Criminal Law: The Revision of Wisconsin's Law of Alcoholism and Intoxication

James J. Robb

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol58/iss1/8

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obriens@marquette.edu.
THE REVISION OF WISCONSIN'S LAW OF ALCOHOLISM AND INTOXICATION

JAMES J. ROBB*

INTRODUCTION

In a period when many voices are heard decrying the retention and enforcement of criminal sanctions against so-called victimless crimes and over-extension of the criminal law into areas believed to be the individual's private concern, the Wisconsin Legislature has removed one of the least effective classes of prosecution from the state's criminal justice system. This was done during the 1973 legislative session by passage of the Alcoholism and Intoxication Treatment Act, which eliminates from the statutes the crime of public intoxication and substitutes a program aimed at providing treatment and rehabilitation to chronic inebriates. It is the intent of this article to examine portions of this Act in the context of the problem which it was designed to ameliorate. Hopefully, such an examination will prove to be of use to judges, attorneys, and others called upon to implement its provisions throughout the state.

PUBLIC DRUNKENNESS AND THE CRIMINAL JUSTICE SYSTEM

The procedure of arresting and incarcerating persons under public drunkenness statutes has for years been a massive drain upon the resources of the criminal justice system in the United States. Each year some two million arrests for public drunkenness occur in this country, which represent more than one-third of the total non-traffic arrests made, causing a tremendous drain on the resources of police departments. As staggering as this figure is, it must also be presumed that a large number of persons contacted by police who could theoretically be charged with the crime are, for various reasons, neither arrested nor charged. One can only speculate as to the number of arrests which extremely rigid en-

---

*B.A. 1971, University of Wisconsin; J.D. 1974, Marquette University Law School; practicing with the Robb Law Offices, Richland Center, Wisconsin. Mr. Robb was chief draftsman of the Alcoholic Treatment Act for the Wisconsin Council on Criminal Justice.

5. Id. at 1.
forcement might produce, and shudder at the effects of such policy upon an already overburdened court system.

Closer examination of available data on drunkenness arrests leads to the discovery of several tendencies common to the enforcement of drunkenness statutes. It appears that the majority of drunkenness arrests involve men of the lowest economic classes, the group broadly known as skid row derelicts. In most jurisdictions, upper and middle class inebriates are either ignored by police or transported home by them. The skid row dweller, usually lacking a real home, is arrested. Once in custody, such persons are subjected to an assembly line dispensation of justice, in which due process of law is largely abandoned in the interest of rapid processing. It is not uncommon to have twenty-five or thirty defendants brought before a judge at one time, with disposition made of the entire group as a unit rather than on an individual basis.

The result of such procedures is a process which has come to be known as the “revolving door.” An individual is arrested for drunkenness, brought before a judge, usually jailed, and then released. According to the revolving door theory, the individual who is already disadvantaged in terms of economic and social situations finds coping with society even more difficult as a result of the experience, becomes more dependent upon alcohol, and is more likely to be arrested in the future. Persons who are caught in this revolving door are often brought through the criminal justice system an almost incredible number of times in their lives. Parties to three recent federal court cases typify the experiences of many chronic drinkers: Joe Driver of North Carolina was arrested for drunkenness 200 times in 35 years, and spent two-thirds of his life incarcerated on such charges; Leroy Powell of Texas was arrested 100 times in 20 years for the same offense; and DeWitt Easter of the District of Columbia was arrested 70 times in 30 years for the offense, 12 times in 1963 alone.

7. DRUNKENNESS REPORT at 2; GRAD at 12.
8. DRUNKENNESS REPORT at 2; GRAD at 5.
9. GRAD at 2.
One of the most commonly stated rationales favoring the procedure of arresting inebriates is that the removal of such individuals from the street provides them with protection from attack and from the elements.\(^\text{14}\) In a very broad sense this is true. However, the fact is that services rendered in jail facilities are typically poor. Serious injury and death, particularly of persons in delirium tremens, are not uncommon, and medical treatment is seldom readily available.\(^\text{15}\)

When the procedure is viewed in light of the traditionally-stated functions of the criminal — incapacitation, deterrence, rehabilitation and retribution — it becomes apparent that as the mechanism usually operates none of these functions is accomplished. To be certain, the individual is temporarily incapacitated in that he cannot drink while in jail, but the period of his incarceration is almost always brief. The high rate of recidivism demonstrates that deterrence is not often achieved;\(^\text{16}\) indeed, the revolving door theory suggests that the experience tends to reinforce a need to commit the act again. The jail experience per se rarely if ever accomplishes the rehabilitation of a chronic inebriate or alcoholic,\(^\text{17}\) and is likely to have the opposite effect. When alcoholism and chronic inebriation are viewed in the context of disease rather than as premeditated antisocial acts, the vindictiveness of societal retribution becomes apparent as well as the "ineffectiveness"\(^\text{18}\) of such punishment.

One further rationale presented for the existence and use of the

\(^{14}\) R. Nimmer, Two Million Unnecessary Arrests 3 (1971).

\(^{15}\) Id.; Grad at 12.

\(^{16}\) See notes 11-13, supra, and accompanying text.

\(^{17}\) While jail per se does not offer much in the way of rehabilitation, the threat of jail has been used by some courts in Wisconsin as a means of coercing convicted drunks to "voluntarily" commit themselves for treatment at such places as Winnebago State Hospital. Certainly such commitments represent positive thinking on the part of these courts, and undoubtedly furnish rehabilitative assistance. However, such procedures are hit-and-miss, and in many cases are not implemented early enough to provide the optimum opportunity for aiding the subject individual.

\(^{18}\) In Powell v. Texas, 392 U.S. 514 (1968), the argument was made before the United States Supreme Court that a chronic alcoholic who was convicted of public drunkenness was acting not of his own volition when he became intoxicated, and that to punish him for such conduct violated the Eighth and Fourteenth Amendments to the United States Constitution. The Court declined to accept this proposition, stating that to accept it would perform lead to the creation of a constitutional doctrine of criminal responsibility, which would freeze the interaction between law and psychiatry into a rigid constitutional mold. Id. at 536-7. The fact remains, however, that merely because such punishment is not cruel and unusual in the Constitutional sense, it is beneath the dignity of a purportedly enlightened system of justice.
criminal sanction is that the presence of intoxicated persons at liberty on the streets poses a danger to the public. Available statistical data is inconclusive, although there is data which shows that crimes against the person frequently are accompanied by intoxication of one or both parties to the crime. However, it is also pointed out that the socio-economic groups which produce most assaultive or homicidal felons also have a high incidence of intoxication and alcoholism. As is often the case with statistical argumentation, a considerable amount of pro and con data juggling is possible on this point, but it is apparent that no clear cause and effect relationship has been established to date.

Thus, serious questions are posed concerning the usefulness of arresting inebriates. At least one commentator, after reviewing the situation, has suggested that the real basis for the use of the procedure is twofold: (1) esthetic considerations, stemming from the fact that society does not care to see skid row drunks on the streets, and (2) a moral statement of the stigma attached to drunkenness. A more pragmatic statement is that of Mr. Justice Marshall in Powell v. Texas:

[F]acilities for the attempted treatment of indigent alcoholics are woefully lacking throughout the country. It would be tragic to return large numbers of helpless, sometimes dangerous and frequently unsanitary inebriates to the streets of our cities without even the opportunity to sober up adequately which a brief jail term provides.

Regardless of the rationale which one cares to assign for the existence of the process, it is abundantly clear that little or no long-term good is accomplished by its retention, and urgent need for a viable alternative exists.

**CIVIL COMMITMENT OF INEBRIATES**

In addition to criminal sanctions, most states have provisions in their codes for the civil commitment of inebriates and/or alcoholics. Often these provisions are part of the mental health act of the particular state, as was the case with section 51.09 of the Wisconsin Statutes. Viewed as a group, such provisions are typically

---

20. Grad at 2; Drunkenness Report at 43.
23. Wis. Laws 1973, ch. 198 § 10 eliminates the use of § 51.09 procedures for the
vague and ambiguous, and for this reason their constitutionality is suspect. A look at the procedure under section 51.09 exemplifies this point:

Section 51.09(1) Hearing. (a) If it appears to any court of record, by an application of three reputable adult residents of the county, that a resident of the county or person temporarily residing therein is an inebriate or addicted to the use of a controlled substance under ch. 161 and in need of confinement or treatment, the court shall fix a time and place for hearing the application, on reasonable personal notice to the person in question, requiring him to appear at the hearing, and shall summarily hear the evidence. The court may cause notice to be given to such other persons as it deems advisable. The court may, by attachment for the person, require the sheriff or other police officer to take the alleged inebriate or drug addict into custody, detain him pending the hearing (but not to exceed 3 days) and bring him before the court at the hearing. The court may require notice to be given to known relatives of the person.

(b) At such hearing if the court finds that such person is an inebriate or addicted to the use of a controlled substance under ch. 161, and requires confinement or treatment, or that it is necessary for the protection of himself or the public or his relatives that he be committed, he may be committed . . .

(2) Commitment. The commitment of an inebriate or a drug addict shall be for such period of time as in the judgment of the superintendent of the institution may be necessary to enable him to take care of himself. He shall be released upon the certificate of the superintendent that he has so recovered. When he has been confined 6 months and has been refused such a certificate he may obtain a hearing upon the question of his recovery in the manner and with the effect provided for a reexamination under section 51.11.

The validity of section 51.09 has never been challenged in the courts, although even a cursory examination of its provisions reveals the potential for serious attack on due process grounds. For example, objection might be made to the failure of the statute to require the proofs to meet any specific standard, its failure to provide for trial by jury, its failure to provide specifically for cross-examination, its failure to provide a meaningful right to counsel,
and the indefinite duration of commitment which the statute allows. Yet, during the year ending June 30, 1972, 442 persons were involuntarily committed to state and county institutions as alcoholics under section 51.09, a considerable increase in number of commitments over any of the seven previous years.\textsuperscript{26}

Despite the weaknesses in the inebriate civil commitment statute, its treatment-oriented approach is clearly preferable to criminal prosecution. However, the civil commitment procedure was not designed to meet the needs of the individual contacted on the street in a helplessly inebriated condition. Even assuming, arguendo, that the drunkenness arrest was a satisfactory means of providing immediate services to the inebriate, there was no interrelationship between the criminal arrest and civil commitment procedures (except where a judge gave the option of "voluntary" self-commitment or jail to an arrestee). The need existed for an overhaul of the entire system, which would integrate procedures from the time of street contact through to involuntary commitment, if the latter proved necessary (including voluntary commitment). This was the objective sought to be accomplished by the Alcoholism and Intoxication Treatment Act.

**Sources of the Wisconsin Act**

It was immediately clear to the planners of the Act that any proposed program should begin with the elimination of the criminal sanction, and then provide satisfactory alternatives to the arrest procedure. Such alternatives must include making available facilities for treatment as well as procedures for bringing the individual into contact, at the same time giving full protection to his rights. Eliminating the criminal sanction was simple enough;\textsuperscript{27} establishing the alternatives, predictably, proved more difficult.

To aid in the task, the draftsmen had recourse to a piece of model legislation, the Uniform Alcoholism and Intoxication

\textsuperscript{26} Total Alcoholic Commitments to State and County Institutions 1965-1972* (Voluntary Admissions Excluded)

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Commitments</th>
</tr>
</thead>
<tbody>
<tr>
<td>1965</td>
<td>217</td>
</tr>
<tr>
<td>1966</td>
<td>277</td>
</tr>
<tr>
<td>1967</td>
<td>247</td>
</tr>
<tr>
<td>1968</td>
<td>312</td>
</tr>
<tr>
<td>1969</td>
<td>314</td>
</tr>
<tr>
<td>1970</td>
<td>268</td>
</tr>
<tr>
<td>1971</td>
<td>277</td>
</tr>
<tr>
<td>1972</td>
<td>442</td>
</tr>
</tbody>
</table>

*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.

\textsuperscript{27} Wis. Laws 1973, ch. 198 § 32 repeals Wis. Stat. § 947.03 (1971).
Treatment Act, promulgated by the National Conference of Commissioners on Uniform State Laws. The Uniform Act, however, merely served as a starting point for the draftsmen. Virtually every provision of the Uniform Act was modified to some degree before the bill was introduced. The sections most extensively changed were those dealing with procedural mechanisms for securing treatment — emergency medical care, emergency commitment, and involuntary commitment — for intoxicated persons and alcoholics. It was decided at the drafting stage that, rather than adopt the procedures suggested by the Commissioners, the Wisconsin Act should adopt the guidelines for due process in civil commitment actions laid down by the United States District Court for the Eastern District of Wisconsin in Lessard v. Schmidt. Lessard was a class action which challenged the constitutionality of Wisconsin’s mechanism for the civil commitment of alleged mentally ill, mentally infirm, or mentally deficient persons. The decision of the three-judge panel held certain provisions of chapter 51 unconstitutional as violative of due process and equal protection of the law. The statutory provisions considered in Lessard were not the same as the inebriate commitment provisions, but in fact appeared to be more protective of the rights of the individual sought to be committed than did the inebriate provisions. Therefore, Lessard had reinforced the doubts about the constitutionality of Wisconsin’s existing inebriate commitment procedures as well as the mental commitment procedures, a problem which should not be allowed to carry over into new legislation.

**FORMAT AND POLICY OF THE ACT**

The Alcoholism and Intoxication Treatment Act appears in the form of a newly created statutory section, section 51.45. The section is composed of eighteen subsections, which can be roughly


29. The provisions in question are found in Wis. Stats. §§ 51.02, .03, .04 (1971). For an excellent discussion of the case, see M. Remington, Lessard v. Schmidt and its Implications for Involuntary Civil Commitment in Wisconsin, 57 Marq. L. Rev. 65 (1973).

30. For example, Wis. Stat. § 51.01(2) (1971) provides for examination of the patient sought to be committed by two duly licensed physicians; Wis. Stat. § 51.02(2) provides that any party in interest may examine the physicians and any other witnesses and may present evidence; Wis. Stat. § 51.02(4) provides for the appointment of a guardian ad litem for the patient; and Wis. Stat. § 51.03 provides for trial by jury upon demand of the patient or by a relative or friend in his behalf. Wis. Stat. § 51.09 (1971), the former inebriate and drug addict commitment law, provides for none of these safeguards.
divided by subject matter into administrative provisions and substantive/procedural provisions. The nine subsections containing the administrative provisions\(^3\) delineate the powers and responsibilities of the Department of Health and Social Services in planning, establishing, and maintaining treatment programs, gathering and disseminating data, and enforcing standards and rules for those providing and receiving treatment. Since the scope of this article is limited to the substantive and procedural aspects of the Alcoholism and Intoxication Treatment Act, further, in-depth discussion of the Act's administrative aspects will be dispensed with.

The remaining subsections are substantive/procedural in nature, and will be examined in detail for the balance of this article.

Section 51.45(1) declares the policy of the State of Wisconsin under the Alcoholism and Intoxication Treatment Act to be as follows:

It is the policy of this state that alcoholics and intoxicated persons may not be subjected to criminal prosecution because of their consumption of alcoholic beverages but rather should be afforded a continuum of treatment in order that they may lead normal lives as productive members of society.

This policy statement reflects the recognition that the criminal justice system is largely ineffectual in dealing with the problem of public intoxication and the often-coexisting problem of alcoholism. The President's Task Force Reports stated that "[W]hat the system usually does accomplish is to remove the drunk from public view, detoxify him and provide him with food, shelter, emergency medical service, and a brief period of sobriety."\(^2\) In Wisconsin, it is felt that this much and more can be accomplished outside the criminal justice system. Rather than continue to foster the "revolving door" syndrome, by dispensing with criminal prosecution altogether and changing to a policy of providing treatment, a positive step is taken toward returning intoxicants and alcoholics to a useful, productive status in society.

---

31. The subsections of § 51.45, created by Wis. Laws 1973, ch. 198 § 19, which are administrative in nature are the following: § (3) POWERS OF DEPARTMENT; § (4) DUTIES OF DEPARTMENT; § (6) CITIZENS ADVISORY COUNCIL ON ALCOHOLISM; § (7) COMPREHENSIVE PROGRAM FOR TREATMENT; § (8) STANDARDS FOR PUBLIC AND PRIVATE TREATMENT FACILITIES; ENFORCEMENT PROCEDURES; § (9) ACCEPTANCE FOR TREATMENT; RULES; § (14) RECORDS OF ALCOHOLICS AND INTOXICATED PERSONS; § (15) VISITATION AND COMMUNICATION TO PATIENTS; and § (16) PAYMENT FOR TREATMENT.

32. DRUNKENNESS REPORT at 3.
DEFINITIONS UNDER THE WISCONSIN ACT

As a first step in utilizing the Act, examination should be made of certain of the definitions provided therein in order to recognize what conditions must be present to bring an individual under the Act's influence.

1. Alcoholic

'Alcoholic' means a person who habitually lacks self-control as to the use of alcoholic beverages and uses alcoholic beverages to the extent that his health is substantially impaired or endangered and by reason of such use is deprived of his ability to support or care for himself or his family.\(^3\)

The intent of this definition is to delineate a narrow group of persons who will be subject to possible involuntary commitment as alcoholics.\(^4\) The definition includes three elements which must be present before involuntary commitment may be sought. First, the person must habitually lack self-control as to the use of alcoholic beverages. The requirement of habitualness is designed to remove the individual who occasionally gets drunk and then returns to his normal pattern of life from the possibility of involuntarily being committed. This is desired for two reasons: (1) such an individual may not suffer from a treatable alcoholism problem, and (2) a rather large percentage of the population could be reached under a definition broad enough to include the occasional drunk.

As the second element, the person must use alcoholic beverages to the extent that his health is substantially impaired or endangered. This requirement makes medical evidence a practical necessity in an action for involuntary commitment, particularly in light of the requirement of proof beyond a reasonable doubt in order to commit. Spurious commitment actions should be minimized by the impracticability involved in commencing an action without already securing a solid medical opinion of the hazard posed to the health of the person sought to be committed.

Third, by reason of such use of alcoholic beverages, the person must be deprived of his ability to support himself or his family. The State of Wisconsin has a compelling interest in the support of its residents, and is empowered to take steps toward providing such support. When one habitually lacks self-control as to the use of alcoholic beverages and uses them to the extent that his health is

\(^3\) Wis. Stat. § 51.45(2)(a), created by Wis. Laws 1973, ch. 198 § 19.

\(^4\) The procedure for involuntary commitment is found in Wis. Stat. § 51.45(13), created by Wis. Laws 1973, ch. 198 § 19.
substantially impaired or endangered, it can be argued that he is hurting only himself and that he has an ultimate right to do so. However, when he is by reason of such use deprived of his ability to support himself or his family, it is probable that such persons will become wards of the state. Thus the state may act to remedy or forestall such a situation.

2. Incapacitated by Alcohol

'Incapacitated by alcohol' means that a person, as a result of the use of alcohol, is unconscious or has his judgment otherwise so impaired that he is incapable of realizing and making a rational decision with respect to his need for treatment, as evidenced objectively by extreme physical debilitation, physical harm or threats of harm to himself or to any other person, or to property.35

This definition is used to delineate those persons who, at the time contact is made, are suffering recognizable impairment of their functions as a result of the use of alcohol, and who thus are candidates for emergency medical treatment or emergency commitment.36 Contemplated under its terms are persons encountered sleeping on a doorstep, staggering about in traffic on a busy street, or in similar circumstances. A person will not be subject to full-scale involuntary commitment by reason of his being "incapacitated by alcohol;" the person who suffers from a long-term alcoholic degeneration, while he may initially be contacted while incapacitated, may be committed only if found to be an "alcoholic."

The design of the objective evidence criteria is to make it unnecessary for a law enforcement officer to attempt a determination of the person's capability of making a rational decision as to his need for treatment. The presence of extreme physical debilitation, physical harm or threats of harm to himself or to any other person or to property, apparently resulting from the use of alcohol, is sufficient to bring the individual under the definition and thus a proper candidate for emergency treatment.

3. Intoxicated Person

'Intoxicated person' means a person whose mental or physical functioning is substantially impaired as a result of the use of alcohol.37

36. Emergency medical treatment provisions are found in Wis. Stat. 51.45(11), and emergency commitment is provided for by Wis. Stat. 51.45 (12), both created by Wis. Laws 1973, ch. 198 § 19.
This is the broadest of the three definitions in the Act pertaining to persons who use alcohol. It is used as a sole criterion only in the case of a person who voluntarily seeks emergency treatment\textsuperscript{38} or who, in a public place and appearing to be in need of help, consents to be taken to an emergency treatment center.\textsuperscript{39} Persons in this broad class are not subject to even brief involuntary custody, except where there is likelihood of future harm to others.\textsuperscript{40} In the latter event, the machinery of due process of law is brought into play for the person whose threat of harm causes him to be detained without his consent.\textsuperscript{41}

**Voluntary Treatment of Alcoholics**

An alcoholic may apply for voluntary treatment directly to an approved public treatment facility. . . . For purposes of this subsection, an ‘alcoholic’ is a person who habitually lacks self-control as to the use of alcoholic beverages, or uses such beverages to the extent that his health is substantially impaired or endangered or his social or economic function is substantially disrupted.\textsuperscript{42}

The intent of this voluntary treatment provision is to provide services for the alcoholic who recognizes that he has a drinking problem and wishes to take steps to control or cure his problem. This provision is unlike previous statutes of its kind (such as old section 51.09) in that emphasis is placed on voluntary *treatment* rather than upon commitment. Experience indicates that persons having alcohol-related problems will take advantage of voluntary treatment, particularly if the facilities are conveniently located.\textsuperscript{43}

For purposes of the voluntary treatment provisions, an extremely broad definition of “alcoholic” is used. The reason for this is to make such voluntary treatment available to as wide a segment of the public as might care to take advantage of such services. (It is perhaps unfortunate that the same term is used to describe this broad class of people as was used to delineate the narrow group of persons who might be subject to involuntary commitment, even though the voluntary treatment provision and the original, involun-
tary commitment definition each point out the limitations upon their respective usages of the term."

Other aspects of the voluntary treatment provisions are kept flexible in order to allow treatment to be fitted to the individual's wants and needs to the highest degree possible. The superintendent in charge of an approved public treatment facility is vested with the discretion to admit a person for treatment, deny him admittance, or refer him to another approved public treatment facility better able to assist him. A patient admitted for treatment does not obligate himself for any specific period of time nor until he has reached any specific level of recovery; the patient may leave the facility at any time. In the event that the patient does choose to leave, while appearing to still be in need of help, out-patient treatment, intermediate treatment, and supportive services will be available.

EMERGENCY TREATMENT FOR INTOXICATED PERSONS OR PERSONS INCAPACITATED BY ALCOHOL

An intoxicated person may come voluntarily to an approved public treatment facility for emergency treatment. A person who appears to be intoxicated in a public place and to be in need of help, if he consents to the proffered help, may be assisted to his home, an approved public treatment facility, or approved private treatment facility, or other health facility by any law enforcement officer.

A person who appears to be incapacitated by alcohol shall be taken into protective custody by a law enforcement officer and forthwith brought to an approved public treatment facility for emergency treatment. If no approved public treatment facility is readily available he shall be taken to an emergency medical service customarily used for incapacitated persons. The law enforcement officer, in detaining the person and in taking him to an approved public treatment facility, is taking him into protective custody and shall make every reasonable effort to protect his health and safety. In taking the person into protective custody, the detaining officer may take reasonable steps to protect himself. A taking into protective custody under this section is not an arrest. No entry or other record shall be made to indicate that the person has been arrested or charged with a crime.

47. Id. § 51.45(10)(c).
This subsection contemplates the provision of care to persons who are contacted when in an intoxicated condition or when incapacitated by alcohol. This is a point at which the Act makes a major departure from prior law, for under prior law it was at this point that the law enforcement officer was faced with deciding whether to arrest the individual, take him home, or ignore him. Under the Act, the option of arrest (for mere public intoxication) is no longer available to the officer. If the individual appears to be intoxicated in a public place and in need of help, he must consent to be helped before the officer can act. If the individual appears to be incapacitated by alcohol, he shall be taken into protective custody and removed to a facility for emergency treatment, which may be either a detoxification center with medical staff available or an emergency hospital-type facility.

In the case of the individual apparently incapacitated by alcohol, much emphasis is placed upon guidelines for the protective custody to which he is subject. Every reasonable effort must be made to protect his health and safety. No entry or other record shall be made to indicate that the person has been arrested or charged with a crime. At the same time, the Act recognizes that the law enforcement officers who will be called upon to enforce the custody provision may, upon occasion, have difficulty in dealing with persons who are incapacitated by alcohol whom they take into custody. Express provision is made for the right of the officer to take reasonable steps to protect himself. To do otherwise would place an intolerable burden upon law enforcement personnel, and might result in a tacit refusal on their part to implement this procedure. A provision which bars criminal or civil liability for false imprisonment by an officer acting in compliance with section 51.45 is designed to serve the same purpose.49

Other portions of this subsection deal with procedures to be followed at the approved public treatment facility. In keeping with the emergency assistance nature of the services provided hereunder, the person brought to the facility must be examined by a licensed physician as soon as possible.50 This examination is used to determine the person's physical condition, particularly where there is a possibility that he has suffered injury, which information serves both as a diagnostic device and as a means of avoiding possible liability of the facility. Assuming that no reason is found

for admitting the person to the facility as a patient, he may be taken to his home, or to another place of shelter if he has no home.\textsuperscript{51}

The case of the person incapacitated by alcohol is treated more carefully. Such a person, it will be recalled, is unconscious or has his judgment so impaired as to be irrational. Once such a person is no longer incapacitated by alcohol, his release is mandatory.\textsuperscript{52} If such a person remains incapacitated by alcohol for more than 24 hours, application must be made for an emergency commitment.\textsuperscript{53} In addition to the latter safeguard, an additional protection of the individual lies in the requirement that his family or next of kin be notified as soon as possible after admission (unless the individual is an adult, is not incapacitated, and requests that there be no notification).\textsuperscript{54}

**Emergency Commitment**

An intoxicated person who has threatened, attempted or inflicted physical harm on another and is likely to inflict physical harm on another unless committed, or is incapacitated by alcohol, may be committed to the state and brought to an approved public treatment facility for emergency treatment. A refusal to undergo treatment does not constitute evidence of lack of judgment as to the need for treatment.\textsuperscript{55}

Emergency commitment, distinct from the emergency treatment discussed in the previous section of this article, is a procedure designed for use in the case of an individual who poses a danger to others or who may be endangered himself due to extreme impairment of his physical functioning by reason of his use of alcohol. As a practical matter, this procedure will probably be used in relatively few cases, since the number of persons who pose a physical threat or who remain incapacitated by alcohol for an extended period of time will be small. It is anticipated that the large majority of persons will receive sufficient treatment at the emergency treatment (detoxification) stage to enable their return home or to wherever they might wish to go.

Nevertheless, cases will doubtless arise wherein the short-term emergency treatment will prove inadequate to sufficiently restore

\textsuperscript{51} Wis. Stat. § 51.45(11)(e), created by Wis. Laws 1973, ch. 198 § 19.
\textsuperscript{52} Wis. Stat. § 51.45(11)(d), created by Wis. Laws 1973, ch. 198 § 19.
\textsuperscript{53} Id.
\textsuperscript{54} Wis. Stat. § 51.45(11)(f), created by Wis. Laws 1973, ch. 198 § 19.
\textsuperscript{55} Wis. Stat. § 51.45(12)(a), created by Wis. Laws 1973, ch. 198 § 19.
the individual to competence within the permissible period of detention, or where an alcoholic whose commitment is sought under involuntary commitment provisions is intoxicated and dangerous to others or incapacitated by alcohol. It is in these "in-between" cases that the emergency commitment provisions are designed to apply.

Applications for emergency commitment under this subsection can be made by a number of persons. The physician, spouse, guardian, or a relative of the person are all in positions to be familiar with the individual and to have cognizance of his drinking problem. An additional class of other responsible persons may also make application. In most cases one of the first four mentioned will make the application, but there are conceivable instances where no such person exists or is aware of conditions. Thus a clergyman, counselor, or other person with cognizance could initiate the proceedings.

Each application is required to state facts to support the need for such emergency commitment, and to be accompanied by one or more affidavits which aver with particularity the factual basis for the allegations contained in the petition. These requirements are designed to act as an initial safeguard of the rights of the subject individual. Not only must the stated facts provide a proper basis for emergency commitment, but in light of sanctions available against false swearing, the affiant should feel constrained to be certain that such facts are not overstated nor colored in any way. The original text of the Uniform Act required that the application be accompanied by a physician's certificate in lieu of the factual affidavit. This requirement was modified in the Wisconsin Act for two reasons: (1) the affidavit combined with the early preliminary hearing is sufficient to determine the obvious validity or invalidity of the application without infringing upon the person's constitutional rights, and (2) Lessard v. Schmidt demands that the privilege against self-incrimination be applied to statements made to physicians. Thus the testimony of the certifying physician could be tainted at the hearing stage, hampering the fact-finding process.

When an individual is committed without his consent to an

57. Id.
58. Id.
60. 349 F. Supp. at 1101-2.
approved public treatment facility, he is in a situation where due process of law must be observed for the protection of his rights. The Lessard v. Schmidt court held that a person sought to be involuntarily detained on grounds of mental illness has a right to counsel, and to appointed counsel if the person is indigent.61 This right is protected in the Act by the requirement that the person sought to be committed under this subsection be advised, upon arrival at the facility, of his right to counsel, both orally and in writing.62 At the same time he must be advised of his right to trial by jury, his privilege against self-incrimination, and of the reasons for his detention and the standard under which he may be committed prior to all interviews with physicians, psychologists, or other personnel.63 Notification of these rights were also deemed requisite to due process of law by the Lessard court,64 although by requiring the notice to be given before every interview, the Act appears to surpass the Lessard decision in diligence.

Mere notification of rights, however, with no readily available means of implementing such rights, is of questionable value. An individual who wishes to contest a commitment needs the assistance of adversary counsel from the outset of the detention. For this reason, this subsection of the Act requires that counsel be made available immediately to every person committed under it. The right to counsel can be waived if the person so desires, although the incidence of competent, knowledgeable waivers should be low. If the person does not have his own attorney, an official of the approved public treatment facility to which the person has been brought shall apply to a court commissioner or county court for the appointment of counsel, whose services shall be provided if the person is indigent.65 The purpose for this provision is two-fold. First, in the rare case where there is no valid basis for holding the person in the facility, counsel will be immediately available to petition for writ of habeas corpus. Second, Lessard v. Schmidt places very stringent time limits upon the period that a person may be held without preliminary hearing. This period is limited to forty-eight hours,66 so it is vital that no time be wasted in securing

61. 349 F. Supp. at 1097.
63. Id.
64. Trial by jury is discussed at 349 F. Supp. 1092; notice of the privilege against self-incrimination is discussed at 349 F. Supp. 1090-2.
66. 349 F. Supp. at 1091.
counsel. The amount of time for preparation available to counsel, limited as it is, must be protected as much as possible, and every possible effort is required to get him into the case without delay. Thus the application for appointment of counsel must not be delayed beyond twenty-four hours after arrival at the facility. The time for the preliminary hearing to determine probable cause for the need to commit will also be set at the appearance to appoint counsel. In the event that there is no need to appoint counsel, the twenty-four hour limit remains in effect for an appearance to set the preliminary hearing. (The preliminary hearing procedure will be considered in more depth in the discussion of involuntary commitment.)

The superintendent in charge of the approved public treatment facility has the authority to refuse an application for emergency commitment if in his opinion the application and supporting affidavits are insufficient to sustain the grounds for commitment. Generally this authority will not be exercised, since the decision on a close question can be deferred for a maximum of forty-eight hours until the hearing on probable cause. Nevertheless, it is important that such a person have the authority, for in the event of a plainly unsupported or unsupportable application, any detention whatsoever is improper.

**Involuntary Commitment**

A person may be committed to the custody of the state by the county court upon the petition of his spouse or guardian, a relative, a physician, or the superintendent of any approved public treatment facility. A refusal to undergo treatment shall not constitute evidence of lack of judgment as to the need for treatment. The petition for commitment shall:

1. Allege that the person is an alcoholic as defined in subsection (2)(a); and
2. Allege that the condition of the person as an alcoholic is evidenced by a pattern of conduct which is dangerous to the person or to others; and
3. Be supported by one or more affidavits which aver with particularity the factual basis for the allegations contained in the petition.

---

68. Id.
An action for involuntary commitment is commenced by petition supported by affidavit, just as in the emergency commitment procedure. However, the class of persons denominated "other responsible persons," who may petition for emergency commitment, are not eligible petitioners for involuntary commitment. The individual who has no spouse, guardian, relative, nor physician may be committed upon the petition of the superintendent in charge of any approved public treatment facility, who is in fact the next most likely person to be acquainted with such an individual's drinking problem.

Whenever a person sought to be committed is in custody, or is taken into custody after the filing of the petition, a preliminary hearing is required to be held within forty-eight hours of initial detention. In addition to this time limitation, a series of stringent requirements, derived from the Lessard case, which must be fulfilled at the preliminary hearing are laid out in the statute.

The person sought to be committed must be represented by counsel (unless knowingly waived, with consent of the judge), and shall have counsel provided if he is indigent. Counsel shall have access to all reports, records, and transcripts of interviews made or held prior to the hearing. Effective and timely notice shall be given the detainee and his counsel, and the detainee must be present at the hearing and given opportunity to be heard.

The preliminary hearing is not required in the case of an individual who is not in custody at the time the petition is made. In such a case, or upon a finding of probable cause to believe that a person is in need of commitment (at a preliminary hearing), a date is set for a full hearing to be held not more than fourteen days from the earlier of the petition date or initial point of detention. By motion of the person whose commitment is sought and for cause, an extension of up to fourteen more days may be had. At the end of this twenty-eight day period, a full hearing on commitment must be held. The same requirement of access to all reports, records, and transcripts of interviews by the staff of the treatment facility applies to the period preceding the full commitment hearing as applies to the period preceding the preliminary.

73. 349 F. Supp. at 1091-2.
76. Id.
The commitment hearing is envisioned as an open hearing (unless the person whose commitment is sought moves to have it closed) where the jury or, upon waiver of jury, the court hears the evidence. Ordinarily, rules of evidence are applicable (a rule designed to eliminate hearsay, primarily). The presence of the individual is required at the hearing, and he will be given opportunity to be heard. The desirability of having the testimony of a physician who has examined the person sought to be committed is also emphasized in the hearing provisions, including a procedure for temporary five day commitment for medical examination where the evidence suffices to demonstrate the need.

The standard of proof required for commitment is the criminal burden, beyond a reasonable doubt. The use of this standard is another of the Lessard court's requirements for the protection of individual rights in civil commitment action. Even upon a finding by the trier of fact that the grounds alleged in the petition have been established beyond a reasonable doubt, however, an additional showing is required of the Department of Health and Social Services. Before an order for commitment can issue, the department must show: (1) that there is no suitable alternative available; (2) that the department is able to provide the most appropriate treatment for him; and (3) that the treatment is likely to be beneficial.

The commitment under section 51.45(13) is to the custody of the state for a period of thirty days unless sooner discharged. At the end of this period, discharge is automatic unless the department, before the expiration of the period, petitions for and receives a court order of recommitment for an additional ninety days. Two such ninety day recommitments are allowed, at the end of which period discharge is automatic. Each such petition for recommitment reinitiates the hearing procedure as previously described, with a ten day period of time between petition date and hearing date and new notice to the committed individual, his coun-

79. Id.
80. Id.
82. 349 F. Supp. at 1095.
85. Id.
There are three means of discharge available to the person who has been committed, in addition to possible reversal of the commitment hearing upon appeal to the circuit court. As mentioned earlier, discharge is automatic at the end of the period for which the person has been committed or recommitted (210 days if the maximum of two recommittals are made). Alternatively, the Department of Health and Social Services may discharge a committed person if either (1) the patient is no longer an alcoholic or the likelihood of infliction of physical harm to another no longer exists; or (2) further treatment will not be likely to bring about significant improvement in the person's condition, or treatment is no longer adequate or appropriate. The third means of seeking discharge is by writ of habeas corpus pursuant to section 292.01(2) of the statutes.

**CONCLUSION**

The Alcoholism and Intoxication Treatment Act, when viewed in its entirety, appears to be a complex set of procedures, especially in light of its relatively simple objective of providing treatment to problem drinkers in lieu of arresting them. (This objective, it must be emphasized, does not extend to the abrogation of any other criminal sanctions against specific acts done while intoxicated, nor is there any intent to create a doctrine of non-responsibility for criminal acts done while intoxicated.) When one initially examines the procedural machinery created by the Act, two questions might come to mind: (1) Are the complexities necessary?; and (2) Will the procedures work?

The answer to the necessity question appears to be "yes." The *Lessard v. Schmidt* decision clearly is not a mere anomaly in the law. On the contrary, it represents a well-reasoned answer to the question of what is required by the Constitution in terms of due process.
process of law in civil commitment proceedings. For this reason Lessara was relied upon heavily in the drafting of the Alcoholism and Intoxication Treatment Act. Of course, only time will tell whether the United States Supreme Court will hear an appeal of Lessard on the merits, and, if so, whether that Court will modify its holding in any way. An informal consensus of opinion suggests that little if anything would be changed from the three-judge panel's holding upon such an appeal. Such prognostications about a possible Lessard appeal, it must also be remembered, are purely of academic interest with regard to the Act (barring the imposition of even higher due process standards by the Supreme Court). The Act is the law in Wisconsin as of its effective date, and is not assailable in the courts for being too protective of individual rights. Therefore, energies should be directed toward the application of the Act in Wisconsin.

As to whether or not the machinery of the Act will be successful in terms of application to and use by the court system of Wisconsin, again only time and experience will provide the definitive answer. Admittedly, at first glance the procedures appear complex, and possible trouble areas (such as narrow time limitations) seem to lurk throughout the Act. However, many other changes in the law have shared this spectre (the Miranda rule, for example) and have been fitted into the machinery of the law with no more than ordinary amounts of oiling and adjusting. The bench and bar of Wisconsin, who will have most of the responsibility of implementing the Act, are quite capable of making the Wisconsin Alcoholism and Intoxication Treatment Act a success.

92. Note 28. The district court decision did reach the Supreme Court, only to be vacated and remanded without discussion on the merits. The order was held insufficient to satisfy the requirements of Fed. R. Civ. Pro. 65(d), that an order granting injunction "be specific in terms" and "describe in reasonable detail in the act or acts sought to be restrained." Schmidt v. Lessard, 414 U.S. 472, 475 (1974).