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Michael J. Remington

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# LESSARD V. SCHMIDT AND ITS IMPLICATIONS FOR INVOLUNTARY CIVIL COMMITMENT IN WISCONSIN

MICHAEL J. REMINGTON\*

*“ . . . before the Law stands a doorkeeper. To this doorkeeper there comes a man from the country who begs for admittance to the Law. But the doorkeeper says that he cannot admit the man at the moment. The man, on reflection, asks if he will be allowed, then, to enter later. ‘It is possible,’ answers the doorkeeper, ‘but not at this moment.’ Since the door leading into the Law stands open as usual and the doorkeeper steps to one side, the man bends down to peer through the entrance. When the doorkeeper sees that, he laughs and says: ‘If you are so strongly tempted, try to get in without my permission. But not that I am powerful. And I am only the lowest doorkeeper. From hall to hall, keepers stand at every door, one more powerful than the other. And the sight of the third man is already more than even I can stand.’ These are difficulties which the man from the country has not expected to meet, the Law, he thinks should be accessible to every man and at all times, but when he looks more closely at the doorkeeper in his furred robe, with his huge pointed nose and long thin Tartar beard, he decides that he had better wait until he gets permission to enter. The doorkeeper gives him a stool and lets him sit down at the side of the door. There he sits waiting for days and years.”<sup>1</sup>*

The newcomer to the field of involuntary civil commitment is always surprised at how close a guard Kafka's doorkeepers have kept on this area of the law. The public hears relatively little about the mechanics of involuntary civil commitment. Lawyers them-

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\* B.S., University of Wisconsin, 1967; J.D., University of Wisconsin Law School, 1973; Peace Corps Volunteer, Ivory Coast, 1969-1971. The Author began serving as Law Clerk to Chief Judge John W. Reynolds, United States District Court, Eastern District, Wisconsin, on July 1, 1973, and thus was not a participant in the drafting of the *Lessard v. Schmidt* decision.

The Author wishes to acknowledge the use of, and reference to, an unpublished article entitled "Involuntary Civil Commitment in Wisconsin: *Lessard v. Schmidt*," currently on file with the National Clearinghouse Review for Legal Services, Chicago, Illinois, which he co-authored with Ms. Karen Ward, J.D., University of Wisconsin Law School, 1973.

Appreciation is expressed for the aid and advice given by Ms. Ward, and also by Professor Gordon Baldwin, University of Wisconsin Law School.

1. F. KAFKA, *THE TRIAL*, (Afred A. Knopf, New York, 1970), pp. 267-268.

selves often do not know the first thing about how to civilly commit someone, and are forced to do some quick research or consult outside sources when a prospective problem is presented to them. Judges have been anything but consistent in their rulings and discussions concerning the legal problems inherent in restraining individuals who have not committed crimes. And legislators have been neglectful in keeping abreast of changes and breakthroughs in the fields of psychiatry and treatment of mental illness.

### INTRODUCTION

The debate over adequate procedures for the involuntary commitment of mentally ill individuals has been a modern one. Blackstone reports that the common law had little occasion to consider such question, because public institutions for the mentally ill did not exist.<sup>2</sup> In the past, the family was expected, and indeed, required by social mores, to care for the mentally ill.<sup>3</sup> The construction of mental institutions is not one of the priorities of a young and developing country. In the United States, the first such institution was built around the middle of the eighteenth century, with few hospitals built anywhere until the middle of the nineteenth century.<sup>4</sup> The State of Wisconsin opened its first state mental hospital in 1859. The legislature in that year provided that certain procedures be respected before admission to the new institution. For example, it was required that the prospective patient be examined by a "respectable physician" and that this physician certify that he found the patient to be insane.<sup>5</sup> In 1897, the Wisconsin mental commitment procedures were thoroughly revised;<sup>6</sup> the result was a procedure that was to essentially exist for seventy-five years.<sup>7</sup>

The basic procedures for the involuntary commitment of the mentally disabled in Wisconsin prior to the decision of *Lessard v. Schmidt*<sup>8</sup> may be summarized as follows. Formerly, three persons, one of whom must have been a close relation to the prospective patient, could file a petition for judicial inquiry into the prospective

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2. 1 BLACKSTONE, COMMENTARIES 305 (Christian ed. 1827).

3. S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 4 (1971).

4. *Id.*

5. WIS. LAWS, 1859, ch. 218.

6. WIS. LAWS, 1897, ch. 319.

7. See Dix, *Hospitalization of the Mentally Ill in Wisconsin: A Reexamination*, 51 MARQ. L. REV. 1 (1967).

8. 349 F. Supp. 1078 (E.D. Wis. 1972).

committee's mental condition.<sup>9</sup> The court then was to appoint two physicians, one being a psychiatrist, to conduct an examination into the individual's mental condition.<sup>10</sup> Subsequent to this, the two physicians made a written report.<sup>11</sup> The statutes provided for the setting of a hearing, and for the service of notice on the patient.<sup>12</sup> A judicial hearing was given as a matter of right, its importance explained to the patient,<sup>13</sup> and possibly a *guardian ad litem* appointed for him.<sup>14</sup> The patient could demand a jury trial,<sup>15</sup> and under certain conditions, examine the physicians.<sup>16</sup> It was the duty of the court (or the jury) to decide (1) whether the patient was mentally ill, and (2) whether he should be sent to a hospital for the mentally ill.<sup>17</sup>

A procedure also existed whereby, on the petition of one physician and two other individuals, a prospective patient who was "dangerous to himself or others" could be detained for up to five days.<sup>18</sup> Under this procedure, a judicial proceeding had to have been initiated as soon as possible.<sup>19</sup> If "safety" required it, a court could order a patient detained up to ten days pending a judicial hearing.<sup>20</sup> Between the time when the report of the examining physicians was received and the judicial hearing, the court could order the patient detained for up to thirty days; this could be extended, upon application to the court, for up to ninety days.<sup>21</sup> If it appeared to the court that notice of hearing would be "injurious" to the patient, this right could be bypassed.<sup>22</sup> In addition, it was not considered a necessity that the patient be present at the hearing.<sup>23</sup> Finally, there was further provision that if the judge was in doubt about the patient's medical condition, he could order up to ninety days commitment for "medical observation" before determining

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9. WIS. STAT. § 51.01(1) (1971).

10. WIS. STAT. § 51.01(2) (1971).

11. WIS. STAT. § 51.01(2)(b) (1971).

12. WIS. STAT. § 51.01(1)(a) (1971).

13. WIS. STAT. § 51.02(2) (1971).

14. WIS. STAT. § 51.02(4) (1971).

15. WIS. STAT. § 51.03 (1971).

16. WIS. STAT. § 51.02(1) (1971).

17. WIS. STAT. § 51.03 (1971).

18. WIS. STAT. § 51.04(1) (1971).

19. *Id.*

20. WIS. STAT. § 51.04(2) (1971).

21. WIS. STAT. § 51.04(3) (1971).

22. WIS. STAT. § 51.02(1)(a) (1971).

23. WIS. STAT. § 51.02 (1971).

whether the patient was to be committed.<sup>24</sup>

These were Wisconsin's procedures until the decision of *Lessard v. Schmidt*.<sup>25</sup> These were the procedures used to involuntarily commit 4,424 individuals in Wisconsin mental institutions between June 30, 1971, and June 30, 1972.<sup>26</sup> On one hand, these procedures represented what was surely thought to be elaborate safeguards surrounding involuntary civil commitment. On the other hand, they made it possible to involuntarily detain a prospective patient for up to one hundred and forty-five days without a hearing.<sup>27</sup>

## II. THE DECISION OF LESSARD V. SCHMIDT

### A. Introduction and Factual Background

On October 29, 1971, Mrs. Alberta Lessard was picked up by two police officers in front of her home in West Allis, Wisconsin. She was subsequently taken to the Mental Health Center, North Division, Milwaukee, Wisconsin, and detained.<sup>28</sup> What happened to her during the following months was to become the basis of her civil action,<sup>29</sup> and her ultimate victory in overturning Wisconsin's civil commitment procedures.

*Lessard v. Schmidt* was a class action seeking declaratory and injunctive relief against the enforcement of selected portions of Sections 51.02, 51.03 and 51.04 of the Wisconsin Statutes.<sup>30</sup> The

24. WIS. STAT. § 51.02(5)(b) (1971).

25. The decision was handed down on October 18, 1972.

26. State Department of Health and Social Services, Yearly Population Report—Basis for Admission of Patients Admitted to Wisconsin State and County Mental Institutions During the Year June 30, 1971, thru June 30, 1972.

27. These procedures must have seemed to prospective patients not unlike Kafka's doorkeepers who denied access to the law to the man from the country.

28. 349 F. Supp. at 1080.

29. *Id.* at 1082.

30. The relevant portions of Sections 51.02 - .04 are as follows: WIS. STAT. § 51.02 (1971) states, in part:

(1) *Notice of Hearing.* (a) On receipt of the application or of the report of the examining physicians, the court shall appoint a time and place for hearing thereof to be served upon the patient . . . , which notice shall state that application has been made for the examination into his mental condition (withholding the names of the applicants) and that such application will be heard at the time and place named in the notice; but if it appears to the satisfaction of the court that the notice would be injurious or without advantage to the patient by reason of his mental condition, the service of notice may be omitted. The court may, in its discretion, cause notice to be given to such other persons as it deems advisable. If the notice is served the court may proceed to hold the hearing at the time and place specified therein, or, if it is dispensed with, at any time . . .

action was brought pursuant to 42 U.S.C. §1983, on behalf of the class consisting of Mrs. Lessard and "all other persons 18 years of age or older who are being held involuntarily pursuant to any emergency, temporary or permanent commitment provision of the

(2) *Hearing.* At the hearing any party in interest, . . . may examine the physicians and other witnesses, on oath, before the court and may offer evidence. At the opening of the hearing the judge shall state to the patient, if present, in simple, non-technical language the purpose of the examination and his right to be heard and to protest and oppose the proceedings and his commitment; but where it is apparent to the judge that the mentality of the patient is such that he would not understand, he may omit such statement . . .

(4) *Appointment of Guardian Ad Litem.* At any stage of the proceedings, the court may, if it determines that the best interest of the patient requires it, appoint a guardian *ad litem* for him.

(5) *Court's Decision.* At the conclusion of the hearing the court may:

(a) Discharge the patient if satisfied that he is not mentally ill or infirm or deficient, so as to require care and treatment, or

(b) Order him detained for observation if in doubt as to his mental condition, or

(c) Order him committed if satisfied that he is mentally ill or infirm or deficient and that he is a proper subject for custody and treatment, or

(d) In case of trial by jury, order him discharged or committed in accordance with the jury verdict.

WIS. STAT. § 51.03 (1971) states, in part:

If a jury is demanded by the alleged mentally ill . . . patient or by a relative or friend in his behalf, before commitment, the court shall direct that a jury of six people be drawn to determine the mental condition of the patient . . . At the time of ordering a jury to be summoned, the court shall fix the date of the hearing, which date shall not be less than 30 days nor more than 40 days after the demand for a jury is made.

In the meantime the court may order the patient temporarily detained in a designated public institution, until the date of hearing, for observation . . .

WIS. STAT. § 51.04 (1971) states, in part:

*Temporary detention of persons.*

(1) *Emergency Provisions.* The sheriff . . . may take into temporary custody any person who is violent or threatens violence and who appears irresponsible and dangerous. The sheriff . . . shall take temporary custody of any person when it appears by application . . . executed by three persons, one of whom shall be a physician licensed to practice medicine and surgery in this state, that such person has a mental illness, is in need of hospitalization, and is irresponsible and dangerous to himself or others . . . This is an emergency provision intended for the protection of persons and property. Such person may be kept in custody until regular proceedings are instituted to cope with the case, but not exceeding five days . . .

(2) *For Safety.* If it appears from the application for his mental examination or otherwise that safety requires it, the court or a court commissioner if the judge is not available may order the sheriff or other police officer who has such person in custody to confine him in a designated place for a specified time, not exceeding 10 days.

(3) *Medical Observation.* Upon receipt of the report of the physicians the court may order his detention in a designated institution for a stated period not exceeding 30 days. Upon the application of the superintendent of the institution or any interested person the court may extend the detention period, but the temporary detention shall not exceed 90 days in all.

Wisconsin involuntary commitment statute."<sup>31</sup> Because the action challenged the enforcement of a state statute on federal constitutional grounds, a three judge court was impaneled to hear the action.<sup>32</sup>

### B. *Basis of the Action*

The statutes were generally challenged on grounds that the procedure for involuntary civil commitment in Wisconsin denied due process of law to those affected. More specifically, plaintiffs alleged that the Wisconsin statutes were in violation of the due process clause of the fourteenth amendment of the United States Constitution because they permitted detention for a possible maximum of 145 days without a hearing; failed to make mandatory notice of all hearings and to give adequate and timely notice when hearings were given; failed to require notice of the right to trial by jury; failed to provide a right to counsel and appointed counsel at a meaningful time, and failed to permit counsel to be present at psychiatric interviews; permitted hearsay evidence; failed to protect the privilege against self incrimination; permitted commitment upon a standard of proof less than beyond a reasonable doubt; and, finally, neglected to describe the standard for commitment.<sup>33</sup>

### C. *The Decision and the Due Process Grounds of Lessard v. Schmidt*

The three judge court agreed with the plaintiffs' contentions, finding the statutes in question unconstitutional as violative of plaintiff's right to due process of law. After a very lengthy discussion, the court announced its decision and stated nine bases for its conclusions.<sup>34</sup> In an effort to make the explanation clear, the nine conclusions of the court shall be discussed separately, although in the opinion itself, they were overlapped and often discussed together.

1. *Effective and Timely Notice of the "Charges" Under Which a Person is Sought to be Detained Must be Given.* The *Lessard* court held that a patient has a right to be informed of the reasons for his detention, the names of examining physicians and all other persons who may testify in favor of his continued deten-

31. 349 F. Supp. at 1082.

32. The members of the three-judge court were Circuit Judge Robert A. Sprecher, Chief District Judge John W. Reynolds, and District Judge Myron L. Gordon.

33. 349 F. Supp. at 1082.

34. *Id.* at 1103.

tion, and the substance of their proposed testimony.<sup>35</sup> The court stated: "Judged by these standards, the Wisconsin statutory scheme for involuntary civil commitment fails to afford persons alleged to be mentally ill with adequate procedural safeguards."<sup>36</sup> As authority for this conclusion, the court refers the reader forward to section III-B, of its own opinion.<sup>37</sup> That section is a lengthy discussion of the general requirements of due process and a refutation of the justifications for applying lesser safeguards in civil as opposed to criminal commitments. The court's rationale vacillates from *parens patriae*, to a discussion of the right to treatment, to the civil-criminal distinction. *In re Gault*<sup>38</sup> is cited for the proposition that the civil-criminal distinction should be laid to rest.<sup>39</sup> The reference to section III-B in support of the notice of charges requirement was probably meant to lead the reader to both *Gault* and *In re Winship*,<sup>40</sup> and specifically to the conclusion that the right to due process in juvenile proceedings would support the *Lessard* court's conclusion that notice of charges is required.

2. *Adequate Notice of All Rights, Including the Right to a Jury Trial, is Required.* The court also found the Wisconsin statutes to be constitutionally defective in this respect. The court states that notice of the date, time and place of a scheduled hearing is insufficient.<sup>41</sup> The "accused" is entitled to notice of his right to jury trial, the basis for his detention, and "the standard upon which he may be detained."<sup>42</sup> In addition, the "accused" should be notified of the names of the examining physicians and all others who may provide testimony in favor of continued detention, and the substance of their proposed testimony.<sup>43</sup> Although *Gault* is not directly on point regarding the right to notice of all rights, its presence is felt. In *Gault*, the Supreme Court stated that "the Due Process Clause of the Fourteenth Amendment requires that . . . the child and his parents must be notified of the child's right to be represented by counsel. . . ." <sup>44</sup> Subsequently, the Court further

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35. *Id.* at 1092.

36. *Id.* at 1093.

37. *Id.*

38. 387 U.S. 1 (1967).

39. 349 F. Supp. at 1095.

40. 397 U.S. 358 (1970).

41. 349 F. Supp. at 1092.

42. *Id.*

43. *Id.*

44. 387 U.S. at 41.



implied that notice of the privilege against self incrimination is also required in juvenile proceedings.<sup>45</sup>

3. *Detention Longer than 48 Hours Without a Hearing on Probable Cause is Unconstitutional.* The court concludes that emergency detention without benefit of a hearing may not exceed 48 hours.<sup>46</sup> This conclusion again stems from the premise that involuntary detention must meet the requirements of procedural due process. Here, the court applies a compelling state interest test.<sup>47</sup> That is, since liberty is a fundamental right, the state must show a compelling reason for infringing upon it. The court admits that the state may have a compelling state interest in the protection of both society and the individual and therefore gain the power of emergency detention over those persons who threaten violence to themselves or others. Nevertheless, the court specifies that such emergency measures can only be justified for the "length of time necessary to arrange for a hearing before a neutral judge at which probable cause for the detention must be established."<sup>48</sup> Although no authority is provided for this conclusion, if the procedure is justifiable only as an "emergency", it would follow that the emergency should last only so long as it takes to set up the hearing required by fundamental due process.<sup>49</sup>

4. *Detention for Longer than Two Weeks without a Full Hearing on the Necessity for Commitment is Unconstitutional.* Mrs. Lessard was held for 26 days prior to the hearing upon which her commitment was based.<sup>50</sup> The court found this period to be so

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45. *Id.* at 44. In *Gault* the Supreme Court stated: "in light of *Miranda v. Arizona*, 384 U.S. 436 (1966), we must also consider whether, if the privilege against self-incrimination is available it can effectively be waived unless counsel is presented or the right to counsel has been waived."

46. 347 F. Supp. at 1091.

47. *Id.*

48. *Id.*

49. Ample authority in the criminal area regarding pre-arraignment confinement could have been cited to put this holding on more solid ground. For example, in *Mallory v. United States*, 354 U.S. 449 (1957), the Supreme Court stated that "[t]he duty enjoined upon arresting officers to arraign 'without unnecessary delay' [Fed. Rules Crim. Proc., Rule 5(a)] indicates the command does not call for mechanical or automatic obedience. Circumstances may justify a brief delay between arrest and arraignment . . .", such as the need to quickly verify the accused's story with a third party. 354 U.S. at 455. The test the Seventh Circuit uses for pre-arraignment detentions was also available to the Lessard court. In *United States v. Taylor*, 374 F.2d 753 (7th Cir. 1967), the standard was formulated as a determination of whether the delay between arrest and arraignment was unnecessary upon a consideration of the "sum total of circumstances" (at 757). See also *United States v. Hamilton*, 409 F.2d 404, 406 (7th Cir. 1969).

50. 349 F. Supp. at 1098.

long as to be offensive to due process, and set up its own limit of ten to fourteen days. The court finds no "reason why psychiatrists cannot be scheduled to make their examinations within two or three days of the patient's entering the hospital,"<sup>51</sup> but then proceeds to permit ten to fourteen days of pre-hearing detention.

It appears that the ten to fourteen day limit established by the court is purely an arbitrary one. If the purpose of the confinement is for examination only, then it should be permitted only so long as such examination requires. If, as the court suggests, the pre-trial detention period exists also "for the patient to prepare any defense,"<sup>52</sup> it is nowhere evident that this purpose is served by a shorter period of detention followed by an immediate hearing. The opposite may be the case since a longer pre-hearing period without continued detention would probably enable the patient to prepare a more adequate defense.<sup>53</sup>

5. *The Right to Counsel Applies to Civil Commitment Proceedings.* The court finds that the Wisconsin civil commitment procedure is constitutionally defective because it "permits commitment based upon a hearing in which the person charged with mental illness is not represented by adversary counsel."<sup>54</sup> The court stands on firm ground in relying upon *Heryford v. Parker*,<sup>55</sup> which in turn relies on *In re Gault*<sup>56</sup> for authority. The crucial factor for all three courts—*Gault*, *Heryford*, and *Lessard* 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 mental incompetent."<sup>57</sup> Any such incarceration "commands the observance of the constitutional safeguards of due process."<sup>58</sup> All three courts conclude that

51. *Id.*

52. *Id.*

53. A similar contradiction is made evident, by n. 22, 349 F. Supp. at 1092. Dr. David J. Vail, Medical Director, Department of Public Welfare, State of Minnesota, 1970 Hearings at 72, has found that if you are pleading insanity as a defense for a crime, you can be assured that you will receive a thorough medical examination. On the other hand, if you are an ordinary citizen, and are simply trying to keep from being civilly committed, you will be fortunate to have a 15-minute interview with two general practitioners.

54. 349 F. Supp. at 1103. *Lessard*, in addition, held that counsel must be appointed "with time enough before [the] hearing to prepare any initial defenses which may be available." Otherwise, the right to representation by counsel would be a mere formality. *Kent v. United States*, 383 U.S. 541, 563 (1966).

55. 396 F.2d 393 (10th Cir. 1968).

56. 387 U.S. 1 (1967).

57. *Heryford v. Parker*, 396 F.2d at 396.

58. *Id.*

the right to counsel is fundamental among these constitutional safeguards.<sup>59</sup>

The more specific issue in the *Lessard* case, however, is whether the Wisconsin provision for a guardian *ad litem* which is appointed in the court's discretion fulfills the constitutional requirement. The court concludes that the appointment of a guardian *ad litem* serves a function different from that of adversary counsel, and therefore does not displace that requirement.<sup>60</sup> The court looked into the role played by the individual plaintiff's guardian *ad litem* in *Lessard* and also at a recent study of the Wisconsin civil commitment procedure.<sup>61</sup> The study revealed that the guardian *ad litem* conceived his role to be that of a traditional guardian who makes independent decisions about what is best for the "client-ward" rather than as an advocate who presses for his client's interests as perceived by the client.<sup>62</sup> Indeed, if the guardian *ad litem* is permitted to exercise his independent judgment, and he feels that the individual is in need of confined treatment, the individual who wishes to seriously contest commitment is without representation. The court correctly concludes that the role served by the guardian *ad litem* in Wisconsin civil commitment procedures does not satisfy the constitutional right to counsel.<sup>63</sup>

6. *Hearsay Evidence Cannot Be Admitted in Civil Commitment Proceedings.* A relatively minor issue among the nine considered by the court is that of hearsay evidence. The exclusion of hearsay evidence was not seriously disputed by the state.<sup>64</sup> The court again relies on *In re Gault*,<sup>65</sup> which, while not called upon to

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59. 349 F. Supp. at 1097. See also Ennis, *Civil Liberties and Mental Illness*, 7 CRIM. L. BULL. 101, 125 (1971). The court in *Lessard v. Schmidt*, could have treated this issue more summarily. For example, in a similar decision, the New York Court of Appeals in *Rogers v. Stanley*, 17 N.Y.2d 256, 217 N.E.2d 636 (1966), made its memorandum decision on purely constitutional grounds. The court stated: "in our view, the principle of *Baxstrom v. Herold*, *Gideon v. Wainwright*, *Douglas v. California*, *Lane v. Brown*, *Griffin v. Illinois*, and of similar cases, demonstrates that an indigent mental patient, who is committed to an institution, is entitled, in a habeas corpus proceeding . . . , to the assignment of counsel as a matter of constitutional right." *Id.* at 256.

60. *Id.* at 1099.

61. Dix, *supra*, note 7, at 1.

62. *Id.* at 33.

63. 349 F. Supp. at 1099. What the court fails to do is to spell out or even suggest the proper role of the guardian *ad litem* in the commitment process when counsel is afforded. For a general discussion of guardians *ad litem* in Wisconsin, see Hohmann & Dwyer, *Guardians ad litem in Wisconsin*, 48 MARQ. L. REV. 455 (1965).

64. *Id.* at 1102.

65. 387 U.S. 1.

decide the hearsay issue, indicated that the informality of the juvenile proceeding did not justify the admission of hearsay.<sup>66</sup> The court compares the juvenile and mental commitment procedures, and finds no meaningful distinction between the two proceedings with regard to hearsay.<sup>67</sup> Again noting the seriousness of the deprivation of liberty involved, the court reasonably concluded that "where standard exclusionary rules forbid the admission, no sound policy reasons exist for admitting [hearsay] evidence in an involuntary commitment hearing."<sup>68</sup>

7. *If Psychiatric Evidence is to be Presented, the Patient must be Given the Benefit of the Privilege against Self-Incrimination.* Self-incrimination is one of the most troublesome issues in the civil commitment area. Although this and other courts have logically rejected the civil-criminal distinction for purposes of self-incrimination,<sup>69</sup> it has also been recognized that the price of a lawyer's advice to his client not to make statements to a psychiatrist may be to prevent needed treatment.<sup>70</sup> Although a psychiatric examination resembles a police interrogation in its potential loss-of-liberty result, it is difficult to envision an effective psychiatric examination that takes place in the presence of adversary counsel.

The difficulty in balancing the state's (and indeed, possibly the patient's) interest in a confidential uninterrupted psychiatric interview, and the accused's interest in due process, is recognized by the court, which attempts to reconcile these competing considerations. The court states:

Wisconsin may not, consistent with basic concepts of due process, commit individuals on the basis of a showing that the statements were made with "knowledge" that the individual was not allowed to speak. We do think, however, that the safeguards of the privilege may be obtained without the presence of counsel in the psychiatric interview. The patient should be told by counsel and the psychiatrist that he is going to be examined with regard to his mental condition, that the statements he may make may be the basis for commitment, and that he does not have to speak to the psychiatrist. Having been informed of this danger the patient may be examined if he willingly assents.<sup>71</sup>

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66. See 349 F. Supp. at 1102, quoting from Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 794-795 (1966).

67. *Id.*

68. *Id.* at 1103.

69. *Id.* at 1100-1101; see also *In re Gault*, 387 U.S. at 49.

70. *Id.* at 1101.

71. *Id.*

The court neglects, however, to give any indication of when notice of the right must be given, or whether it must be repeated prior to each psychiatric interview.<sup>72</sup>

8. *Commitment Without Proof Beyond a Reasonable Doubt that the Patient is Both "Mentally Ill" and "Dangerous" is Unconstitutional.* The traditional civil-criminal distinction regarding burden of proof was clearly eroded with regard to juvenile delinquency procedures by *In re Winship*.<sup>73</sup> In that case, the United States Supreme Court held that all facts needed to prove juvenile delinquency had to be proven beyond a reasonable doubt, because of possible loss of liberty and the stigmatizing effect of a conviction.<sup>74</sup> The *Lessard* court found the considerations that formed the basis for the *Winship* holding even more persuasive in the mental commitment area. Not only does the individual lose liberty and become stigmatized, but he loses civil rights as well.<sup>75</sup> The court therefore held that "the state must prove beyond a reasonable doubt all facts necessary to show that an individual is both mentally ill and dangerous."<sup>76</sup>

The dangerousness requirement stems from the United States Supreme Court's interpretation of Section 51.02(5), Wis. Stats.,<sup>77</sup> in *Humphrey v. Cady*.<sup>78</sup> That case read into the state's definition of mental illness the requirement that a person's "potential for doing harm, to himself or others, is great enough to justify . . . a massive curtailment of liberty."<sup>79</sup>

*Humphrey* interpreted the statute to require "dangerousness"; however, it did not consider whether such a requirement may be constitutionally compelled. The *Lessard* court suggests that a statute which does not require a finding of dangerousness would be defective, although it did not phrase its discussion in constitutional terms.<sup>80</sup> The court compares the physically ill with the mentally ill,

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72. The same conditions should be present for the warning of legal rights in a mental commitment case as were present in *Miranda v. Arizona*, 384 U.S. 436 (1966), and therefore the warning should be given before each psychiatric interview.

73. 397 U.S. 358 (1970).

74. 349 F. Supp. at 1095; see also 397 U.S. at 365-366.

75. *Id.*

76. *Id.*

77. WIS. STAT. § 51.02(5)(c) (1971) provides that the court may "order [the patient] committed if he is satisfied that he is mentally ill or infirm or deficient and that he is a proper subject for custody and treatment."

78. 405 U.S. 504 (1972).

79. *Id.* at 509.

80. 349 F. Supp. at 1094.

and notes that the physically ill are free to reject treatment. The court then states that those who are mentally ill should have the same choice unless 1) dangerousness is proven or 2) the patient's inability to make a decision is proven.<sup>81</sup> This, in essence, is an equal protection argument, which could have been stated as follows:

Non-dangerous mentally ill persons and physically ill persons constitute similarly situated classes. To require one group (the mentally ill) to undergo involuntary treatment while not requiring the other group (the physically ill) to undergo such treatment is a denial of equal protection to the mentally ill class.

Applying this traditional equal protection analysis, the state would thus have to show that the state has a legitimate interest in achieving a certain level of mental health while it does not have to achieve the same level of physical health.

9. *Involuntary Civil Commitment Without Consideration of Less Restrictive Alternatives is Unconstitutional.* The *Lessard* court finds that: "[p]ersons suffering from the condition of being mentally ill, but who are not alleged to have committed any crime, cannot be totally deprived of their liberty if there are less drastic means for achieving the same basic goal."<sup>82</sup> The philosophy of the court is that full-time involuntary commitment should be turned to only as a last resort.<sup>83</sup> Relying upon *Lake v. Cameron*,<sup>84</sup> the court holds that the party seeking 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."<sup>85</sup>

Here again the court flirts with the application of a compelling state interest test, by holding that the burden shifts to the party seeking commitment to show that less restrictive alternatives were not feasible. However, the court simply shifts the burden to the "person"<sup>86</sup> recommending hospitalization. There is no indication whether such person is equated with the "state".

Further, the court does not find the statute<sup>87</sup> constitutionally

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81. *Id.*

82. *Id.* at 1096.

83. *Id.* at 1095.

84. 364 F.2d 657 (D.C. Cir. 1966). See also 7 CRIM. L. BULL. 101 (1971), in which this issue is discussed in light of *Lake v. Cameron*.

85. 349 F. Supp. at 1096.

86. *Id.*

87. WIS. STAT. § 51.05 (1971) only states that "if the court or jury finds that the patient is mentally ill or infirm and should be sent to a hospital for the mentally ill or infirm, the

defective here, because the standard could have been applied consistently with the statute's discretionary mandate to the judge regarding commitment. The court merely found that the procedure followed for the commitment of Alberta Lessard was constitutionally defective because the *judge* failed to consider alternative methods.<sup>88</sup>

#### D. Summary

Henceforth, the present Wisconsin civil commitment statutes cannot be enforced to the extent that they conflict with the conclusions of the *Lessard* court. Lawyers, legislators, and judges should now be aware that in Wisconsin the following dictates must be respected; Wisconsin must now: (1) afford a right to counsel to those "accused" of mental illness; (2) hold a preliminary hearing on probable cause within 48 hours; (3) hold a full adversary hearing within 2 weeks of the accused's confinement; (4) serve the accused with notice of all hearings and all rights including the right to a jury trial; (5) afford the accused the privilege against self-incrimination; (6) exclude hearsay evidence; (7) commit only upon proof of dangerousness and mental illness beyond a reasonable doubt; and (8) investigate alternatives before resorting to full time involuntary commitment.<sup>89</sup>

It should be noted that all of the above requirements, with the possible exception of the last, affect only the procedure used in committing those alleged to be mentally ill. Although a few of the court's conclusions should profoundly affect fundamental constitutional rights, especially the self-incrimination privilege and the reasonable doubt standard, the major thrust of the decision merely fortifies requirements that already exist in fact or in law. For example, notice requirements are found to be somewhat stricter than those existing under the present statute. Hearsay is now absolutely excluded instead of being within the judge's discretion. Appointed counsel is now required.

In light of *In re Gault*,<sup>90</sup> none of the conclusions is especially shocking, nor is it likely that Wisconsin will experience much long-term difficulty in adapting to the new procedural safeguards. With

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court shall commit him to a hospital . . ." See also WIS. STAT. § 51.02(5)(c) (1971), quoted in n. 77.

88. For further discussion of the court's decision requiring the search for alternatives, see nn. 181-191.

89. 349 F. Supp. at 1103.

90. 387 U.S. 1.

the growing disintegration of the civil-criminal distinction in the area of due process rights, it seems surprising that it took so long for the status of those accused of mental illness to be elevated to that accorded juveniles in delinquency proceedings.

### III. THE FUTURE AND UNRESOLVED PROBLEMS

Wisconsin has a dual system of mental health facilities; one at the county level,<sup>91</sup> and the other at the state level.<sup>92</sup> County hospitals, because of lack of facilities, except in Milwaukee County, have been primarily custodial and have been utilized either for chronic cases or for institutionalization of the aged. The state institutions, and especially Mendota State Hospital and Winnebago State Hospital, have been the primary treatment facilities.<sup>93</sup>

Within the state of Wisconsin, the disparities among counties is great. Among the state's seventy-two counties, only about one-half (thirty-five) have local county institutions.<sup>94</sup> These institutions are situated in the more populous, and generally richer, counties. For instance, none of the counties with under 10,000 residents (Adams, Burnett, Florence, Forest, Iron, Marquette, Menominee, Pepin, and Sawyer), have local mental health facilities.<sup>95</sup> On the other hand, the state's two most populous counties (Milwaukee and Dane) have excellent facilities, including out-patient treatment centers, half-way houses, psychiatric counseling centers, and several other alternative treatment facilities.<sup>96</sup> Many of Wisconsin's counties literally have no trained psychiatrists living within their confines, whereas others have a wealth of psychiatric personnel.<sup>97</sup>

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91. WIS. STAT. § 51.25 (1971) states that "any county having a population of less than 500,000 may establish a hospital or facilities for the detention and care of mentally ill persons . . ." Notably absent from this statute is "for the treatment of mentally ill persons."

Counties in Wisconsin with mental health institutions are Brown, Chippewa, Clark, Columbia, Dane, Dodge, Douglas, Dunn, Eau Claire, Fond du Lac, Grant, Green, Iowa, Jefferson, La Crosse, Manitowoc, Marathon, Marinette, Monroe, Outagamie, Racine, Rock, St. Croix, Sauk, Shawano, Sheboygan, Trempealeau, Vernon, Walworth, Washington, Waukesha, Waupaca, Winnebago, and Wood.

92. WIS. STAT. § 51.15 (1971) provides for two hospitals for the mentally ill known as Mendota State Hospital and Winnebago State Hospital. In addition, see WIS. STAT. § 51.21 (1971) for the provision concerning the establishment of Central State Hospital; and WIS. STAT. § 51.22 (1971) for the establishment of state colonies and training schools.

93. Dix, *supra* note 7.

94. Wisconsin Department of Health and Social Services, *supra*, note 26.

95. Wisconsin Public Health Statistics, Division of Health, Department of Health and Social Services (1971), at 8-9.

96. Wisconsin Department of Health and Social Services, *supra*, note 26.

97. Biographical Directory, American Psychiatric Association (1970). See Geographical index.



Since the decision of *Lessard v. Schmit* enunciates procedures that are to apply to the whole state of Wisconsin, and these procedures are to be implemented primarily at the county court level, some counties will have more difficulties than others in respecting the decision. Some of the lesser populated counties which have no local treatment facilities, no half-way houses, no out-patient mental care units, will not have many "less restrictive" alternatives available for investigation. At the very least, they may be required to investigate treatment alternatives that exist in surrounding counties.<sup>98</sup> Some counties, because of a lack of judicial resources, may encounter difficulties in holding a preliminary hearing on probable cause within 48 hours, as has been the case concerning the requirement of a speedy arraignment in the criminal area.<sup>99</sup> This question is likely to arise if the patient is confined on a Friday evening or during a holiday week-end. Likewise, some counties will have more difficulty than others in complying with the requirement that the prospective patient be notified ahead of time of the names of the examining physicians.

Due to the nature of the decision in *Lessard v. Schmidt*, all counties, and all legal authorities, judges, district attorneys, and lawyers alike, must be held to the standards laid down. The decision effectively obliterated a major portion of the Wisconsin civil commitment statute. It did so because the due process clause of the Constitution of the United States dictated this. It did so because the three-judge court believed that this result was required by man's natural compassion for his fellow man, especially those who are stricken with disease. As Judge Sprecher emphasized, using a quote from John Stuart Mill early in his decision, the court did so because of our basic feelings about freedom. Mill stated:

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98. WIS. STAT. § 51.437(1) (1971) does not presently require counties with few facilities to investigate treatment alternatives which may exist in surrounding counties, it only advises them to combine their energies and resources with other counties to develop joint services. In an attempt ". . . to insure the delivery of needed services and the prevention of unnecessary duplication, fragmentation of services and waste of resources" (§ 51.437(1)(a) 1), "[a]djacent counties, lacking the financial resources and professional personnel needed to provide or secure such services on a single-county basis, may and shall be encouraged to combine their energies and financial resources to provide these joint services and facilities . . ." (§ 51.437(1)).

99. See note 49 *supra*, for a prior discussion of this. *But also see* United States v. Gorman, 36 F.R.D. 416, 420 (D.C. Conn. 1965), where it was stated that for pre-arraignment detention "[c]ircumstances may justify a delay of over forty-eight hours, as in United States v. Walker, 176 F.2d 564, 567 (2d Cir. 1949), cert. denied 338 U.S. 891 . . ." The Gorman court stated that delays of such length could be justified if the purpose was investigatory, or where no committing magistrate was available.

The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.<sup>100</sup> [Emphasis added]

The ultimate duty of implementing a judicial decision invariably falls on the shoulders of lawyers. Lawyers, especially those of Wisconsin, should become aware of the *Lessard* decision. They should attempt to understand it and the bases on which it stands. They should use it to both protect the rights of those clients who are involuntarily subjected to civil commitment procedures and to facilitate the treatment of those clients who are truly suffering from mental illness. Thus, a discussion introducing some of the substantive and procedural issues not resolved by *Lessard* is in order. This discussion will attempt to raise, but not exhaustively discuss, such substantive issues as the right to involuntarily commit an individual who has not committed a crime; the right to treatment; civil commitment as an adversary proceeding; the role of the attorney in commitment proceedings; the role of the guardian *ad litem*; the scope of the hearing required by *Lessard*; and the search for alternatives. An understanding of these issue areas is necessary for a successful implementation of the decision of *Lessard v. Schmidt*, and for the welfare of all the individuals who have been or will be involuntarily committed in Wisconsin mental institutions. An understanding of all of these issues will also be necessary to critically examine and analyze the new statute that the state legislature will pass to replace those aspects of the Wisconsin Mental Health Act which *Lessard v. Schmidt* ruled unconstitutional.<sup>101</sup>

#### A. *Substantive Questions Concerning Civil Commitment*

The requirement that less drastic alternatives be considered before commitment is ordered reaches beyond procedural limitations and approaches the basic substantive question of when and what type of involuntary medical treatment is justified. The *Lessard* court neither confronts the question of the constitutionality of involuntary commitment, nor does it resolve the confines

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100. 349 F. Supp. at 1084, quoting from J.S. MILL, ON LIBERTY, 18 (Gateway ed. 1962).

101. See *supra* note 30.

of the right to treatment.<sup>102</sup> As the United States Supreme Court recently declared in *Jackson v. Indiana*<sup>103</sup> that “[c]onsidering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated.”<sup>104</sup> Mr. Justice Blackmun, however, disposed of his observation by stating that “[w]e need not address these broad questions here.”<sup>105</sup> The reader is left holding an empty bag. He is provided only with references to *Robinson v. California*<sup>106</sup> and *Powell v. Texas*,<sup>107</sup> two cases confronting the broad constitutional issues presented by status crimes. Whatever may have been the motive of the Supreme Court in *Jackson* in avoiding the substantive issues, the reader is made aware of the presence of serious questions which remain unanswered. Is involuntary civil commitment unconstitutional *per se*? If such commitment is not unconstitutional, is it conditioned on a subsequent right to treatment?

Involuntary civil commitment has never been held to be unconstitutional *per se*. In the past, it has been justified on two legal grounds, seldom distinguished from each other. The first is the lofty notion of *parens patriae* which entails the right of the state to commit individuals so mentally disordered as to be incapable of deciding how and when to seek treatment. In this instance, the state was thought to be acting in the best interests of the individual.<sup>108</sup> The second justification for civil commitment was society's right to preventatively detain an individual because of society's need to protect itself from potential irrational acts by persons who were adjudged as “dangerous”.<sup>109</sup> The latter rationale has tradi-

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102. 349 F. Supp. at 1086.

103. 406 U.S. 715, 737 (1972).

104. *Id.*

105. *Id.* In *Lessard* the court stated that “[t]he issue of a constitutional right to treatment is not before us.” (349 F. Supp. at 1086).

106. 370 U.S. 660 (1961). In *Robinson* the Supreme Court invalidated a California statute making it a criminal offense to “be addicted to the use of narcotics” as being contrary to the eighth amendment's protection against cruel and unusual punishment.

107. 392 U.S. 514 (1968). In *Powell* the Supreme Court failed to extend *Robinson v. California* to bar the conviction of a chronic alcoholic for drunkenness. In a 5 to 4 decision, the majority, in affirming the conviction, generally rejected the eighth amendment defense in alcoholism cases. For an excellent discussion of *Robinson* and *Powell* and their effect on the treatment of alcoholics, see Comment, “*Alcoholism Treatment in Wisconsin: The Need for Legislative Reform*”, 1973 Wis. L. Rev. 133, 140-144.

108. 349 F. Supp. at 1084-1086.

109. *Id.* at 1084. See also Comment, “*Civil Restraint, Mental Illness, and the Right to Treatment*,” 77 YALE L.J. 87 (1967).

tionally been regarded as tenuous. To restrain an individual who has not committed a crime is bad enough, but to restrain him for some vague reason like the protection of society, in a punitive fashion, is worse. The former rationale, *parens patriae*, is easier to accept. Being essentially paternalistic, it proceeds from the theory that the restraint is for treatment. The focus is on trying to act for the benefit of the patient; and on treating the patient as it is assumed he would treat himself if he were not mentally ill.<sup>110</sup>

For this reason, civil commitment statutes, and the judicial decisions construing them, have generally stressed the treatment aspect of such confinement.<sup>111</sup> The real picture, however, has shown that the treatment afforded those who have been committed as being mentally ill has not corresponded with the wording of the statutes and judicial pronouncements.<sup>112</sup>

Although it must be admitted that the institutional treatment of the mentally ill is in the process of radical change, many mental institutions are dangerously understaffed and severely overcrowded.<sup>113</sup> Institutionalized treatment of the mentally ill is a difficult proposition no matter what the situation. Until the present day, mental hospitals have had difficulty attracting trained psychiatrists, who often earn higher incomes and are more stimulated by private practice. Treatment of the mentally ill has become increasingly expensive.<sup>114</sup> Far down the list of financial concerns competing for state money, treatment of the mentally ill has not been adequately funded. The institutions themselves have been clogged

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110. The chain of cases from *Kent v. United States*, 383 U.S. 541 (1966), to *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), show the changing fortunes of *parens patriae*, which is being treated to a renaissance by the Burger Court after having suffered serious attack during the Warren years.

111. See generally Note, "The Nascent Right to Treatment," 53 VA. L. REV. 1134 (1967). See also WIS. STAT. § 51.001(3) (1971), which states that the "state hospitals" shall have "the purpose of providing diagnosis, care or treatment, for mental or emotional disturbance or mental deficiency." And WIS. STAT. § 51.005 (1971) which states that "[i]t is the purpose of this chapter [51] to provide for care and treatment in state and county hospitals for persons who by reason of mental illness, infirmity or deficiency are in need of care and treatment not feasible in their own homes or in private facilities."

112. There is a wealth of literature critical of American mental hospitals. See, for example, Joint Commission on Mental Illness and Health, *Action for Mental Health: Final Report* 3-23 (1961); and Bloomberg, *A Proposal for a Community-based Hospital as a Branch of a State Hospital*, 116 AM. J. OF PSYCHIATRY 814 (1960).

113. Comment, *supra*, note 108 at 88. *Milwaukee Journal*, July 22, 1973, at 1, part 2, col. 4.

114. Keeping a patient at South Division County Hospital, Milwaukee, Wisconsin, costs about \$810 a month.

by "custodial" cases (such as senile patients) who could be better treated and cared for in nursing homes.

The net result has been that in many instances those committed to mental hospitals are often not treated.<sup>115</sup> This recently came under the scrutiny of judicial eyes. In *Rouse v. Cameron*,<sup>116</sup> Judge Bazelon suggested that "[i]ndefinite confinement without treatment of one who has been found not criminally responsible may be so inhumane as to be 'cruel and unusual punishment.'"<sup>117</sup> In his opinion, there exist two principal constitutional attacks on confinement without treatment. First, he suggested that commitment on the basis of "dangerousness" was to be allowed, but only if procedural guarantees like those provided in the criminal process, were respected. This is essentially the same approach as that used by the court in *Lessard*. The second constitutional attack is that commitment without treatment may be so inhumane as to fall within the scope of the eighth amendment's protection against cruel and unusual punishment.<sup>118</sup> The *Lessard* court was aware of this issue, but did not have to decide it.<sup>119</sup>

The basis for constitutionally attacking commitment without treatment as being cruel and unusual punishment is the United States Supreme Court's decision in *Robinson v. California*.<sup>120</sup> Cali-

115. See Bloomberg, *supra*, note 111, who has suggested that the effects of institutionalization of the mentally ill are so severe that if an individual is confined for over two years, the chances are very great that he will die in the hospital. In *Lessard*, the court states that "[p]erhaps the most serious possible effect of a decision to commit an individual lies in the statistics which indicate that an individual committed to a mental institution has a much greater chance of dying than if he were left at large." 349 F. Supp. at 1089, citing *Furman & Connors, Jr., The Pennsylvania Experiment in Due Process*, 8 DUQUESNE L. REV. 32, 65-66 (1970).

116. 373 F.2d 451 (D.C. Cir. 1966). Rouse brought forth numerous comments on the right to treatment. Comment, *Due Process for All: Constitutional Standards for Involuntary Civil Commitment and Release*, 34 U. CHI. L. REV. 633; Note, *supra*, note 110; 16 AM. U.L. REV. 307 (1967); Note, *supra* note 108. Judge Bazelon responded to several of these articles in Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742 (1969).

117. *Id.* at 453.

118. *Id.*

119. 349 F. Supp. at 1086; the court quoting from note 110, at 1140.

120. 370 U.S. 660 (1962). For an interesting decision in which the Federal District Court held that conditions and practices in the Arkansas penitentiary system, including the trustee system whereby trustees ran the prison, inhumane conditions in isolation cells, and the absence of meaningful rehabilitation programs, were such as to constitute cruel and unusual punishment, see *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970). The court's treatment of the definitional problems of what constitutes "cruel and unusual punishment" is doubly interesting. After stating that cruel and unusual punishment cannot be defined with any specificity, the court states that "[i]t is flexible and tends to broaden as society tends to pay more regard to human decency and dignity and becomes, or likes to think it becomes,

fornia had passed a law making it a crime to be addicted to narcotics. The Court, in ruling the statute unconstitutional, emphasized that it did not provide or require medical "treatment". Rather, it simply made the "status" of addiction to narcotics a criminal offense. The Court compared this to making leprosy or syphilis a criminal offense, and held that to make such a disease a criminal offense would be contrary to the eighth and fourteenth amendments.<sup>121</sup> In *dicta*, the Court added an important caveat: "[A] state might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment. . . ." <sup>122</sup> Hence, the Court imposed an important limitation on civil commitment; that it be accompanied by *treatment*.

The *Robinson dictum* has not hardened into solid constitutional principle. The fact that some mentally ill individuals are considered untreatable has made commentators hesitant to pronounce that *Robinson* requires that these people be set free.<sup>123</sup> On the other hand, the courts have been unwilling to find that there is no constitutional right to treatment, thus at least rationalizing the involuntary detention and confinement of those insane individuals who are untreatable.<sup>124</sup>

The courts have been noticeably more willing to treat this whole area from the point of view of equal protection. They do not consider substantive issues, in what one commentator calls "avoidance of more difficult issues via the modestly interventionist equal protection route."<sup>125</sup> Examples of this are *Jackson v. Indiana*,<sup>126</sup> and *Humphrey v. Cady*.<sup>127</sup> In *Jackson* the Supreme Court emphasized the temporary nature of the incompetency-to-stand-trial commitment. The Court held that "a person charged by a state with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a sub-

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more humane." This indicates that, assuming society is paying more attention to human rights and dignity, the confines of cruel and unusual punishment are accordingly growing larger and larger.

121. 370 U.S. at 666.

122. *Id.*

123. Comment, *supra*, note 108 at 98.

124. *Id.* at 99.

125. Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 26 (1972).

126. 406 U.S. 715 (1972).

127. 405 U.S. 504 (1972).

stantial probability that he will attain that capacity in the foreseeable future."<sup>128</sup> The basis for the decision in *Jackson* was the equal protection clause of the fourteenth amendment. The equal protection violation was isolated by comparing the procedures applicable to commitment of those charged with criminal offenses and those for persons not charged with offenses. The Court found that criminal defendants were subject both to more lenient commitment standards and to more severe standards of release.<sup>129</sup> In *Humphrey v. Cady*<sup>130</sup> the petitioner challenged the commitment procedures under the Wisconsin Sex Crimes Act.<sup>131</sup> The Supreme Court, in finding that a jury determination preceded commitment under the Mental Health Act and not under the Sex Crimes Act, ruled that equal protection was sufficiently challenged as to warrant an evidentiary hearing on remand.<sup>132</sup>

The future of this area of the law is difficult to predict. Present judicial activity can be characterized as either being in avoidance of the major substantive issues, or as being an effort to tighten-up the procedures utilized in this area to correspond to those used in the criminal area. One can only guess at how the courts will decide if the substantive issue before them cannot be avoided or decided on procedural grounds.

### B. *Involuntary Civil Commitment as Adversary Proceeding*

The court in *Lessard v. Schmidt* emphasizes the need of representative counsel for those who wish to contest commitment.<sup>133</sup> The court assumes that the role the attorney plays goes beyond that of the guardian *ad litem* (who tends to proceed in the best interests of the client and not according to the client's will), to that of adversary counsel.<sup>134</sup> Elemental to the court's decision is the belief that civil commitment procedures should be governed by the adversary system.

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128. 406 U.S. 738.

129. *Id.* at 723-730.

130. 405 U.S. 504.

131. Wis. STAT. § 959.15 (1958), as amended, Wis. LAWS ch. 975 (1971).

132. 405 U.S. at 508-512. See also *State ex rel. Matalik v. Schubert*, 57 Wis. 2d 315 (1972), in which the Wisconsin Supreme Court relied heavily on *Jackson v. Indiana*, 406 U.S. 715 (1972), in reaching its decision. The Wisconsin Court, however, found no equal protection violation because of the absence of a jury determination under the criminal section (Wis. STAT. § 971.14 (1971)), and provision for it under the civil commitment provision (Wis. STAT. § 51.03 (1971)).

133. 349 F. Supp. at 1099, citing Gupta, *New York's Mental Health Information Service: An Experiment in Due Process*, 25 RUTGERS L. REV. 405, 438 (1971).

134. 349 F. Supp. at 1099.

In this context, it must be noted that the adversary system is central to the administration of criminal justice. It is the result of both the evolution from trial by combat and the belief in a non-violent forum for argument and presentation of evidence.<sup>135</sup> The efficient functioning of the adversary system depends on challenge and a constant searching and a creative questioning of all official decisions and assertions of authority at every stage of the judicial process.<sup>136</sup> In the middle of the system sits the judge. The requirement that the judge remain neutral reflects the belief that the parties acting in an adversary context are more likely to accept the decision of a neutral and detached magistrate than a judge who favored one side over the other.<sup>137</sup> The corollary to the principle that the tribunal remain neutral and not take the initiative in developing the case, is that the judge insure that the opportunity to present evidence and information relevant to the issue remain open to each side.<sup>138</sup>

Relating to civil commitment procedures, the theory that the adversary system is capable of determining the facts and facilitating a decision on mental competency must be closely examined.<sup>139</sup> Assumed in that decision is that the participants in the system—counsel, judge, jury, witnesses, and medical experts—will assume their assigned positions. In reality, as one commentator has stated: “. . . the nature of the issues involved often causes the participants either to misconceive their roles or to reject them entirely.”<sup>140</sup> For example, the attorney is the professional representative of the “accused”; he is not his alter ego.<sup>141</sup> It is his duty to do what is legally in the best interests of his client. Sometimes, however, the legal interest of the client does not correspond with his medical interest. What does the attorney do then? Medical experts often are called upon to give independent opinions to the court. Since by its very nature psychiatry is an uncertain field,

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135. ABA Standards Relating to the Prosecution Function and the Defense Function 2 Approved Draft, 1971.

136. Report of the Atty. Gen.'s Committee On Poverty and the Administration of Federal Criminal Justice 11 (1963).

137. Prosecution Function and the Defense Function, *supra*, note 135 at 4.

138. *Id.*

139. For an excellent discussion of this same issue as it relates to juvenile procedures, see Handler, *The Juvenile Court and the Adversary System: Problem of Function and Form*, 1965 Wis. L. Rev. 7.

140. Chernoff & Schaffer, *Defending the Mentally Ill: Ethical Quicksand*, 10 AM. CRIM. L. REV. 505, 509 (1972).

141. Prosecution Function and the Defense Function, *supra*, note 135, at § 1.1(c).



there is generally room for differences of opinion on either side of any given question.<sup>142</sup> Hence, medical experts are often put into the position of acting as advocates for whichever side retains them, and the proceeding may become a "battle of psychiatric experts".<sup>143</sup> It is common for psychiatrists not to understand the adversary system. Many of them, in fact, become very perturbed by what they feel are unnecessary legal restraints, such as the hearsay rule.<sup>144</sup> Since jurors are generally unsophisticated in the science of psychiatry and its terms, it becomes exceedingly difficult for them to receive, evaluate, and resolve the contradictory and conflicting testimony of medical experts.<sup>145</sup> And what role is the judge to play? Should he simply assume the role of neutral and detached magistrate that the adversary system requires of him? Or should he reach out from his neutrality, and at the very least, assume a more active role by initiating inquires, aiding the search for alternative treatment facilities, and insuring that the patient is to receive the most advantageous and beneficial treatment available?<sup>146</sup> In the midst of the confusion concerning the roles that attorneys, medical experts, guardians *ad litem*, and jurors, are to play in the system, it would seem wise to expect the judge to become an active director of all the participants in the system. For

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142. See Chernoff, *supra*, note 140, at 509. See also generally Roberts, *Some Observations on the Problems of the Forensic Psychiatrist*, 1965 Wis. L. REV. 240.

As Mr. Justice Frankfurter so masterfully understated in *Greenwood v. United States*, 350 U.S. 266, 275 (1956): "The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached formality of judgment . . ." This statement still applies today.

143. Henry H. Foster, Director of the Law—Psychiatry Project, New York University, reacts to the fact that psychiatrists can often testify on both sides of an issue when it concerns human motivation, by stating:

"Humility seems to be called for if we start with the premise that both law and psychiatry are concerned with motivation and human behavior, and that informed guesses rather than absolutes are the stocks in trade. . . . If only because of the phenomenon of projection, it is difficult if not impossible to achieve certitude when we deal with motivation and human behavior. No matter how objective we try to be we cannot escape our own subjectivity."

Foster, *What Psychiatrists Should Know About the Limitations of Law*, 1965 Wis. L. REV. 189, 190.

144. Roberts, *supra*, note 142, at 255.

145. See Judge Bazelon's concurring opinion in *United States v. Leazer*, 460 F.2d 864 (D.C. Cir. 1972). Bazelon has also held that psychiatrists should avoid the use of technical language. *Washington v. United States*, 390 F.2d 444 (D.C. Cir. 1967).

146. See *Lake v. Cameron*, 364 F.2d 657. Bazelon, in his opinion here, implies that the court is to take an active role in these procedures. Note especially Chief Justice Warren Burger's overt disagreement, with Bazelon's feelings, in his dissenting opinion. 364 F.2d at 664.

example, when it comes to the "facts" of the case, the judge must make clear to all parties the likely difference in agreement between the legal and psychiatric points of view. He should insure that technical terms are used as little as possible, and that the medical testimony is not conclusory.<sup>147</sup> As concerns the search for alternatives, the judge (especially at the county level, where he knows his county well) should be in an advantageous position to seek out the optimal methods of treatment.

Accordingly, the judge might have to assume a more active role than that required by the adversary process, especially if the right to treatment is recognized and the requirement that alternatives be investigated is enforced. In this context, two further questions arise. What happens to the guardian *ad litem*, in light of the decision in *Lessard* that he does not satisfy the constitutional right to counsel?<sup>148</sup> And what role is the attorney to play in these proceedings?

*Lessard* finds the guardian *ad litem* constitutionally inadequate as counsel, but does not hold that the appointment of a guardian is legally inadmissible *per se*.<sup>149</sup> In the adversary system, it is clear that the lawyer speaks as the patient's defense counsel. The guardian *ad litem*, on the other hand, evaluates what he considers to be the "best interests of the client-ward"<sup>150</sup> and then proceeds, possibly independent from the will of his client-ward, to accomplish this.<sup>151</sup> Under such circumstances, would it not be possible for the guardian *ad litem* to act as an intermediary between the patient and his attorney—directing the legal representation because the patient is presumed to be incapable? If the patient is indeed in a mentally confused state, whether or not his condition merits commitment, a guardian *ad litem* may serve a useful, if not indispensable role in protecting the rights of his client-ward. He may prevent

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147. Judge Bazelon does not fear that scientific expertise will overwhelm the court. He states, concerning the right to treatment of mental illness, that "[t]he Cassandras that foresee judges wallowing hopelessly in the bogs of psychiatry seldom distinguish the problems of enforcing a right to treatment from those encountered whenever courts deal with complicated questions of science and technology", such as railroad rates, airplane design, and dam-building. Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742, 743 (1969).

148. 349 F. Supp. at 1099. WIS. STAT. § 51.02(4) (1971) states: "At any stage of the proceedings, the court may, if it determines that the best interest of the patient requires it, appoint a guardian *ad litem* for him."

149. 349 F. Supp. at 1099.

150. *Id.* For a general discussion of guardians *ad litem* in Wisconsin, see Hohmann & Dwyer, *Guardians ad litem in Wisconsin*, 48 MARQ. L. REV. 445 (1965).

151. 349 F. Supp. at 1099.

a patient from unwisely waiving counsel<sup>152</sup> or may press for a contest when the patient is unable to make that decision. He may also take an active role in looking for and analyzing the alternatives available for treatment of the patient.

One must be careful not to assume that the appointment of a guardian *ad litem* means that the "accused" is of unsound mind, which is the very issue that remains in question until a full adversary hearing has been held. In the analogous juvenile setting, minors are legally incompetent, and assumed to need state protection because of their age.<sup>153</sup> The need for protection stems from the fact of their youth, which is not in question; but not from an assumption of delinquency, which is. However, in the mental commitment setting, confusion is often caused by the fact that justification for a guardian *ad litem* appears to involve the disputed question of mental competence.

It is also important to analyze the role of the attorney in these proceedings. Several pertinent questions arise. First, now that the civil-criminal distinctions have disappeared concerning most procedural due process rights, would it be wise for the attorney to advise his client to exercise his privilege against self-incrimination and remain totally silent? The fifth amendment states that "No person shall be compelled in any criminal case to be a witness against himself . . ." *Lessard* made it explicit that this constitutional protection applies to civil commitment procedures.<sup>154</sup> The court, however, failed to explore the possibility that a patient having been informed that he need not speak to the psychiatrist, might very well refuse to be examined at all. If the state's case rests largely on the results of a psychiatric examination, does the patient's refusal to make statements to the psychiatrist result in his immediate release? Clever counsel, it seems, would advise his client to remain silent and thereby prevent the state from obtaining the necessary evidence for a commitment.<sup>155</sup> Indeed, since counsel is to

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152. See 349 F. Supp. at 1101, n. 33, which signals the waiver of counsel by a mental incompetent.

153. "The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment." *Kent v. United States*, 383 U.S. 541, 554 (1966); see also *In re Gault*, 387 U.S. 1 (1967).

154. 349 F. Supp. at 1100-1101, quoting from *In re Gault*, 387 U.S. at 49-50, and *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 250 (1972), (Douglas, J., concurring).

155. One author has even proposed that a defense lawyer's duty to his client extends to the point of requiring that he at times engage in purposeful deception. Freedman,

be adversary, the lawyer would be bound to advise his client to do whatever would reduce the chances that he will be committed, regardless of whether he believes the client would be "benefitted" by the examination. *Lessard* not only ignores this possibility but strongly suggests that the patient will "open up and tell all" if he feels he is "being treated fairly."<sup>156</sup> It is doubtful that this result would obtain if adversary counsel informed his client that "Wisconsin may not, consistent with basic concepts of due process, commit individuals on the basis of their statements to psychiatrists in the absence of a showing that the statements were made with 'knowledge.'"<sup>157</sup>

Within the context of the *adversary process* the conclusion that according to the fifth amendment an individual should not be compelled to make statements that could lead to a loss of liberty is sound.<sup>158</sup> In the normal situation, however, the privilege against self-incrimination works to protect individuals against being compelled to reveal their own *crimes*, and consequently to protect them against *punishment*<sup>159</sup> for these crimes. In the civil commitment situation, the privilege works to protect individuals from being compelled to reveal their own *diseases*, and ironically enough, to protect them from *treatment*<sup>160</sup> for their diseases. This irony places the defense attorney in an unenviable position. For example, if his client is in a catatonic stupor, hardly able to feed or provide for himself, and obviously needs to be committed, but cannot make that decision himself, should the lawyer equate treatment with punishment, and do everything possible to prevent his client from being committed? Or, should he work hand-in-hand with the judge and the parties seeking commitment to find a middle ground, possibly a less onerous facility for treatment such as an out-patient

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*Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

156. 349 F. Supp. at 1101.

157. *Id.*, n. 33.

158. *Id.*

159. It does not matter whether the theory for confining the individual is that of retribution, rehabilitation, or general deterrence.

160. The term "treatment" is used here to show the polarity between two basic thoughts in the area of involuntary civil commitment. First, mental commitment is justified on the humanistic grounds that its purpose is treatment of the patient. Second, prospective patients must be afforded standard procedural due process rights to insure that only those proved beyond a reasonable doubt to be mentally ill will be confined. The rationale behind the latter thought is protective, and proceeds from the assumption that treatment is in fact not being afforded, but only a sort of prevention detention.

mental health clinic? It seems obvious that the latter course would be the most advisable, notwithstanding the fact that the adversary system demands that the good attorney do the former.

Another interesting question concerning the role the attorney is to play in these proceedings, especially under adversary conditions, is whether or not to attempt getting his client released from confinement pending a determination on pre-hearing detention. In *Lessard* the court decided that detention for longer than two weeks without a full hearing on the necessity for commitment was unconstitutional.<sup>161</sup> Upon close examination, it appears that a lawyer can attack even this two-week detention, or at least force the state to show that such detention serves a compelling state interest and is only for the amount of time required to accomplish the purpose of the given state interest.<sup>162</sup> It is customary in criminal cases, where probable cause that an individual has already endangered society has been established, to permit most defendants to be released on bail prior to trial. The civil commitment cases do not remotely suggest that a similar right be afforded those accused of mental illness. This situation is ludicrous, for an accused murderer may await his fate in relative freedom, while one accused only of being ill, must remain in custody before the necessity of confinement or treatment has been established.<sup>163</sup>

This situation is probably caused by the fact that the right to bail is normally discussed in light of the eighth amendment's prohibition against excessive bail. Although the Supreme Court has never decided whether there is a constitutional right to bail, several Supreme Court decisions contain language that implies that bail may be a due process right.<sup>164</sup> Although the *Lessard* court cannot be criticized for not including this on its list of rights protected by procedural due process, it would have done well to require at least a stronger showing of dangerousness to justify pre-hearing detention than that required for post-hearing commitment. In addition,

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161. 349 F. Supp. at 1098.

162. The court in *Lessard* fails to look at the issue of detention itself, and considers only its length. 349 F. Supp. at 1092.

163. This seems required by the decision of *In re Gault*, *supra*, which laid to rest the issue of whether the civil commitment proceedings were merely "civil" and not "criminal". Specifically, in *Gault*, the Court found the distinction unpersuasive as a rationale for providing lesser procedural rights to juveniles in delinquency proceedings than were afforded to adults charged with actual violations of the criminal law.

164. *Carlson v. Landon*, 342 U.S. 524, 545 (1951) (Black and Frankfurter, JJ., dissenting); *Stack v. Boyle*, 342 U.S. 1 (1951).

the state could be required to demonstrate that pre-hearing detention is necessary for the particular patient, either for extended examination of the patient or for the safety of society.

### C. *The Format of the Hearing and the Presentation of Medical Testimony*

The due process clause of the fourteenth amendment affords a full and fair hearing to any person facing a loss of liberty. The Supreme Court has been very receptive recently to insuring that a hearing be given to those who stand to lose a wide range of benefits, either because of impending imprisonment<sup>165</sup> or loss of property,<sup>166</sup> by the proceedings. It matters little that the loss of liberty be characterized as incarceration or institutionalization; or whether one is confined to a hospital instead of to a prison.<sup>167</sup>

In Wisconsin, *Lessard* requires that notice of the hearing, notice of the basis for the detention, the names of the examining physicians and all other people who propose to testify in favor of detention, and the substance of their testimony, be afforded the prospective patient.<sup>168</sup> The *Lessard* court found that there was no need to decide at the present time "the precise nature of the hearing that is required."<sup>169</sup> In reference to the exact nature of the hearing, the court only stated that the decision of whether or not to commit should be made at a judicial hearing presented in an adversary context in which both sides have the right to cross-examine.<sup>170</sup>

It is assumed that the purpose of requiring that the prospective patient be given notice before the hearing is to insure not only that he will be adequately informed of the nature of the charges against him, but so that he can effectively rebut these charges with evidence and witnesses of his own.<sup>171</sup> It is also assumed that notice of the names of all the people who propose to testify in favor of

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165. See, e.g., *In re Gault*, 387 U.S. 1, and its progeny. *But see* *McKeiver v. Pennsylvania*, 403 U.S. 328 (1971), holding that trial by jury in the juvenile court's adjudicative stage is not constitutionally required, for recent change in emphasis by the Supreme Court for this area of the law.

166. See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972), teachers' employment contracts; *Goldberg v. Kelly*, 397 U.S. 254 (1970), welfare benefits; *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), wage garnishment. See also *Stanley v. Illinois*, 405 U.S. 645 (1972), involving removal of children from parents.

167. *Barry v. Hall*, 98 F.2d 222 (D.C. Cir. 1938).

168. 349 F. Supp. at 1092.

169. *Id.* at 1091.

170. *Id.*

171. *Escalera v. New York Housing Authority*, 425 F.2d 853 (2d Cir. 1970).

detention, and the substance of their testimony, is required because allowing the prospective patient to rebut evidence against him would be of little value if, before the hearing, he was given no information concerning the evidence to be presented against him.<sup>172</sup> These are principles well-grounded in the present law. In addition, it is well established that the hearing should take place in the presence of an impartial tribunal,<sup>173</sup> and the decision of whether to commit or not to commit should be made solely on the evidence adduced at the hearing.<sup>174</sup>

The problems concerning mental commitment procedures are different than those affecting other areas of the law. The future awaits the resolution of several important issues concerning the nature of the hearing to be afforded during these proceedings. Paramount among these problems is the question of how to present medical testimony to the trier of fact. If the hearing is to aid the judge or jury in making the ultimate decisions, it becomes very important to avoid formalistic medical conclusions about the medical capacity of the accused.<sup>175</sup> One court has stated that the use of such psychiatric code-words as schizophrenia, neurosis, etc., be directed away from the courtroom.<sup>176</sup> The use of purely opinion testimony can either confuse the judge or jury, hinder them from getting at the underlying facts,<sup>177</sup> or force them to passively acquiesce to the conclusions of the medical experts.<sup>178</sup> It thus becomes imperative that the courts, in order to insure that the issue of mental capacity be made upon sufficient information, require that informative reports detailing the patient's condition, containing both empirical test results and specific observations of the examining physicians, be presented.<sup>179</sup> McCormick in his work on Evidence agrees with this. He states that the "core" of the opinion

172. *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 107 (1963) (Goldberg, J., concurring).

173. *Goldberg v. Kelly*, 397 U.S. at 271; *cf. In re Murchison*, 349 U.S. 133, 136 (1955); *Escalera v. Housing Authority*, 425 F.2d at 863.

174. "The decision maker's conclusion . . . must rely solely on the legal rules and evidence adduced at the hearing." *Goldberg v. Kelly*, 397 U.S. at 271. *See also Escalera v. Housing Authority*, 425 F.2d at 863. *See generally Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

175. Kaufman, *Evaluating Competency: Are Constitutional Deprivations Necessary?*, 10 AM. CRIM. L. REV. 465, 480 (1972).

176. *See, supra*, note 145.

177. 390 F.2d at 450.

178. Kaufman, *supra*, note 174.

179. *Id.*

evidence rule would be preserved by a rule "prescribing that the trial judge in his discretion may require that a witness, before giving testimony in terms of inference or general description, shall first give the concrete details upon which the inference or description is founded, so far as feasible."<sup>180</sup> If such information is not put in the hands of the court, or presented to the jury, it is doubtful whether either one can proceed to the conclusion that involuntary commitment is warranted.<sup>181</sup>

#### D. *The Search for Alternatives and Rehabilitation*

Since it appears that institutionalization of the mentally ill is predicated upon treatment,<sup>182</sup> *Lessard* requires that a search for alternatives be made. Assuming that the patient usually lacks the necessary resources to cover the field of alternatives, the court places the burden on the party seeking commitment to comprehensively evaluate the spectrum of available choices. Several questions arise, however, and two inconsistencies are readily apparent in this portion of the opinion. First, since the statute failed to require the "alternative means" test, the judge's failure to apply it was not inconsistent with the statute. If the failure was a constitutional defect in and of itself, the court should have found the statute (and not merely the judge's actions) unconstitutional for failing to require the application of the correct standard by the judge.<sup>183</sup> Second, confusion is created by the court's critical holding that the party seeking commitment has the burden of considering alternatives, which is then followed by the conclusion that the judge's failure to consider alternatives was a denial of due process. Does the *Lessard* court suggest that the judge is the party seeking commitment, or only that if the initiating party fails to consider alternatives, the judge must do so?<sup>184</sup>

Similar confusion was apparent in *Lake v. Cameron*,<sup>185</sup> wherein

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180. McCORMICK, EVIDENCE 24 (1954); citing Uniform Rules of Evidence, Rule 57.

181. Kaufman, *supra*, note 174.

182. *Id.* at 482. See notes 114-124, and accompanying text. See also *Lessard v. Schmidt*, 349 F. Supp. 1084, which states that involuntary civil commitment is "justified on the basis of potential benefit to the one confined in a mental hospital."

183. This defect in the reasoning of the opinion does not effect the result of the decision, as the statute in question was held unconstitutional on the standard of proof issue.

184. A more consistent and reasonable approach might have been for the court to hold that the burden of proof regarding alternatives rests on the party seeking commitment (as it has done) and that, if the judge is not satisfied that the burden has been met, he should dismiss the case.

185. 364 F.2d at 664.



the court seemed to place a dual burden on the state *and* the court to explore less drastic alternatives. There, however, the court emphasized that commitment proceedings are not strictly adversary, thereby indicating that the court should become involved in the process of exploring alternative remedies to commitment.<sup>186</sup> This should follow, though, only if two conditions are present: (1) the proceeding is merely a procedure seeking treatment, in which the "accuser" has no interest in the outcome other than the interest of the patient, and (2) the court has at its disposal the means to analyze the alternatives upon which to decide the optional disposition. If the new Wisconsin statutes made necessary by *Lessard* provide for a quasi-adversary treatment, rather than commitment, proceeding and oblige the state to present a full range of explored alternatives, the courts will be in a better position to order the form of care that meets the needs of the patient.<sup>187</sup>

Requiring the "persons" seeking commitment, or the state, to bear the burden of finding the least restrictive alternative is strong medicine. Even where a hospital is found with an adequate in-patient treatment facility, or a community mental health clinic with adequate in-patient services, to require the patient to submit to such treatment may be unwise, and indeed, unconstitutional, because such treatment may not be the most suitable, or least drastic alternative available to the patient. In *Lake* Judge Bazelon stated that the court must determine whether or not less drastic alternatives could achieve the same goal before ordering the commitment for treatment.<sup>188</sup> Thus, it is arguable under both *Lake* and *Lessard*<sup>189</sup> that the state may be constitutionally compelled to order out-patient rather than in-patient treatment if it can be proved that both programs would cause the same ends.<sup>190</sup>

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186. *Id.*

187. Wisconsin statutes already provide provisions for many different kinds of treatment: WIS. STAT. § 51.22, Colonies and training schools; WIS. STAT. §§ 51.24-25, county hospitals; WIS. STAT. § 51.36, Community mental health clinic services; WIS. STAT. § 51.37, Outpatient clinic services; WIS. STAT. § 51.42, Community mental health, mental retardation, alcoholism and drug abuse services. What is needed is some kind of county coordination, especially in the northern counties, to insure uniform and diverse facilities for multi-county units, made up of the lesser populated counties which cannot afford to make available to their residents all the alternatives listed above.

188. 364 F.2d at 657.

189. *Lessard* relied heavily on *Lake*.

190. Further evidence for this lies in the Supreme Court's decision in *Aptheker v. Secretary of State*, 378 U.S. 500, 508-09 (1964), where the court recognized that the government may not impose unnecessary restrictions on its citizens with regard to constitutionally protected freedoms.

The reason behind the requirement that alternatives be analyzed is an obvious change of emphasis from the simple commitment, or containing, of the individual, to a desire that, if possible, his cure be effected. To this end, it appears that in most cases out-patient treatment should be preferred. In addition, the patient should be able to participate, to whatever extent possible, in his treatment. He should not become a passive recipient of treatment except under the most compelling circumstances.<sup>191</sup>

If involuntary civil commitment is the only possible vehicle to treat the patient, the period should not be so indefinite or indeterminate that the patient be confined until a cure is found, or until "dangerousness" has ceased. The period of confinement, in all cases, should be set for a definite, limited period of time. After that period has run, the patient should be afforded another hearing to determine whether his present confinement should be continued for another designated term, or whether his situation has so improved that he can be treated on an out-patient basis.<sup>192</sup> This procedure is a necessary extension of the present statute<sup>193</sup> relying on the theory that involuntary civil commitment should only be turned to as a last resort. Once the involuntary commitment has occurred, a strong effort should be made not to forget the patient and let him languish in a mental hospital for the rest of his life.<sup>194</sup> Periodic review under the guidelines set in *Lessard* would alleviate this problem.<sup>195</sup>

#### IV. CONCLUSION

*Lessard v. Schmidt* has been appealed to the United States Supreme Court. It is unlikely, because of the numerous bases for the decision in *Lessard*, that the Supreme Court will either reverse or consider and rule upon each conclusion of the *Lessard* decision. On appeal, the Court will have to look at each of the statutes rejected in *Lessard*, and in my opinion, will probably choose a basis for affirming the court's decision regarding each. Only the reason-

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191. Milwaukee Journal, *supra*, note 112.

192. See notes 187-189, and accompanying text.

193. See WIS. STAT. § 51.11(1) (1971) only provides that any person adjudged mentally ill ". . . may on his own verified petition or that of his guardian . . . have a re-examination before any court of record . . . ."

194. As statistics have shown to be the case. See 349 F. Supp. at 1089, quoting statistics found in Furman & Conners, Jr., *The Pennsylvania Experiment in Due Process*, 8 DUQUESNE L. REV. 32, 65-66 (1970).

195. The guidelines laid down by the *Lessard* court are found at 349 F. Supp. 1103.

able doubt standard and the requirement that less severe alternatives be investigated, are likely to be met with skepticism by the Supreme Court.<sup>196</sup> The other holdings, as explained previously, rest on the quite settled notions of *In re Gault* and its progeny. Because the decision does not interfere with the state's police power (a favorite of the Burger Court) to commit the mentally ill, but addresses itself only to the procedural requirements that the state must meet in the exercise of that power,<sup>197</sup> *Lessard v. Schmidt* will in all probability be substantially affirmed.

Even if severely dealt with by the Supreme Court and reversed on one, or possibly two, grounds, *Lessard* will remain an important case in Wisconsin law. It represents the opening of a large door, allowing access to the assurance of procedural due process to a segment of society which has not committed any violation of laws, but has only been vaguely described as "dangerous to themselves or others," and has thus been designated as being in need of "treatment" for which they are to be involuntarily committed. It also hopefully represents the commencement of legal attempts to delineate the perimeters of the substantive right to treatment of those individuals committed. *Lessard* allows us to hope. It manifests a philosophy which dictates that the form of treatment to be afforded mental patients in Wisconsin shall be both the least onerous and the most beneficial alternative available to them. Mental patients are to be treated in the most humane way possible, they are to be guaranteed all the constitutional rights afforded those in the criminal process, and they are not to be forgotten or hidden behind closed doors. The time is ripe to solve some of society's archaic ideas about mental illness and the treatment of the mentally ill. As stated by Judge Bazelon, who might, for want of a better name, be called the patron saint of the mentally ill:

Certainly the law approaches more closely every day the realization that individuals have definite entitlements that they may claim rather than request. We no longer regard the welfare client as a supplicant who must accept our bounty with whatever degrading conditions we choose to attach. We may soon realize

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196. See Chief Justice Burger's dissent in *Lake v. Cameron*, 364 F.2d 657. This opinion may be an indication of the view of *Lessard* that the Chief Justice will take on appeal.

197. In this context, a recent statement made by Justice Douglas concerning the importance of procedural rights is important. Found in the majority opinion of *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1970), Douglas states: "[i]t is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat."

that the necessities of life are a matter of personal right and societal duty, and not a bounty at all. Mental health is the most basic of these necessities. We owe it to every man.<sup>198</sup>

If nothing more, *Lessard* has brought Judge Bazelon's concerns closer to their consummation. For this, Wisconsin can be thankful. From this, the lawyers, judges, physicians and psychiatrists, legislators, and interested citizens of the state can move on to challenge, attack, and ultimately define the procedures, rights and remedies to be afforded not only the mentally ill, but also the alcoholics<sup>199</sup> and drug addicts, who are presently involuntarily detained or will be involuntarily committed in the future. The time has arrived in Wisconsin to treat mental illness as both a matter of public and personal health. The time when it was treated as a matter of civil liability to be punished by undefined lengths of involuntary civil commitment and confinement has passed.

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198. Among the important decisions written in the area of mental commitment, Bazelon's decisions in *Rouse v. Cameron*, *supra*; *Washington v. United States*, *supra*; *United States v. Leazer* (concurring), *supra*; and *Lake v. Cameron*, *supra*, carry great weight.

199. In this context, see Comment, *Alcoholism Treatment in Wisconsin: The Need for Legislative Reform*, 1973 WIS. L. REV. 133.

## APPENDIX

Table of admissions to Wisconsin Mental Hospitals: 1965-1972.\* The following table is presented as both a statistical reminder of the importance of involuntary civil commitment procedures to the thousands of people affected by them, and as a comparison of the means by which patients were admitted to Wisconsin state and county mental institutions over a seven-year period.

TYPE OF ADMISSION	1965	1966	1967	1968	1969	1970	1971	1972
<b>I. TEMPORARY DETENTIONS</b>								
<b>A. Court Order</b>								
(TOTAL)	272	255	261	275	267	338	319	340
Mendota State	167	143	155	149	155	192	194	166
Winnebago State	104	112	105	126	112	145	125	174
Other State Hosp.	1	0	1	0	0	1	0	0
<b>County Hospitals</b>								
Milwaukee	1,318	1,384	1,394	1,340	1,085	1,283	1,290	1,052
All Others	388	384	431	450	650	672	642	673
<b>B. Without Court Order (TOTAL)</b>								
(TOTAL)	645	793	902	902	739	674	985	1,176
Mendota State	5	4	4	8	3	1	2	6
Winnebago State	20	28	53	76	70	77	103	94
Other State Hosp.	0	0	0	3	2	4	3	2
<b>County Hospitals</b>								
Milwaukee	483	542	647	601	627	559	648	598
All Others	137	219	198	214	37	33	229	476
<b>II. COMMITMENTS</b>								
<b>A. Temporary Observational (TOTAL)</b>								
(TOTAL)	1,101	1,103	978	732	620	725	768	755
Mendota State	112	132	133	179	177	183	170	102
Winnebago State	67	117	109	70	73	119	105	117
Other State Hosp.	264	282	338	94	109	178	246	261
<b>County Hospitals</b>								
Milwaukee	465	387	345	315	242	221	212	190
All Others	71	85	53	74	19	24	35	85
<b>B. Continuing Regular (TOTAL)</b>								
(TOTAL)	975	847	839	739	722	768	713	428
Mendota State	152	140	109	147	121	118	104	85
Winnebago State	376	316	285	230	207	208	173	149
Other State Hosp.	117	54	47	26	10	24	25	21

\* Wisconsin Department of Health and Social Services—Statistical Report—Basis for Admission of Patients Admitted to Wisconsin State and County Mental Institutions. Each figure represents statistics for the year ending June 30 of the indicated year.

## County Hospitals

Milwaukee	1	6	6	9	4	1	7	2
All Others	329	331	392	325	380	417	404	171

## III. VOLUNTARY COMMITMENTS

A. Regular (TOTAL)	2,803	3,065	3,197	3,437	3,809	3,924	4,089	4,075
Mendota State	644	627	660	729	723	645	591	619
Winnebago State	397	508	538	542	567	573	596	528
Other State Hosp.	132	265	230	321	360	350	446	424
County Hospitals								
Milwaukee	1,278	1,247	1,185	1,209	1,407	1,212	1,232	1,227
All Others	352	418	584	636	752	1,144	1,224	1,275

