COMMENT

A CONSTITUTIONAL RIGHT TO COURT APPOINTED COUNSEL FOR THE INVOLUNTARILY COMMITTED MENTALLY ILL: BEYOND THE CIVIL-CRIMINAL DISTINCTION

INTRODUCTION

Involuntary civil commitment of the mentally ill entails a loss of liberty substantially paralleling incarceration for criminal activity.[1] The protection of individuals accused of crime is facilitated through the provision of a full range of constitutional safeguards which enable the accused to adequately defend against the state's power.[2] The Supreme Court has recognized that civil commitment results in a substantial loss of liberty.[3] However, since this form of incarceration is generally considered to have been provided for the individual's care and protection,[4] it has usually been effectuated without those procedural

1 *See, e.g.*, Barry v. Hall, 98 F.2d 222, 225 (D.C. Cir. 1938), wherein the court stated: "[C]onfinement in a mental hospital is as full and effective a deprivation of personal liberty as is confinment in jail."

2 *See, e.g.*, the application of fourth, fifth and sixth amendment guarantees in Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to appointed counsel in all criminal prosecutions where there may be a deprivation of liberty); Duncan v. Louisiana, 391 U.S. 145 (1968) (jury trial); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Griffin v. California, 380 U.S. 609 (1965) (protection against commentary by the prosecution concerning the failure of accused to testify); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation and cross-examination of witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to appointed counsel in all felony prosecutions); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusion of evidence obtained by unreasonable search and seizure).

3 *E.g.*, Humphrey v. Cady, 405 U.S. 504, 509 (1972).

4 Gupta, in an expansive article on mental health, states:

> Legislatures pretending to be humane tend to rely on the state's obligation as *parens patriae*, and consider suspending due process guarantees in involuntary commitment laws an act of generosity toward the mentally ill. Consequently, notice, hearing, right to counsel, and jury trial have been variously provided for or not according to the source of statutory authority emphasized.

Gupta, *New York's Mental Health Information Service: An Experiment in Due Process*, 25 RUTGERS L. REV. 405, 406-07 (1971).

The state usually presents two rationales for the withholding of more rigorous procedural safeguards: (a) the prerogative of the state as custodian or guardian of the mentally ill pursuant to its *parens patriae* role, and (b) the state providing treatment rather than punishment for the mentally ill. Combs, *Burden of Proof and Vagueness in Civil Commitment Proceedings*, 2 AM. J. CRIM. L. 47, 50-51 (1973). *See also* Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1290, 1295-97 (1966).

safeguards mandatory in a criminal prosecution.[5] The failure to provide procedural due process protection at involuntary civil commitment is essentially the product of a prevailing judicial reasoning that commitment proceedings are civil in nature.[6] However, there is an increasing recognition that when a substantial loss of liberty is threatened, the fact that the proceedings are denominated "civil" will not be permitted to determine the measure of due process afforded the individual.[7] The dispositive issue should not be the nature of the proceeding, but rather the divestment of one's liberty.

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5 Wexler, *Therapeutic Justice*, 57 MINN. L. REV. 289, 304 (1972). The author stated:

> American law thus has two parallel but very different procedural systems for controlling aberrant behavior—a criminal system with a host of procedural rights and a therapeutic system with very few.

The most significant reason for the lack of procedural safeguards lies in the existence of a contrary trend, noted as still continuing over a decade ago, toward the use of quasi-judicial and administrative commitment procedures. Under the guise of moving away from "legal formalism," a concomitant and somewhat deliberate failure to allow strict due process requirements to materialize developed within the context of this setting. Kittrie, *Compulsory Mental Treatment and the Requirements of "Due Process,"* 21 OHIO S.L.J. 28-29 (1960) (citing Kadish, *A Case Study in the Signification of Procedural Due Process—Institutionalizing the Mentally Ill*, 9 W. POL. Q. 93, 96-97 (1956)). For an overview of due process requirements for civil commitment at the time, see generally Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945, 964-78 (1959).

The Supreme Court has recently indicated surprise at the lack of litigation concerning the constitutional limitations on state power in several areas, including that of civil commitment. Jackson v. Indiana, 406 U.S. 715, 737 (1972).

6 Bruce Ennis, the former director of the Civil Liberties and Mental Illness Project of the New York Civil Liberties Union, attributed the presence of summary commitment procedures and the absence of due process standards to the following theories: (a) the proceedings are civil; (b) the purpose of commitment is not punishment; (c) formal proceedings would be traumatic to the prospective patient; and (d) a formal hearing would "stigmatize" the prospective patient. Ennis, *Civil Liberties and Mental Illness*, 7 CRIM. L. BULL. 101, 109 (1971).

7 The foundation for the right of the alleged mentally ill to due process of law in civil commitment proceedings was established in Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940). This case was an appeal from a denial of a writ of prohibition commanding the probate court to desist from attempting to commit the appellant as a "psychopathic personality." Appellant attacked the Minnesota commitment statute as violative of the due process and equal protection clauses of the fourteenth amendment. Although the Court rejected the appellant's principal contentions, it did recognize a right to due process:

> We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity . . . and the special importance of maintaining the basic interests of liberty . . . and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings.

Id. at 276-77. Focusing upon the question of whether the statutory procedures adequately safeguarded the fundamental rights embraced by due process, the Court found the statutes not patently offensive in any respect, and further assumed that the Minnesota court would protect all of the constitutional rights which appellant possessed. In analyzing

This comment will focus upon the developing recognition of the constitutional right of indigent mental patients,[8] to be represented by court appointed counsel when faced with the possibility of involuntary civil commitment.[9] Special emphasis will be directed toward an analysis of the prevailing view that commitment proceedings are nonadversarial in nature in light of the demise of the civil-criminal dichotomy as a standard for measuring the requirements of due process.

THE RATIONALE FOR COMMITMENT

The critical policy issue underlying the civil commitment question is whether the state is acting predominantly for the benefit of the individual or for the protection of society in general. Justice Brandeis has taken a critical view of procedural laxity whenever it has been tolerated in the name of governmental beneficence. In a dissenting opinion to the 1928 wiretapping case, *Olmstead v. United States*,[10] Brandeis argued:

> Experience should teach us to be most on our guard to protect

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the procedure used to commit, the Court alluded to the fact that legal representation had been furnished. *Id.* at 273-75.

8 *See* Schneider, *Civil Commitment of the Mentally Ill*, 58 A.B.A.J. 1059, 1061 (1972). Judge Schneider of the Circuit Court of Cook County, Illinois, notes that in his court the majority of commitment hearings are instituted against the poor, and rarely is the same judicial machinery used to impose treatment on the upper or middle classes. The judge cites the fact that the wealthy can afford the alternatives to institutionalization as the primary cause of this disparity. *Id. See also* A. HOLLINGSHEAD & F. REDLICH, SOCIAL CLASS AND MENTAL ILLNESS: A COMMUNITY STUDY 253-334 (1958).

9 Although involuntary commitment has been variously defined by the authorities, the term commonly includes all situations in which the committed or an authorized agent had not instituted the commitment process. On that basis estimates indicate that between 80 and 90 percent of all admissions are involuntary. Postel, *Civil Commitment: A Functional Analysis*, 38 BROOKLYN L. REV. 1, 4 & n.15 (1971) (citing *Hearings on S. 935 Before the Subcomm. on Constitutional Rights of the Sen. Comm. on the Judiciary*, 88th Cong., 1st Sess. 61 (1963), and *Hearings on Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Sen. Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 1, at 11 (1961)).

By way of contrast, Dr. Albert Deutsch has estimated that approximately 90 percent of all commitments are voluntary. Postel, *supra* at 4 n.16 (citing *Hearings on Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Sen. Comm. on the Judiciary*, 88th Cong., 1st Sess. 43 (1963)). Postel observed that Dr. Deutsch's estimate is based on a definition of voluntary commitment as those cases in which the patient neither objected nor took a position on the matter. Postel, *supra* at 4 n.16.

The procedures for commitment of the mentally ill vary from state to state. However, there are basically three types of commitment that are almost universally employed. These include: (1) emergency commitment or detention; (2) involuntary commitment for an indeterminate period; and (3) voluntary commitment. *See, e.g.*, B. ENNIS & L. SIEGEL, THE RIGHTS OF MENTAL PATIENTS 17-39 (1973).

10 277 U.S. 438 (1928).

> liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[11]

This admonition has particular applicability in civil commitment cases, where it has been frequently cited by advocates of more stringent procedural safeguards for the alleged mentally ill.[12] The warning is also of significance because of widespread misconceptions concerning the state's role in the commitment process. An analysis of the state's power to commit will aid in delineating its role and motivation in the commitment process.

Parens Patriae

A major justification for the state's power to commit is based upon the doctrine of *parens patriae*.[13] At common law, *parens patriae* was defined as the duty of the king to care for these subjects who were unable to care for themselves.[14] The states have now assumed this duty

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11 *Id.* at 479 (footnote omitted).

12 Lessard v. Schmidt, 349 F. Supp. 1078, 1103 (E.D. Wis. 1972). *See* Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424, 433 n.43 (1966); Dershowitz, *Law of Dangerousness: Some Fictions about Predictions*, 23 J. LEGAL ED. 24, 47 (1970) [hereinafter cited as Dershowitz, *Law of Dangerousness*]; Dershowitz, *The Psychiatrist's Power in Civil Commitment: A Knife That Cuts Both Ways*, PSYCHOLOGY TODAY, Feb. 1969, at 47 [hereinafter cited as Dershowitz, *A Knife That Cuts Both Ways*]; Ennis, *supra* note 6, at 102-03; Gupta, *supra* note 4, at 442; Postel, *supra* note 9, at 6.

13 Taylor, *A Critical Look Into the Involuntary Civil Commitment Procedure*, 10 WASHBURN L.J. 237, 239 (1971). The interposition of the state is founded upon the inability of the patient to independently arrive at a sound decision. *Id.* at 240. The Supreme Court has recognized the potential threat to constitutional rights posed by an overly broad interpretation of *parens patriae* in the field of juvenile justice:

> The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance.

In re Gault, 387 U.S. 1, 16 (1967).

14 Beverly's Case, 76 Eng. Rep. 1118 (K.B. 1603). This case gives a detailed description of the development of common law and early statutory provisions relating to the guardianship of idiots and lunatics (*non compos mentis* or not master of his mind) and the protection of their property. Lunatics were characterized as those in possession of unsound memory which might be recovered at any time. As a consequence, the duty of the King to the idiot was custodial in nature (*Rex habebit custodiam*), whereas his duty to the lunatic was to care for both his person and property (*Rex providebit* or the King will see ahead, *i.e.*, will take care). *Id.* at 1126.

A much broader definition of lunacy is described by Blackstone. 1 W. BLACKSTONE COMMENTARIES* 304

> A lunatic, or *noncompos mentis*, is one who hath had understanding, but by disease, grief, or other accident, hath lost the use of his reason.

Blackstone described the King's relation to lunatics as a "guardian" but emphasized, as in *Beverly's Case*, the potential temporary nature of their infirmity, and that they may

through the enactment of statutes designed to provide care and treatment for the mentally ill.[15]

Parens patriae has a substantial effect on the lives of persons subject to commitment proceedings. First, the doctrine permits the commitment of persons on the basis of their need for treatment[16] regard-

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recover their proprietary rights "when they come to their right mind." *Id.*

[15] *See, e.g.*, ALA. CODE tit. 45, § 210 (1958), wherein a person may be committed if he is

> so defective mentally that he (or she) ought to be committed to the hospital for insane persons for safekeeping and treatment.

HAWAII REV. STAT. § 334-53(a) (1968) authorizes the administrator of a psychiatric facility or his deputy to

> admit to and detain at the facility for observation, care, and treatment as a patient any person mentally ill or habituated to the excessive use of drugs or alcohol to an extent requiring hospitalization . . . .

N.Y. MENTAL HYGIENE LAW § 31.01 (McKinney Supp. 1972-73), which defines a person "in need of involuntary care and treatment" as one who

> has a mental illness for which care and treatment as a patient in a hospital is essential to such person's welfare and whose judgment is so impaired that he is unable to understand the need for such care and treatment.

Although it is formally absent from the New York hospitalization statute, the element of dangerousness to oneself or others represents a critical issue in commitment hearings. Kumasaka & Gupta, *Lawyers and Psychiatrists in the Court: Issues on Civil Commitment*, 32 MD. L. REV. 6, 10, 12 (1972) [hereinafter cited as *Lawyers and Psychiatrists in the Court*]. Consequently, a patient adjudged "harmless" may be released to the custody of relatives. *Id.* at 10 n.11.

[16] There has been a growing recognition that when the state confines a person for treatment, the confinement is merely custodial. Clinical data compiled by three clinical psychologists demonstrates the conflict between the "idea" of treatment and the reality of what they termed a "custodial system" marked by "dehumanization and institutionalization." Suchotliff, Steinfeld & Tolchin, *The Struggle for Patients' Rights in a State Hospital*, 54 MENTAL HYGIENE 230, 230-31 (1970). The study is a compilation of their experiences in trying to implement change at the Fairfield Hills Hospital (Newton, Conn.) of which they were staff members. They found that the basic individual rights of the patients were continually violated; the patients were allowed no communication with attorneys or relatives by phone or by mail, and no periodic review of patient's present condition or treatment needs. They also discovered that voluntarily committed patients were not permitted to leave and those who did were forcefully "captured" and returned. *Id.* at 231.

> The situation may be far worse than we realize.
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> Empirical evidence has shown how the social processes and structures of a typical "chronic" ward not only fail to be therapeutic, but are actually *anti-therapeutic*, in spite of an espoused therapeutic ideology more or less accepted by front-line staff. These processes and structures not only fail to undo the early damage, but instead act to reinforce schizophrenic adaptation. In this sense the charge that mental hospitals make people sick is not absurd.

Kantor & Gelineau, *Making Chronic Schizophrenics*, 53 MENTAL HYGIENE 54, 65 (1969) (emphasis in original) (both of the authors were clinical psychologists on the staff of Boston State Hospital, Boston, Mass.).

This concept is of major significance since the failure of the state to provide more than custodial care obviates the original therapeutic justification for committing the patient. Because commitment of the noncriminal mental patient is primarily justified by

less of their capacity to evaluate that need.[17] Secondly, it may be impossible for an individual who does not desire treatment to effectively contest commitment because the *parens patriae* role of the state is executed in a nonadversary proceeding.[18] Ordinarily, the state provides for

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the doctrine of *parens patriae*, the continuation of that commitment represents the exercise of bare police power without legal justification whenever the state fails to provide adequate treatment.

Alternatively, the state may commit an individual under the theory of its police power only where that person poses a threat to society. If such is the case, and the state fails to provide treatment to remove the threat, it is in fact punishing that individual. *See, e.g., In re* Curry, 452 F.2d 1360, 1363 (D.C. Cir. 1971) (custodial care alone gives rise to release unless diagnosis, observation, and ultimately treatment is provided). This form of "treatment" is justified only in response to action that violates the law.

See Penn, Sindberg & Roberts, *The Dilemma of Involuntary Commitment: Suggestions for a Measurable Alternative*, 53 MENTAL HYGIENE 4, 5 (1969):

> Although we certainly would not advocate preventing anyone from receiving needed treatment, we very seriously question whether the great majority of those who are involuntarily committed really *need* the "treatment" they receive.

(emphasis in original).

17 Unfortunately, the *parens patriae* concept assumes that all persons who suffer from mental disturbance are equally incapable of making rational choices as to their need for treatment. *See* Combs, *supra* note 4, at 50. Since the patient is presumed to be incapable of making rational choices as to his treatment needs, the doctrine eliminates the necessity to obtain permission for any treatment procedure believed necessary for the patient's welfare. Therefore the patient cannot, in effect, refuse treatment. T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY 151-52 (1963). *See, e.g.*, O'Donoghue v. Riggs, 73 Wash. 2d 814, 820 n.2, 440 P.2d 823, 828 n.2 (1968) (relying on a state statute which makes such conduct lawful, the court observed that a patient impliedly consents to use of such force as may be reasonably necessary for proper care).

Additionally, it has been stressed that a distinction must be made between "rational" choices, "irrational" choices and simply "wrong" choices. Too often, a patient's refusal of treatment or denial of illness is interpreted as an inability to recognize his own illness and his need for treatment. *See* Ennis, *supra* note 6, at 103-05. Such a self-serving rationale is manifested, nevertheless, in the definitions section of various state statutes. A person "in need of involuntary care and treatment" under the New York hospitalization statute is one "whose judgment is so impaired that he is unable to understand the need for such care and treatment." N.Y. MENTAL HYGIENE LAW § 31.01 (McKinney Supp. 1972-73).

18 *In re* Phillips, 158 Mich. 155, 122 N.W. 554 (1909) (proceeding to declare a person insane is not adversary but in the public's interest); Prokosch v. Brust, 128 Minn. 324, 151 N.W. 130 (1915) (proceeding to appoint a guardian is not adversary when initiated by the state pursuant to its *parens patriae* status); Hook v. Simes, 98 N.H. 280, 98 A.2d 165 (1953) (the determination of insanity and the appointment of a guardian constitute matters germane to a *parens patriae* proceeding and are therefore not adversary).

Professor Harris notes that members of the medical profession believe that adversary proceedings will result in irreparable damage to the patient. He observes, however, that the hospital administration is an interested party in such proceedings and, as it often favors the patient's commitment, it must necessarily be adverse to a patient who desires release. Harris, *Mental Illness, Due Process and Lawyers*, 55 A.B.A.J. 65, 66 (1969).

Nevertheless, a recent position statement of the American Psychiatric Association with regard to involuntary commitment has been interpreted as an encouraging development because of its recognition of the need for due process guarantees. Wexler, *supra* note 5, at 317. Pursuant to the Association's adopted policy, all patients would be

adversary proceedings when the parties to the action have conflicting interests. In a commitment proceeding, however, it is maintained that all parties to the action have a common purpose because its objective is therapeutic. The weakness of this argument becomes apparent when an individual has decided that he does not wish to be subjected to treatment. In such a situation the commitant would then be placing himself in an adversary position, in which his will would challenge the interest of the state.[19]

In response, the state often extends the "common interest" view in such circumstances by interpreting any objection to treatment as a failure to recognize illness or, more seriously, as a symptom of the disease.[20] Militating against this position is a growing view that a commitant should have the right to refuse treatment because of the possibility of a substantial loss of liberty.[21] There is also increasing recogni-

entitled to a psychiatric examination by both the hospitalizing physician and by one or more independent psychiatrists if so requested. The results of these tests would then be made available to the court which determines the need for treatment. All patients would have the benefit of legal representation at both the initial proceeding and, if committed, at reasonable subsequent intervals where the need of continued hospitalization would be judicially decided. All parties concerned with the commitment proceedings must receive frequent periodic reports of the patient's treatment and progress which cannot be denied by "administrative, judicial, or institutional delay." American Psychiatric Association, *Position Statement on Involuntary Hospitalization of the Mentally Ill*, 128 AM. J. PSYCH. 1480 (1972).

However, there are jurists who believe that the right to counsel guarantee may be potentially damaging to a patient where an attorney refuses to permit his own independent evaluation of his client's best interests to govern his professional conduct. In such instances, it is maintained, an informal hearing is transformed into an adversary trial which may leave traumatic repercussions upon the patient-client. Dix, *Hospitalization of the Mentally Ill in Wisconsin: A Need for Reevaluation*, 51 MARQ. L. REV. 1, 33 (1967).

In contrast to this approach, other jurists oppose assignment of counsel and adversary trials, at least in habeas corpus proceedings, because of the additional burden that would be placed upon lawyers and physicians to execute their responsibilities and to justify their judgments respectively. The threat of adversary trials is not seen by these members of the legal community as an impetus for better diagnoses or superior hospital management. People *ex rel.* Rogers v. Stanley, 17 N.Y.2d 256, 260-61, 217 N.E.2d 636, 637, 270 N.Y.S.2d 573, 574-75 (1966) (Bergan, J., dissenting).

19 The author defines a commitant as a person who is subjected to the commitment process as well as one who is in fact committed.

20 Wexler, *supra* note 5, at 325.

21 It has often been asserted that an underlying issue is whether the individual has the right to refuse treatment. Postel, *supra* note 9, at 2.

Even a person who comprehends the fact that he needs treatment may come to a rational conclusion that the following negative effects of commitment outweigh the benefits of treatment: loss of liberty; stigma of being an ex-mental patient; difficulty of obtaining release from institutions; curtailment of rights; effect on acquiring employment; possible deprivation of driver license privileges after release; and, general disruption to former life situation. Lessard v. Schmidt, 349 F. Supp. 1078, 1094 (E.D. Wis. 1972). In addition to citing reasons why a person would desire to refuse treatment, the court noted

tion of the argument that the need for treatment, standing alone, represents an insufficient justification for the state to deprive persons of their liberty.[22]

Police Power

An alternative approach adopted by many jurisdictions is based upon the theory that the state, through its police power, has the authority to commit those persons who are dangerous to themselves or to society.[23] On cursory examination, application of police power standards to commitment would seem more palpable and, in fact, overcome many of the incongruities of the *parens patriae* commitment standards.[24] However, the police power justification for state action in

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that since persons who need hospitalization for physical ailments are allowed to choose, a person with a mental illness should be allowed to choose unless the state can demonstrate that the person is unable to make that decision because of the nature of his illness. *Id.*

22 *See* Ennis, *supra* note 6, at 103: "Furthermore, even if a thousand psychiatrists agreed that a given person was mentally ill (and non-dangerous) that alone would not justify commitment." *See also* Turkel & Szasz, *"What Psychiatry Can Do": A Comment and a Reply*, HARPER'S, Apr. 1964, at 96, where Szasz, in his reply, stated:

> I oppose involuntary mental hospitalization . . . because, in a free society, I do not believe that mental illness is a morally legitimate ground for loss of liberty. Only conviction for lawbreaking is.

Id. at 100. The New York Civil Liberties Union also takes the position that all involuntary commitments should be abolished:

> Mental illness can never by itself be a justifiable reason for depriving a person of liberty or property, against his objection. Even when such deprivations are accompanied by fair procedures, they are unjustified except on a basis—for example, a violation of the criminal law—that would be equally applicable in the absence of mental illness.

Ennis, *supra* note 6, at 102 n. 2 (quoting from N.Y.C.L.U. Board of Directors on Jan. 13, 1969).

Those who do not oppose all forms of involuntary civil commitment maintain that a threat to society is necessary to commit a person who refuses treatment. One legal commentator feels that this requirement represents the only legitimate reason for commitment. Taylor, *supra* note 13, at 242.

23 Dix, *supra* note 18, at 27; Comment, *Compulsory Commitment: The Rights of the Incarcerated Mentally Ill*, 1969 DUKE L.J. 677, 683-84. *See* Jackson v. Indiana, 406 U.S. 715, 737 n.19 (1972), where the Court noted the jurisdictions which provide for some judicially supervised form of involuntary commitment: (a) six states commit pursuant to the patient's need for treatment; (b) in nine jurisdictions dangerousness to self or others is the sole criterion for commitment; (c) 18 other jurisdictions have as their standard, the patient's need for care or treatment on an alternative basis; and (d) some jurisdictions leave the determination to the judge's discretion.

24 The confusion surrounding what constitutes mental illness, coupled with the vague criterion of "need of care or treatment," creates such a loose standard that *parens patriae* can be easily abused. *See generally* Combs, *supra* note 4, at 50, 58-59. According to the author, "need" does not connote an absolute standard, rather, its customary construction is "desirability," thereby inviting the witness to speculate from his own values. *Id.* at 58.

Furthermore, while the common statutory alternative of "dangerousness" suggests

committing persons involuntarily is also subject to criticism since its standard of "dangerousness" is itself vague and thus subject to inherent defects.[25] Dangerousness has been defined in a variety of ways by various states in their commitment statutes. For example, in New Jersey and Montana, a person is dangerous if he is a threat to other individuals, to himself, or to property.[26] In Nevada, Massachusetts, and Maryland there must be an explicit showing that the individual is dangerous to other persons.[27] The most common criterion, however,

some objective criteria, "need" invites subjective construction. *See* Dodd v. Hughes, 81 Nev. 43, 47, 398 P.2d 540, 542 (1965). Ordinarily, the void for vagueness doctrine as usually employed is not applicable because mental illness is theoretically not a condition which could be avoided even if the statutory classifications contained sufficient specificity to enable a person to govern his conduct accordingly. Nevertheless, these statutes may be open to constitutional attack where they invite "arbitrary and discriminatory enforcement by officials." Combs, *supra* note 4, at 55 (footnote omitted).

25 An extreme example of the wide latitude which has been employed in the classification of "dangerousness" is found in United States v. Charnizon, 232 A.2d 586 (D.C. Ct. App. 1967), in which a probable "check bouncer" was found to be dangerous to others.

26 N.J. STAT. ANN. § 30:4-23 (Supp. 1973-74) defines 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.

New Jersey's commitment statutes have been interpreted to include "dangerous to property." *In re* Heukelekian, 24 N.J. Super. 407, 409, 94 A.2d 501, 502 (App. Div. 1953). MONT. REV. CODES ANN. § 38-208 (1947) states in pertinent part:

> The judge . . . if he believes the person so far disordered in his mind as to endanger health, person, or property, must make an order that the party be confined in the Montana state hospital . . . .

27 MD. ANN. CODE art. 59, § 12 (1972) authorizes the admission for purposes of care and treatment of any person who:

> (1) Has a mental disorder; and
> (2) For the protection of himself or others, needs inpatient medical care or treatment . . . .

MASS. ANN. LAWS ch. 123, § 8 (1972) states that if a hearing is requested prior to commitment, the court shall not order the person committed or renew an order for the commitment unless it finds:

> (1) such person is mentally ill; and (2) the discharge of such person from a facility would create a likelihood of serious harm.

MASS. ANN. LAWS ch. 123, § 1 defines "likelihood of serious harm" as

> (1) substantial risk of physical harm to the person himself as manifested by evidence of threats of, or attempts at, suicide or serious bodily harm; (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or (3) a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgment is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community.

NEV. REV. STAT. § 433.685 2(a) (1971) authorizes commitment:

> 2. By a sworn written statement by the petitioner that:
> (a) The petitioner has good reason to believe that such person is mentally ill and, because of such illness, is likely to injure himself or others if allowed to remain at liberty . . . .

NEV. REV. STAT. § 433.695 (1971) states:

is dangerousness to self and others.[28]

Ordinarily, the police power is exercised in criminal law to punish those persons who have been found to have violated a societal norm. However, since civil commitment is not contingent upon the commission of a crime, the finding that a person is a threat to society is essentially based upon a prediction of the individual's future behavior.[29] The use of the state's police power in this respect may be questioned for two basic reasons. First, it sanctions massive preventive detention[30] —a means of social control which raises serious moral questions, is subject to extensive abuse,[31] and is generally in direct contradiction to the concepts of a free society.[32] Secondly, the predictive capabilities of the behavioral sciences have been subjected to extensive criticism.[33]

> If the district court finds, after a hearing . . . that the person with respect to whom such hearing was held:
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> 1. Is not mentally ill, or if mentally ill is not likely to injure himself or others if allowed to remain at liberty, the court shall immediately order his release.

28 *See* Ennis, *supra* note 6, at 107; B. ENNIS & L. SIEGEL, *supra* note 9, at 93-282 (a compilation of the standards for commitment by jurisdiction in appendix form).

29 Wexler, *supra* note 5, at 319.

30 "The most widespread form of preventive detention employed in the United States today is commitment of the mentally ill." Dershowitz, *On "Preventive Detention,"* THE NEW YORK REVIEW OF BOOKS, Mar. 13, 1969, at 22, 23.

31 The great potential for the misuse of the commitment process has been cited by some writers as the greatest threat, in what has been labeled the "emerging therapeutic state." Szasz maintains that an uncontrolled therapeutic state could eliminate from the political mainstream those individuals deemed "undesirable" through arbitrary psychological characterization and commitment. Hence, Whittaker Chambers has been called a "psychopathic personality," Barry Goldwater a "paranoid schizophrenic," and Woodrow Wilson a "neurotic," frequently "very close to psychosis (by no less a psychiatrist than Sigmund Freud). Dr. Szasz warns "[t]he commitment procedure has already been used against General Edwin Walker and Ezra Pound." Szasz, *The Crime of Commitment,* PSYCHOLOGY TODAY, Mar. 1969, at 55, 56.

32 Senator Sam Ervin, Jr., in his opening remarks during the Senate's hearings on preventive detention of criminal suspects alleged to be dangerous to the community, considered whether the possible threat that suspected criminals impose on society, if they are allowed to remain free, outweighs the moral disdain of preventive detention:

> [I]t is better for our country to take these risks and remain a free society than it is for it to adopt a tyrannical practice of imprisoning men for crimes which they have not committed and may never commit . . . .

Hearings on Preventive Detention Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 3 (1970). The Senator expressed both an opinion that the concept of preventive detention is "repugnant to our traditions," *id.* at 3, and his deep unalterable opposition to the procedure:

> These measures trouble me greatly for I am convinced that they are unconstitutional and would initiate a dangerous and unfortunate policy in the administration of criminal justice.

Id. at 1.

33 J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY 131-35 (1970); Dershowitz, *A Knife That Cuts Both Ways, supra* note 12, at 47; Dershowitz, *Law of*

The state's ability to commit an individual as an exercise of its police power is determinative of the nature of the commitment process itself.

> Although commitments pursuant to the police power may often involve therapeutic elements, the real basis for intervention under the police power is, of course, the protection of society.[34]

Because the primary thrust of the police power rationale is the protection of society, the state should not be permitted to argue that it is acting solely on behalf of the patient. When the state acts pursuant to its police power, the proceedings take on an adversary nature. What clearly emerges is a conflict of interest in which the state, while ostensibly attempting to protect the commitant, in reality, seeks to protect itself. The justification for withholding more rigorous procedural safeguards at commitment hearings has been the state's professed unselfish and beneficent intent towards the individual. However, it would appear that when the state acts pursuant to its police power, it should be required to provide the individual with due process safeguards.[35] At a minimum, an attorney should be provided the commitant because of the adversarial nature of the proceeding. In order to appreciate

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Dangerousness, supra note 12, at 46-47; Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 82-85 (1968).

For an analysis of case studies concerning the relationship between dangerous criminal activity and the mentally ill, see Greenland, *Evaluation of Violence and Dangerous Behavior Associated With Mental Illness*, 3 SEMINARS IN PSYCHIATRY 345, 353-54 (1971); *see also* Schreiber, *Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems*, 56 U. VA. L. REV. 602, 619 (1970).

34 Wexler, *supra* note 5, at 323.

35 Justice Black, dissenting in Boddie v. Connecticut, 401 U.S. 371, 389 (1971), discussed the difference between civil and criminal actions. In defining the nature of a civil action, he emphasized the state's role in each type of proceeding when he stated:

> Civil lawsuits, however, are not like government prosecutions for crime. Civil courts are set up by government to give people who have quarrels with their neighbors the chance to use a neutral governmental agency to adjust their differences. In such cases the government is not usually involved as a party, and there is no deprivation of life, liberty, or property as punishment for crime. Our Federal Constitution, therefore, does not place such private disputes on the same high level as it places criminal trials and punishment. There is consequently no necessity, no reason, why government should in civil trials be hampered or handicapped by the strict and rigid due process rules the Constitution has provided to protect people charged with crime.

Id. at 391.

If the standard for a civil action is the use of the courts as a "neutral governmental agency" to adjust personal quarrels with their neighbors, it becomes immediately apparent that commitment is not an ordinary civil action. Furthermore, in the case of commitment, there is a deprivation of life, liberty, and property. It would seem that an adversary proceeding is clearly required in cases where the state deprives a person of his fundamental rights.

the fundamental importance of having counsel in a commitment proceeding, it is necessary to examine the historical development of the right to court appointed counsel in criminal cases, as well as the due process safeguards afforded in the civil context.

THE RIGHT TO COUNSEL & DUE PROCESS

In state criminal prosecutions, the fourteenth amendment's due process clause has been employed to extend the concept of court appointed counsel.[36] While early decisions rejected the contention that the due process clause incorporated the sixth amendment's guarantee of a right to counsel, it was recognized that fundamental fairness dictated the appointment of counsel where circumstances required that protection.[37] The Court in *Gideon v. Wainwright*,[38] reversed its earlier views, concluding that the sixth amendment was applicable to the states through the due process requirement.[39] The Court emphasized the necessity of the guidance of counsel at trial because of the proceeding's adversary nature.[40] Recently, the Court extended the constitutional right to counsel to all proceedings irrespective of the alleged crime's classification as "petty, misdemeanor, or felony."[41] In extending

36 Gideon v. Wainwright, 372 U.S. 335 (1963).

37 In Powell v. Alabama, 287 U.S. 45 (1932), an issue before the Court was whether the right to counsel was guaranteed in state trials through the application of the due process clause of the fourteenth amendment. However, the decision merely discussed the relation of that right to due process. The Court cited Hebert v. Louisiana, 272 U.S. 312 (1926), for the proposition that such a right could not be ignored if it violated " 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' " 287 U.S. at 67 (quoting from 272 U.S. at 316). It chose to emphasize the close relationship between the right to counsel and the opportunity to be heard. 287 U.S. at 68-69, 72.

The Court very carefully circumscribed its holding by limiting its immediate application to circumstances where "ignorance, feeble mindedness, illiteracy, or the like" prevented the accused from adequately presenting a defense. *Id.* at 71. In other words, even in capital cases most of those accused would presumedly still have been considered capable of presenting their own defenses.

In Betts v. Brady, 316 U.S. 455 (1942), the Court acknowledged that its prior expressions "lend color to the argument" that counsel should be provided for all accused of crime. *Id.* at 462-63 (footnote omitted). *See also* cases collected *id.* at 463 n.13.

38 372 U.S. 335 (1963).

39 *Id.* at 342. The incorporation of the sixth amendment was based on the belief that it was a fundamental right similar to those guaranteed in the first, fourth, fifth, and eighth amendments. *Id.* at 341-42. Compare the concurring opinion of Justice Douglas, *id.* at 345-47, who viewed the decision as a full incorporation of the right, with the concurring opinion of Justice Harlan, *id.* at 352 (quoting from Palko v. Connecticut, 302 U.S. 319, 325 (1937)), who perceived application of the right as valid against the states because it was "implicit in the concept of ordered liberty."

40 372 U.S. at 344.

41 Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

due process safeguards, the Court, although confining its holding to criminal cases, emphasized the importance of looking to the effect of sentencing—the deprivation of one's liberty.[42]

The Court has required due process in civil as well as criminal proceedings,[43] but a party to a civil action is not granted the full panoply of rights due a criminal defendant.[44] In analyzing the applicability of procedural rights in civil proceedings, a determination must first be made that there will be a substantial or "grievous loss"[45] of either liberty or property.[46] If so, due process attaches.[47] Having reached this conclusion, the court must then decide the procedures to be prescribed in a given situation by analyzing both the nature of the requisite governmental function, and the affected individual interests.[48] This balancing, or weighing approach, attempts to invest due process with a flexibility in dealing with differing situations.[49]

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42 *Id.* at 39. Liberty, it should be noted, means more than freedom from physical restraint. The Court has indicated that it must be accorded a very broad meaning where contained "[i]n a Constitution for a free people." Board of Regents v. Roth, 408 U.S. 564, 572 (1972). For cases broadly interpreting the word "liberty," see Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Grosjean v. American Press Co., 297 U.S. 233, 244 (1936); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

43 *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (due process requires prior notice in trust settlement).

44 *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 480 (1972) (parole revocation not a part of criminal prosecution and hence all due process rights do not apply).

45 *Id.* at 481; Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

46 Board of Regents v. Roth, 408 U.S. 564, 571 (1972); Morrissey v. Brewer, 408 U.S. 471 (1972). The Court in *Morrissey* stated:

> The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment.

Id. at 481 (citing Fuentes v. Shevin, 407 U.S. 67 (1972)).

47 *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

48 *See, e.g.*, Cafeteria Workers Local 473 v. McElory, 367 U.S. 886 (1961), where the Court stated:

> [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.

Id. at 895.

This two-step approach to due process (first determining whether liberty or property are deprived, and then weighing the interests to decide what procedures apply) has recently been utilized by the Court in resolving cases where individuals have been deprived of governmental benefits, usually without prior hearings. *See* Note, *Procedural Due Process in Government-Subsidized Housing*, 86 HARV. L. REV. 880, 889 (1973).

49 In *Board of Regents*, the Court stated that "a weighing process has long been a part of any determination of the *form* of hearing required in particular situations." Board of Regents v. Roth, 408 U.S. 564, 570 (1972) (emphasis in original). *See also* Boddie v.

In essence, procedural due process embodies what the Supreme Court deems to be required by fundamental fairness whenever an individual faces a deprivation of life, liberty, or property.[50] When such a cognizable interest is under attack, due process has traditionally required, at a minimum, the elementary protection afforded by prior notice and hearing.[51] The Court has recognized that such hearing and notice must be meaningful as to both time and manner.[52] In *Powell v. Alabama*,[53] Justice Sutherland commented on the importance of counsel as a requisite to the hearing requirement.

> What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party

Connecticut, 401 U.S. 371, 378 (1971). In Morrissey v. Brewer, 408 U.S. 471, 481 (1972), the Court, discussing the due process concept, recognized:

> Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

50 The Court has made the following statements concerning those elements and concepts inherent in due process:

(a) "[F]undamental fairness—the touchstone of due process . . . ." Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

(b) "The Due Process Clause commands us to apply its great standard to state court proceedings to assure basic fairness." Bloom v. Illinois, 391 U.S. 194, 213-14 (1968) (Fortas, J., concurring).

(c) "Due process is that which comports with the deepest notions of what is fair and right and just." Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting).

(d) "[I]mmunities . . . implicit in the concept of ordered liberty . . . ." Palko v. Connecticut, 302 U.S. 319, 324-25 (1937).

(e) "[The] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

(f) "[T]he fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . ." Hebert v. Louisiana, 272 U.S. 312, 316 (1926).

51 *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778, 781-82 (1973) (probation revocation requires notice and two hearings—one preliminary and one more comprehensive—before final revocation can be made); Perry v. Sindermann, 408 U.S. 593, 602-03 (1972) (if on remand, college teacher in non-tenure system could show property interest in expectancy of employment in light of policies and practices of institution, due process would require a hearing prior to his termination); Morrissey v. Brewer, 408 U.S. 471, 485-88 (1972) (parole revocation requires notice and two hearings—one preliminary and one more comprehensive—before final revocation can be made); Fuentes v. Shevin, 407 U.S. 67, 80-82 (1972) (repossession through statutory replevin requires notice and prior hearing); Bell v. Burson, 402 U.S. 535, 541-42 (1971) (suspension of driver's license of uninsured motorist requires prior hearing on question of liability); Wisconsin v. Constantineau, 400 U.S. 433, 436-37 (1971) (characterization of a person by "posting" is a stigmatization sufficient to require prior notice and hearing); Goldberg v. Kelly, 397 U.S. 254, 264, 266-71 (1970) (termination of welfare benefits requires a pre-termination hearing).

For examples of cases upholding summary deprivations where the governmental interest is paramount, see cases collected in *Goldberg, id.* at 263 n.10.

52 *See, e.g.*, Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

53 287 U.S. 45 (1932).

> asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.[54]

Although *Powell* involved the right to counsel in a criminal prosecution, it was cited with approval in *Goldberg v. Kelly*.[55] In *Goldberg*, the Court held that welfare recipients were entitled to prior notice and hearing before termination of their benefits.[56] While the Court recognized that "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard,"[57] it did not mandate court appointed counsel to represent the welfare recipients at such hearings, although the Court did permit these indigents to retain counsel at their own expense.[58] Justice Black, however, observed in his dissent that the majority's interpretation of due process would logically necessitate the provision of court appointed counsel since welfare recipients could not afford representation, and the "right" without the reality would be rendered meaningless.[59]

Since the *Goldberg* decision, the Court has extended the right of prior notice and hearing to a widening number of protectible interests. The Court must of necessity face the right to counsel issue in a variety of civil case situations if the due process guarantee is to be truly meaningful.[60] In the context of the civil commitment proceeding, the

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54 *Id.* at 68-69.

55 397 U.S. 254, 270 (1970).

56 *Id.* at 266-71.

57 *Id.* at 268-69 (footnote omitted).

58 *Id.* at 270.

59 *Id.* at 278-79 (Black, J., dissenting). For subsequent cases that have applied the *Goldberg* "right to retain counsel" rationale to other types of civil proceedings, see Miller v. United States, 455 F.2d 833, 836 (4th Cir. 1971) (claim proceedings to recover portion of fine owed to supplier of information leading to conviction of illegal discharger under 1899 Refuse Act); Caulder v. Durham Housing Authority, 433 F.2d 998, 1004 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971) (lease termination procedures); Sands v. Wainwright, 357 F. Supp. 1062, 1088-89 (M.D. Fla. 1973) (prison disciplinary hearings); Landman v. Royster, 333 F. Supp. 621, 654 (E.D. Va. 1971) (prison disciplinary hearings); Wheeler v. Adams Co., 322 F. Supp. 645, 652 (D. Md. 1971) (state replevin procedures). *But see* Sostre v. McGinnis, 442 F.2d 178, 195, 198 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049, 405 U.S. 978 (1972) (prison disciplinary proceedings).

60 A line of recent Supreme Court decisions suggests a possible constitutional basis for guaranteeing court appointed counsel in many kinds of civil cases. The right may emerge as an outgrowth of the developing Court doctrine of employing due process to grant indigents access to the judicial process in civil proceedings. In Boddie v. Connecticut, 401 U.S. 371 (1971), the Court held that in view of the state's monopolization of the

question is whether the opportunity to be heard, in a manner that comports with the fundamentals of due process, is dependent upon the presence of counsel.

THE RIGHT TO COUNSEL IN CIVIL COMMITMENT PROCEEDINGS

Premising a right to counsel in civil commitment proceedings on the due process hearing requirement may be supported by policy and constitutional considerations which are analogous to that right in the criminal context, and to the emergent right to counsel in civil matters. Parallel to the stigmatization emanating from a criminal conviction is the socially detrimental, judicially determined status arising from civil commitment which inevitably characterizes the individual as being mentally ill or dangerous.[61] Such a consequence of judicial process must be considered a deprivation of liberty in its broadest

adjudicatory process, it could not, as a matter of due process, deny indigents access to divorce courts where they were unable to pay filing and other fees. *Id.* at 380-81. Since that decision, however, there appears to be a trend limiting its application to cases involving fundamental interests. *See* Ortwein v. Schwab, 410 U.S. 656, 659 (1973); United States v. Kras, 409 U.S. 434, 445 (1973).

The link between access to the courts and provision of counsel was indicated by Justice Black in an interesting dissenting opinion he appended to a denial of certiorari in Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954 (1971). Despite his prior dissent in *Boddie*, Justice Black intimated that if the decision was to stand, it could only do so through a recognition

> that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, *or afford to hire an attorney.*

402 U.S. at 955-56 (emphasis added). He further reasoned that since the Court in *Boddie* had effectively erased distinctions between civil and criminal processes with respect to court access, the right to appointed counsel for indigents in all civil cases would follow as the only way of insuring that the access was meaningful. *Id.* at 958-59.

Although this dissent was written prior to the limitations imposed by *Kras* and *Ortwein*, Justice Black's reasoning still appears to be compelling within the context of *Boddie*'s limited scope. Thus, where fundamental interests such as basic liberty in civil commitment are involved, the right to a court appointed attorney may well be constitutionally mandated.

[61] For Supreme Court cases discussing the application of due process safeguards where state action stigmatizes individuals, see Wisconsin v. Constantineau, 400 U.S. 433, 434, 436-37 (1971) (recognizing that a statute requiring the posting of an individual's name in liquor stores as one who through "excessive drinking" exposes his family "to want" or presents a "danger to the peace" of the community, is a stigmatization bringing procedural due process requirements into play); *In re* Gault, 387 U.S. 1, 36 (1967) (characterization of juvenile as "delinquent" and subjecting him to incarceration requires the presence of counsel); Wieman v. Updegraff, 344 U.S. 183, 190-91 (1952) (holding that requirement of loyalty oath, which requires denial of membership in subversive organizations as a condition for public employment, but does not distinguish between "knowing" and "innocent" membership was, among other things, violative of due process, since such a disqualification would brand the individual with "a badge of infamy").

sense, since the whole spectrum of an individual's existence is affected.[62] Moreover, civil commitment results in a deprivation of the individual's physical liberty similar to criminal incarceration. Perhaps it represents an even more compelling loss of freedom because civil commitment is frequently for an indeterminate period.

In addition to the loss of liberty as a consequence of the commitment procedure, the adversary character of the proceedings, with its attendant labyrinth of legal complexity, requires the guidance of counsel.[63] Thus, a corollary right to the hearing requirement in a variety of civil proceedings is the right to confront and cross-examine witnesses in situations where factual determinations are to be made.[64] Such a right is particularly crucial in a commitment hearing because the state frequently introduces expert medical testimony concerning the need to confine the individual. Under these circumstances, the individual is especially in need of the assistance of counsel to effectively cross-examine and rebut the testimony of such trained professionals.[65] Rarely could the commitant adequately perform this task *pro se*.

The commitant's plight is consequently similar to that formerly faced by juveniles in juvenile court proceedings. This problem is further exacerbated where the appointment of a guardian or counsel in commitment proceedings is judicially discretionary, or is conditioned upon a demand by the commitant. Prior to such a hearing, an obvious problem in these jurisdictions is the lack of effective notice to the patient of the statutory right to counsel. In *In re Gault*,[66] however, the Supreme Court had considered the entire range of due process guarantees in juvenile court proceedings, including the question of whether counsel was necessary to effectively insure protection of the

62 In Lessard v. Schmidt, 349 F. Supp. 1078, 1088-89 (E.D. Wis. 1972), the court outlined the detrimental effects of involuntary civil commitment on a person's civil rights and liberties under Wisconsin's commitment scheme. These included raising a rebuttable presumption of incompetency; placing restrictions on the right to contract, litigate, and obtain professional licenses; and prohibiting the right to vote, drive a car, serve on juries, or enter into marriage.

63 *See* Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938).

64 Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970).

65 Wexler, *supra* note 5, at 316. The author suggests that in addition to being necessary to "effectively scrutinize medical and behavioral science testimony," an attorney will be necessary for more "mundane" tasks such as: (1) examining the factual basis for the commitment; and (2) examining the suitability of possible less restrictive alternatives. *Id. See also* Cohen, *supra* note 12, at 450-57; Note, *The Right to Counsel at Civil Competency Proceedings*, 40 TEMPLE L.Q. 381, 387-89 (1967). For an excellent discussion of the special role of counsel during emergency detention under California's statutory authority, see Comment, *Compulsory Counsel for California's New Mental Health Law*, 17 U.C.L.A.L. REV. 851, 855-64 (1970).

66 387 U.S. 1 (1967).

juvenile's rights. In this controversy, the Court was confronted with a statutory procedure which granted Arizona's juvenile courts discretionary authority to appoint counsel at adjudicatory hearings.[67] The state court had rejected the plaintiff's contention that counsel was a requirement of due process, stating that juvenile courts have the "discretion, but not the duty, to allow such representation."[68] Discretion had been employed in those cases in which the court, for example, discerned a conflict between the interests of the child and his parents.[69] The Supreme Court noted that the probation officer's dual role as arresting officer and witness for the state was necessarily adverse to the interests of the child, and that he could not therefore act as counsel to the child.[70] Since a juvenile adjudicated "delinquent" would be subjected to a substantial loss of liberty, the Court recognized the child's need for counsel to

> cope with 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.[71]

Quoting *Powell v. Alabama*,[72] the Court stated that the child depended upon counsel's guidance at the adjudicative proceedings against him.[73] The Court further maintained that the need for counsel was not limited to those cases in which the juvenile had committed an act which violated the penal laws. It recognized that delinquents were confined "for anything from waywardness to rape and homicide."[74] The incarceration of juveniles for noncriminal conduct is similar to the commitment of the mentally ill under the therapeutic rationale of *parens patriae*, since both groups face a deprivation of liberty for a condition or "status of being," rather than for the violation of the state's criminal standards.[75] For this reason, the *Gault* requirement of counsel for

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67 *Id.* at 34-35.

68 *Id.* at 35.

69 *Id.*

70 *Id.* at 35-36.

71 *Id.* at 36 (footnote omitted).

72 287 U.S. 45, 69 (1932).

73 387 U.S. at 36.

74 *Id.* at 27 (footnote omitted).

75 In Gesicki v. Oswald, 336 F. Supp. 371 (S.D.N.Y. 1971), *aff'd mem.*, 406 U.S. 913 (1972), a 19 year old girl challenged her adjudication as a "wayward minor" and her incarceration in an adult penal institution. 336 F. Supp. 371, 375 n.5. She had been charged pursuant to N.Y. CODE CRIM. PRO. § 913-a (McKinney 1958) which provided:

> Any person between the ages of sixteen and twenty-one who either . . .
> (5) is wilfully disobedient to the reasonable and lawful commands of parent, guardian or other custodian and is morally depraved or . . .
> (6) who without just cause and without the consent of parents, guardians or other

all juveniles faced with possible commitment should also be a constitutional requisite within the context of civil commitment proceedings.

THE CIVIL-CRIMINAL DISTINCTION—A DISINTEGRATING BARRIER TO DUE PROCESS PROTECTION

The major justification for the absence of due process requirements in involuntary commitment cases has been founded upon the view that such proceedings are civil rather than criminal in nature. This distinction has been supported by two major propositions: first, that the state's intentions are purely beneficent and second, that commitment is not equatable with punishment for the commission of an antisocial act.

In addressing itself to the ramifications of a civil-criminal distinction, the Supreme Court in *Gault* held that regardless of the label ascribed to a juvenile proceeding, be it civil or criminal, the possible loss of liberty necessitates the imposition of due process safeguards.[76] In recognition of that requirement, the Court guaranteed to the juvenile facing possible commitment the right to: (1) notice to parent and child adequate to afford reasonable opportunity to prepare a defense, including a statement of the specific charge alleged; (2) counsel, and provision for the appointment of counsel for the indigent offender; (3) privilege against self-incrimination; and (4) confrontation and cross-examination of witnesses.[77] The Court recognized that a juvenile adjudged to be delinquent is "subjected to the loss of his liberty for years . . . comparable in seriousness to a felony prosecution."[78] Hence, in rejecting the civil-criminal dichotomy, the Supreme Court in *Gault* chose not to adhere to the traditional rationale founded upon the purpose of such a distinction but elected to emphasize its effect.

Although the specific origin of the civil-criminal distinction is uncertain, its foundational principles had enjoyed seemingly uninter-

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custodians, deserts his or her home or place of abode, and is morally depraved or is in danger of becoming morally depraved . . .

(7) . . . may be deemed a wayward minor.

Gesicki v. Oswald, 336 F. Supp. 365, 368 (S.D.N.Y. 1971) (ordering the convening of three-judge district court).

The statute was subsequently held to be impermissibly vague. 336 F. Supp. 371, 374. *See* Comment, *Juvenile Statutes and Noncriminal Delinquents: Applying the Void-for-Vagueness Doctrine*, 4 SETON HALL L. REV. 184, 189-91 (1972).

[76] 387 U.S. at 27-30.

[77] *Id.* at 33-56.

[78] *Id.* at 36.

rupted prominence for at least 85 years prior to *Gault*. In one of the earliest reported cases concerned with this subject in an involuntary commitment context, the distinction was upheld by the Iowa Supreme Court in *County of Black Hawk v. Springer*.[79] In this case, it was argued that the Iowa commitment procedure violated the due process provisions of the state constitution.[80] Although the language of the constitution required certain due process safeguards in all criminal prosecutions and in all cases in which an individual was faced with the deprivation of life or liberty,[81] the court confined its application only to "criminal prosecutions or accusations, for offenses against the criminal law, where it is sought to punish the offender by fine or imprisonment."[82] Because punishment was not the goal sought through these proceedings, the court viewed this action as noncriminal, thereby divesting the patient of procedural due process protection.

> The inquest of lunacy by a board of commissioners, is in no sense a criminal proceeding. The restraint of an insane person is not designed as punishment for any act done. The insane are, by the law, taken into the care and custody of the State, for treatment for their unfortunate infirmity.[83]

The theory that commitment does not constitute a deprivation of liberty was discussed again by the same court almost nine years later in *Chavannes v. Priestley*.[84] Ostensibly because of the severe nature of the plaintiff's condition, he had been adjudged insane after an *ex parte* proceeding.[85] The court stated that commitment is "a method by which the public discharges its duty to a citizen,"[86] and that the committed are not " 'deprived of liberty,' within the meaning of the constitu-

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79 58 Iowa 417, 10 N.W. 791 (1881).

80 *Id.* at 418, 10 N.W. at 791.

81 IOWA CONST. art. 1, § 10, reads as follows:

> In all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall have a right to a speedy and public trial by an impartial jury; to be informed of the accusation against him, to have a copy of the same when demanded; to be confronted with the witnesses against him; to have compulsory process for his witnesses; and, to have the assistance of counsel.

82 58 Iowa at 418, 10 N.W. at 791. This interpretation appears to have ignored that part of section 10 which affords due process safeguards in cases involving the loss of life or liberty of an accused.

83 *Id.*, 10 N.W. at 791-92.

84 80 Iowa 316, 320-21, 45 N.W. 766, 768 (1890).

85 A duty to notify the patient was dependent upon a determination by the board of commissioners, during its preliminary inquiry, that exposure of the individual to the proceedings would not have a detrimental effect. However, the court simultaneously observed that the matters adjudicated herein were not conclusive but subject to possible rectification pursuant to the patient's right of appeal. *Id.* at 319-21, 45 N.W. at 767-68.

86 *Id.* at 320, 45 N.W. at 768.

tion."[87] Thus, the court's civil-criminal distinction supported the view that *parens patriae* justifies the commitment process, and that commitment does not involve loss of liberty.

The nature of the commitment process was again considered by the Iowa Supreme Court in *In re Bresee*.[88] Here the court concluded that the state's failure to provide for a trial by jury at commitment hearings did not invalidate such proceedings because they were not criminal in character,[89] but were of a statutorily defined "special" nature.[90] Hence, commitment was technically not a civil action within the contemplation of a state statute which authorized a jury trial in certain civil proceedings.[91]

An alternative approach taken by some jurisdictions is that commitment proceedings are of a special quasi-criminal nature since they fail to fall within the technical parameters of either civil or criminal actions.[92] The treatment of commitment cases as quasi-criminal is not a new concept. One of the first cases to characterize commitment as a quasi-criminal proceeding was *Taylor v. Barker*,[93] decided by the Kentucky Court of Appeals in 1898. The court concluded that "as such inquests generally involve the question of personal liberty, it is a quasi criminal proceeding, properly within the jurisdiction" of the criminal division.[94]

The quasi-criminal distinction was reaffirmed by the same court

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87 *Id.* at 321, 45 N.W. at 768.

88 82 Iowa 573, 48 N.W. 991 (1891).

89 *Id.* at 578, 48 N.W. at 992-93.

90 *Id.* at 577, 48 N.W. at 992. This third classification of an action, as defined by Iowa Code of 1873, ch. 1, §§ 2505-06, [1873] Iowa Laws 429, *as amended*, IOWA CODE ANN. § 611.2 (1950), provides:

> A civil action is a proceeding in a court of justice in which one party, known as the plaintiff, demands against another party, known as the defendant, the enforcement or protection of a private right, or the prevention or redress of a private wrong. It may also be brought for the recovery of a penalty or forfeiture.
>
> Every other proceeding in a civil case is a special action.

91 For a further discussion of the criteria by which courts generally distinguish criminal actions from those that are civil, see United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 553 (1943) (Frankfurter, J., concurring), and Amato v. Porter, 157 F.2d 719, 721 (10th Cir. 1946).

92 One author has defined quasi-criminal actions as "cases civil in form but affecting the personal liberty of a party." Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 545 n.2 (1967). In addition to commitment, the author recognized habeas corpus proceedings, juvenile cases, probation revocation, and deportation proceedings as further examples of quasi-criminal action. *Id.*

93 20 Ky. L. Rptr. 582, 47 S.W. 217 (Ct. App. 1898).

94 *Id.* at 583, 47 S.W. at 217. *See also* Reade v. Halpin, 193 App. Div. 566, 184 N.Y.S. 438 (1920), wherein the court stated that commitment proceedings may result in more serious consequences than a criminal prosecution. "It seeks nothing less than the incarceration of the individual proceeded against." *Id.* at 569, 184 N.Y.S. at 440.

in *Denton v. Commonwealth*.[95] There, the court recognized that a lunacy inquest was "neither wholly civil nor wholly criminal."[96] In its broad holding the court stated that where the possible result of such an inquest is a deprivation of liberty and property "[t]his deprival should be obtained *only* by the due processes of law under constitutional guarantees."[97] The court concluded that the defendant was entitled to the same constitutional protection afforded the accused in a criminal prosecution.[98]

The state's rationale which serves as justification for committing an individual should not be the proper basis for determining whether stricter due process requirements should apply. "The legislative intent for any involuntary commitment statute, moreover, is likely to be ambivalent, reflecting varying proportions of punitive, restorative and preventive purposes."[99] The more logical approach would be to analyze the effect of the state's action on the constitutionally protected rights of the individual. Since commitment deprives a person of the fundamental right to liberty, the state should be required to provide procedural safeguards appropriate to the threatened curtailment of one's freedom. Application of this principle makes the civil-criminal dichotomy irrelevant.[100]

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95 383 S.W.2d 681 (Ky. 1964).

96 *Id.* at 682.

97 *Id.* (emphasis added).

98 *Id.* Similar reasoning was articulated in *Ex parte* Chin Loy You, 223 F. 833 (D. Mass. 1915). The court stated that "[t]o make the defendant's substantial rights in a matter involving personal liberty depend on whether the proceeding be called 'criminal' or 'civil' seems . . . unsound." *Id.* at 838.

99 Frankel, *Preventive Restraint and Just Compensation: Toward a Sanction Law of the Future*, 78 YALE L.J. 229, 235 (1968).

100 The Supreme Court has recognized this approach in recent years when confronted with state statutes that would permit, as an alternative to penal incarceration, discretionary substitution of involuntary commitment for an indefinite term. In Specht v. Patterson, 386 U.S. 605 (1967), petitioner, convicted for taking "indecent liberties," initiated a habeas corpus proceeding after being deprived of his freedom for an indeterminant period without notice and full hearing pursuant to a Colorado sex offender statute. This form of punishment had been selected in lieu of a term of imprisonment because the trial court had found him to be either a threat to the public or an habitual offender and mentally ill as required by the statute. *Id.* at 607.

Focusing upon the operation of the sex offender statute, the Court observed that the impetus for its invocation was not the commission of a crime, but any conviction in a separate proceeding which could characterize the individual as either dangerous to the public or an habitual offender. Such a determination would therefore represent a finding of fact that was absent in the original criminal prosecution. *Id.* at 608. Application of the sex offender statute consequently created a new charge for which a different form of criminal punishment was possibly appropriate. Under these circumstances, the Court maintained that petitioner was entitled to the full range of procedural due process safeguards. *Id.* at 610. The Court refused to entertain a civil-criminal distinction approach to this

CASE LAW RECOGNITION OF A RIGHT TO COURT APPOINTED COUNSEL

The right to counsel as a requirement of due process in commitment proceedings has been expressly recognized in *Heryford v. Parker*.[101] The United States Court of Appeals for the Tenth Circuit held, in applying the *Gault* rationale, that a juvenile commitant had a "fundamental right of representation by counsel."[102] By writ of habeas corpus, a mother who had previously had her son committed initiated proceedings to obtain his release from a state training school for the feeble-minded and epileptic. She attacked a Wyoming statute that merely provided that a commitant "may be represented by counsel" at commitment proceedings.[103] The court held that the statutory procedure was insufficient to discharge the state's duty to provide

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situation, stating that the confinement, regardless of its purpose, constituted criminal punishment. *Id.* at 608-09.

See also Jackson v. Indiana, 406 U.S. 715 (1972) (equal protection violated by state statute which eased institutionalization standards for the pretrial commitment of incompetent criminal defendants); Humphrey v. Cady, 405 U.S. 504, 512 (1972) (equal protection requires that proceedings which result in commitment in lieu of sentence reflect those procedural safeguards that are mandatory under the state commitment statute); Baxstrom v. Herold, 383 U.S. 107 (1966).

101 396 F.2d 393 (10th Cir. 1968). Dooling v. Overholser, 243 F.2d 825 (D.C. Cir. 1957), has been cited by some courts and commentators as being the first case to decide that the appointment of counsel for the indigent mental patient was a constitutional right. *See, e.g.*, United States v. Dickerson, 168 F. Supp. 899, 901 n.2 (D.D.C. 1958); Cohen, *supra* note 12, at 437 n.62. However, careful analysis of the decision indicates that the court grounded the right upon the District of Columbia's statutory requirements rather than on constitutional grounds. 243 F.2d at 827.

Perhaps the first decision to base its requirement of counsel at any stage of the commitment process on constitutional grounds was People *ex rel.* Rogers v. Stanley, 17 N.Y.2d 256, 217 N.E.2d 636, 270 N.Y.S.2d 573 (1966). In this case, the New York court of appeals held that a mental patient had a constitutional right to the appointment of an attorney in a habeas corpus proceeding brought to establish the petitioner's sanity. While *Rogers* applied only to habeas corpus proceedings, the same court, one year later, maintained that a patient was "entitled to be represented by counsel . . . and should have been represented by counsel during the proceedings which resulted in her commitment." People *ex rel.* Woodall v. Bigelow, 20 N.Y.2d 852, 853, 231 N.E.2d 777, 778, 285 N.Y.S.2d 85, 85 (1967).

102 396 F.2d at 395-97. The court stated:

> Where . . . the state undertakes to act in parens patriae, it has the inescapable duty to vouchsafe due process, and this necessarily includes the duty to see that a subject of an involuntary commitment proceedings [*sic*] is afforded the opportunity to the guiding hand of legal counsel at every step of the proceedings, unless effectively waived by one authorized to act in his behalf.

Id. at 396. For an analysis of the application of the *Gault* doctrine to *Heryford*, see Comment, *Alleged Incompetent Held Entitled to Counsel at Civil Commitment Hearing*, 43 N.Y.U.L. REV. 1004 (1968).

103 396 F.2d at 395 (quoting from WYO. STAT. ANN. § 9-449 (1957)).

counsel at every stage of the proceedings.[104] The court relied exclusively on *Gault* in reiterating the position that *parens patriae* cannot excuse the state from its duty to ensure due process regardless of whether the proceedings are labeled civil or criminal.[105] *Heryford* recognized that the right to due process applies equally to all persons faced with the threat of involuntary incarceration, whether that person be an adult facing criminal punishment, a juvenile facing rehabilitation as a delinquent, or the mental incompetent facing treatment and training.[106]

In *In re Collman*,[107] an Oregon court of appeals adopted the rationale of *Heryford* and *Gault*. It found that the state's statutory commitment procedure which permitted the court's discretionary appointment of counsel was constitutionally impermissible.[108] In reversing the order of commitment the court concluded that since civil commitment results in a loss of liberty for an indefinite period, the commitant is entitled to the appointment of counsel by way of the due process clause of the fourteenth amendment.[109]

Lessard v. Schmidt[110] is the most far ranging decision to date to recognize a wide panoply of procedural safeguards for the mentally ill. Invalidating Wisconsin's civil commitment procedures, a three-judge federal district court held, as a measure of due process, that an individual facing commitment had a right to counsel, including appointed counsel if indigent.[111] The Wisconsin civil commitment statute had no provision providing for a right to counsel. The statute did provide for the appointment of a guardian ad litem in the court's discretion, who was required to be an attorney. However, the court

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104 396 F.2d at 396.

105 *Id.* The court reasoned:

> [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.

Id.

106 *Id.*

107 — Ore. App. —, 497 P.2d 1233 (Ct. App. 1972).

108 *Id.* at —, 497 P.2d at 1236-37. ORE. REV. STAT. § 426.100 (1971) provides in pertinent part:

> (1) At the time of the hearing . . . the court shall inform the allegedly mentally ill person that he has the right to legal counsel during the proceedings and that, at his request . . . the court may postpone the hearing . . . to allow the allegedly mentally ill person an opportunity to obtain counsel . . . .
>
> (2) If no request for legal counsel is made, the court may, at its discretion, appoint legal counsel.

109 — Ore. App. —, 497 P.2d at 1237.

110 349 F. Supp. 1078 (E.D. Wis. 1972).

111 *Id.* at 1098.

recognized that an attorney as guardian "does not view his role as that of an adversary counsel."[112] The court quoted the conclusion of a recent study of the Wisconsin civil commitment procedures.

> In present practice, it seems clear that in almost all cases where a guardian is appointed he sees his role not as an advocate for the prospective patient but as a traditional guardian whose function is to evaluate for himself what is in the best interests of his client-ward and then proceed, almost independent of the will of the client-ward, to accomplish this.[113]

The court, in commanding the observance of the constitutional safeguards of due process, cited the *Heryford* analysis of *Gault* which ignored the civil-criminal distinction, and instead looked to the loss of liberty involved in involuntary incarceration.[114] The court made reference to a New York study which indicated the importance of counsel to those who had contested commitment. On the basis of the disposition of some 55 commitment cases, the study noted that " '[o]ne might fairly conclude that intervention by counsel acting as patient's attorney tremendously increases chances of discharge.' "[115] By way of dictum the court concluded that the appointment of a guardian ad litem could not satisfy the constitutional requirement of representative counsel.[116]

The *Lessard* court then explored the right to counsel at the various stages of the commitment procedure, a right that plaintiff contended existed at every step of the proceedings.[117] The court recognized the right "as soon after proceedings are begun as is realistically feasible."[118] Thus such a right existed at the preliminary hearing on detention, or at a mental health proceeding brought by complaint. Moreover, counsel was to be permitted sufficient time in advance of these proceedings to prepare any initial defenses which might be available. In addition, counsel was to be granted access to all reports, psychiatric and otherwise, which would be introduced at the hearing.[119] Since the Wisconsin provisions included a jury trial on demand, the court recognized the necessity for counsel at an early stage in the

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112 *Id.* at 1097.

113 *Id.* at 1099 (quoting from Dix, *Hospitalization of the Mentally Ill in Wisconsin: A Need for Reevaluation*, 51 MARQ. L. REV. 1, 33 (1967)).

114 349 F. Supp. at 1097-98.

115 *Id.* at 1099 (quoting from Gupta, *New York's Mental Health Information Service: An Experiment in Due Process*, 25 RUTGERS L. REV. 405, 438 (1971)) (footnote omitted by the court).

116 349 F. Supp. at 1099.

117 *Id.*

118 *Id.*

119 *Id.* at 1099-1100.

proceedings since it was clear that an individual facing a civil commitment proceeding may not be able to "competently decide whether to exercise that right without the aid of counsel."[120] The court refused to recognize the right to counsel at the psychiatric interview brought by the state since the presence of a third party might limit the efficacy of the examination. However, recognizing the inability of the individual to properly exercise what it characterized as "his rights of cross-examination without the presence of counsel at this critical stage in the proceeding," the court would require that the state make available to defense counsel recordings and written results of the interview.[121]

The *Lessard* court recognized that involuntary civil commitment of those adjudged mentally ill and consequently hospitalized for lengthy periods "may greatly increase the symptoms of mental illness and make adjustment to society more difficult."[122] Additionally it found that an adjudication of mental illness results in the loss of basic civil liberties as well as future opportunities. Thus, the court equated the interest of an individual in avoiding civil commitment "at least as high as those of persons accused of criminal offenses,"[123] and emphasized the "importance of strict adherence to stringent procedural requirements and the necessity for narrow, precise standards."[124] In addition to defining and extending the right to counsel, the *Lessard* court applied a variety of due process safeguards to the commitment process: notice and opportunity to be heard; proof beyond a reasonable doubt that an individual is mentally ill and dangerous; proof that less restrictive alternatives to commitment were investigated and found neither available nor suitable; the privilege against self-incrimination including statements made to a psychiatrist; and the exclusion of hearsay evidence from the commitment hearing.[125]

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120 *Id.* at 1100.

121 *Id.*

122 *Id.* at 1087.

123 *Id.* at 1090.

124 *Id.* at 1088.

125 *Id.* at 1090-1103.

There have been to date relatively few additional cases expressly finding a constitutional right to court appointed counsel in the commitment process. A recent Ohio decision, which had extended the right to court appointed counsel to mental patients at the commitment hearing, has been reversed by that state's supreme court on grounds of mootness, although the latter expressed approval of the lower court's discussion of the right to counsel issue. *In re* Popp, 33 Ohio App. 2d 22, 292 N.E.2d 330 (1972), *rev'd on other grounds*, CCH 1973 Pov. L. REP. ¶ 17,573 (Ohio, July 11, 1973). *Cf.* Baxstrom v. Herold, 383 U.S. 107 (1966) (New York statute that permitted civil commitment upon expiration of prison sentence without right to de novo review by jury trial on the question of sanity, held to be a denial of equal protection since such a procedure was prescribed for the civil com-

CONCLUSION

The argument for the extension of the right to court appointed counsel at involuntary civil commitment proceedings is made pointedly clear by the *Lessard* decision.

> The damage done is not confined to a small number among the population. In 1963, 679,000 persons were confined in mental institutions in the United States; only 250,000 persons were incarcerated in all prisons administered by the states and federal government.[126]

New Jersey's statutory scheme regulating the civil commitment process falls far short of the due process standards recognized in *Heryford, Collman,* and *Lessard.*[127] By way of dicta, New Jersey case law has recognized that fundamental fairness requires court appointed counsel for an indigent commitant, both upon application for habeas corpus as well as at the commitment hearing itself.[128] A recent lower court decision has held that due process requires the right to an independent psychiatric examination at the expense of the state in order that the commitment hearing sufficiently safeguard the commitant's rights.[129] *Coll v. Kugler,*[130] a suit filed in the federal district court for New Jersey, has brought the state's commitment statutes under broad constitutional attack in the manner of *Lessard.*[131]

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mitment of all others alleged to be mentally ill); *In re* Barnard, 455 F.2d 1370 (D.C. Cir. 1971) (constitutional requirement of appointed counsel at commitment hearing under District of Columbia's emergency hospitalization procedure); Dixon v. Attorney General, 325 F. Supp. 966 (M.D. Pa. 1971) (due process requires right to court appointed counsel at proceedings for recommitment of mentally ill after original authority for confinement on basis of criminal conviction had expired).

126 349 F. Supp. at 1090 (citing Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill,* 44 TEX. L. REV. 424, 432-33 (1966)).

127 N.J. STAT. ANN. § 30:4-23 *et seq.* (Supp. 1973-74).

128 McCorkle v. Smith, 100 N.J. Super. 595, 602, 242 A.2d 861, 865 (App. Div. 1968).

129 *In re* Gannon, 123 N.J. Super. 104, 105-06, 301 A.2d 493, 494 (Somerset County Ct. 1973).

130 Civil No. 1525-73 (D.N.J., filed October 23, 1973).

131 Plaintiffs' Complaint at 12, Coll v. Kugler, Civil No. 1525-73 (D.N.J., filed October 23, 1973). New Jersey's statutory scheme is alleged to be unconstitutional on its face and as applied for failure to require the following:

a. effective, adequate and timely notice of the "charges" under which a person is sought to be detained;
b. adequate notice of all rights, including appointed counsel if indigent and right to jury trial;
c. adequate discovery proceedings, confrontation and cross-examination of witnesses;
d. permits detention up to 112 days without a preliminary hearing on probable cause;

A growing trend is evident. The courts of this nation have begun to recognize their responsibility for insuring that due process plays a part in involuntary civil commitments. *Coll* presents the judiciary with the opportunity of recognizing the demise of the "civil" label which has been affixed to these proceedings, and afford those alleged to be mentally ill with sufficient procedural safeguards to insure the protection of their fundamental liberties.

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e. permits detention up to 112 days without a full hearing on the necessity for commitment;
f. permits indefinite commitment upon a hearing in which the individual is not represented by adversary counsel;
g. exclusion of hearsay evidence;
h. warning of benefit of privilege against self-incrimination;
i. proof beyond reasonable doubt that such person is mentally ill and as a result of such illness is dangerous;
j. those seeking commitment to consider less restrictive alternatives to commitment;
k. periodic judicial review.