Civil Commitment of the Mentally Ill: Lessard v. Schmidt

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CIVIL COMMITMENT OF THE MENTALLY ILL: LESSARD v. SCHMIDT

On October 29, 1971, Miss Alberta Lessard was picked up in front of her residence in West Allis, Wisconsin, by two police officers and taken to a mental health center in Milwaukee, where she was detained on an emergency basis. Three days later, without a preliminary hearing on probable cause for detention, a judge of the Milwaukee County Court issued an order permitting the confinement of Miss Lessard for an additional ten days. On November 4, a Doctor Currier formally stated to the county court judge that Miss Lessard was a schizophrenic and recommended that she be permanently committed. The judge ordered an examination by two physicians and entered a second ten day detention order, which was extended again on November 12. Throughout this initial series of hearings, neither Miss Lessard nor anyone who might act on her behalf was informed of the proceedings.

Through her own initiative, Miss Lessard retained counsel through Milwaukee Legal Services. She was given less than 24 hours notice of a November 16 commitment hearing, which had to be reset for November 26 to allow her attorney an opportunity to appear. Her request to go home during this ten day period was denied without reason. She was given no notice of the names of persons who would testify against her, of her right to a jury trial, nor the basis upon which her continued detention would be sought. At the commitment hearing, the judge ordered Miss Lessard committed for 30 additional days giving no reason other than his finding that she was mentally ill. He made no findings on the issue of dangerousness, despite the fact that the evidence of her attempted suicide 26 days earlier was of a hearsay nature and the fact that a staff psychiatrist at the mental hospital testified that, in his opinion, she presently had no suicidal tendencies. The judge refused to consider any alternatives less restrictive than commitment and did not disclose the standard of proof, if any, which was used to decide the issues.

Three days following her commitment, hospital authorities permitted her to go home on an out-patient parole basis. However, successive 30 day commitment orders were issued for nearly one year, thereby maintaining the involuntarily committed status of Miss Lessard.
Miss Lessard initiated a class action on behalf of herself and all persons 18 years of age and older who were being held involuntarily pursuant to any provision of Wisconsin's involuntary commitment statute. Jurisdiction was claimed under 42 U.S.C. § 1983 and a three judge court was requested pursuant to 28 U.S.C. § 2281, and allowed in view of the substantial constitutional claims raised by the pleadings. The complaint sought declaratory and injunctive relief against enforcement of certain provisions of Wisconsin's statutes relating to the procedure for commitment of mentally ill persons and an injunction against the further detention of Miss Lessard. In finding for the plaintiff, the Federal District Court for the Eastern District of Wisconsin found several of the procedures authorized by the Wisconsin statute to be constitutionally defective and also strictly limited the power of the state to involuntarily commit both dangerous and non-dangerous mentally ill persons. The court granted the requested injunction as to Miss Lessard and ordered release or rehearing of all members of the plaintiff class who were committed pursuant to the defective procedures noted in the opinion. Lessard v. Schmidt.

Lessard is significant in at least two respects: (1) it strictly limits state power to commit certain classes of mentally ill persons, and (2) it makes applicable to the involuntary commitment process, as a matter of constitutional right, several procedural safeguards which apply to the trial of criminal defendants. In addition, the court makes clear at the outset of its opinion that, in order to resolve plaintiffs' claims, an analysis of the justifications which underlie civil commitment theory and procedure is required. The resulting broad scope of the opinion is a rarity among cases in the mental health field.

In evaluating the effect of Lessard upon the problem of protecting the rights of alleged mentally ill persons subject to involuntary commitment, this note will examine the extent of state commitment powers and consider the procedural limitations which have been imposed on the commit-

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
3. 349 F. Supp. 1078 (E.D. Wis. 1972), vacated and remanded, 42 U.S.L.W. 3402 (U.S. Jan. 15, 1974) [hereinafter cited as Lessard]. The actual entry of an order granting injunctive relief did not occur until about nine months after the opinion, which indicated that plaintiffs were entitled to an injunction, was filed.
ment process by statute and case law. Following this will be an analysis of the holdings of the court in Lessard. In order to provide a proper framework for the subsequent discussions, the following section will briefly define the two key concepts.

I. DEFINITIONS

A. What is Mental Illness?

The Draft Act for the Hospitalization of the Mentally Ill, upon which several state statutes are based, defines a mentally ill individual as "an individual having a psychiatric or other disease which substantially impairs his mental health." The Wisconsin statute involved in Lessard defined mental illness as "mental disease to such an extent that a person so afflicted requires care and treatment for his own welfare, or the welfare of others or of the community." Clearly, neither definition provides much in the way of standards to guide the individual who is empowered to enforce commitment laws, nor a sound basis for the use of a relaxed set of due process rights.

Since hospitalization involves the loss of an individual's liberty and many additional civil rights, the alleged mentally ill person should be entitled to a clear standard which justifies commitment. Unfortunately, the prospects for such a standard are poor. Mental illness has been described as "a global medical concept with as imprecise a definition as 'physical illness.'" The medical profession is in no sense in agreement about which illnesses are properly includable within this category. The problems involved with basing a commitment scheme on a medical term upon which the medical profession cannot agree was discussed by Burger (the present Chief Justice) concurring in Blocker v. United States:

[N]o rule of law can possibly be sound or workable which is dependent upon the terms of another discipline whose members are in profound disagreement about what those terms mean . . . . This is not simply a matter of experts disagreeing on opinions or on diagnosis, which often occurs, but disagreement at the threshold on what their own critical terms mean.

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6. See note 81 infra and accompanying text.
9. Id. at 860.
While some authors dispute the existence of mental illness or the need for civil commitment laws,10 it seems that the general social view recognizes that there does exist some forms of mental disease with which the law may properly deal in the form of commitment laws. Efforts to refine the current legal definitions of mental illness should continue. However, the current need to protect the rights of those who should not be subject to commitment can be satisfied by employing more strict standards in applying the additional criteria which are used to base a commitment decision11 and by adopting strict procedural safeguards in the commitment process.

B. What is Involuntary Commitment?

The phrase "involuntary commitment," or the more modern term "involuntary hospitalization," describes the removal of a person judged to be mentally ill from his normal surroundings to a hospital authorized to detain him.12 It is wise to consider that the term should be construed to include not only those relatively few situations in which the patient actively opposes commitment,13 but also those in which the patient stands mute at a commitment proceeding and fails to raise any objection. Used in this inclusive sense, a proper evaluation of both commitment standards and procedures can be made in determining the propriety of state action and the adequacy of safeguards provided.

II. SOURCE AND EXTENT OF STATE COMMITMENT POWERS

As a general proposition, state statutes authorize the commitment of a mentally ill individual based upon one or more of the following criteria: (1) to protect the public against acts of violence ("dangerous to others"); (2) to protect the individual from self-inflicted injury or peril ("dangerous to self"); and/or (3) to provide therapeutic measures in order to alleviate the individual's condition ("in need of treatment").14

10. See, e.g., N. Kittrie, The Right to Be Different: Deviance and Enforced Therapy (1971); T. Szasz, Law, Liberty and Psychiatry (1963); Szasz, The Sane Slave: Social Control and Legal Psychiatry, 10 AM. CRIM. L. REV. 337 (1972). The question of whether or not the state should be involved at all in the enforced treatment of certain categories of individuals is beyond the scope of this note.

11. See note 14 infra and accompanying text.


14. See Brakel and Rock, supra note 7, at 72-79 for a comprehensive listing of each state's statutory criteria for involuntary commitment.
The power of the state to commit mentally ill persons who fall within one or more of the above criteria is based upon the police power and the doctrine of *parens patriae*. Under the police power, the state may confine a mentally ill person who presents a danger to other members of society. In the *parens patriae* capacity, the state has the right and the duty to protect the person and property of those who, due to mental illness or minority, are unable to care for themselves. It is by virtue of the *parens patriae* power that the state is empowered to commit a mentally ill individual who presents a danger to himself or is considered to be in need of treatment. Where employed, the doctrine of *parens patriae* has been used to justify a less comprehensive set of procedural due process rights than is required in criminal adjudications. The basic justification for this state of affairs is the belief that a formal adjudicatory hearing in which full due process rights are provided is not required where the state is proceeding for the benefit of the individual involved. Potential benefit to the individual is also employed as a justification for commitment without traditional due process rights when the state seeks commitment under the police power. In addition, the view that society's rules cannot deter the violent mentally ill is also used to support commitments under the police power without traditional due process safeguards.

The departure from the common law requirement of dangerousness to others came about in America in the mid-19th century. Up until that time, the basic purpose of confinement of the mentally ill was detention and not therapy. However, as the mentally ill came to be recognized as sick rather than cursed and as the community came to accept greater responsibility for the care of its disadvantaged members, considerations other than community self-protection were employed to justify commitment. The courts reflected this change in view by allowing commitments based upon state *parens patriae* powers. In the seminal case of *In re Josiah Oakes*, Chief Justice Shaw of the Massachusetts Supreme Court upheld the detention of a non-violent individual who alleged wrongful detention. In so doing, Chief Justice Shaw found that dangerousness to self, in addition to the more familiar dangerousness to others standard, would suffice as a proper basis for detention.

The justification for commitment based upon dangerousness to self is

17. 8 LAW REP. 123 (Mass. 1845), discussed in Hallett v. Oakes, 55 Mass. 296, 1 Cush. 296 (1848).
18. Id. at 125.
that the state, as parens patriae, may proceed to protect the interests of the individual involved. Under English law, parens patriae had been used as a source of power over the person and goods of certain mentally ill individuals for centuries. Under the English practice, commitment was allowed for persons deemed incompetent but it worked no deprivation of property and civil rights during lucid moments. The American practice, on the other hand, generally resulted in total and perhaps permanent loss of liberty.19

The use of parens patriae as a source of substantive power over mentally ill individuals may be viewed as motivated by humanitarian concerns. Its use, however, brought within state power a new class of individuals. This new class of potential committees were subject to unjustified commitments for two important reasons. The first of these was the failure of the courts to require strict standards of dangerousness.20 The second was the belief that when the state sought to deprive an individual of his liberty to treat rather than to punish, traditional due process rights were considered unnecessary.

III. PROCEDURAL SAFEGUARDS

This section will examine the principal arguments which are used to limit the extent to which procedural rights should be required in civil commitment proceedings and survey certain basic procedural safeguards which have been imposed on the commitment process in the several states by statute and case law.

A. Principal Arguments

Whether or not an alleged mentally ill person should be entitled to the procedural safeguards to which a criminal defendant is entitled has been the subject of extensive controversy. Courts,21 commentators,22 and psy-

20. See, e.g., United States v. Charnizon, 232 A.2d 586 (D.C. Ct. App. 1967) in which the probability that the accused would issue checks drawn on insufficient funds was held to fall within the statutory test of mental illness characterized by dangerousness to others. See also Dodd v. Hughes, 81 Nev. 43, 398 P.2d 540 (1965) in which recidivism and a failure to respond to conventional penal and rehabilitative techniques were held to satisfy a “mentally ill and dangerous” commitment standard.
22. See, e.g., M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 295 (1952):
chiatrists have advanced the proposition that it is not only acceptable, but desirable that alleged mentally ill persons receive less than the traditional due process safeguards afforded criminal defendants. Two justifications which have been advanced in support of this proposition are that the proceeding is civil rather than criminal and that the purpose of the commitment is not punishment but rehabilitation. Neither reason supports the proposition asserted.

Several recent cases lend strong support to the view that the civil-criminal distinction is an untenable premise upon which to base a relaxation of traditional due process standards in commitment proceedings.

In re Gault involved the commitment of an alleged juvenile delinquent pursuant to juvenile court proceedings which have traditionally been classified as "civil." Notwithstanding this label, the Court held that the privilege against self-incrimination, which by the express words of the fifth amendment is applicable only to a "criminal case," is available in such a proceeding because "commitment is a deprivation of liberty. It is incarceration against one's will whether it is called 'criminal' or 'civil'."

Heryford v. Parker applied an approach similar to that used in Gault in a habeas corpus proceeding brought by the mother of a mentally retarded son who had been committed to a state institution for the feeble-minded and epileptic. The mother alleged that the state had failed to meet the requirements of due process at least in part due to a failure to provide counsel at the commitment proceeding. Chief Judge Murrah, speaking for the tenth circuit, agreed:

[L]ike Gault, and of utmost importance, we have a situation in which the liberty of an individual is at stake, and we think the reasoning in Gault emphatically applies. It matters not whether the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration—
whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent—which commands observance of the constitutional safeguards of due process.\(^{28}\)

Taken together, these decisions appear to indicate that the traditional due process safeguards which apply in the trial of a criminal defendant should equally apply in a civil commitment proceeding, or in any other proceeding in which an individual is threatened with deprivation of liberty.

The notion that commitment pursuant to relaxed due process standards is justified due to the therapeutic rather than punitive purpose of the subsequent commitment is likewise unsupportable. In discussing the issue in the context of juvenile courts, the Supreme Court noted:

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults . . . . There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.\(^{29}\)

There can be little doubt that civil commitment of an adjudged mentally ill individual similarly fails to provide the care and treatment upon which commitment pursuant to relaxed due process standards is designed to rest.\(^{30}\)

But what if the rehabilitative purpose of the commitment is raised to the level of an enforceable right? That is, may lesser procedural safeguards be allowed in a commitment proceeding than in a criminal trial where the potential committee has a constitutional right to treatment fol-

\(^{28}\) Id. at 396.


\(^{30}\) State mental institutions are typically overcrowded and understaffed, serving a caretaking rather than a therapeutic function for most of their inmates. In 1965, the median number of patients per physician employed by public mental hospitals was 102. National Institute of Mental Health, Patients in Mental Institutions, 1965 (1967). Twenty to thirty patients would constitute a relatively heavy case load if individual psychiatric therapy were actually provided. Reibman, Rights of Mental Patients to Treatment and Remuneration for Institutional Work Pending Mental Health Legislation, 39 Pa. B. Ass'n Q. (1968). In 1961, a Senate committee was told that half the patients in state mental hospitals receive no treatment and that "in most public mental hospitals the average ward patient comes into personal-to-person contact with a physician about 15 minutes every month. . . ." Hearings on Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess., pt. I, at 43-44, 103 (1961).
lowing civil commitment? This question should be answered in the negative. The courts should not allow the constitutionally based right to treatment to bolster an argument which is designed to maintain constitutionally defective procedures. The right to treatment following civil commitment has received less than universal judicial acceptance. In addition, several difficulties attend enforcement of this right where it is recognized. But more importantly, even if there was a nationally recognized and enforceable right to treatment, full procedural rights should be required to insure that "treatment" is not allowed for persons who do not desire it, cannot benefit from it, or may be harmed by it.

One additional point with respect to the "purpose" argument deserves present note. When a mentally ill individual is committed on the basis of a dangerous to others standard, his confinement, in a sense, is similar to criminal confinement in that in both cases the state decides that society at large will benefit from the deprivation of the individual's liberty. To the extent that such confinement of a mentally ill individual serves a traditional criminal purpose, then, on this basis alone, it should be attended by traditional criminal safeguards.

It seems clear from the above, then, that even if the purpose and effect of commitment is rehabilitative rather than punitive, that this does not constitutionally justify the use of any fewer due process rights than are required in a criminal trial.

31. A constitutional right to treatment was first recognized by a federal court in Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971).


34. State enforced treatment of an individual against his will raises the specter of enforced state behavioral norms. See, e.g., KITTRE, supra note 10, at 45-49 and 386-94. Second, certain types of mental illnesses are presently untreatable. See, e.g., Livermore, supra note 33, at 93. Confining an individual with such a disease is tantamount to punishing him for being mentally ill in contravention of Robinson v. California, 370 U.S. 660 (1962). Finally, "any lengthy hospitalization, particularly where it is involuntary, may greatly increase the symptoms of mental illness and make adjustment to society more difficult." 349 F. Supp. at 1087.


B. Survey of Required Procedures

(1) Notice and Opportunity To Be Heard

In 1971, only twenty-six of the forty-two jurisdictions which had judicial hospitalization procedures required by statute that notice be given to the alleged mentally ill individual of the commitment proceeding. Nine states, including Wisconsin, allowed for the omission of notice where it would be harmful to the patient. The remaining states allowed either notice to be served on the individual or someone on his behalf or had no statute on the subject. In only twelve jurisdictions did the statute specify the minimum notice permissible.37

Courts are apparently divided on whether notice and a hearing prior to hospitalization are required by due process. In In re Wellman,38 which is followed by some courts, it was held that notice and a hearing are required. In response to the assertion that notice of a commitment hearing should not be required because it might be ineffective or futile, the Kansas Court of Appeals stated:

Notice and opportunity to be heard lie at the foundation of all judicial procedure. They are fundamental principles of justice, which cannot be ignored . . . . It will not do to say that it is useless to serve notice upon an insane person,—that it would avail nothing, because of his inability to take advantage of it. His sanity is the very thing to be tried.39

Where statutes have dispensed with all requirements of notice and the opportunity to be present at the hearing and have no provision for substitute notice, they have been held invalid.40 However, where the patient has the unqualified right, either through statutory provisions for a post-hospitalization hearing or through habeas corpus, to contest the validity of his hospitalization in a judicial hearing, hospitalization without a hearing has been held valid.41 It may be noted, however, that in only seventeen states does the patient have an unrestricted right to communicate with an attorney.42 As a result, the patient's ability to contest the validity of his hospitalization is, in those states which do not provide for unrestricted communication with counsel following commitment without a hearing, severely hampered if not totally frustrated.

37. Brakel and Rock, supra note 7, at 52. See id. at 72-79 (contains a listing of each individual state requirement).
38. 3 Kan. App. 100, 45 P. 726 (1896).
39. Id. at 103, 45 P. at 727.
40. See Brakel and Rock, supra note 7, at 52 n.163 and citations therein.
41. Id. at 52.
42. Id. at 174-79 (contains a listing of the state provisions involved).
Right to Counsel

Forty-two jurisdictions provide that the alleged mentally ill individual has the right to be represented by counsel. However, only twenty-four provide for the appointment of counsel in all commitment cases in which the person has none. In seven jurisdictions, such appointments may be made at the discretion of the court, and in five states appointment is mandatory upon the individual's request.\(^{48}\)

In *Argersinger v. Hamlin*,\(^{44}\) the Supreme Court extended the right to appointed counsel to all criminal proceedings in which an accused is subject to a deprivation of liberty. Chief Justice Burger, concurring in the result, noted that "cogent factors suggest the infirmities in any approach that allows confinement for any period without the aid of counsel at trial; any deprivation of liberty is a serious matter."\(^{45}\) In *Gault* the Court noted that the individual whose freedom is in jeopardy, needs the assistance of counsel to cope with the problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.\(^{46}\)

In *Heryford* a right to counsel in proceedings to involuntarily commit a mentally deficient individual was held to be a due process right, guaranteed under the fourteenth amendment. In its opinion, the court noted that

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\text{[w]here . . . the state undertakes to act in parens patriae, it has the inescapable duty to . . . see that a subject of an involuntary commitment proceedings is afforded the opportunity to have] the guiding hand of legal counsel at every step of the proceedings, unless effectively waived by one authorized to act in his behalf.}\(^{47}\)

IV. *Lessard v. Schmidt*

A. Substantive Limitations on State Commitment Powers

Under § 51.02(5) of Wisconsin's Mental Health Act, the court may order a patient involuntarily committed if it is "satisfied that he is mentally ill or infirm or deficient and that he is a proper subject for custody and treatment . . . ." The plaintiffs in *Lessard* attacked this statute (1) on the grounds of vagueness and overbreadth, (2) for its allowance of commitment based upon a preponderance of the evidence, and (3) for

\[\text{id. at 54. See id. at 125-28 (contains a listing of each state's statute).}\]

\[\text{id. at 25 (1972).}\]

\[\text{id. at 41.}\]

\[387 \text{ U.S. 1, 36 (1967).}\]

\[396 \text{ F.2d 393, 396 (10th Cir. 1968).}\]
its failure to allow for the concept of less drastic means. The court (1) avoided a finding of vagueness, (2) found that commitment based upon a preponderance of the evidence is violative of due process of law, and (3) construed the statute so as to allow for the concept of less drastic means.

The court avoided a "void for vagueness" analysis of the Wisconsin commitment statute by employing the United States Supreme Court opinion, *Humphrey v. Cady*, 48 which interpreted commitment under the Wisconsin sex crimes statute in light of the Wisconsin statute which defines mental illness. 49 In dicta, the Court noted that implicit in the definition is the requirement that a person's "potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty." 50 From this, the court in *Lessard* implied a balancing test, stating that

> [the Supreme Court's] approval of a requirement that the potential for doing harm be "great enough to justify such a massive curtailment of liberty" implies a balancing test in which the state must bear the burden of proving that there is an extreme likelihood that if the person is not confined he will do immediate harm to himself or others. 51

After noting the caution with which a finding based upon a prediction of future conduct must be viewed, the court refined the "extreme likelihood of immediate harm" test to require a finding of "a recent overt act, attempt or threat to do substantial harm to oneself or another." 52 At least one problem with such an approach will arise in attempting to define "substantial" and "harm."

Importantly, the court further refined its standard with respect to commitment based upon dangerousness to self. When dangerousness to self is alleged as the ground upon which commitment is to be based

> an overt attempt to substantially harm oneself cannot be the basis for commitment unless the person is found to be 1) mentally ill and 2) in immediate danger at the time of the hearing of doing further harm to oneself. 53

The court based this refinement upon two considerations. First, the justifications for commitment of an individual who, because of mental illness, is likely to harm others do not necessarily apply to a situation of potential

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49. See note 5 supra and accompanying text.
50. 405 U.S. 504, 509 (1972).
51. 349 F. Supp. at 1093 (emphasis added by court).
52. Id.
53. 349 F. Supp. at 1093 n.24 (emphasis added).
harm to self. Second, dangerousness to self need not require a finding of mental illness such that the individual should be subject to the commitment power of the state. An attempted suicide should not, and the court holds that it cannot, in itself invoke state commitment powers.54

The need to find dangerousness to self or others, by one of the above standards, in addition to a finding of mental illness as a prerequisite to commitment was further supported by comparing the mentally ill individual with the physically ill individual. With the exception of communicable or contagious diseases,55 persons in need of physical treatment are allowed the choice of whether or not to undergo hospitalization and treatment. The reason for this is plain: the state simply has no interest in compulsory physical treatment of persons who do not pose a direct threat of contamination of others with their disease. The mental process which a physically ill individual undergoes in choosing whether or not to seek treatment is accorded great respect. Society has determined that it is more desirable to allow a physically sick individual the choice rather than to compel him to undergo treatment.56 The Lessard court extended this analysis to those with a sickness of the mind. That is, even though an individual is alleged to be mentally ill and even though it is thought that treatment might be beneficial to his well being, the power of the state to compel his confinement and treatment will be cut off “unless the state can prove that the person is unable to make a decision about hospitalization because of the nature of his illness.”57 It is clear that even though treatment may in itself be beneficial to the individual, the disadvantages involved in institutional confinement (e.g., stigma, difficulties in obtaining release and in finding a job, etc.) may result in the conclusion that the “sane” choice would be not to seek such treatment.

One drawback to this approach may be found in the use of the phrase “unable to make a decision.” Does the state’s evidence that an individual stands mute at a commitment proceeding prove inability to make a decision? Does the conscious decision not to seek treatment in the face of several doctors’ reports that indicate that treatment is recommended evidence inability to make a decision because the decision is wholly unwise in view of professional reports? Such results were apparently unintended by the opinion in Lessard, but it seems possible that a finding of inability

54. Id.
55. See, e.g., Jacobson v. Massachusetts, 197 U.S. 11, 27 (1905): “Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”
56. See Comment, supra note 35, at 1290.
57. 349 F. Supp. at 1094.
could be made upon a showing of (1) a failure to manifest ability, or
(2) a decision which, when viewed in the context of professional opinion,
exhibits unwise or irrational judgment.

A final reason for the requirement of a finding of dangerousness is the
present state of medical knowledge on mental illness which, due to "un-
avoidably ambiguous generalities" allows the diagnostician the ability "to
shoehorn into the mentally diseased class almost any person he wishes,
for whatever reason, to put there."\(^8\) So long as the state's power is being
employed, the decision to commit must remain essentially a social and
not a medical one. To effectuate this end, the criteria for commitment
must reflect (1) a standard which judges can apply without a virtually
complete reliance upon medical opinion, and (2) a standard which will
constitutionally justify the invocation of state power. A strict standard
of dangerousness meets these tests.

\textit{Lessard} limits the state in the use of \textit{parens patriae} as a source of com-
mitment power because of its stated requirement that either dangerous-
ness to self or others, or inability to make a decision concerning treatment
be shown before treatment is justified. The non-dangerous mentally ill
individual who retains the capacity to make a decision concerning treat-
ment is thus placed beyond the state's commitment powers. Where, how-
ever, dangerousness to self or others is shown (by the stated standard ap-
plicable in each case), a showing of decisional capacity will not, under
the \textit{Lessard} standard, defeat commitment. In addition, the strictness with
which the court defines dangerousness in itself narrows the class of poten-
tial committees.

The court next proceeded to determine the standard of proof which
is constitutionally required in a civil commitment case. While the Wis-
cconsin statutes are silent as to the burden of proof which is permissible,\(^6\)\(^9\) the Wisconsin Supreme Court in \textit{In re Hogan}\(^6\)\(^0\) has approved a jury in-
struction allowing commitment based on a preponderance of the evidence.
The court found this to be an impermissible standard in light of \textit{Woodby v. Immigration and Naturalization Service}.\(^6\)\(^1\) In \textit{Woodby}, the United
States Supreme Court disallowed a deportation based "upon no higher
degree of proof than applies in a negligence case."\(^6\)\(^2\) Since commitment
involves greater deprivations of liberty than those involved in deportation,
the court reasoned, it follows that commitment based upon a standard

\(^{58}\) Id., citing Livermore, supra note 33, at 80.
\(^{59}\) Id.
\(^{60}\) 232 Wis. 521, 287 N.W. 725 (1939).
\(^{62}\) Id. at 285.
impermissible in a deportation case is likewise impermissible in a commit-
ment case. 63 The Court in Woodby announced a standard of “clear, unequivocal,
and convincing evidence.” 64 The court in Lessard held that proof beyond
a reasonable doubt of all facts necessary to show mental illness and dan-
gerousness is the requisite standard of proof in a commitment hearing. 65 The court based this holding primarily upon In re Winship, 66 in which
the United States Supreme Court held that proof beyond a reasonable
doubt was required to prove every fact necessary in a juvenile delin-
quency proceeding. Since the same interest in liberty is involved in both
commitment and juvenile delinquency proceedings, the court reasoned,
the same “extreme caution in factfinding” 67 should be required of the
factfinder in reaching his result. Furthermore, there is the added factor
of a loss of civil rights upon a commitment which is not present in a delin-
quency proceeding making the Lessard standard more compelling. 68

It is submitted, however, that the stated standard is unfortunately strict.
Will it be possible for a trier of fact to find beyond a reasonable doubt
that “there is an extreme likelihood that if the person is not confined he
will do immediate harm to himself or others?” 69 The Lessard court noted
its awareness of the problems attendant upon predictions of future con-
duct, stating that commitments based upon such prediction must be
“viewed with suspicion . . . .” 70 It stated a belief that commitment can
be justified in those cases in which “the proper burden of proof is satisfied
and dangerousness is based upon a finding of a recent overt act, attempt
or threat to do substantial harm to oneself or another.” 71 The court’s con-
cern with the protection of the due process rights of alleged mentally ill
individuals will not be realized, however, if all that is required to find
commitment appropriate is a showing of some prior conduct. The better
approach it is submitted, is that suggested in Tippett v. Maryland 72 in-

63. 349 F. Supp. at 1094.
64. 385 U.S. at 286.
65. 349 F. Supp. at 1095.
67. Id. at 365.
68. 349 F. Supp. at 1095. See also note 81 infra and accompanying text. In
In re Ballay, 482 F.2d 648 (D.C. Cir. 1973), a commitment based upon a “prepon-
derence of the evidence” standard rather than a “beyond a reasonable doubt” stand-
ard was held to constitute a deprivation of due process.
69. 349 F. Supp. at 1093.
70. Id.
71. Id.
72. 436 F.2d 1153, 1159 (4th Cir. 1971) (Sobeloff, J., concurring in part and
volving a defective delinquency proceeding, in which "clear, unequivocal and convincing evidence" was suggested as the appropriate standard as to the issue of dangerousness, and proof beyond a reasonable doubt was suggested as the appropriate standard as to all objective facts in dispute.\(^7\)

By using different standards for distinct issues, dangerousness retains its usefulness as a matter of prediction and allows the defendant a sound basis upon which to contest such a finding. The Lessard standard would apparently authorize commitment upon a showing of some prior dangerous conduct which would evidence present tendencies upon which a prediction as to future conduct could be based. It is true that dangerousness is difficult if not impossible to accurately predict,\(^7\) but requiring that it be shown beyond a reasonable doubt may encourage some factfinders to place unwarranted reliance upon prior conduct alone, thereby severely limiting its usefulness.

The third aspect of the court's substantive analysis involved the concept of less drastic means. The principle was stated in Shelton v. Tucker\(^7\) that

> even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose.\(^7\)

In Lake v. Cameron,\(^7\) involving a habeas corpus proceeding, a burden of exploration of possible alternatives to commitment was imposed upon the state. The burden was imposed on the basis of a provision in the District of Columbia Hospitalization of the Mentally Ill Act\(^7\) which al-


73. In the words of Judge Sobeloff,

> [A]s to the ultimate issue of the inmate's dangerousness, the beyond a reasonable doubt standard may in practical operation be too onerous. After all, the ultimate issue is not as in a criminal case whether an alleged act was committed or event occurred, but the much more subjective issue of the individual's mental and emotional character. Such a subjective judgment cannot ordinarily attain the same "state of certitude" demanded in criminal cases. A number of commentators have suggested that a standard lying between the civil and the criminal may suffice where a determination of "dangerousness" is at issue. Frequently advocated is a standard of "clear and convincing evidence." (citations omitted)

\(^74\) See Livermore, supra note 33, at 84 for an excellent discussion of the point.

75. 364 U.S. 479 (1960).

76. Id. at 488.

77. 364 F.2d 657 (D.C. Cir. 1966) [hereinafter cited as Lake].

ollowed the court, after a finding that the individual was subject to commitment, to order "any other alternative course of treatment which the court believes will be in the best interests of the person or of the public."79

In Lessard, a burden of proof of alternatives to commitment was imposed upon the state (whereas Lake imposed a burden of exploration) and this burden was imposed without the benefit of a statute as in Lake. Specifically,

the person recommending full-time involuntary hospitalization must bear the burden of proving (1) what alternatives are available; (2) what alternatives were investigated; and (3) why the investigated alternatives were not deemed suitable.80

Thus, even though the standards for commitment are satisfied, full-time involuntary hospitalization may not be ordered unless all less drastic means of achieving the same objective have been investigated and found not suitable in the individual case.

B. Procedural Safeguards Required in the Commitment Process.

The basic principle upon which the court based its holdings with reference to procedural rights was that it is the seriousness of the deprivation of liberty and the consequences which follow a finding of committable mental illness which require strict adherence to the stringent procedural requirements which apply to other proceedings in which individual liberty is in jeopardy. The court noted several reasons for dispelling the notion that parens patriae should justify less stringent procedural rights in a civil commitment proceeding than are required in a criminal trial. Among the reasons cited were loss of numerous civil rights, stigma which accompanies release, and statistics which indicate that a person committed to a mental institution has a much greater chance of dying than if left at large.81 The court noted that

the interests in avoiding civil commitment are at least as high as those of persons accused of criminal offenses. The resulting burden on the state

79. D.C. Code § 21-545(b) (Supp. V 1966). It may also be noted that in State v. Sanchez, 80 N.M. 438, 457 P.2d 370 (1969), the Supreme Court of New Mexico, citing with approval the dissent in Lake, rejected the contention of an involuntarily committed individual that hospitalization imposed a restraint much broader than was necessary to protect him from injury to himself. Absent a statutory duty to explore alternatives, the court held, no duty existed. Id. at 373.

80. 349 F. Supp. at 1096.

81. Id. at 1088-90. For tables listing the legal effect of an adjudication of mental illness in the several states, see Braekel and Rock, supra note 7, at 240 (marriage), 244 (divorce), 248 (adoption), 273 (legal competency), 315 (personal and property rights), 322 (testamentary capacity), 326 (engagement in occupations), and 333 (voting, holding office, jury service and driver's license).
to justify civil commitment must be correspondingly high.\textsuperscript{82}

The issue of procedural due process requirements was raised by plaintiffs in that part of the complaint which alleged that the Wisconsin procedure for civil commitment denied due process by (1) permitting involuntary detention for a possible 145 days without a hearing on the necessity of the detention; (2) failing to make notice of hearings mandatory; (3) failing to give adequate and timely notice where notice is given; (4) failing to provide a mandatory notice of right to trial by jury; (5) failing to give right to or appointment of counsel at a meaningful time; (6) failing to permit counsel to be present at psychiatric interviews; (7) failing to provide for the exclusion of hearsay evidence and for the privilege against self-incrimination; and (8) failing to provide access to an independent psychiatric examination by a physician of the allegedly mentally ill person's choice.\textsuperscript{83} With the exception of the sixth\textsuperscript{84} and eighth allegation above,\textsuperscript{85} the court in \textit{Lessard} agreed that these various failures of the Wisconsin civil commitment statute \textit{did} deny plaintiffs due process and the court declared each a prerequisite to a valid commitment as a matter of due process of law.

The requirement that an individual subject to civil commitment be given prior notice and an opportunity to be heard prior to a valid commitment was established in \textit{Lessard} with principal reliance upon \textit{Boddie v. Connecticut}\textsuperscript{86} and \textit{Gault}. As a result of its analysis, five sections of the Wisconsin civil commitment statute\textsuperscript{87} were held unconstitutional on their face and as applied to Miss Lessard.

\textit{Boddie} established the proposition that an individual must "be given an opportunity for a hearing before he is deprived of any significant property interest . . . ."\textsuperscript{88} Since an individual's interest in liberty is more compelling than his interest in property rights, the court reasoned that "no significant deprivation of liberty can be justified without a prior hearing on the necessity of the detention."\textsuperscript{89} Within this analysis, however,

\begin{itemize}
  \item \textsuperscript{82} Id. at 1090.
  \item \textsuperscript{83} Id. at 1082.
  \item \textsuperscript{84} See text accompanying note 97 infra for the court's suggested alternatives.
  \item \textsuperscript{85} Since an offer of independent psychiatric examination was refused by plaintiff's counsel, the court did not rule on the issue. 349 F. Supp. at 1082 n.2.
  \item \textsuperscript{86} 401 U.S. 371 (1971).
  \item \textsuperscript{87} Wis. Stat. Ann. §§ 51.02(1); 51.03; and 51.04(1) to 51.04(3) (Supp. 1969).
  \item \textsuperscript{88} 401 U.S. at 379 (emphasis added).
  \item \textsuperscript{89} 349 F. Supp. at 1091. See also Goldberg v. Kelly, 397 U.S. 254 (1970), in which the Supreme Court held that due process requires an evidentiary hearing prior to the termination of welfare benefits.
\end{itemize}
the court did allow for the emergency detention of violent individuals without a prior hearing, but only until such time as a probable cause hearing on the necessity of the detention can be held. The court noted that the maximum period during which an individual can be held pursuant to emergency procedures without a probable cause hearing is 48 hours and that due process is violated where there is no meaningful opportunity to be heard at the preliminary hearing due either to medication or lack of counsel.\textsuperscript{90}

The full hearing on the necessity for detention is required as soon after detention as possible within the limits made necessary in order for psychiatrists to make their examination and reports and for the patient to be able to prepare any defense.\textsuperscript{91}

While the court stated its "belief" that "from ten to fourteen days should be the maximum period [during] which an individual can be detained without a full hearing,"\textsuperscript{92} it appears to have allowed a possible escape from this requirement. The court stated that if full examination is not accomplished during this period due to inadequate personnel, "it is difficult to see how continued detention can be said to be beneficial to the patient."\textsuperscript{93} It appears that this is unfortunate dictum. If benefit to the patient is the key to the required period for a hearing, this invites return to the \textit{parens patriae} model, since hospital authorities could argue that even though there has been inadequate personnel to conduct the required examinations, there are sufficient personnel to provide treatment to the individual. This argument may be seen as a viable one in view of the variety of psychiatric theories as to proper methods of treatment and in view of the belief expressed by several judges that the adequacy of treatment issue is not within the court's competence to adjudicate.\textsuperscript{94} A delay in a full hearing under such an argument should be unjustified in light of \textit{Boddie} and in light of this court's attack upon the \textit{parens patriae} model. It remains to be seen whether such an argument will be successful to delay a full hearing on the necessity of detention.

In order for the notice of the hearing to comply with the requirements of due process, it "must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded," and it must set forth the basis for detention with particularity.\textsuperscript{95}

\textsuperscript{90} 349 F. Supp. at 1091-92.
\textsuperscript{91} \textit{Id.} at 1092.
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} See, e.g., Dobson v. Cameron, 383 F.2d 519 (D.C. Cir. 1967).
\textsuperscript{95} 349 F. Supp. at 1092, \textit{quoting In re Gault}, 387 U.S. 1, 33 (1967).
The court held that an individual subject to commitment is entitled to assistance of counsel as soon after the proceedings have begun as is reasonably feasible, and this includes the right to appointed counsel where the individual is indigent. Counsel must be present at the preliminary hearing on detention, must have sufficient time to prepare initial defenses, and must have access to all reports which will be introduced at the commitment hearing.\textsuperscript{96}

In balancing the right to effective aid of counsel with the state's interests in meaningful consultation, the court decided that counsel shall not be required in the psychiatric interview. Rather, the state is allowed to show that means other than attendance of counsel at the interview, such as recording and making available to counsel the written results of the interview, "will prove as effective in maintaining the individual's rights with less disruption of the traditional psychiatrist-patient relationship."\textsuperscript{97}

Competing considerations also attended the decision as to whether a privilege of self-incrimination should apply to the commitment process. On one hand, the statements of an alleged mentally ill person may subject him to involuntary loss of freedom. On the other hand, any realistic possibilities for treatment of an individual who is subject to commitment may be lost if counsel is allowed to instruct his client not to answer questions put to him by an examining psychiatrist. The court reconciled these competing interests in favor of the privilege with reliance upon the Supreme Court's rationale in \textit{Gault}:

\begin{quote}
It is true that the statement of the privilege in the Fifth Amendment . . . is that no person "shall be compelled in any criminal case to be a witness against himself." However, it is also clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites . . . . [O]ur Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with a deprivation of liberty—a command which this Court has broadly applied and generously implemented . . . .\textsuperscript{98}
\end{quote}

The implementation of the privilege requires that the subject be informed by counsel that he need not speak to the examining psychiatrist and that statements made may be used to effectuate commitment. Commitment may be valid, however, where the individual did not have "knowledge" that he was under no obligation to speak if his failure to have knowledge was due to mental illness.\textsuperscript{99} A subsequent finding of

\begin{itemize}
\item \textsuperscript{96} 349 F. Supp. at 1097-1100.
\item \textsuperscript{97} \textit{Id.} at 1100.
\item \textsuperscript{98} \textit{Id.} at 1100-01, \textit{quoting In re Gault}, 387 U.S. 1, 49-50 (1967).
\item \textsuperscript{99} 349 F. Supp. at 1101. The court noted that if an individual's rights are ex-
mental illness based upon such statements will not be held to offend due process. The court provided a rule, however, which forbids commitment based upon statements made to a psychiatrist by an alleged mentally ill individual unless voluntarily given after notice of possible consequences.100

Finally, the court provided for the exclusion of hearsay evidence in commitment proceedings to the same extent that it is excluded in trials generally. The court reasoned that "[t]he weaknesses of hearsay evidence are the same, whatever the nature of the proceeding."101 In the same way that the civil-criminal distinction was found an unsatisfactory basis on which to base relaxed due process standards for civil commitment, it was considered unsatisfactory in the specific context of hearsay evidence. The court reiterated its basic position that the seriousness of the deprivation of liberty and the consequences which follow an adjudication of mental illness require no relaxation in the protections afforded in other proceedings in which individual liberty is at stake.102

V. CONCLUSION

Lessard v. Schmidt is a case of great significance to those concerned with the protection of the rights of persons subject to civil commitment. It characterized plaintiffs' claims as an attack upon the parens patriae model and the abuses upon individual liberty which have resulted from it. Substantively, it defines and limits the state in the exercise of parens patriae power over mentally ill persons; it requires proof beyond a reasonable doubt of all facts required to be shown for commitment; and it requires implementation of the concept of less drastic means in the commitment process. Procedurally, it requires notice and an opportunity to be heard prior to commitment; affords a right to counsel; allows a privilege against self-incrimination; and provides for the exclusion of hearsay evidence in commitment proceedings.

As may be seen from the discussion herein, there has been a definite trend of case law directed towards the expansion of protections afforded society's forgotten members. As may also be seen, this trend is not generally prevalent and the protections afforded vary widely from jurisdiction to jurisdiction.

plained to him in simple terms, he may be presumed to have "knowledge" since there is a presumption of competency in a commitment proceeding. Id. at 1101 n.33.

100. Id. at 1102.
101. Id. at 1103.
102. Id. at 1102-03.
The time is ripe for Supreme Court action in the mental health field. The defendants in *Lessard* have filed a notice of appeal to the Supreme Court. It is hoped that the Court will respond to the need for a clear and uniform statement of rights to which persons subject to commitment nationally are entitled.

Arnold H. Landis

103. *Notice of appeal filed*, 42 U.S.L.W. 3201 (U.S. Sept. 28, 1973) (No. 568). On January 14, 1974, the Supreme Court, Mr. Justice Douglas dissenting, entered a per curiam order which, after noting that the judgment entered by the *Lessard* court was sufficient to invoke the Supreme Court's appellate jurisdiction, vacated the judgment for lack of specificity with respect to the injunctive relief granted and remanded the case to the District Court for clarification of its order. Schmidt v. Lessard, 94 S. Ct. 713 (1974).