-21 (personal and property rights), 322-25 (wills), 326-32 (occupations and licensing) and 333-40 (rights of citizenship) for statutory provisions in the various states.

37. 482 F.2d at 651-52. See also GOFFMAN, *Normal Deviants*, in MENTAL ILLNESS AND SOCIAL PROCESSES 267 (T. Scheff ed. 1967).

38. 397 U.S. 358 (1970).

39. 482 F.2d at 668. The analogy apparently will not hold for all elements of procedural due process. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (juveniles not entitled to jury as matter of right in hearing concerning alleged criminal activity).

tient has at stake interests of equivalent proportions"⁴⁰ to those of the criminal or juvenile.

The change in the standard of proof required for mental health commitment can prevent the routine commitment of those persons brought before the courts who may not fit the typical statutory prescription of being dangerous to themselves or to others.⁴¹ These persons may have a condition which can be diagnosed and classified by the psychiatric examiners, and because of the label attached by the doctor, they are committed. Even where the psychiatrist moves beyond the technical diagnosis and attempts to show that the patient is indeed dangerous to himself or others, such testimony can only be a prediction of the future conduct of the patient. Predictions of human behavior are by their very nature imprecise and uncertain⁴²; for these predictions to be accepted by the committing authority, they should be as reliable as possible.⁴³ It is the inherent imprecision in such predictions which should make it necessary to establish their probability of occurring beyond a reasonable doubt before the patient's liberty would be removed.⁴⁴ Undoubtedly, many per-

40. 482 F.2d at 669.

41. For a discussion of the common statutory formulations see N. KITTRIE, *THE RIGHT TO BE DIFFERENT* 65-75 (1971). Some states add the provision that such persons found to be dangerous to themselves or others also require that the person be "in need of treatment."

42. Ennis, *Civil Liberties and Mental Illness*, 7 CRIM. L. BULL. 101, 111 (1971):

A diagnosis of mental illness tells us nothing about whether the person so diagnosed is or is not dangerous. Some mental patients are dangerous, some are not. Perhaps the psychiatrist is an expert at deciding whether a person is mentally ill, but is he an expert at predicting which of the persons so diagnosed are dangerous? Sane people, too, are dangerous and it may legitimately be inquired whether there is anything in the education, training or experience of psychiatrists which renders them particularly adept at predicting dangerous behavior.

See also Comment, *Due Process For All—Constitutional Standards For Involuntary Commitment and Release*, 34 U. CHI. L. REV. 633, 656 (1967).

43. The accepted standard is evidence of recent incidents of violence. *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940). The Court stated: "These underlying conditions, calling for evidence of past conduct pointing to probable consequences are as susceptible of proof as many of the criteria constantly applied in prosecutions for crime." *Id.* at 274.

44. In *Baxstrom v. Herold*, 383 U.S. 107 (1966), the Court ordered that all persons detained in New York institutions for the criminally insane beyond their sentences must be given hearings under the civil commitment statute rather than having their detention continue as a routine matter where continued treatment appeared to be indicated. The 969 persons comprising the so-called "Baxstrom population" have provided insights into many problems concerning commitment including the issue of future dangerousness. Once transferred to civil institutions only seven of the 969 proved to be too dangerous to be retained in those institutions. Only a single arrest,

sons for whom commitment is sought would benefit from some form of treatment, but an involuntary commitment may not be the best method of providing that treatment.⁴⁵ The adoption of the "reasonable doubt standard" would focus the commitment hearing on the legal question—should the individual be deprived of his liberty because he is, as a result of mental illness, a danger to himself or others—rather than on the strictly medical determination of a psychiatric label describing the individual's mental state.⁴⁶ The "reasonable doubt standard" is especially appropriate when treatment could be best obtained without commitment.⁴⁷

Adoption of the stricter standard of proof would also help eliminate the almost exclusive reliance on the testimony of medical personnel by

for petit larceny occurred among the 147 patients released out-right into the community within the first year after the Court ordered transfer. Hunt & Wiley, *Operation Baxstrom After One Year*, 124 AM. J. PSYCHIATRY 974, 976 (1968). The authors, a doctor and lawyer employed by the New York State Department of Mental Hygiene during the transfer period, conclude:

Most of them had been examined at least once—often several times—by experienced psychiatrists from the Department of Mental Hygiene and had been denied transfer on the grounds that they were too disturbed or potentially dangerous. Yet over 99 per cent of them did well in civil hospitals when the court decision compelled the move. This would appear to be another instance of institutionalized expectations putting blinders on our perceptions.

Id. at 977.

45. In *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969) the court held that a patient must obtain treatment following commitment in the least restrictive setting. Some state statutes also require the committing judge to explore alternative means of treatment. See, e.g., ILL. REV. STAT. ch. 91½, § 9-6 (1973). Reasons for not relying on the massive state institutions for adequate treatment are documented in the "right to treatment" cases which held that a patient must be given treatment following commitment and not merely be given custodial care. *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971).

46. After a point it may seem that discussion about the difference between the standards of proof and the probable consequences and advantages of adopting one over the other one can only lead to confusion and obscurity of what many consider to be the "real" issue—if the potential committee is ill, he must be given treatment. However, as Judge Sobeloff stated in his dissent to the decision in *Tippett v. Maryland*, 436 F.2d 1153 (4th Cir. 1971) (Sobeloff, J., concurring and dissenting "[t]he standard of proof is more than an empty semantic exercise; it reflects the value society places on individual liberty." Judge Sobeloff does feel, however, that all issues presented at a commitment hearing are not susceptible to determination beyond a reasonable doubt, i.e., clear and convincing evidence only is needed to show future dangerousness. *Id.* at 1166. Furthermore, as the Supreme Court has stated, "it [the reasonable doubt standard] impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *In re Winship*, 397 U.S. at 364.

47. See *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969); *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966).

the courts. This undue reliance on the expert's testimony has resulted in "rubber-stamping" the doctor's opinion that the individual suffers from one or more mental illnesses or conditions which require treatment under the force of involuntary commitment.⁴⁸ Again, the accuracy of the diagnosis is not the central issue but, rather, whether the diagnosed condition, or degree of condition, justifies the imposition of commitment. By imposing the reasonable doubt standard, a court will be unable to commit a person unless the state can provide something more than a one sentence diagnosis of the individual's condition.⁴⁹ When properly applied, the new standard would require better preparation by both the doctor and the state to support a recommendation of commitment. The adversary character of the hearing, which is now generally lacking,⁵⁰ could then be restored with the patient's attorney challenging the state and its witness to produce sufficient evidence.⁵¹ On those occasions when the state could

48. At least one psychiatrist also objects to this "rubber-stamp" relationship between law and psychiatry in the civil commitment process. Suarez, *Psychiatry and the Criminal Law System*, 129 AM. J. PSYCHIATRY 293, 295 (1972).

49. In an American Bar Foundation study published in 1968 which focused on four cities, Los Angeles, Chicago, Topeka and Philadelphia, it was found that cursory evaluations and extremely short judicial hearings were the norm in most cases. Rock, *supra* note 8; at 121-213.

50. "Advocacy is by default allotted to the hospital psychiatrists with the lawyer assuming only a 'ceremonial function.'" Comment, *The New Mental Health Codes: Safeguards in Compulsory Commitment and Release*, 61 NW. L. REV. 977, 981 (1967). See also Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424, 424-25 (1966).

51. Objections by a doctor to the dominant presence of the psychiatrist at the commitment hearing are vividly stated in LEIFER, *supra* note 10, at 123-125:

[T]he accused mental patient must defend himself against psychiatric testimony that he is mentally ill, potentially dangerous, and in need of care and treatment. This testimony is presented in vague, pseudoscientific language so flexible that it may be used against anyone. Nor is the commitment hearing an adversary procedure. The psychiatrists who testify against the allegedly ill person are employed by the state, which is a party to the decision. Yet, these psychiatrists are considered to be "neutral" experts. This is comparable to having the prosecuting attorney in a criminal trial testify as an expert against the defendant! Moreover, the "mentally ill" defendant may engage a psychiatrist to testify in his behalf only if he has the funds, which often he does not have.

The information presented by the psychiatric "expert witness" in his testimony against the patient-defendant is obtained from that patient during the course of what is supposed to be a confidential doctor-patient relationship. Thus, the defendant in a commitment hearing is not protected from testifying against himself. On the contrary, during interviews with the hospital psychiatrist, the defendant supplies the bulk of the evidence against himself. Refusal to cooperate with the psychiatrist, rather than being within his rights under the Fifth Amendment, may be construed as evidence for a "paranoid illness" for which he requires psychiatric hospitalization.

not establish the need for commitment beyond a reasonable doubt, the patient would rightfully be freed where as once he might have been hospitalized for an indeterminate period of time.⁵²

While some courts have recognized that reform in the mental health commitment procedures are necessary, it is doubtful that widespread change will occur without a Supreme Court decision mandating such changes. The dictum in a recent case indicates that the Supreme Court would consider the litigation of the constitutional issues involved in commitment as appropriate for determination: "Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated."⁵³ This fact, coupled with the Court's previous objection to treating an illness as a crime,⁵⁴ may indicate that a statement on this issue by the Court may be forthcoming at some future date. A search for the case within which it would be possible to determine these issues is apparently being conducted. In *Murel v. Baltimore City Criminal Court*⁵⁵ the Court heard the oral arguments and then decided that "this case does not present these issues in a manner that warrants the certiorari jurisdiction of this Court."⁵⁶ More recently, the Court vacated⁵⁷ the judgment entered by the district court in *Lessard v. Schmidt*⁵⁸ which had broadly

52. As was stated previously, some patients who are inappropriate for commitment may nonetheless profit from some form of treatment. Even the liberal model statute proposed in Elliott, *supra* note 15, would allow involuntary commitment for those in need of treatment who refuse to cooperate even though they may not fall under the "dangerous to self or others" provision.

53. *Jackson v. Indiana*, 406 U.S. 715, 737 (1972).

54. *Robinson v. California*, 370 U.S. 660, 666 (1962): "It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease."

55. 407 U.S. 355 (1972), *dismissing cert. as improvidently granted to Tippet v. Maryland*, 436 F.2d 1153 (4th Cir. 1971). Four inmates serving fixed prison terms but committed under the Maryland defective delinquency statute petitioned the Court for a review of that statute and the civil commitment statute. The Court dismissed their petition as one of the inmates had been released and the rest would be subject to continued incarceration because of the criminal convictions even if the Court overturned the statutes in question. Further a contemplated revision of the statutes by the state legislature made the Court wary of a "comprehensive challenge to the Defective Delinquency Law" which might unduly interfere with the legislative efforts. *Id.* at 357-58.

56. *Id.* at 357.

57. *Schmidt v. Lessard*, 414 U.S. 473 (1974).

58. 349 F. Supp. 1078 (E.D. Wis. 1972). See Note, *Civil Commitment of the Mentally Ill: Lessard v. Schmidt*, 23 DEPAUL L. REV. 1276 (1974). Discussions of mental health commitment in Illinois can be found in I. Beis, *Civil Commitment: Rights of the Mentally Disabled, Recent Developments and Trends*, 23 DEPAUL L. REV. 42 (1973) and R. Shlensky, *Constitutional Problems with Mental Commitment*

attacked the Wisconsin commitment statute. By not reversing the judgment in *Lessard*, the Court demonstrated that it is still open for consideration of the proper case. When such a case is found, it can be hoped that the Court will see fit to extend reforms such as that ordered in *Ballay* to protect all persons who may be required to defend themselves at a commitment hearing regardless of the jurisdiction.⁵⁹

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in *Illinois*, 62 ILL. B.J. 552 (1974). A comprehensive discussion of the current state of commitment is found at *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974).

59. The difficulty in making such changes in the appellate process was illustrated in *Smith v. Staunton*, 72 C 1979 (N.D. Ill. order entered Nov. 13, 1973) where the attorneys for the plaintiff-patients in pre-trial conference agreed to drop their demand for the requiring of the reasonable doubt standard since the judge, sitting without a jury, had ordered the commitment of patients Smith and Mathew, and there was no means of determining what standard he applied in reaching that decision. Due to this uncertainty, no appeal was possible on this issue.

