CONSERVATORSHIP OF ROULET: CIVIL COMMITMENT AND DUE PROCESS IN CALIFORNIA

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Introduction

So long as man[1] lived alone, he had full freedom of choice. When he began to commune with others, however, it became necessary to give up some individual freedoms so as to enjoy the benefits of the group. The larger the group became, the more freedoms man had to surrender and the more order was imposed upon each individual. We accept the imposition of order and we question it. We want more benefits and more freedoms.

Two of the strongest sources of power to impose order in the United States are the power of *parens patriae*[2], the concept of the state as parent, and the state's police power,[3] the power to protect society. A major problem with both sources is that it is difficult to determine at what point the desire for order must be restrained out of respect for individual liberties. It has been held that fewer safeguards are required under the *parens patriae* power to insure individual freedom because the state is acting in the best interests of the individual.[4] But it is difficult to know where the best interests of the individual leave off and the convenience of order begins.

There are some people with less order in their lives than most: people whose decision-making faculties are impaired; people whose mental capabilities are different; and people who are incapable of surviving in society without aid.[5] These people require more order than

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1. For the purposes of this note, the masculine gender will be used to refer to members of both sexes.

2. *See* notes 24-26 and accompanying text *infra*.

3. Discussed in detail in Note, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974). *See also* notes 27-28 and accompanying text *infra*.

4. Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959).

5. "Let us define mental health as the adjustment of human beings to the world and to each other with a maximum effectiveness and happiness. Not just efficiency, or just contentment, or the grace of obeying the rules of the game cheerfully. It is all of these together. It is

they are capable of providing for themselves. The state will not let them die or suffer, but it does not want them to embarrass, harm, or burden the rest of society. Thus, society acknowledges that there is a need for mental health care.

The Lanterman-Petris-Short Act[6] (hereinafter LPS Act or Act) is California's attempt to strike a balance between society's need for protection and the mentally disordered individual's right to freedom. In addition to providing for the detention of persons classified as dangerous to others and gravely disabled,[7] the Act contains some safeguards for the individual. Emergency commitments may be challenged by *habeas corpus* proceedings,[8] and the Act recognizes the individual's right to a jury trial.[9] However, the LPS Act has no provisions detailing appropriate due process requirements. While it does outline the progressive stages of detention—initial 72-hour observation period,[10] 14-day involuntary treatment period,[11] 90-day post-certification period[12] and conservatorship[13]—it does not address the appropriate standard of proof and jury verdict requirements necessary for commitment or conservatorship.

The developing case law which addresses these problems indicates the need for more clearly defined standards of due process relating to the commitment of the gravely disabled mentally ill. The California Supreme Court's first decision in the case of *Conservatorship of Roulet*[14] indicated that, at least in California, due process for the gravely disabled was satisfied by clear and convincing evidence of disability and a ¾ jury vote.[15] Chief Justice Bird's dissent called for proof beyond a reasonable doubt and a unanimous jury verdict.[16] This note will examine the history of the treatment of gravely disabled persons which underlies Chief Justice Bird's initial dissent and subsequent majority

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the ability to maintain an even temper, an alert intelligence, socially considerate behavior, and a happy disposition. This, I think, is a healthy mind." Redlich & Freedman, *The Problem of Normality*, in READINGS IN LAW AND PSYCHIATRY 56 (1968) (quoting Karl Menninger) [hereinafter cited as READINGS].

6. CAL. WELF. & INST. CODE §§ 5000-5368 (West 1972).

7. CAL. WELF. & INST. CODE § 5008(h) (West Supp. 1979) defines gravely disabled as a "condition in which a person, as a result of mental disorder, is unable to provide for his basic personal needs for food, clothing, or shelter." *See* text accompanying note 6 *supra*.

8. *Id.* § 5275.

9. *Id.* § 5350(d).

10. *Id.* § 5150.

11. *Id.* § 5250.

12. *Id.* § 5300.

13. *Id.* §§ 5350, 5352.1, 5355.

14. 20 Cal. 3d 653, 574 P.2d 1245, 143 Cal. Rptr. 893 (1978), *rev'd on rehearing*, 23 Cal. 3d 219, 590 P.2d 1, 152 Cal. Rptr. 425 (1979) (The opinion was deleted from Cal. 3d when rehearing granted, and subsequent footnotes will only cite P.2d and Cal. Rptr. for this Case.)

15. *Id.*, 574 P.2d at 1249-50, 143 Cal. Rptr. at 897-98.

16. *Id.* at 1260, 143 Cal. Rptr. at 908 (Bird, C.J., dissenting).

opinion on rehearing. It will attempt to demonstrate that her stricter standards are in the best interests of both society and the individual.

The note begins with a general discussion of the history and theory behind the civil commitment process in this country. It will acquaint the reader with the current procedures for civil commitment and the way in which those procedures are viewed by the legal and medical professions. The second section is a synopsis of the LPS Act, with emphasis on the involuntary civil commitment requirements and the powers granted to a conservator. The third section contains a discussion of procedural and substantive due process. The note continues by tracing the relevant case law prior to the initial *Roulet* decision which deals with standard of proof and a discussion of the two *Roulet* decisions. Next the authors address the points raised in the initial *Roulet* majority opinion, and conclude with a discussion on the recent decision handed down on rehearing by the California Supreme Court, in which Chief Justice Bird's earlier position prevailed to emerge as the new law in California.

I. Civil Commitment

Civil commitment is a twentieth century chimera. It has legal, medical, moral and ethical portions. Each person, when looking at the beast, will see something different. In 1858, one author commenting on his country's civil commitment system said, "in no country in the world could similarly well-ordered provisions for the maintenance and recovery of the poor insane be found. . . ."[17] Other writers report that the hospitals were overcrowded, with squalid conditions resembling a jail or almshouse.[18] Most contemporary scholars focus on the dramatic changes which have occurred in the civil commitment system. They note the better living conditions, more educated staff and more scientific methods of treating the mentally ill.[19]

The existence of mental illness was recognized as early as 1500 B.C.,[20] yet the causes remain a mystery. Theories ranged from possession by evil spirits to imbalances of the brain.[21] Treatment was also

17. *Insane Colony of Gheel*, 4 ASYLUM J. MENTAL SCIENCE 427 (Apr. 1858).

18. Bassuk & Gerson, *Deinstitutionalization and Mental Health Services*, 238 SCIENTIFIC AMERICAN, 46, 47 (1978).

19. *See generally* J. Zusman, Conservatorship and Guardianship: A Medical Perspective (1978) (unpublished paper prepared for the 1978 Regional Institutes in Law and Mental Health, USC Schools of Medicine and Public Administration) [hereinafter cited as Zusman, 1978 unpublished paper]. *See also* S. Pollack, Commitment of the Mentally Ill (1978) (unpublished paper prepared for the 1978 Regional Institutes in Law and Mental Health, USC Schools of Medicine and Public Administration) [hereinafter Pollack, 1978 unpublished paper].

20. Overholser, *An Historical Sketch of Psychiatry*, in READINGS, *supra* note 5, at 3.

21. *Id.*

erratic, ranging from blood letting to music, and from burning at the stake to hospitalization.[22] It was not until the mid-17th century that scientific thought began to outweigh the superstitious dogmatism of the Catholic Church which had dominated the Middle Ages. By the mid-1700's, several advanced philosophers and a few organically-oriented physicians had begun to write on the classifications and explanations of mental illness.[23]

There are two bases of the state's power to commit an individual to a mental health facility: *parens patriae* and the police power. In early England, the King was responsible for the care of the mentally ill. Acting in the setting of a paternalistic ruler, the King was said to have the power, indeed the duty, of *parens patriae*.[24] In the United States, the *parens patriae* power was exercised by the state legislatures rather than the King.[25] It was exercised on behalf of the mentally ill individual considered incapable of making competent decisions regarding his own mental state or his need for mental health care.[26] Police power is the authority of the state to protect itself against breaches of the peace.[27] It is invoked in the area of civil commitment if a person is determined to be dangerous to others.[28] The state then assumes the power to protect its citizens from the dangerous person by removing him from the mainstream of society.

A. Civil Commitment in California

The civil commitment process in California usually begins when a person is brought to a mental health facility by family members, friends or the police.[29] The person is given a short interview with a psychiatrist, social worker or other mental health professional. The object of this initial interview is to determine whether the person was tem-

22. *Id.* at 3-4.

23. For a complete discussion of this history, *see* Overholser, *An Historical Sketch of Psychiatry*, in READINGS, *supra* note 5, at 3.

24. Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972) (quoting 3 W. BLACKSTONE, COMMENTARIES 47).

25. *Id.*

26. Note, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974).

27. MENTAL DISABILITY L. REP. 83 (July-Aug. 1977). *See also* note 3 *supra*.

28. A discussion of this area of the law is beyond the scope of this note. However, many civil commitment cases stem from cases relating to the criminal record of the individual, and a finding that one is "dangerous to others" may be considered in that respect. For discussion of civil commitment under the "dangerous to others" statutes of the LPS Act, *see* D. Herman, *Preventative Detention, A Scientific View of Man, and State Power*, 2 U. ILL. L. F. 673 (1973), and Comment, *A Dangerous Commitment*, 2 PEPPERDINE L. REV. 117 (1974).

29. Report of the State Bar of California's Commission on Law and Mental Health Problems, Committee on California Mental Health Services Act 33 (Jan. 1979) [hereinafter cited as Committee Report].

porarily upset or distressed or instead has a problem which requires mental health care.[30] The person is ordinarily asked to describe his own behavior and give the reasons for it. If he appears overly anxious or upset, or in any other way in need of mental health care, he will be detained in the facility for an initial observation period. This decision to detain or release marks the beginning of the civil commitment process. The entire process may involve emergency detention, temporary detention, indefinite commitment, outpatient care or a conservatorship. It may be as short as 72 hours[31] or it may extend over the life of the individual.[32]

The most common rationale for civil commitment is the determination that a person is unable to care for himself in society: he cannot provide his own shelter, clothing or food.[33] Generally this person will be placed under the supervision of a "conservator," a person (family, friend, or state employee) who is responsible for aiding him in his everyday needs, much like a guardian.[34] Conservatorship was first envisioned as a kind of supervision for mentally impaired people who only needed some assistance to survive, rather than detention and complete surveillance.[35]

The civil commitment statutes of most states now look strikingly different from those of 10 or 20 years ago.[36] Today's process of civil commitment contains more legal safeguards and fewer strictly medical

30. *Id.* at 12-13.

31. CAL. WELF. & INST. CODE § 5150 (West 1972).

32. *See* Note, *Civil Commitment of the Mentally Ill in California: The Lanterman-Petris-Short Act*, 7 LOY. L.A. L. REV. 93, 121-22 (1974). Under the LPS Act, once a person is placed in a mental health facility there are certain minimum standards which must be observed throughout his commitment. Some of these are periodic review of his condition, periodic reevaluation of the treatment program and the right to consult a staff psychiatrist. However, until recently most mentally ill people did not know that there were ways out of the mental health system. Mental health ombudsmen and attorneys specializing in the field, as well as cooperative legal organizations, have discovered cases of people who have been in a mental health facility for 25 to 50 years. Furthermore, mental health detention is a debilitating experience. After a period of time even the most "well" person may begin to depend upon medication, forget how to perform the normal functions of a healthy person and in fact become a mentally disabled person. These people may well be doomed to a life of dependence and mental health care detention.

33. CAL. WELF. & INST. CODE § 5008(h) (West 1972).

34. A "guardian," as opposed to a "conservator," is utilized most often in the case of minor children. While most practitioners in the field of mental health use the two terms interchangeably, the general feeling is that guardianship implies legal incompetency while conservatorship under the LPS Act implies an actual medical disability caused by mental illness. Further, conservatorship lends itself to potential restoration of independent functioning capabilities, whereas guardianship, in spite of its extensive use for minor children, implies a degenerative condition, such as senile dementia, from which the individual will not recover.

35. Committee Report, *supra* note 29, at 3.

36. *See* A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION (1975).

decisions.[37] Mental illness is becoming more a legal standard and less a medical diagnosis.[38] The system also looks different from the perspectives of the mental health and legal professionals. The mental health professional envisions the civil commitment process as a method of aiding the mentally impaired person who may not recognize his own need for mental health care.[39] The legal professional may see civil commitment as the end of social control in the form of preventive detention in which the patient is incarcerated rather than hospitalized.[40]

Some legal professionals assert that the mental health professional has no regard for the patient's competence to make decisions or his ability to be helped by the mental health care system.[41] In response, some mental health professionals claim that the legal professional has no regard for the patient's need for mental health care or the possibility that such care may permanently "cure" the patient and allow him to live successfully in society.[42] Civil commitment under the LPS Act is an attempt to balance these concerns. It is an effort to allow the mental health professional to make mental health care decisions while interjecting the legal process to protect personal liberties.[43] The next section of this note analyzes this statutory response to the problem of civil commitment of the mentally ill.

B. Overview of the Lanterman-Petris-Short Act

Before the enactment of the LPS Act, the law governing involuntary civil commitment was contained in California Welfare and Institutions Code sections 5559 and 5567.[44] These sections provided that a person could be committed involuntarily on grounds of mental illness if his mental state was such that he was in need of supervision, treatment, care or restraint and/or dangerous to himself or to the person or

37. *See generally* J. Ellis, Constitutional Issues in Civil Commitment: An Attempt to Answer the Current Backlash (1978) (unpublished paper for the 1978 Regional Institutes in Law and Mental Health, USC Schools of Medicine and Public Administration).

38. *Id.*

39. Schwartz, *Social Ambivalence Over Involuntary Treatment*, 16 PSYCHIATRIC OPINION 25 (April 1979).

40. Pollack, 1978 unpublished paper, *supra* note 19, at 6.

41. *Id.* at 6-7; Zusman, 1978 unpublished paper, *supra* note 19, at 22.

42. *See* Thorn v. Superior Court, 1 Cal. 3d 666, 673-74; 464 P.2d 56, 61; 83 Cal. Rptr. 600, 605, where the court stated: "The Subcommittee Report, *supra*, at pages 6-7, notes that a review of recent legislative actions throughout the nation with respect to mental health services 'illustrates the tendency to make the process either more medical, as in New York, or to increase legal protections, as in the District of Columbia. This has tended to place state legislatures in the uncomfortable position of having to choose between the medical objectives of treating sick people without delays and the equally valid legal aim of insuring that persons are not deprived of their liberties without due process of law.' (Footnotes omitted.)"

43. Pollack, 1978 unpublished paper, *supra* note 19, at 6-7.

44. CAL. WELF. & INST. CODE §§ 5559, 5567 (West 1966).

property of others and in need of supervision, treatment, care or restraint. If a person was found to meet one of the above criteria and was committed, he lost: (1) the right to refuse medical or psychiatric treatment;[45] (2) the right to own or possess firearms;[46] (3) the right to vote;[47] and (4) the right to engage in property transactions where a title search was required, because the title insurance companies refused to insure anyone who had been committed.[48] If a person practiced a profession such as law, medicine, accounting, psychology or nursing, the respective licensing boards would automatically suspend his license upon involuntary commitment.[49] The Department of Motor Vehicles, in its discretion, could revoke a drivers license or refuse to renew an expired one.[50] A public official lost his office if civilly committed.[51] In addition to these specific deprivations, a stigma attached to someone who had been involuntarily committed in other numerous and varied aspects of his life.[52]

The LPS Act was enacted in 1967,[53] due in large part to the effects of involuntary commitment, plus the desire for local, rather than state care.[54] The Act was intended to establish new procedures for the civil commitment of the mentally ill and to safeguard their legal rights after commitment.[55] A California appellate court recently reiterated this po-

45. CAL. WELF. & INST. CODE § 5150 (West 1966).

46. *See* Note, *The Need for Reform in the California Civil Commitment Procedure*, 19 STAN. L. REV. 992 n.3 (1967).

47. *Id.* at 992 n.4.

48. *Id.* at 993 n.7.

49. CAL. ASSEMBLY COMM. ON WAYS AND MEANS, SUBCOMM. ON MENTAL HEALTH SERVICES, THE DILEMMA OF MENTAL COMMITMENTS IN CALIFORNIA—A BACKGROUND DOCUMENT 189-90 (1966) [hereinafter cited as BACKGROUND DOCUMENT].

50. *See* CAL. VEH. CODE §§ 12805 (West Supp. 1966), 13359 (West 1960).

51. CAL. GOV'T CODE § 1770(b) (West 1966).

52. *See* BACKGROUND DOCUMENT, *supra* note 49, at 59-60. For a more complete discussion, *see* Conservatorship of Roulet, 23 Cal. 3d 219, 590 P.2d 1, 152 Cal. Rptr. 425 (1979); In re Roger S., 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977).

53. The LPS Act was amended by 1968 Cal. Stats., ch. 1374, § 13, prior to its effective date of July 1, 1969. The LPS Act has served as a model for other state legislation, *e.g.*, WASH. REV. CODE ANN. §§ 71.05.010-.920 (1975), which became effective on January 1, 1974. Wash. Rev. Code § 71.05.930 (1975).

54. CAL. WELF. & INST. CODE § 5358 (West 1972) provides in part: "If the conservatee is not to be placed in his own home or the home of a relative, first priority shall be to placement in a suitable facility as close as possible to his home or the home of a relative."

55. *See, e.g.*, Thorn v. Superior Court, 1 Cal. 3d 666, 668, 464 P.2d 56, 57, 83 Cal. Rptr. 600, 601 (1970), where the court stated: "The LPS act, as enacted in 1967 after a two-year legislative study, and thereafter amended, repealed the principal provisions for the civil commitment of mentally ill persons found in prior California law and replaced them by a new statutory scheme repealing the indeterminate commitment, removing the legal disabilities previously imposed upon persons adjudicated to be mentally ill, and enacting an extensive scheme of community-based services, emphasizing voluntary treatment and providing for periods of involuntary observation and crises treatment for persons who are unable to

sition when it wrote that the LPS Act was "designed to provide prompt, short-term, community-based intensive treatment, without stigma or loss of liberty, to individuals with mental disorders."[56] The following sections examine specific provisions of the LPS Act.

1. Gravely Disabled

While California Welfare and Institutions Code section 5008 provides a statutory definition of "gravely disabled",[57] the term has led to much confusion within the judicial system. Section 5008(h) defines "gravely disabled" as a "condition in which a person, as a result of mental disorder or impairment by chronic alcoholism, is unable to provide for his basic personal needs for food, clothing or shelter."[58] Since its inception, this legislatively created definition has precipitated numerous difficulties, both judicially and medically, in measuring "basic personal needs."[59] Thus, it has become apparent that a more accurate and reliable standard is required. In response, many state courts have adopted functional or operational definitions. They are not identical in all respects, but strong similarities are evident. Some of the relevant questions include: "Is the person making it in the community or do they repeatedly require hospitalization? Are they taking medication? Do they get their welfare checks and do they eat the check or do they spend it appropriately? Do they go out and buy alcohol the first day?"[60]

In a recent study focusing on this problem in California,[61] Carol

care for themselves or whose condition makes them a danger to themselves or others." *See also* CAL. WELF. & INST. CODE § 5001 (West 1977) (legislative intent of the LPS Act); A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 60 (1976).

56. Conservatorship of Chambers, 71 Cal. App. 3d 277, 282, 139 Cal. Rptr. 357, 362 (1977) (footnote omitted). *But see* People v. Thomas, 19 Cal. 3d 630, 566 P.2d 228, 139 Cal. Rptr. 594 (1977); People v. Burnick, 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975); People v. Feagley, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975). These three cases held that commitment does entail stigma and loss of liberty equal to that of criminal incarceration.

57. All statutory references are to the California Welfare and Institutions Code unless otherwise stated.

58. CAL. WELF. & INST. CODE § 5008(h) (West 1978).

59. The reason that more cases do not address this problem is that most decisions in this area of the law are not appealed beyond the trial court level.

60. *A Review of California's Programs for the Mentally Disabled: Public Hearings on House Resolution 106 Before the Permanent Subcommittee on Mental Health and Developmental Disabilities* 231-32 (Nov. 4, 1977) (Teknekron, Inc.) [hereinafter cited as November Teknekron Report]. Dr. Selwyn Rose, from whose testimony this excerpt is quoted, was Senior Consultant and Associate to Teknekron Corp. which contracted to do the study for the State Assembly Mental Health and Developmental Disabilities Subcommittee. Dr. Rose is a psychiatrist and an attorney who has long been involved in hospital administration and court proceedings involving the LPS Act.

61. Warren, *Involuntary Commitment for Mental Disorder: The Application of Califor-*

A.B. Warren sat in on the civil commitment hearings of 100 persons who had filed writs of habeas corpus after being detained for 72 hours.[62] Warren discovered that despite the strict statutory definition of "gravely disabled," the California courts employed certain operational factors of their own: (1) prior hospitalization; (2) refusal of medication; (3) denial of illness; (4) cooperation in the hospital during the 72 hour hold; (5) concurrent conservatorship proceedings; (6) family's willingness to care for the individual; (7) ability to provide food, clothing and shelter; (8) residual deviance (violation of norms); and (9) financial and employment status.[63] Relatively few of these factors relate either directly or indirectly to the strict statutory standards of section 5008(h). The courts' use of these additional criteria points out that they are finding the statutory criteria inadequate to enable them to make objective judgments regarding potential commitments.

In addition to the definitional problems with the term "gravely disabled," there is also a timing problem. The law is unclear as to whether the patient must meet the legal requirement of "gravely disabled" before or after hospitalization.[64] Many courts interpret "gravely disabled" as referring to a person's mental status on the day of his court appearance.[65] Other courts interpret the term as referring to a person's ability to provide for food, clothing and shelter in his everyday life.[66] Though seemingly unimportant, this may be a crucial difference since on the day of a person's court appearance he may have been under institutional care for over two weeks[67] and thus may be in better condition than he would have been in if left to fend for himself. Persons under institutional care generally have been well fed, are clothed and are usually in better physical condition.[68] Despite those factors, the California Court of Appeal held in *Conservatorship of Chambers*[69] that the term "gravely disabled" is not unconstitutionally vague and over-

nia's Lanterman-Petris-Short Act, 11 L. & SOC'Y REV. 629 (1977) [hereinafter cited as Warren].

62. CAL. WELF. & INST. CODE § 5252.1 (West 1978). Section 5252.1 provides that the copy of the notice of certification required to be delivered to all patients before involuntary 14-day intensive treatment, *id.* § 5252, must inform a person of his right to judicial review by *habeas corpus*. *See* text accompanying note 8 *supra*.

63. Warren, *supra* note 61, at 633-38.

64. ENKI RESEARCH INSTITUTE, A STUDY OF CALIFORNIA'S NEW MENTAL HEALTH LAW 157 (1969-1971).

65. *California Assembly Permanent Subcommittee on Mental Health and Developmental Disabilities: Improving California's Mental Health System* 42 (Sept. 30, 1977) (Teknekron, Inc.) [hereinafter cited as September Teknekron Report]. *See also* November Teknekron Report, *supra* note 60, at 232-35.

66. September Teknekron Report, *supra* note 65, at 42.

67. This includes the 72-hour hold period plus the 14-day intensive treatment period.

68. November Teknekron Report, *supra* note 60, at 232.

69. 71 Cal. App. 3d 277, 139 Cal. Rptr. 357 (1977).

broad.[70] In so holding, the court stated that

> The term "gravely disabled" is sufficiently precise to exclude unusual or nonconformist lifestyles. It connotes an inability or refusal on the part of the proposed conservatee to care for basic personal needs of food, clothing and shelter. It also provides fair notice of the proscribed conduct to the proposed conservatee who must be presumed to be a person of common intelligence for the purpose of determining the sufficiency of the statute.[71]

The *Chambers* court never considered the question of when to apply the statutory definition, but due to Chambers' long history of mental disorder[72] it is doubtful that this factor would have influenced the court's decision. The court's primary concern was comparing the safeguards available in "grave disability" proceedings with those in "dangerousness" proceedings. Thus, the court seemed unconcerned with whether Chambers could care for himself before, during or after hospitalization. In addition, the court was only addressing the narrow issue raised by Chambers: that the standard for "grave disability" purports to provide for the incarceration of individuals who have not committed an overt act demonstrating dangerousness to themselves or to others.[73]

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70. *Id. Cf.* In the Matter of Gary Seefeld, No. 454-225 (Wis. Cir. Ct. Milwaukee County Oct. 31, 1977) (as commented on in 2 MENTAL DISABILITY L. REP. 363 (Jan.-Feb. 1978)), (Wisconsin's statute permitting civil commitment of a person with impaired judgment was held unconstitutionally vague and a denial of substantive due process). It must be noted that Wisconsin's definition of a person who, due to impaired judgment, manifested a very substantial probability of injury to himself or herself was unlike California's definition of gravely disabled, even though substantially similar. It read: "Every written petition for examination shall allege that the subject individual to be examined: Is mentally ill, drug dependent, or developmentally disabled and is a proper subject for treatment; and [E]vidences such impaired judgment, manifested by evidence of a pattern of recent acts or admissions, that there is a very substantial probability of physical impairment or injury to himself or herself. The probability of physical impairment or injury may not be deemed very substantial under this subparagraph if reasonable provision for the subject individual's protection is available in the community or if the individual is appropriate for placement under § 55.06." WIS. STAT. ANN. § 51.20(1)(a)(2)(c) (West 1976).

71. 71 Cal. App. 3d at 284, 139 Cal. Rptr. at 362.

72. Chambers had first been admitted to Napa State Hospital on January 23, 1973 at the age of 21. Prior to this he had begun drinking heavily at the age of 15 and had been arrested numerous times for drunkenness as an adult. He had also taken LSD 35 times and had ingested mescaline, marijuana, methedrine and heroin. Due to his drug habits he was subject to bizarre and violent behavior. Before this proceeding, Chambers had been admitted to Napa State Hospital six times. The last admission was the result of a physical attack upon his mother, precipitated when she flushed his prescribed medications down the toilet for his own good. *Id.* at 280-81, 139 Cal. Rptr. at 359-60.

73. *Id.* at 281, 139 Cal. Rptr. at 360.

2. Procedure for detention and commitment of persons adjudged to be "gravely disabled"

Conservatorship proceedings are initiated by application from any individual who alleges that a person's condition should be evaluated due to grave disability.[74] A peace officer or other professional person designated by the county may, if he has "reasonable cause," take that person into custody and place him in a facility for a 72 hour evaluation period.[75] Since the 72 hour detention period is of a relatively short duration, and because it serves to protect against imminent danger to people confined for evaluation, it was deemed not in violation of an individual's due process rights by the legislators who enacted the LPS Act.[76] However, "reasonable cause" as required by the Act is never defined within the Act itself. Thus, a person could theoretically be detained for 72 hours for no other reason than a neighbor's grudge or because another person considered his behavior unusual.

If a person is found to be gravely disabled or dangerous to himself or others after the initial 72 hours have elapsed, he may be certified for an additional 14 days of involuntary treatment.[77] This period may be shorter, however, if the person is willing to accept voluntary treatment.[78] At the time a person receives a notice of certification for intensive treatment, he has the right to counsel and to a habeas corpus hearing to obtain his release.[79] Within two days after this petition is filed, the superior court must grant the writ or order an evidentiary hearing.[80] The court will immediately release the petitioner if: (1) he is not gravely disabled; (2) he has not been advised of or has accepted voluntary treatment; or (3) the facility is incapable of providing the mandated treatment.[81] If a person is still thought to be gravely disabled after 17 days,[82] then the mental health professional in charge of the facility providing care for the 17 day period can recommend conservatorship to the county officer in charge of conservatorship investi-

74. CAL. WELF. & INST. CODE § 5201 (West 1978).

75. CAL. WELF. & INST. CODE § 5150 (West 1978) provides for emergency detention by any peace officer or designated county official. Section 5201 of the same code provides for the filing of a petition by a private person requesting an evaluation of an individual. Both of these procedures are used to initiate the 72-hour holding period.

76. While the constitutionality of the 72-hour hold period has never been successfully attacked, there are some who believe that more due process safeguards are mandated during this period. *See* Comment, *Compulsory Counsel for California's New Mental Health Law*, 17 U.C.L.A. L. REV. 851 (1970) (advocates appointment of counsel, as distinguished from the right to counsel, during the initial 72 hour hold period).

77. CAL. WELF. & INST. CODE § 5250 (West 1978).

78. *Id.* § 5254.

79. *Id.* § 5275.

80. *Id.* § 5276.

81. *Id.*

82. This is the 72-hour period plus the 14-day period.

gation.[83] If the officer concurs with this judgment after investigating all of the possible alternatives,[84] he will petition the superior court to establish conservatorship pursuant to California Probate Code section 1754.[85] At this stage in the proceedings, either a temporary conservator will be appointed for a period not to exceed 30 days,[86] or a permanent conservator will be assigned.[87] If the latter is assigned, the conservatorship will automatically terminate after one year.[88] At the end of the one year period the conservator may petition the court to re-establish the conservatorship for another one year period.[89] The petition must include the opinions of two physicians that the conservatee is still "gravely disabled."[90] In addition, the conservatee may request a rehearing on the issue of his "grave disability" every six months.[91] In all of these hearings and rehearings, the conservatee is entitled to a jury trial if he so elects.[92]

3. Conservator's Powers under the LPS Act

While there are no uniform powers awarded to all conservators, there are certain powers granted to give conservators minimum rights over their conservatees. The governing provisions of the LPS Act in this area are sections 5357 and 5358. Section 5357 confers upon the conservator the general administrative powers specified in Probate Code section 1852,[93] as well as the additional powers specified in Pro-

83. CAL. WELF. & INST. CODE § 5352 (West 1978).

84. *Id.* § 5354.

85. *Id.* § 5352. One important difference between the *habeas corpus* hearing and the conservatorship hearing is that the subject need not be present at the conservatorship hearing. Section 5352 states that a petition for a conservatorship hearing shall be filed as set forth in CAL. PROB. CODE § 1754. This section states that while the "proposed conservatee shall have the right to appear at such hearing and oppose such petition" he may be excused "if not able to attend by reason of medical inability, . . ." CAL. PROB. CODE § 1754 (West Supp. 1978).

86. CAL. WELF. & INST. CODE § 5352.1 (West 1978).

87. *Id.* § 5355.

88. *Id.* § 5361.

89. *Id.*

90. CAL. WELF. & INST. CODE § 5361 (West 1978) provides: "In the event that the conservator is unable to obtain the opinion of two physicians, he shall request that the court appoint them."

91. *Id.* § 5364.

92. *Id.* § 5350(d).

93. This section gives a guardian or conservator all of the powers in Chapters 7, 8 and 9 of Division 4 of the CAL. PROB. CODE §§ 1500-61. These include: payment of debts owed by and collection of monies owed to the conservatee, § 1501; management of the conservatee's estate as well as the application of income to the support of the conservatee and his family, §§ 1502, 1530; commencement and prosectuion of actions for partition of the conservatee's property, as well as execution of deeds of conveyance to the remaining owners of the land, §§ 1506-1508; deposit or withdrawal of the conservatee's money or assets in a bank or a trust company, respectively, §§ 1513, 1514; dedication of the conservatee's prop-

bate Code section 1853.[94] Furthermore, section 5357 allows the court the collateral power to rule on the proposed conservatee's rights to: (1) possess a driver's license; (2) enter into contracts; (3) refuse or consent to treatment related to the conservatee's grave disability; and (4) refuse or consent to other medical treatment.[95] Section 5358 allows the conservator the power, if specified in the order, to hospitalize his conservatee and order treatment related to his grave disability.[96]

The court in its discretion may grant all or some of the above powers. Were a conservator granted all of these powers, he would have full control over his conservatee's private, social, and professional life. Because of the potential scope of a conservator's powers, civil commitment under the LPS Act implicates the individual's due process rights to liberty and property. The next section of this note will examine the nature and extent of these constitutional rights.

II. Due Process

A. Substantive Due Process

In general, if government seeks to propound a law which either deprives a person of "fundamental rights" or employs a suspect classification, it must show that the law is necessary to promote a compelling

erty to the state, § 1515; the giving of powers of proxies to vote shares of the conservatee's corporate stock, § 1517; and the borrowing of money when it will benefit the conservatee, § 1533.

94. These powers are as follows: "To institute and maintain all actions and other proceedings for the benefit of and to defend all actions and other proceedings against the conservatee or the conservatorship estate; to take, collect and hold the property of the conservatee; to contract for the conservatorship and to perform outstanding contracts and thereby bind the conservatorship estate; to operate at the risk of the estate any business, farm or enterprise constituting an asset of the conservatorship, to grant and take options to sell at public or private sale; to create by grant or otherwise easements and servitudes; to borrow money and give security for the repayment thereof; to purchase real or personal property; to alter, improve and repair or raze, replace and rebuild conservatorship property; to let or lease property for any purpose including exploration for and removal of gas, oil and other minerals and natural resources and for any period, including a term commencing at a future time; to loan money on adequate security; to exchange conservatorship property; to sell on credit provided that any unpaid portion of the selling price shall be adequately secured; to vote in person or by proxy all shares and securities held by the conservator; to exercise stock rights and stock options; to participate in and become subject and to consent to the provisions of any voting trust and of any reorganization, consolidation, merger, dissolution, liquidation or other modification or adjustment affecting conservatorship property; to effect necessary insurance for the proper protection of the estate, to pay, collect, compromise, arbitrate, or otherwise adjust any and all claims, debts, or demands upon the conservatorship, including those for taxes; to abandon valueless property, and to employ attorneys, accountants, investment counsel, agents, depositaries and employees and to pay the expense therefor from the conservatorship estate." CAL. PROB. CODE § 1853 (West Supp. 1979).

95. CAL. WELF. & INST. CODE § 5357 (a), (b), (c), (e) (West Supp. 1978).

96. *Id.* § 5358.

or overriding state interest.[97] If rights are not impaired or if no suspect classification is employed, then the law need only be rationally related to a legitimate government end.[98]

Within a civil commitment or conservatorship context, substantive due process analysis would require that two determinations be made: first, whether the law authorizing commitment or conservatorship impinges on an individual's fundamental rights so that strict scrutiny is necessary; and second, whether the state can meet the burden of showing a compelling state interest.[99]

Before it can be determined whether fundamental rights are involved, that term must be defined. Basically, fundamental rights are rights which the United States Supreme Court recognizes as essential to individual liberty. The Court has determined these to include: First Amendment rights of freedom of speech and religion;[100] the right to engage in interstate travel;[101] the right to vote;[102] the right to fair proceedings prior to a deprivation of personal property;[103] the right of as-

97. *See* Loving v. Virginia, 388 U.S. 1 (1967) (race as a suspect classification); Takahasi v. Fish and Game Comm'n, 334 U.S. 410 (1948) (alienage as a suspect classification). For recognized fundamental interests, *see* Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting); Griffin v. Illinois, 351 U.S. 12 (1956) (procedural rights of criminal defendants) and Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation). Nonetheless, the concept of fundamental rights has yet to be defined with exactness. The common theme of cases finding a fundamental right is a severe detriment imposed on the complaining party. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1130 (1969); *see generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW, 416-19 (1978).

98. Allgeyer v. Louisiana, 165 U.S. 578 (1897), was one of the first cases where the Court expounded its rational relation test, even though it was only in dicta. In Nebbia v. New York, 291 U.S. 502 (1934), which involved a state minimum price law for milk, the Court held that if the law has a reasonable relation to a proper legislative purpose, the requirements of due process are satisfied. This was the first in a series of cases in which the Court adopted a deferential attitude toward state economic regulatory legislation. *See also* Jackson v. Indiana, 406 U.S. 715 (1972), where the Court observed that, "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.* at 738.

99. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (Court invalidated a statute restricting welfare payments to residents of the state of more than one year); Skinner v. Oklahoma, 316 U.S. 535 (1942) (constitutional challenge to the Oklahoma Habitual Criminal Sterilization Act). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-6 to 16-8 (1978).

100. Everson v. Bd. of Educ., 330 U.S. 1 (1946); Bridges v. California, 314 U.S. 252 (1941).

101. Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966). *See also* Kent v. Dulles, 357 U.S. 116 (1958) for important dictum on the right to travel.

102. Hill v. Stone, 421 U.S. 289 (1975); Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Evans v. Cornman, 398 U.S. 419 (1970); Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

103. Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).

sociation;[104] the right of privacy including the rights of free choice in abortion[105] and birth control;[106] and the right to freedom of choice in marriage.[107]

An individual facing a civil commitment or conservatorship hearing is in danger of losing certain of these fundamental rights, including the right to vote,[108] as well as the right to personal property[109] and liberty.[110] The individual may also lose his right to contract[111] and his right to a drivers license.[112]

Since commitment and conservatorship hearings do affect fundamental rights, it should be determined whether a compelling state interest justifies the existence of the laws authorizing these processes. In general, the commitment and conservatorship processes serve to further dual state interests: the first being the state's interest in the individual's welfare; and the second being the state's interest in the safety of society.[113]

The concern for individual welfare is typified in this language from a 1965 competency hearing: "[t]he alleged incompetent is suffering from a mental illness to such an extent that he is incapable of caring for himself, or managing his property or is likely to dissipate or lose his property or become the victim of designing persons."[114] Should a mentally ill person enter into a contract with another party, this last statement takes on particular significance. It is in society's interest to assume the responsibility of protecting the incompetent person from overreaching by the competent contracting party.[115]

104. Shelton v. Tucker, 364 U.S. 479 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

105. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

106. Griswold v. Connecticut, 381 U.S. 479 (1965). This case established a constitutional right of privacy based on the penumbras of various guarantees contained in the Bill of Rights. The Court concluded that the First, Third, Fourth and Fifth Amendments all protected privacy in various forms, and that in combination these amendments extend beyond their specific terms and create "zones of privacy" protected by the Fourteenth Amendment against state invasion.

107. Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

108. CALIF. WELF. & INST. CODE § 5357 (West Supp. 1979).

109. *Id.* § 5353. This is a qualified loss of personal property subject to court approval.

110. *Id.* § 5358.

111. *Id.* § 5357.

112. *Id.*

113. *See* note 3 *supra*.

114. *In re* Pickles' Petition, 170 So.2d 603, 613 (Fla. Dist. Ct. App. 1965).

115. RESTATEMENT (SECOND) OF CONTRACTS §§ 231, 233, 234 (Tent. Draft Nos. 1-7, 1973). *See also* Alexander & Szasz, *From Contract to Status via Psychiatry*, 13 SANTA CLARA LAW. 537. In this article the authors conclude: "In short, we favor doing away with the legal recognition of mental incompetency as a ground of avoiding contracts . . . because we believe that this policy is most consistent with the traditional moral aims of Anglo-Saxon law, and especially contract law—namely, the expansion of the scope of individual self-determination and the protection of personal dignity; and because we cherish and support

The concern for society's safety exists because of potential consequences which could result if a mentally ill person is left to mingle in the mainstream of society. For example, in a contractual setting, it may not be the competent party who overreaches, but rather, the competent party may instead rely to his detriment upon the contract.[116] Moreover, there also exists the danger of actual physical harm to another person if an incompetent person is permitted to drive an automobile.

Societal concerns such as these must be weighed against the detriment to the individual who is labeled "mentally ill." Even if the state's interests are seen as compelling, thereby justifying commitment and conservatorship processes, the individual's interest may still be protected to a certain extent by various procedural due process guarantees. The remainder of this Note will discuss these due process safeguards.

B. Procedural Due Process

The Fourteenth Amendment provides that no state may deprive an individual of life, liberty, or property without first affording him due process of law.[117] Procedural due process is required, only when the impaired interest is either a life, liberty or property interest falling under Fourteenth Amendment protection.

The United States Supreme Court has failed to define either "liberty" or "property" with exactness.[118] We do know, however, that the term "liberty" is not merely confined to its more common connotation of freedom from bodily restraint.[119] The Court has included within its meaning the right to contract and the right to engage in gainful employment, among other rights.[120] "Property" is not limited to ownership of tangibles. It encompasses one's legitimate expectations of entitlement to various benefits under state or federal law.[121] Included

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these values and rank them, on our own scale, higher than security or 'mental health.' " *Id.* at 559.

116. Dexter v. Hall, 82 U.S. (15 Wall.) 9 (1872).

117. "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

118. Far from being an omission, the Court instead has seen the evoluation of these terms as an aging process. This is illustrated by the Court's statement that: " 'Liberty' and 'property' are broad and majestic terms. They are among the '[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience. . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.' " Board of Regents v. Roth, 408 U.S. 564, 571 (1972) (quoting National Ins. Co. v. Tidewater Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)).

119. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

120. *See generally* Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 411-16 (1977). *See also* Meyer v. Nebraska, 262 U.S. 390 (1923), *and* Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 439 (1926).

121. Board of Regents v. Roth, 408 U.S. 564 (1972). This case established the view of

among these benefits are the right to public education,[122] welfare,[123] a drivers license,[124] and other statutory rights.[125] Since a person facing a civil commitment or conservatorship hearing is in danger of losing his liberty and property rights,[126] presumably procedural due process safeguards are necessary parts of these processes.

In general, the United States Supreme Court has leaned toward a utilitarian view in determining what procedures due process may require under any given circumstance.[127] Essentially, the Court balances the cost of the safeguards to society against their worth to the individual.[128] Conversely, the detriment to the individual must be weighed against the benefit to society.[129]

Specifically, the Court has found that due process requires in varying degrees, the following safeguards for the individual: (1) adequate notice of the charges or reasons for the governmental action;[130] (2) an opportunity to be heard;[131] (3) the right to confront witnesses or evidence;[132] (4) the right to counsel;[133] and (5) the right to a decision based on the record.[134] In criminal matters, additional safeguards are imposed: (1) the right to compulsory process to ensure the presence of

property as an "entitlement." The Court will recognize a property interest in government benefits only if it can be determined that the person is entitled to them.

122. Goss v. Lopez, 419 U.S. 565 (1975). The Supreme Court held that public high school students could not be suspended without a hearing since the students had a legitimate entitlement to a public education as a property interest.

123. Goldberg v. Kelly, 397 U.S. 254 (1970).

124. Bell v. Burson, 402 U.S. 535 (1971).

125. Goldberg v. Kelly, 397 U.S. 254, 262.

126. *See* notes 108-112 *supra*.

127. *See generally* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 46-49 (1976) (hereinafter cited as Mashaw), where the author discusses the utility theory used in Mathews v. Eldridge, 424 U.S. 319 (1976). *Mathews* states that due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action, second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the government's interest. *See also* Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961), where Justice Stewart stated that two factors must be considered in due process cases: "the precise nature of the government function involved . . . [and] the private interest that has been affected by governmental action.", and Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 330 (1945), where the Court per Justice Douglas, stated that the right to a hearing "becomes an empty thing" unless all parties affected by the proceeding have an equal opportunity to be heard.

128. Mashaw *supra* note 127 at 46-49.

129. *Id.*

130. *In re* Oliver, 333 U.S. 257, 273 (1948).

131. Irvin v. Dowd, 366 U.S. 717 (1961).

132. Pointer v. Texas, 380 U.S. 400 (1965).

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

134. Goldberg v. Kelly, 397 U.S. 254, 271.

witnesses;[135] (2) the right to a public hearing;[136] (3) the right to a transcript of the proceedings for appellate review;[137] and (4) the right to a jury trial.[138]

In the context of civil commitment, it was not until 1972, in the case of *Lessard v. Schmidt*,[139] that substantial due process considerations were recognized for the mentally ill. In that case, a three-judge district court held that a person could be detained provided there was probable cause to believe that he was in need of mental health care. The court cautioned, however, that he had to be brought before a magistrate as soon as possible, and no later than 48 hours after his initial detention.[140] *Ex parte* hearings were held not to satisfy due process.[141] Further, the detainee was entitled to a prompt trial on the merits with the assistance of counsel.[142] The state had the burden of going forward with evidence on all material issues.[143] The detainee had the right to the equivalent of a Miranda warning[144] before being interviewed by a mental health professional.[145] Finally, the state was required to investigate the alternatives to confinement and use the least restrictive alternative.[146]

Decided the same year as *Lessard, Wyatt v. Stickney*[147] recognized that civil confinement involves a substantial infringement on liberty, therefore necessitating that certain rights be accorded to the mentally ill. "Patients have a constitutional right to a residence unit with screens or curtains to insure privacy, a comfortable bed, adequate meals, and a locker or closet for personal belongings." The court also ruled that "patients cannot be deprived of such privileges as visitors, physical exercise, selection of suitable clothing, interaction with other people (including members of the opposite sex), and attendance at religious services."[148]

135. Washington v. Texas, 388 U.S. 14 (1967).

136. *In re* Oliver, 333 U.S. 257 (1948).

137. Griffin v. Illinois, 351 U.S. 12 (1956).

138. Duncan v. Louisiana, 391 U.S. 145 (1968).

139. 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974).

140. *Id.* at 1091.

141. *Id.* at 1092.

142. *Id.* at 1097-1100.

143. *Id.* at 1095.

144. For a complete explanation of the "Miranda warning" required for criminal detention, *see* Miranda v. Arizona, 384 U.S. 436 (1966).

145. 349 F. Supp. at 1101.

146. *Id.* at 1096.

147. 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

148. 344 F. Supp. at 395-407.

Relying on *Wyatt* and *Rouse v. Cameron*,[149] *Welsch v. Likins*[150] and *Stachulak v. Coughlin*[151] determined that in order to deprive a person of liberty for the purpose of "treatment," due process requires that such treatment be supplied.[152] The consensus of these courts was that treatment is the process of improving the individual's ability to function in society. While constitutional standards do not call for actual improvement, *Wyatt v. Aderholt*[153] found "a constitutional right to such individual treatment as will help each of them to be cured or to improve his or her mental condition."[154]

The cases discussed above concern themselves with the protection of the individual either at the pre-hearing or at the confinement and treatment stage.[155] Perhaps the greatest protection can be afforded an individual at the hearing itself by requiring that a certain standard of proof be met. The next section will discuss possible degrees of proof, and what standard is currently required in California.

C. Standard of Proof

The essence of due process is the right to a fair hearing.[156] Traditionally, a fair hearing has included not only the right to counsel, a neutral magistrate and other rights listed above,[157] but also the requirement that the party with the burden of proof meet a specified standard. California Evidence Code section 190 defines "proof" as the establishment by evidence of a requisite degree of belief,[158] the amount of doubt the trier of fact may have and still find for the plaintiff.[159] This degree of belief is ordinarily divided into three levels: a preponderance of evidence (where the degree of belief on one side of the dispute merely

149. 373 F.2d 451 (D.C. Cir. 1967).

150. 373 F. Supp. 487 (D. Minn. 1974).

151. 364 F. Supp. 686 (N.D. Ill. 1973).

152. The Court in *Stachulak* reasoned that there is a constitutional right to treatment "because confining a person on the altruistic theory that he must receive treatment and then failing to provide it violates due process." *Id.* at 687.

153. 503 F.2d 1305 (5th Cir. 1974).

154. *Id.* at 1312.

155. *Welsh* dealt with patients involuntarily committed to state hospitals due to retardation. Petitioner in *Stachulak* was committed under the Illinois Sexually Dangerous Persons Act and was confined in the psychiatric division of the Illinois State Penitentiary. Appellant in *Rouse* was committed for four years upon a finding of guilty by reason of insanity. The charge was carrying a dangerous weapon, a misdemeanor with a maximum one year sentence.

156. *In re* Murchison, 349 U.S. 133, 136 (1955).

157. *See* notes 130-138 and accompanying text *supra*.

158. CAL. EVID. CODE § 190 (West 1966) states that, "Proof is the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the trier of fact or the court."

159. Dworkin, *Easy Cases, Bad Law, and Burdens of Proof*, 25 VAND. L. REV. 1151, 1160 (1972).

outweighs the degree of belief on the other), clear and convincing evidence (more belief than that required for a preponderance of evidence), and proof beyond a reasonable doubt (the highest or most strict standard of proof).[160]

1. Preponderance of the Evidence

California Evidence Code section 115 provides that, except where otherwise specified, the appropriate standard of proof is proof by a preponderance of the evidence.[161] A preponderance of the evidence is traditionally required in civil cases such as fraud,[162] negligence,[163] nuisance[164] and cases involving child custody and visitation matters.[165] This standard requires only slightly more evidence on one side than on the other. In the case of a criminal who is acquitted by reason of insanity, courts have held that a preponderance of the evidence is the standard necessary to commit the criminal to a mental health care facility.[166]

160. Legal scholars may deny that the burdens imposed by the various standards of proof correspond to their reliability. However, a growing number of commentators have turned to a statistical method of describing standards of proof for lack of a more clear and efficient method.

Dr. Alan Stone estimates that a preponderance of the evidence requires the trier of fact to be 51% sure of the defendant's guilt; clear and convincing evidence requires a level of 75%, and beyond a reasonable doubt requires a level of 90%. Statistically speaking, the higher the required percentage, the lower the probability of error to the detriment of the defendant. The problem arises, however, not in the clear cases but in those cases which fall near the specified percentages. For a thorough discussion of this statistical method of estimating reliability, *see* A. STONE, MENTAL HEALTH AND THE LAW: A SYSTEM IN TRANSITION (1975).

161. CAL. EVID. CODE § 115 (West 1966), provides as follows:

" 'Burden of Proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."

162. Ratay v. Lincoln Nat'l Ins. Co., 405 F.2d 286 (3rd Cir. 1968).

163. Southern Ariz. York Refrig. Co. v. Bush Mfg. Co., 361 F.2d 336 (9th Cir. 1966).

164. People v. Frangadakis, 184 Cal. App. 2d 540, 7 Cal. Rptr. 776 (1960).

165. Stanley v. Illinois, 405 U.S. 645 (1972).

166. United States v. Brown, 478 F.2d 606 (D.C. Cir. 1973). However, in one "defective delinquent" case, Justice Douglas dissented from the majority's dismissal of certiorari with these words: "Petitioners have thus been taken from their families and deprived of their constitutionally protected liberty under the same standard of proof applicable to run-of-the-mill automobile negligence actions." Murel v. Baltimore City Criminal Court, 407 U.S. 355, 359 (1972) (Douglas, J. dissenting).

2. Clear and Convincing Evidence

Where "various interests of society are pitted against restrictions on the liberty of the individual,"[167] the court will require more than a balance tipped slightly one way or the other. For questions of oral agreements to make a will,[168] proof of non-intercourse to overcome the rebuttable presumption of legitimacy of a child,[169] and in disbarment proceedings,[170] proof by clear and convincing evidence is required. This standard is also called "clear, strong and convincing,"[171] or "so clear as to leave no substantial doubt,"[172] serving to make this standard less distinguishable from the others.

In *State ex rel Hawks v. Lazaro*,[173] the Supreme Court of Appeals of West Virginia held that the "current state of the medical arts" did not lend itself to requiring the exclusion of "every reasonable doubt."[174] While holding that "clear, cogent and convincing evidence" was appropriate for civil commitment, the court indicated that the highest standard of proof was desirable.[175] In *Lynch v. Baxley*,[176] an Alabama federal district court appeared to require "clear, unequivocal and convincing evidence" for civil commitment proceedings, but also said that the necessity for commitment must be "proved by evidence having the highest degree of certitude reasonably attainable in view of the nature of the matter at issue. . . ."[177]

3. Proof Beyond a Reasonable Doubt

In criminal cases the prosecution's burden is to establish the defendant's guilt by "proof beyond a reasonable doubt."[178] This standard

167. *In re* Ballay, 482 F.2d 648, 662 (D.C. Cir. 1973).
168. Lynch v. Lichtenthaler, 85 Cal. App. 2d 437, 193 P.2d 77 (1948).
169. Estate of Walker, 180 Cal. 478, 181 P. 792 (1919).
170. *In re* Palmer, 72 N.M. 305, 383 P.2d 264 (1963).
171. *Id.* at 308, 383 P.2d at 267.
172. *In re* Jost, 117 Cal. App. 2d 379, 256 P.2d 71 (1953).
173. 202 S.E.2d 109 (W. Va. 1974).
174. *Id.* at 126.
175. *Id.* at 126-27.
176. 386 F. Supp. 378 (M.D. Ala. 1974).
177. *Id.* at 393.
178. Opinions in many cases would indicate that throughout the years, courts have assumed that "beyond a reasonable doubt" was a constitutional standard. *See, e.g.*, Mullaney v. Wilbur, 421 U.S. 684 (1975); Holland v. United States, 348 U.S. 121, 138 (1954); Wilson v. United States, 232 U.S. 563, 569-70 (1914); Miles v. United States, 103 U.S. 304, 312 (1881). In a criminal case, if the issue is not an element of the offense charged, the prosecution's burden is reduced from beyond a reasonable doubt to proof by a preponderance of the evidence. *See, e.g.*, People v. Cavanaugh, 44 Cal. 2d 252, 262, 282 P.2d 53, 59 (1955) (Territorial jurisdiction of the offense). The defendant using the insanity defense need only prove his "insanity" by a preponderance of the evidence. People v. Daugherty, 40 Cal. 2d 876, 901; 256 P.2d 911, 926 (1953). To establish that he was incapable of harboring the specific mental state which is an element of the crime charged, the defendant need only introduce

was reaffirmed in the recent case of *In re Winship*.[179] In that case the Supreme Court specifically held that proof beyond a reasonable doubt applied to every proceeding in which violation of a criminal law was charged or as to which criminal sanctions could be imposed.[180] In the initial adjudication in 1967, a New York Family Court judge found Samuel Winship, then twelve years old, guilty by a preponderance of the evidence of stealing $112 from a woman's purse. This act constitutes the crime of larceny if committed by an adult. The judge relied on a section of the New York Family Court Act which provides that an adjudicatory finding concerning a juvenile must be based on a preponderance of the evidence. The Appellate Division of the New York Supreme Court affirmed without an opinion.[181] The New York Court of Appeals also affirmed,[182] expressly sustaining the constitutionality of the Family Court Act section.

The Supreme Court reversed. The Court first reiterated that proof beyond a reasonable doubt is required in adult criminal cases due to the deprivation of liberty and stigma which would result from a conviction.[183] It then held that such proof is also required in juvenile proceedings where the same consequences could result as from a criminal conviction.[184] If the juvenile is convicted of committing an act which would be a crime if committed by an adult, the resulting confinement and stigma can be as severe as that arising from a criminal conviction.[185] Thus, the Court rejected the *parens patriae* argument that juvenile proceedings are designed to save, rather than punish the child.[186] The Court then affirmed its holding in *In re Gault*,[187] stating that, "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts. . . ."[188] The Court stressed that a court must look to the realities of the situation and not mere labels.[189]

The language in *Winship, Lazaro* and *Baxley* indicates that there is no definitive line which divides "clear and convincing proof" and

evidence of his "diminished capacity" sufficient to raise a reasonable doubt in the trier of fact's mind. People v. Genery, 257 Cal. App. 2d 607, 610; 65 Cal. Rptr. 235, 238 (1968).

179. 397 U.S. 358 (1970).

180. *Id.* at 364.

181. 30 A.D.2d 781,.291 N.Y.S.2d 1005 (1968).

182. 24 N.Y.2d 196, 229 N.Y.S.2d 414 (1969).

183. 397 U.S. at 361-64. While the requirement of proof beyond a reasonable doubt was assumed to be the correct standard for many years, it was first explicitly so recognized in this case. There is nothing in the Constitution which expressly mandates this standard of proof.

184. 397 U.S. at 368.

185. 397 U.S. at 374 (Harlan, J., concurring).

186. 397 U.S. at 365.

187. 387 U.S. 1 (1967). *See* notes 213-21 and accompanying text *infra*.

188. 397 U.S. 358, 365-66 (1970).

189. *Id.*

"proof beyond a reasonable doubt." However, it can be said that whereas a "preponderance of the evidence" requires only a probability of truth, "clear and convincing evidence" demands a higher degree of probability and "proof beyond a reasonable doubt" should approximate no doubt at all.

The problem of the appropriate standard of proof for civil commitment proceedings reflects the difficulties which are inherent in the relationship between law and mental health.[190] At present, only one state legislatively requires a preponderance of the evidence standard,[191] thirteen states require clear and convincing evidence,[192] and four states require proof beyond a reasonable doubt.[193] The standard of proof question was further obfuscated when, within a 30 day period in 1977, three state supreme courts reached differing decisions regarding the appropriate standard of proof. Texas adopted the less rigorous preponderance of the evidence standard,[194] Illinois held for a showing of clear and convincing evidence,[195] and New Hampshire adopted proof beyond a reasonable doubt.[196]

In the Texas case of *State v. Turner*,[197] respondent Dan Turner was committed to a state hospital for an indefinite period of time. The trial court instructed the jury that the state's burden was to prove mental illness by clear and convincing evidence. The court of civil appeals reversed and held that the proper standard of proof was proof beyond a reasonable doubt.[198] The Texas Supreme Court, after discussing the rationale behind civil commitment and listing the cases which had adopted each of the possible standards of proof, held that a preponderance of the evidence is the correct standard to apply.

The Texas Supreme Court chose the preponderance of the evi-

190. Share, *The Standard of Proof in Involuntary Civil Commitment Proceedings*, 1977 DET. C. L. REV. 209, 213 (1977).

191. This state is: Mississippi—MISS. CODE ANN. § 41-21-75 (Supp. 1978).

192. These states are: Arizona—ARIZ. REV. STAT. ANN. §§ 36-532, -540 (1974); Colorado—COLO. REV. STAT. § 27-10-111 (Supp. 1978); Delaware—DEL. CODE ANN. tit. 16, § 5010(2) (Supp. 1976); Iowa—IOWA CODE ANN. § 225.11 (West Supp. 1978); Maine—ME. REV. STAT. tit. 34, § 2334 (1978); Michigan—MICH. COMP. LAWS ANN. § 330.1465 (1975); Minnesota—MINN. STAT. ANN. § 253A.07(17) (West Supp. 1978); Pennsylvania—PA. STAT. ANN. tit. 50, § 7304(f) (Purdon Supp. 1979); South Carolina—S.C. CODE § 44-17-580 (1977); South Dakota—S.D. COMPILED LAWS ANN. § 27A-9-18 (1976); Tennessee—TENN. CODE ANN. § 33-604(d) (Supp. 1977); Washington—WASH. REV. CODE ANN. § 71.05.310 (1975); and West Virginia—W. VA. CODE § 27-5-4(j)(3) (Supp. 1979).

193. These states are: Montana—MONT. REV. CODES ANN. § 38-1305(7) (Supp. 1977); Oregon—ORE. REV. STAT. § 426.130 (Repl. Vol. 75-75); Rhode Island—R.I. GEN. LAWS § 40.1-5-8(10) (1977); and Utah—UTAH CODE ANN. § 64-7-36(10) (Supp. 1979).

194. State v. Turner, 556 S.W.2d 563 (Tex. 1977).

195. *In re* Stephenson, 67 Ill.2d 544, 367 N.E.2d 1273 (1977).

196. Proctor v. Butler, 117 N.H. 927, 380 A.2d 673 (1977).

197. 556 S.W.2d 563 (Tex. 1977).

198. Turner v. State, 543 S.W.2d 453 (Tex. Civ. App. 1976).

dence standard for seemingly opposing reasons. The involuntarily committed person, according to the *Turner* majority, is entitled to treatment, periodic review and subsequent release when he is "cured."[199] Thus, the mental patient's loss of liberty is less severe than that suffered by an incarcerated criminal. The court also noted that requiring the highest standard of proof, as in criminal cases, would severely impair the state's *parens patriae* function.[200] But the majority went on to state that psychiatry is an inexact science and should not be held to a burden of proof which it could not bear.[201] Thus, while saying on the one hand that psychiatric treatment makes incarceration in a mental health facility less severe than criminal incarceration, the court held, on the other hand, that psychiatry is inexact and should not be expected to conform to a higher burden of proof.

In *In re Stephenson*,[202] a majority of the Illinois Supreme Court held that the appellant, who had been found unfit to stand trial on criminal charges, could be committed to a state mental health facility on the basis of clear and convincing evidence. The opinion was almost entirely a discussion of the competing interests of the mentally ill person and society. As in *Turner*, the court concluded that psychiatry is as yet incapable of the precision required to establish proof beyond a reasonable doubt, thus requiring a lesser standard.[203] However, the Illinois Court held that a preponderance of the evidence is an inappropriate standard because it may encourage erroneous commitment. In choosing the middle standard, the court focused on four factors: (1) erroneous commitment is less harmful than erroneous criminal incarceration;[204] (2) Illinois law provides for speedy release when treatment is no longer needed and requires periodic review of detention;[205] (3) a higher standard of proof would place an impossible burden on the state;[206] and (4) commitment is for the patient's own welfare.[207] The court cited opinions from other jurisdictions which had also adopted clear and convincing evidence as the appropriate standard of proof in support of its result. Ultimately, the court concluded that the question of requiring clear and convincing evidence rather than proof beyond a reasonable doubt was best left for resolution by the legislature.[208]

199. 556 S.W.2d at 566.
200. *Id.*
201. *Id.*
202. 67 Ill. 2d 544, 367 N.E.2d 1273 (1977).
203. *Id.* at 555-56, 367 N.E.2d at 1277-78.
204. *Id.*
205. *Id.*
206. *Id.* at 556-57, 367 N.E.2d at 1278.
207. *Id.*
208. *Id.* at 559, 367 N.E.2d at 1279.

The New Hampshire Supreme Court, in *Proctor v. Butler*,[209] found the Supreme Court's rationale in the *Winship* case persuasive. The court addressed and rejected each of the arguments in favor of a lesser standard of proof advanced in *Turner* and *Stephenson*.[210] The inexactitude of the law, the court concluded, only reinforces the need for a "standard of proof that will ensure the utmost care in reaching an involuntary commitment decision."[211] Relying, as had the Supreme Court in *Winship*, on the loss of liberty and the stigma, which it compared to that resulting from adult criminal incarceration, the *Proctor* court held that due process requires proof beyond a reasonable doubt.[212] The uncertain state of the law and of society's knowledge concerning mental illness is apparent from the foregoing analysis of these three cases. While these state courts all examined essentially the same factors, they were all able to reach different results due to their differing interpretations of the import of the relevant factors.

This pattern of differing interpretations is reflected throughout the United States. *In re Gault*,[213] decided a few years prior to the *Winship* case, dealt with a juvenile delinquency proceeding. In that case, Gerald Gault, a fifteen year old, was ordered committed to the State Industrial School until majority, as a penalty for lewd telephone calls he allegedly made. Under Arizona law, no appeals are permitted in juvenile cases. A petition for a writ of habeas corpus was filed, but the Arizona Supreme Court dismissed it, holding that procedural due process requirements had been met.[214] The United States Supreme Court, after a lengthy discussion of the juvenile delinquency and *parens patriae* concepts, first held that adequate notice sufficient to meet constitutional standards was not given.[215] The Court refused to accept the state court's rationale that the procedure was intended to shield "the child from the public stigma of knowledge of his having been taken into custody and scheduled for hearing. . . ."[216] The Court continued by holding that Gault was denied the right to counsel, the right of confrontation, the privilege against self-incrimination and the right of cross-examination.[217] Thus, the Court held that juveniles facing civil commitment must be afforded all the rights available in criminal prosecutions.

209. 117 N.H. 927, 380 A.2d 673 (1977).
210. *Id.* at 933-34, 380 A.2d at 676-77.
211. *Id.* at 934, 380 A.2d at 677.
212. *Id.* at 932-33, 380 A.2d at 677-78.
213. 387 U.S. 1 (1967). *See also* Note, *Civil Commitment in Tennessee—What Process is Due?* 8 MEM. ST. U.L. REV. 135 (1977).
214. 387 U.S. at 4.
215. *Id.* at 33-34.
216. *Id.* at 33.
217. *Id.* at 34-56.

As in *Roulet*, a holding against the petitioner would not have mandated civil commitment: the holding with respect to Gault related only to the adjudicatory process which would follow. The Court said in essence that the realities of the adjudication must be examined; the fact that a juvenile is committed to an "industrial school" instead of a jail is of no constitutional consequence, as the juvenile may nevertheless be deprived of liberty for years.[218] As the Court stated, "a proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."[219] The court thus reasoned that due process in the criminal sense is required and rejected what it called the " 'civil' label-of-convenience. . . Commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.' "[220] The key element entitling a person to the protection of the due process clause is not the nature of the inquiry but rather, the nature of the deprivation which that inquiry might trigger.[221]

Although *Gault* dealt with juvenile rights, a United States Court of Appeals specifically rejected the preponderance of evidence standard for civil commitment proceedings in *Lessard v. Schmidt*.[222] The court in that case required proof beyond a reasonable doubt.[223] The *Lessard* court utilized a comparative technique to determine the appropriate standard of proof. Referring to the Supreme Court's decisions in *Gault* and *Winship*, the court stated that, "the argument for a stringent standard of proof is more compelling in the case of a civil commitment [than in a juvenile hearing] in which an individual will be deprived of basic civil rights and be certainly stigmatized by the lack of confidentiality of the adjudication."[224] The court also referred to *Woodby v. Immigration and Naturalization Service*,[225] a case involving a deportation proceeding. Reasoning that individuals should not be "banished from

218. *Id.* at 27.

219. *Id.* at 36.

220. *Id.* at 50.

221. Share, *The Standard of Proof in Involuntary Civil Commitment Proceedings*, 1977 DET. C. L. REV. 209, 243 (1977).

222. 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974).

223. 349 F. Supp. at 1094-95. *Accord*, United States ex rel. Stachulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975); In re Ballay, 482 F.2d 648, 650 (D.C. Cir. 1973).

224. 349 F. Supp. at 1095. An individual committed to a mental institution loses numerous civil rights. These include: 1) restrictions on making contracts and limitations on the right to sue and be sued (WIS. STAT. ANN. §§ 319.215, 260.22, 262.06(2)(b) (West Supp. 1972), 296.02, 893.33); 2) restrictions on professional licensing (WIS. STAT. ANN. § 441.07 (West Supp. 1972) (registered and practical nurses), § 447.07 (7) (West Supp. 1972) dentists and dental hygienists), § 256,286 (attorneys); 3) restrictions on the right to vote (WIS. STAT. ANN. §§ 6.03(1), 12.59 (West)). These are very similar to the deprivations which accompany a finding of "grave disability" in California. *See* notes 93-96 and accompanying text *supra*.

225. 385 U.S. 276 (1966).

this country upon no higher degree of proof than applies in a negligence case,"[226] the Supreme Court in *Woodby* held that the appropriate standard of proof was clear and convincing evidence. The *Lessard* court held that the deprivation of freedom involved in civil commitment is greater than that involved in deportation because a deported person may still keep his family with him, make contracts, vote and travel unfettered outside of the United States.[227] Finding that a greater deprivation resulted from civil commitment, the *Lessard* court required the higher standard of proof beyond a reasonable doubt.

One of the first attempts by the California Supreme Court to follow the path which *Gault* and *Winship* had paved was *People v. Burnick*,[228] decided in 1975. Relying heavily on the recent United States Supreme Court cases of *Specht v. Patterson*,[229] *Winship*,[230] and *Gault*,[231] the California Supreme Court held that proof beyond a reasonable doubt and a unanimous jury verdict are required for commitment under the Mentally Disordered Sexual Offender (MDSO) statutes of the LPS Act.[232] The California court's reliance on *Gault* and *Winship* is evidence that the personal deprivation of liberty experienced by an MDSO is far greater than that experienced by a juvenile delinquent.[233] The stigma and loss of good name experienced is also greater than that which is typically attached to a juvenile offender and is in fact more like that of a convicted criminal.[234] For these reasons "the standard of proof in mentally disordered sex offender proceedings must be as high as it is in juvenile delinquency proceedings—to wit, proof beyond a reasonable doubt. Anything less will fall short of providing the level of due process required by the California and federal Constitutions."[235] The dissent in *Burnick* differentiated the case at bar from

226. *Id.* at 285.

227. 349 F. Supp. at 1094.

228. 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975).

229. 386 U.S. 605 (1967). Specht concerned the Colorado Sex Offenders Act, which was essentially the same in outline and purpose as the legislation challenged in Burnick.

230. 397 U.S. 358 (1970). *See* notes 179-86 and accompanying text *supra*.

231. 387 U.S. 1 (1967). *See* notes 213-21 and accompanying text *supra*.

232. CAL. WELF. & INST. CODE §§ 6300 (West 1972). *See* 14 Cal. 3d at 320, 535 P.2d at 364, 21 Cal. Rptr. at 500.

233. *Id* at 320-21, 535 P.2d at 361, 121 Cal. Rptr. at 497. "Not only is the mentally disordered sex offender's loss of freedom more severe than that of the juvenile, it is also of a much longer duration. Any confinement of the juvenile is ordinarily limited by law to a few years at most. . . . A person adjudicated a [MDSO] however, is committed for an indeterminate period. (CAL. WELF. INST. CODE, §§ 6316, 6326)."

234. 14 Cal. 3d at 321, 535 P.2d at 362, 121 Cal. Rptr. at 498.

235. *Id.* at 322, 535 P.2d at 362, 121 Cal. Rptr. at 498. *Accord*, Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *cert. granted*, 419 U.S. 894 (1974) (constitutional right to treatment); Sarzen v. Gaughan, 489 F.2d 1076 (1st Cir. 1973) (sexual psycopath law); In re Ballay, 482 F.2d 648 (D.C. Cir. 1973); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated on other grounds sub nom*, Schmidt v. Lessard, 414 U.S. 473 (1974) (proof beyond a

Winship and *Specht* on the grounds that the facts were sufficiently different so as not to be controlling. Justice Burke argued that the proceedings here were largely predictive in nature.[236] The argument was also made that MDSO proceedings are essentially civil in nature and therefore required only clear and convincing evidence.[237]

People v. Feagley,[238] another California Supreme Court decision handed down in 1975, also addressed the issues of standard of proof and required jury verdict in MDSO proceedings.[239] Unlike Burnick, however, Feagley was adjudged to be "unable to benefit from treatment."[240] After a lengthy discussion of due process and equal protection under the California and federal Constitutions,[241] the majority held that a unanimous jury verdict and proof beyond a reasonable doubt are required.[242] Justice Burke's dissent stressed three main points. First, as he pointed out in his *Burnick* dissent, the nature of the proceeding is "civil" and the purpose of confinement is treatment, not punishment.[243] Second, the majority erred, according to Justice Burke, in holding the confinement unconstitutional for lack of treatment.[244] Third, Burke felt the unanimous jury verdict is not mandated by the equal protection guarantee.[245] He concluded with the thought that because Feagley had previously been convicted of a criminal offense connected with this MDSO proceeding, he fit into a "special class" which justified a ¾ jury verdict.[246]

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reasonable doubt held to be required in involuntary civil commitment of persons found to be dangerously mentally ill).

236. 14 Cal. 3d at 333, 535 P.2d at 370, 121 Cal. Rptr. at 506 (Burke, J., dissenting).

237. *Id.* at 335, 535 P.2d at 371, 121 Cal. Rptr. at 507 (Burke, J., dissenting).

238. 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975). This was a 4-3 decision with Burke, J., writing the dissent in which McComb and Clark, JJ., concurred.

239. Feagley, unlike Burnick, was not committed under the LPS Act but rather under California's Mentally Disordered Sex Offenders Law. CAL. WELF. & INST. CODE §§ 6300-6350 (West 1972).

240. 14 Cal. 3d at 344, 535 P.2d at 376, 121 Cal. Rptr. at 512. The California statutory scheme divides MDSO's into two categories: those who can and those who cannot benefit from treatment in a state hospital (CAL. WELF. & INST. CODE § 6316). The latter are confined not in a state hospital but in a state institution or institutional unit (CAL. WELF. & INST. CODE § 6326).

241. CAL. CONST. art. I, § 7(a); U.S. CONST. Amend. XIV. *See* 14 Cal. 3d at 349-52, 535 P.2d at 380-82, 121 Cal. Rptr. at 515-17.

242. 14 Cal. 3d at 352, 535 P.2d at 382, 121 Cal. Rptr. at 517.

243. *Id.* at 376, 535 P.2d at 399, 121 Cal. Rptr. at 535 (Burke, J., dissenting).

244. *Id.* at 380-81, 535 P.2d at 401-02, 121 Cal. Rptr. at 537-38 (Burke, J., dissenting).

245. *Id.* at 382-83, 535 P.2d at 402-03, 121 Cal. Rptr. at 538-39 (Burke, J., dissenting).

246. *Id.* at 383, 535 P.2d at 403, 121 Cal. Rptr. at 539. The majority had relied on Baxstom v. Herold, 383 U.S. 107 (1966), and Humphrey v. Cady, 405 U.S. 504 (1972), which respectively dealt with a person civilly committed at the expiration of a prison sentence without the jury review available to others civilly committed, and the Wisconsin Sex Crimes Act, which allowed civil commitment for a period equal to the maximum term of the crime committed if the crime was sexually motivated.

The 1977 case of *People v. Thomas*[247] is one of the last cases in California, prior to *Roulet*, to extend the "beyond a reasonable doubt" standard of proof and the requirement of a unanimous jury verdict to involuntary commitment proceedings. The court, after careful consideration of its decisions in *Burnick* and *Feagley*, applied its rationale of requiring the above safeguards to cases involving the involuntary commitment of alleged narcotics addicts.[248] The court went through a *Lessard*-type comparison[249] to show that the deprivation and the stigma attached to a person who is a narcotics addict is far worse than that experienced by a juvenile delinquent.[250] In this decision, unlike the previous decisions in *Burnick* and *Feagley*, the majority consisted of six members of the court,[251] with Justice Clark dissenting.[252]

D. The Hearing

Section 5350 of the California Welfare and Institutions Code guarantees an individual the right to a trial on the issue of "grave disability." However, nowhere in that statute or in the Probate Code did the legislature set out the boundaries and requirements for the "trial." In practice, the proceeding is a hearing and the courts have been left to create their own due process standards.

Conservatorship and other civil commitment hearings are ordinarily very brief and informal in California and throughout the country. The State Bar of California's Commission on Law and Mental Health Problems' Committee on California Mental Health Services Acts reports that such hearings are often *pro forma* and last from 2 to 5 minutes.[253] A nationwide study by the National Center for Law and the Handicapped found that: "Generally, the judge will ask a few questions concerning the proposed ward and will receive reassuring answers from his attorney or other interested persons. The usual result is that a guardian is appointed without a careful evaluation being made

247. 19 Cal. 3d 630, 566 P.2d 228, 139 Cal. Rptr. 594 (1977).

248. CAL. WELF. & INST. CODE § 3000-3300 (West 1972).

249. *See* notes 222-27 and accompanying text *supra*. The *Lessard* court was one of the first to use this technique in this area.

250. 19 Cal. 3d at 640-41, 566 P.2d at 234, 139 Cal. Rptr. at 600.

251. The *Burnick* and *Feagley* courts were split 4-3.

252. Justice Clark dissented for the same reasons expressed by Justice Burke in *Burnick* and *Feagley*. *See* notes 236-37 and accompanying text *supra* and notes 243-46 and accompanying text *supra*.

253. Committee Report, supra note 29, at 14, n.1. An extreme example was reported in MARC and Thayer v. Wayne County Probate Judge, No. 77-535 (Mich. Ct. App. Nov. 9, 1977). In this case, the judge was convicted of holding guardianship hearings for over 100 people in 75 minutes. *See* The National Center for Law and the Handicapped, *Guardianship of the Mentally Impaired:* A Critical Analysis, 25 (1977) (unpublished paper).

of the ward's abilities to care for himself or his needs."[254]

Frequently the potential conservatee or detainee is not present at the hearing.[255] Often he has not been informed of his right to defend himself in court and the right to legal assistance.[256] Adding to these difficulties is the fact that it is not always easy to communicate with the outside world from inside a mental health facility. If a person is drugged during initial detention, he may lack the presence of mind to seek legal aid or contact friends.[257] Once he obtains legal help, he may be faced with insufficient time to contact witnesses or prepare his defense.[258]

At the hearing, the determinative question is not whether the person is suffering from mental illness or is in need of psychiatric care, but instead whether that person is mentally ill to such an extent that he is incapable of caring for himself. This raises the question of the appropriate level of proof necessary in a civil commitment hearing. Doctor Seymour Pollack of the University of Southern California wrote that proof of "mental disability," which he defines as "the realtionship of mental impairment to the patient's social role and the impact of the mentally impaired person upon society,"[259] should be required for commitment. He went on to state that it should be supported by evidence of four elements: 1) the mentally ill patient's need for hospitalization and/or treatment as manifested by his clinical condition; 2) irrational action (rejection of aid); 3) such rejection resulting from his mental impairment; and 4) consequent dangerousness to himself or others by virtue of his mental impairment.[260] Thus, Dr. Pollack rejects involuntary civil commitment on the basis of grave disability and calls for evidence in the form of an actual clinical condition which will result in harm. Even this standard, though sufficiently flexible for the mental health professional, seems vague and overbroad to the legal mind. Dr. Pollack's position, however, shared by many mental health professionals, calls for more evidence than is presently required.[261]

254. The National Center for Law and the Handicapped, *Guardianship of the Mentally Impaired: A Critical Analysis*, 25 (1977) (unpublished paper).

255. Wexler & Scoville, *Special Project: The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 39 (1971) [hereinafter cited as Wexler & Scoville].

256. *Id.* at 51-55 and 69-76.

257. *Id.* at 33-34. *See also* Litwack, *The Role of Counsel in Civil Commitment Proceedings: Emerging Problems*, 62 CAL. L. REV. 816, 830 (1974) [hereinafter cited as Litwack].

258. Wexler & Scoville *supra* note 255, at 54. Litwack, *supra* note 257 at 821-22.

259. S. Pollack, Commitment of the Mentally Ill, 9 (unpublished paper prepared for the 1978 Regional Institutes in Law and Mental Health USC Schools of Medicine and Public Administration) (1978).

260. *Id.* at 8-9.

261. Presumably, if an actual clinical condition were required, testimony would have to be elicited concerning the technical diagnosis of the medical condition, the case history of

The subject of the hearing also faces frequently insurmountable problems in defending himself. In court, the allegedly mentally ill person may not be regarded as a reliable witness for himself.[262] Everything he does may be seen as a manifestation or result of his illness.[263] Ultimately, though the law requires that he be given the presumption of mental soundness, expert testimony will weigh heavily against him.[264] Even under Dr. Pollack's heightened evidentiary standards, unless objective medical evidence rather than speculation and medical opinion is required, only four findings need be made to ensure long-term mental health care detention.

The reason most often given for the informal nature of civil commitment proceedings is that a formal trial tends to upset and unnerve the mentally ill person.[265] Critics of the present system contend that the adversary process deters families of the mentally ill from seeking care for their loved ones because of the trauma involved in a "trial."[266] They also argue that requiring the same standards for the mentally ill person as for the criminal is inappropriate because the patient then feels threatened and may be unwilling to accept treatment.[267] Retaining the civil hearing, they claim, prevents the trauma but fulfills due process requirements. The recent discovery of many people improperly committed, however, may lead one to believe that sufficient due process safeguards are lacking.[268]

Another problem fundamental to the nature of the hearing—that of expert testimony in civil commitment proceedings—is a complex

the individual in relation to the condition and corroborated evidence as to whether the individual has displayed symptoms of his diagnosed condition. By limiting the availability of the term "grave disability," the testimony of the expert witness would require more than a simple opinion on the issue.

262. Letter from Albert H. Urmer, President, ENKI Research Institute to Susan Mahony, Staff Attorney, State Bar of California, Committee on Law and Mental Health Problems (August 1, 1978) [hereinafter cited as Letter].

263. *Id.*

264. *Id.* Dr. Urmer wrote: "While apparently the pre LPS committment [sic] process appeared to be a judicial event, in fact ENKI Research showed that the judges rarely, if ever, reversed the recommendation of the psychiatrist." He noted later that this policy has not been affected by the enactment of the LPS Act.

265. For a full discussion of this argument, *see* Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CAL. L. REV. 840, 883-85 (1974).

266. *Id.*

267. *Id.*

268. Crane, Zonana & Wizner, *Implications of the Donaldson Decision: A Model for Periodic Review of Committed Patients*, 28 HOSP. & COMMUN. PSYCH. 827 (1977). This article reports that 53% of the patients surveyed were inappropriately confined on involuntary status. *See also, After 55 Years, He's Finally Free*, Albuquerque Tribune, Aug. 3, 1977, at A-1, which relates the story of a man who was committed to an institution as mentally retarded in 1920, and was discovered to have an average Intelligence Quotient after 55 years of wrongful confinement.

one.[269] The quality of expert testimony in such proceedings is being questioned by mental health as well as legal professionals.[270] With few exceptions, the mental health professional serving as an expert witness has had no special education or training in the field of forensic psychiatry/psychology.[271] In recognition of this problem, Chief Justice Bird has noted that:

> 'Mental illness' is generally acknowledged to be a vague and uncertain concept. Categories of mental diseases are notoriously unclear, often overlapping, and regularly changing. Not surprisingly, there is little consistency in psychiatric diagnoses. There is also a well-documented tendency of psychiatric personnel to 'over diagnose' the existence of mental illness, sometimes based on the application of inappropriate criteria such as a psychia-

269. For a full discussion of this topic, *see* Cairns, *People v. Burnick: The California Supreme Court Extends the Standard of Proof Beyond a Reasonable Doubt to Civil MDSO Commitment Proceedings*, 10 BEVERLY HILLS B.A.J. 83, 90-95 (1976) (author aruges that concept of "dangerousness" is nebulous and difficult to define); Dershowitz, *The Law of Dangerousness: Some Fictions about Predictions*, 23 JOURNAL OF LEGAL EDUC. 24 (1970) (general discussion on predictions of dangerousness and their unreliability); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439 (1974); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974) (authors conclude that psychiatrists tend to overpredict and testimony tends to be unreliable); Shah, *Some Interactions of Law and Mental Health in the Handling of Social Deviance*, 23 CATH. U.L. REV. 674 (1974) (author concludes that reliance on experts and expert testimony in the courtroom is too heavy).

270. The State Bar of California's Commission on Law and Mental Health Report indicates that perhaps the issues of "competence to make mental health care decisions" and the "right to refuse treatment" might better be left to legal professionals. Alternative answers may be that: (1) expert testimony should be allowed but discounted as compared to the individual's testimony as to his actions and desires for mental health care; (2) forensic psychiatry should be developed as a science and mental health professionals who testify in civil commitment hearings should be required to be "certified" as competent in that science; and (3) Assembly Bill 2895 (March 16, 1978) introduced by Assemblyman Lanterman would require special medical school training for all psychiatrists and psychologists. Each department would have to submit a report to the Legislature yearly concerning the implementation of forensic training programs.

271. Letter from Seymour Pollack to Susan Mahony, Staff Attorney, Committee on Mental Health Law (August 4, 1977). A portion of the letter from Dr. Pollack reads:
"Generally Accepted Givens:
(1) That the input of forensic sciences, including forensic psychiatry, to the field of litigation will probably continue to increase substantially in the foreseeable future.
(2) That the expertise of the mental health professional, as the psychiatric expert witness in issues of litigation, in contrast to the evidentiary input from other forensic sciences, especially that visible in publicized criminal-legal cases, is less than desirable.
(3) That the credibility of the psychiatric expert witness is generally quite poor.
(4) That, with very few exceptions, the mental health professional serving as a psychiatric expert witness enters into the litigation arena with no special education or training in this field. This circumstance has served to promote the poor quality of the psychiatric expert witness, especially in light of the increasing complexity of many mental health/law issues (e.g., the criminal-legal matter of diminished capacity).

trist's personal biases regarding a patient's age, race, sex or social class.[272] (footnotes omitted).

In addition to the uncertainty involved in psychiatric diagnosis, a recent development may cause mental health professionals to over diagnose their patients. In the wake of the California Supreme Court's 1974 decision in *Tarasoff v. Board of Regents*,[273] mental health professionals have reason to fear civil liability for the actions of their patients.[274] The social outrage engendered by an instance of wrongful mental health detention can only be equaled by the social outrage at the disasterous consequences of an under-diagnosis which led to the death of an innocent person at the hands of a mentally ill person not recognized as needing help.[275] It has been suggested that the best way of avoiding liability for the fate of the patient (or those he may harm) is to keep him clutched securely to the mental health care bosom.[276] It is the lack of expertise, the personal biases, the fear of civil liability and the "better safe than sorry"[277] attitude, compounded by the mental health professional's ingrained desire to help,[278] that leads to an increasing amount of "expert testimony" in civil commitment proceedings without a concommitant increase in the accuracy of that testimony.

The foregoing analysis demonstrates that substantial individual freedoms, especially the right to liberty, are implicated by the civil commitment process. Courts in various jurisdictions have split on the question of the appropriate standard of proof for civil commitment proceedings. There are no established standards governing the nature of such proceedings, which are frequently informal, *ex parte*, and which rely heavily on expert testimony. It was against this background

272. Conservatorship of Roulet, 20 Cal. 3d 653, 672, 574 P.2d 1245, 1259, 143 Cal. Rptr. 893, 907 (Bird, C.J. dissenting).

273. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1974).

274. That case held that the psychiatrist had the duty to warn Ms. Tarasoff that one of his patients had expressed the intention of killing her. Failure to warn, the court held, left the doctor civilly liable for his patient's actions.

275. Committee Report, *supra* note 29, at 9.

276. *Id.*

277. *Id.*

278. This aspect of mental health care has been blamed for much of the overdiagnosis of grave disability. A primary school teacher is trained to believe that everyone can benefit from education and that everyone can learn something more. This is the motivation behind the teacher's forcing education upon children whether or not they want to learn. Similarly, it might be said that mental health professionals believe that no one is 100% mentally and emotionally healthy and that everyone can benefit from mental health care. This altruistic attitude is the catalyst for mental health care for large numbers of people who may or may not want such care. *See* Rosenhan, *On Being Sane in Insane Places*, 179 SCIENCE 250 (1973) (reprinted in 13 SANTA CLARA LAW. 379 (1973)); Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CAL. L. REV. 840, 865 (1974).

that the California Supreme Court was called upon to decide what process is due an individual facing civil commitment.

III. Conservatorship of *Roulet*

In 1974, after a hearing on the question of petitioner's grave disability, the Public Guardian of Santa Barbara County was named conservator of the person and estate of Mabel Roulet. The Public Guardian was awarded general conservatorship powers,[279] plus the authority to have Mrs. Roulet confined in a state hospital if the need arose.[280] Shortly thereafter Mrs. Roulet was confined in Camarillo State Hospital by the Public Guardian.

The conservator petitioned the court to reestablish the conservatorship for an additional year in 1975[281] pursuant to his opinion that Mrs. Roulet was still gravely disabled. At this hearing Mrs. Roulet requested that the jury be instructed on two matters: that reestablishing the conservatorship required a unanimous vote by the jury, and that the evidentiary standard of proof beyond a reasonable doubt was also required. The trial court refused to give these instructions deeming them contrary to the LPS Act standards. Instead, the jury was instructed that a ¾ vote and proof by a preponderance of the evidence were sufficient to reestablish the conservatorship. The California Court of Appeals reversed, relying primarily on *Burnick* and *Winship*.[282] It held that, due to both the stigma attached to a person who has been adjudged gravely disabled and the risk of erroneous incarceration, proof beyond a reasonable doubt and a unanimous jury verdict were mandated.[283]

A. The Decisions

The California Supreme Court reversed the Court of Appeals in *Conservatorship of Roulet*.[284] Justice Clark, writing for the majority, focused on three fundamental points: (1) grave disability proceedings are basically civil in nature; (2) the potential confinement is never in a criminal setting; and (3) the stigma attached to a person adjudged to be gravely disabled is not as damaging or severe as the stigma attached to a criminal or a MDSO.[285] Based on these factors, Justice Clark con-

279. *See* note 93, *supra*.

280. As authorized by CAL. WELF. & INST. CODE § 5358 (West Supp. 1978).

281. *Id.* § 5361 (West 1972).

282. Estate of Roulet, 134 Cal. Rptr. 722 (1976).

283. *Id.*

284. 20 Cal. 3d 653, 574 P.2d 1245, 143 Cal. Rptr. 893 (1978).

285. The petitioner also argued that not requiring a unanimous jury verdict, as provided for in imminently dangerous proceedings, was a violation of the equal protection clauses of

cluded that proof by clear and convincing evidence and a ¾ jury vote are appropriate.

Chief Justice Bird, joined by Justices Tobriner and Mosk, dissented,[286] finding that the stigma attached to a person adjudged to be gravely disabled is far worse than that attached to a criminal.[287] Chief Justice Bird also disagreed with Justice Clark's analysis of the noncriminal setting, noting that conservatees are often placed in Atascadero and Patton State Hospitals, institutions acknowledged by the California Supreme Court to be similar to prisons.[288] Finally, she took issue with Justice Clark's use of the "civil label of convenience,"[289] stating that it is not "the theoretical nature of the proceedings but rather. . .the actual consequences of commitment" that are important.[290]

The California Supreme Court reversed its previous holding in *Conservatorship of Roulet* on February 6, 1979.[291] In an opinion authored by Chief Justice Bird and joined by Justices Tobriner, Mosk and Newman, the court found the logic of *Burnick* and *Feagley*[292] persuasive and held for a higher standard of proof and a unanimous jury verdict to establish a conservatorship under the LPS Act's grave disability provisions. By examining the loss of liberty and the stigma at stake in a grave disability proceeding, the court found applicable the standard of proof of beyond a reasonable doubt.[293] The court also refused to adopt the minority opinion's use of the civil label of convenience and the presumed benevolent intent of the state in these proceedings.[294] The court framed its conclusion in terms of the continuity of the law in this area: "There is no logical reason to diverge from that path [of *Burnick, Feagley* and *Thomas*] in this case. To turn back toward the repudiated criterion of the civil-criminal label serves only to exalt form over constitutional substance."[295]

1. Civil Nature of Proceedings

The majority in *Roulet I* held that "whether a proceeding is de-

the state and federal Constitutions. A discussion of the equal protection issue, however, is beyond the scope of this note.

286. 20 Cal. 3d at 663-73, 574 P.2d at 1251-60, 143 Cal. Rptr. at 899-903 (Bird, C.J., dissenting, joined by Tobriner and Mosk, JJ.).

287. *Id.* at 670, 574 P.2d at 1255, 143 Cal. Rptr. at 903.

288. *Id.* at 667, 574 P.2d at 1253, 143 Cal. Rptr. at 901.

289. *Id.* at 671, 574 P.2d at 1256, 143 Cal. Rptr. at 904.

290. *Id.*

291. 23 Cal. 3d 219, 590 P.2d 1, 152 Cal. Rptr. 425 (1979).

292. *See* notes 228-52 and accompanying text *supra.*

293. 23 Cal. 3d at 225-26, 590 P.2d at 4, 152 Cal. Rptr. at 428.

294. *Id.*

295. *Id.* at 235, 590 P.2d at 11, 152 Cal. Rptr. at 435.

nominated civil or criminal, its nature and purpose must be ascertained by examining its true character. . . . Examination of grave disability proceedings discloses that they are essentially civil in nature."[296] The fact that the majority viewed the proceeding as unconnected to criminal conviction or conduct loomed heavily behind their words. Justice Clark saw the grave disability proceedings as a necessary outgrowth of the state's *parens patriae* power.[297] Their sole purpose is to protect and care for the individual, not to protect society or seek retribution. The court seemed to draw a distinction between dangerous-to-others and MDSO proceedings, which involve an element of social protection and thus require a higher standard of proof and gravely disabled proceedings, which are solely concerned with the protection of the individual.

In her *Roulet I* dissent and again in writing for the majority in *Roulet II*, Chief Justice Bird cautioned against the majority's use of the "civil label of convenience."[298] Citing *Gault*, Chief Justice Bird stressed that, whether commitment is called criminal or civil, incarceration against one's will is a deprivation of liberty. As the court in *Winship* stated, "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards."[299] The nature of the incarceration should not be discounted merely because the purpose of commitment is rehabilitative and not punitive.

At the heart of the dispute over whether a "grave disability" commitment proceeding is "civil" or "criminal" in nature is the problem of determining exactly where to draw the line between the two. Courts have traditionally examined a given proceeding to determine whether the procedural safeguards required for criminal prosecutions should be constitutionally mandated.[300] The potential for abuse when utilizing this approach is great because, by labeling a proceeding "civil," the court can ignore procedural safeguards.[301] Proceedings for the commitment of juveniles, sexual psychopaths, the mentally ill, alcoholics

296. 20 Cal. 3d at 659, 574 P.2d at 1248, 143 Cal. Rptr. at 896-97. *See also*, Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), where the court, in citing Kent v. United States, 383 U.S. 541 (1966), raised the same argument with respect to juveniles.

297. *See* notes 24-26 and accompanying text *supra*.

298. 20 Cal. 3d at 671, 574 P.2d at 1256, 143 Cal. Rptr. at 904 (Bird, C.J., dissenting). *See* 23 Cal. 3d at 225, 590 P.2d at 4, 152 Cal. Rptr. at 428.

299. 397 U.S. 358, 365-66 (1970). The United States Supreme Court in *Winship* went on to note that a juvenile proceeding, where a guilty verdict could subject a juvenile to a deprivation of liberty for years plus the stigma of being labeled a "delinquent," was comparable in seriousness to a felony prosecution.

300. Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277, 1296 (1973) [hereinafter cited as Dershowitz].

301. This may actually encourage a state to eliminate safeguards in order to characterize the proceeding as civil. This occurred in Michigan in 1937 with regard to a sexual psychopath law. *See* People v. Frontczak, 286 Mich. 51, 281 N.W. 534 (1938).

and drug addicts have all, at one time, been labeled civil.[302] An approach such as that outlined above would have the effect of denying defendants in those proceedings many procedural safeguards to which they would otherwise be entitled.

Courts subsequently developed a number of analytical techniques to determine whether a proceeding was "civil" or "criminal." Some courts simply concluded that the proceeding was civil, without further explanation.[303] Other courts looked to whether the proceeding was based on either the criminal statutes or a civil statute.[304] Many courts focused on the legislative intent behind a statute to determine whether the purpose was to regulate or to punish.[305] Still other courts simply compared the proceeding with ones that were "clearly" civil or criminal to determine the classification of the one in question.[306] The flaw in this last technique was that one mislabeled case could easily affect countless others.

In recent years, courts have begun to turn away from this labeling technique by looking to the actual procedures and effects of a trial, as well as the "nature" of the proceeding. Both the majority and dissenting opinions in *Roulet I* recognized that the nature of the proceedings and the possible consequences resulting therefrom must be evaluated.[307] The majority's evaluation found the potential deprivation of liberty and resultant stigma insufficient to mandate proof beyond a reasonable doubt. In contrast, Chief Justice Bird's dissenting opinion in *Roulet I* and subsequent majority opinion in *Roulet II* found the potential deprivation of liberty and stigma resulting from involuntary commitment significant enough to require proof beyond a reasonable doubt.[308]

Therefore, as a consequence of *Roulet II*, California courts will no longer concern themselves merely with labeling a proceeding either "civil" or "criminal" in order to determine the appropriate standard of proof. The current state of the law is represented by Chief Justice Bird's view that the nature of the proceedings and its attendant consequences must first be evaluated before the appropriate standard of proof can be determined. Furthermore, such an analysis when applied

302. *See* Dershowitz, *supra* note 300, at 1296.

303. *Id.*

304. *See* In re De La O, 59 Cal. 2d 128, 378 P.2d 793, 28 Cal. Rptr. 489, *cert. denied*, 374 U.S. 856 (1963) (court held that a statute was "civil" even though it appeared in the Penal Code).

305. *Id.* at 148-49, 378 P.2d at 806-07, 28 Cal. Rptr. at 500-01.

306. Dershowitz, *supra* note 300, at 1298 n.75.

307. *See* 20 Cal. 3d at 659, 574 P.2d at 1248, 143 Cal. Rptr. at 896.

308. 20 Cal. 3d at 670-71, 574 P.2d at 1255-56, 143 Cal. Rptr. at 903-04 (Bird, C.J., dissenting), 23 Cal. 3d at 229-30, 590 P.2d at 7, 152 Cal. Rptr. at 431. The requirement of a unanimous jury verdict followed from the analysis of the appropriate standard of proof.

to involuntary commitment proceedings bears the conclusion that the threat to the individual's liberty and good name are of significant import, therefore requiring proof beyond a reasonable doubt in order to satisfy due process considerations.

2. Criminal Setting

The majority in *Roulet I* found that "Confinement does not necessarily follow establishment of the conservatorship. If it occurs at all, confinement is never in a criminal setting."[309] Justice Clark relied on section 5358 of the Welfare and Institutions Code, which precludes confinement in a penal institution or criminal facility.[310] While it is true that Mrs. Roulet would not have been confined in a criminal facility for mental health treatment, there is a substantial amount of evidence contrary to the notion that confinement is never in a "criminal setting."[311]

As Chief Justice Bird noted in her dissenting opinion in *Roulet I* and her majority opinion in *Roulet II*, a significant number of conservatees are placed in Atascadero and Patton State Hospitals.[312] These hospitals contain approximately 60 percent and 40 percent, respectively, of the MDSO's committed to state institutions in California.[313] In *Burnick* and *Feagley* the California Supreme Court was persuaded that the commitment of MDSO's was similar enough to criminal deprivation of liberty to require the same standard of proof as in criminal cases. Part of the court's reasoning in those cases was based on the descriptions of Atascadero State Hospital given by respected members of the California Medical Association,[314] as well as by senior staff members of Atascadero itself.[315] All of these medical professionals described Atascadero as closer to a prison or correctional facility in its appearance than to a hospital.[316]

309. 20 Cal. 3d at 660, 574 P.2d at 1249, 143 Cal. Rptr. at 897.

310. "A conservator. . .shall have the right, if specified in the court order, to place his conservatee in a medical, psychiatric, nursing, or other state-licensed facility, or a state hospital, ..."

311. 14 Cal. 3d at 319, 535 P.2d at 360, 121 Cal. Rptr. at 496.

312. 20 Cal. 3d at 667, 574 P.2d at 1253, 143 Cal. Rptr. at 901 (Bird, C.J., dissenting), 23 Cal. 3d at 226, 590 P.2d at 5, 152 Cal. Rptr. at 429.

313. *Id.*

314. *See* People v. Burnick, 14 Cal. 3d 306, 319 n.10, 535 P.2d 352, 365 n.10, 121 Cal. Rptr. 488, 501 n.10 (1975).

315. *Id.* This testimony was given by Dr. Harold M. Rogallo, senior psychiatrist on the Atascadero staff. Dr. Rogallo described Atascadero as "the only 'maximum security' hospital in the Department of Mental Hygiene."

316. *Id.* at 319, 535 P.2d at 360, 121 Cal. Rptr. at 496: "In its physical appearance, this is much more like a prison than a hospital. In its architectural planning, it disregards the modern psychiatric concept of the therapeutic community. There are bare corridors, bars, iron gates, rows of cells—all the stigmata of punishment rather than treatment."

Since conservatees can be routinely placed in the same facilities which house MDSO's,[317] it can be argued that they should be afforded the same procedural safeguards available to MDSO's, including the same standard of proof, prior to commitment. However, whether Atascadero, Patton or any other state institution is deemed a "criminal setting" is overshadowed by other considerations for purposes of determining the appropriate standard of proof. As the courts in *Winship* and *Lessard v. Schmidt* pointed out,[318] a higher standard of proof is mandated if the risk of deprivation of liberty and stigma are as great, or nearly as great, as those of a criminal proceeding.[319] Still, as Chief Justice Bird noted for the majority in *Roulet II*, "the mere fact that appellant found herself confined in a hospital rather than a prison does not eliminate the need to protect her against *false* confinement."[320] It is the fact of possible confinement in what is effectively a criminal setting that is critical and determinative of the procedural safeguards that the individual must be afforded.

3. Stigma

In its discussion of the stigma attached to a person adjudged to be gravely disabled, the majority in *Roulet I* differentiated that stigma from the kind associated with a convicted criminal or an MDSO: "Criminal convictions carry society's opprobrium based on fear and distrust. A gravely disabled person is far more likely to be viewed by society with compassion instead of fear. A prior criminal conviction may impose continuing legal impairment. The Act, on the other hand, prohibits any presumption of incompetence."[321] While in an ideal society this would perhaps be true, Chief Justice Bird argued in her dissent in *Roulet I* and her majority opinion in *Roulet II* that this view ignores reality.[322]

Once knowledge of a person's past commitment becomes known to a prospective employer, co-worker or peer,[323] it is easily seen, yet

317. 20 Cal. 3d at 667, 574 P.2d at 1253, 143 Cal. Rptr. at 901 (Bird, C.J., dissenting).

318. In re Winship, 397 U.S. 358, 363 (1970); Lessard v. Schmidt, 349 F. Supp. 1078, 1088-89 (E.D. Wis. 1972).

319. As previously observed, *see* notes 45-52 and accompanying text *supra*, petitioner here risked losing the right to contract, the right to travel unimpeded and the right to manage her money and property. *Compare* Lessard v. Schmidt, 349 F. Supp. 1078, 1089 (E.D. Wis. 1972), where the court found that the loss of the right to contract, along with professional licensing restrictions and jury duty restrictions (WIS. STAT. ANN. §§ 319.215, 260.22 (West Supp. 1972), 256.286, 447.07(7) (West Supp. 1972), 6.03(1), 12.59; WIS. CONST. art. 3, § 2), were civil deprivations which result from a criminal conviction.

320. 23 Cal. 3d at 227, 590 P.2d at 5, 152 Cal. Rptr. at 429 (emphasis in original).

321. 20 Cal. 3d at 660, 574 P.2d at 1249, 143 Cal. Rptr. at 897.

322. *Id.* at 669-70, 574 P.2d at 1255, 143 Cal. Rptr. at 903 (Bird, C.J., dissenting); 23 Cal. 3d at 228-30, 590 P.2d at 6-7, 152 Cal. Rptr. at 430-43.

323. The trial is public record. *See* CAL. WELF. & INST. CODE § 5118 (West 1972).

difficult to prove, that subtle but damaging discrimination can occur.[324] Rather than being the subjects of understanding and compassion, Chief Justice Bird pointed out in *Roulet II*, that the mentally ill are often viewed with suspicion and even loathing.[325] She noted that the California Supreme Court recently recognized the stigma which attaches to the mentally ill.[326] "It is implausible," she wrote, "that a person labelled by the state as so totally ill could go about, after his release, seeking employment, applying to schools, or meeting old acquaintances with his reputation fully intact."[327] One further point, which Chief Justice Bird failed to note, is that conservatorship proceedings for persons accused of being "gravely disabled" are open to the public, and the permanent records become public records.[328]

Other commentators have also suggested that the stigma attached to being adjudged mentally ill is just as great, if not greater than that attached to a criminal conviction.[329] A recent study conducted at San Jose State University found that:

> [t]he mentally ill are seen as a special class of beings to be feared, scorned, pitied or degraded. It is believed that they are capable of engaging in only the simplest tasks and are not able to know what is in their own best interests. The assignment of the sick role promotes helplessness, dependence, and a feeling that there is no personal, familial, or society responsibility for the person's disturbed behavior or emotions. It also carries the potential for self-devaluation. Stigmatization works in the nature of a self-fulfilling prophecy.
>
> Even when the patient is later cured of the behavioral symptoms that resulted in his being classified mentally ill, the public will not usually accept such cures as permanent. The ex-patient

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324. Lashly, *Legal Issues in State Mental Health Care: Proposals for Change*, 2 MENT. DISAB. L. RPTR. 57, 70 (July-Aug. 1977).

325. 23 Cal. 3d at 229, 590 P.2d at 7, 152 Cal. Rptr. at 431.

326. *Id.*, citing In re Roger S., 19 Cal. 3d 921, 929, 569 P.2d 1286, 1290-91, 141 Cal. Rptr. 298, 302-03 (1977).

327. 23 Cal. 3d at 229, 590 P.2d at 7, 152 Cal. Rptr. at 431.

328. *See* note 323 *supra*.

329. The stigma borne by the mentally ill has frequently been identified in the literature: "a former mental patient may suffer from the social opprobrium which attaches to treatment for mental illness and which may have more severe consequences than do the formally imposed disabilities. Many people have an 'irrational fear of the mentally ill.' The former mental patient is likely to be treated with distrust and even loathing; he may be socially ostracized and victimized by employment and educational discrimination. Finally, the individual's hospitalization and post-hospitalization experience may cause him to lose self-confidence and self-esteem.

The legal and social consequences of commitment constitute the stigma of mental illness, a stigma that could be as socially debilitating as that of a criminal conviction." (Footnotes omitted) Developments in the Law, *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1200-01 (1974); *accord*, Rosenhan, *On Being Sane in Insane Places*, 13 SANTA CLARA LAW. 379, 385 (1973).

> is prevented in many obvious and subtle ways from resuming his customary roles or from taking on any new ones. Seldom is he trained to be, expected to be, or allowed to be a productive and functional member of society.[330]

It becomes more important to most people that a person was classified as mentally ill than to determine the nature or extent of that person's illness or present state of health.[331]

Thus, it appears that despite the altruistic view of the *Roulet I* majority as to the public's attitude toward the mentally ill, the prevailing opinion is that the stigma attached to these individuals is indeed great. This is an additional justification for damanding a higher standard of proof before an individual can be involuntarily committed. In *Roulet II*, this aspect of being classified as gravely disabled provided further support for the conclusion that proof beyond a reasonable doubt is required.

B. Analysis

1. Abuses of Grave Disability Proceedings and the Conservatorship Device

Despite the recent California Court of Appeals decision which held the LPS Act definition of "gravely disabled" not unconstitutionally vague or overbroad,[332] there is strong evidence that the statutory scheme is being abused. It has been suggested that the classification of "gravely disabled" is so vague that many courts are using it as a catch-all to confine persons whom they feel should be confined but as to whom they have an insufficient basis for commitment under the dangerousness statutes. The Warren study[333] found that the courts were utilizing what she termed a "bargaining down" technique[334] to insure the commitment of persons whom the court, for some reason felt should be committed. The evidence suggests that the criteria for grave disability are being manipulated by the courts for convenience sake.[335]

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330. *A Review of California's Programs for the Mentally Disabled: Public Hearings on House Resolution 106 Before the Permanent Subcommittee on Mental Health and Developmental Disabilities*, 84 (November 18, 1977) (Teknekron, Inc.).

331. Sarbin & Mancuso, *Failure of a Moral Enterprise: Attitudes of the Public Toward Mental Illness*, 35 J. CONSULTING & CLINICAL PSYCH. 159 (1970).

332. *See* note 56 and accompanying text *supra*.

333. *See* Warren note 61 and accompanying text *supra*.

334. *Id.*at 645.

335. In an accompanying article, Monahan, *Empirical Analyses of Civil Commitment: Critique and Context*, 11 LAW & SOC'Y REV. 619, 620 (1977), Warren is criticized for her use of the term "bargaining down." Monahan instead advocates use of the term "selective targeting" to show that the state is merely deciding which criteria to pursue to accomplish commitment. Monahan generally agreed with Warren's observations but criticized the relatively small sample size of her testing, which amounted to about 10% of the civilly committed population of her area. *Id.* at 621.

"Bargaining down" is a procedure which occurs between the 72 hour hold period of a person committed under LPS and the *habeas corpus* hearing granted to one who petitions for such relief.[336] It is analogous to the plea bargaining which occurs in a criminal prosecution. The difference is that in bargaining down, the person affected has no input as to what is happening and in fact is usually ignorant of the entire procedure. The judge, the District Attorney and the public defender will usually get together out of court and "bargain down" the original grounds for commitment to less severe grounds.[337] Warren found in her sample study that only 11% of the people committed were originally committed for grave disability and given 72 hour hold periods. By the time the *habeas corpus* hearings were granted, the percentage of those committed for grave disability had jumped to 52%.[338] Most of this increase can be attributed to the fact that people who were originally committed for dangerousness to others, dangerousness to self and grave disability were later reclassified solely as gravely disabled.[339]

In one case which Warren witnessed, the judge, the District Attorney and the public defender bargained in the courtroom, "to ensure that the petitioner—originally committed for danger to others but not grave disablement—was not released on writ. Because no adequate evidence could be introduced showing that he was imminently dangerous, grave disablement was substituted in place of dangerous to others."[340] This is not to suggest that the courts have an evil motive in conducting these kinds of hearings or that they occur in every court. However, the very fact that this kind of manipulation does occur and that many individuals who were originally considered "dangerous" are being committed as "gravely disabled" indicates that the standard of proof needed to commit a person for "grave disability" should be as high as that for a person considered imminently dangerous to others.

Another study, conducted by Grant Morris,[341] came to the conclusion that the LPS conservatorship device is being used as an "escape hatch" to prolong the institutional confinement of nondangerous persons.[342] Morris utilized statistical evidence showing the number of individuals in California who were detained on 72-hour holds, and from this the number of persons detained on 14-day treatment periods, 90-

336. *See* Warren *supra* note 61 at 645.

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* at 646. Often a public defender will help to commit his client "for his own good" rather than proceeding as an advocate for the individual.

341. Morris, *Conservatorship for the "Gravely Disabled": California's Nondeclaration of Nonindependence*, 15 SAN DIEGO L.REV. 201 (1978).

342. *Id.* at 214. *See also*, A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION, 64 (1975).

day post-certification periods and conservatorship status.[343] Morris' point was that, given the time constraints for observation mandated by the LPS Act, there naturally has to be a way of classifying persons whom it is felt should be confined for longer periods than allowed. The conservatorship device provides such an escape hatch. Morris viewed the use of conservatorship status as a surrogate for the 90-day post-certification hold. He based this observation, however, on the fact that there were no individuals detained for a 90-day post-certification period while many individuals were placed under conservatorships.[344] This may not support the conclusion that the conservatorship device is encompassing those imminently dangerous individuals who should be detained on 90-day periods. The statistics, however, do at the least suggest such a practice. Morris further pointed out, although he failed to provide any statistical proof, that "the definite impression of many data gatherers is that the conservatorship device is used to avoid the necessity of obtaining consent to treatment from recalcitrant patients."[345]

2. *Medical Evidence of Abuses of Grave Disability*

Not all charges that the conservatorship device is being abused come from the legal profession. Persons in the medical profession have also witnessed some of these occurrences. In a recent paper,[346] Dr. Donald Schwartz referred to the "grave disability" category as a "wastebasket."[347] Dr. Schwartz claimed that this category is used to detain and treat people who may be mentally ill but who could nonetheless survive in the community on their own.[348] The rationale behind this theory is that there are certain people whose condition may not fall within the intended scope of the LPS Act, but who still represent an embarrassment to society. Thus, to keep these mentally ill individuals out of the mainstream of society they are committed under the classification "gravely disabled."

The common conclusion of these studies, that the conservatorship device is being used unjustly to detain people at both ends of the mentally ill spectrum, is hard to ignore. People who present a danger to others are on one end of the spectrum and people who are capable of caring for themselves but are an embarrassment to society are on the other end. According to these commentators, the conservatorship de-

343. *Id.* at 214-15.

344. *Id.* at 215 n.77.

345. *Id.* at 225.

346. Schwartz, *Social Ambivalence over Involuntary Treatment*, 16 PSYCHIATRIC OPINION 25 (April 1979). Dr. Schwartz is currently a professor of psychiatry at the UCLA Medical School.

347. *Id.* at 27.

348. *Id.*

vice is being used in violation of the intent of its creators to incarcerate everyone within the spectrum.

The majority in *Roulet II* also recognized this problem as more than a theoretical one: " 'Mental illness' is generally acknowledged to be a vague and uncertain concept. Categories of mental diseases are notoriously unclear, often overlap, and frequently change. The experts themselves often disagree on what is an appropriate diagnosis."[349] Thus, the court found sufficient inexactitude, overlap and confusion in classifying mentally ill persons to require proof beyond a reasonable doubt to assure that a person about to be adjudged gravely disabled be afforded adequate procedural safeguards.

Conclusion

The enactment of the LPS Act in California inaugurated one of the most revolutionary and humane civil commitment policies in the country. With its focus on the rights of the individual and the inclusion of safeguards to protect those rights, it represented a new wave of thought in the area of civil commitment. In keeping with these concepts of individual rights and due process of law, cases such as *Burnick, Feagley* and *Thomas* mandated a high standard of proof to protect the rights of MDSO's and narcotics addicts. These same concerns were held in *Roulet II* to mandate proof beyond a reasonable doubt and a unanimous jury verdict for the commitment of gravely disabled persons. The loss of liberty and stigma attached to a person adjudged gravely disabled are every bit as severe as those experienced by an MDSO or convicted criminal. Also, the inexactitude and predictive nature of psychiatry require that a person receive the greatest possible protection before being committed. It can therefore be argued that the appropriate standard of proof for all portions of the civil commitment process is proof beyond a reasonable doubt. This includes the *habeas corpus* hearing, the conservatorship hearing and subsequent hearings to renew conservatorship.

At this point, however, society must step back from constitutional form and look to the substance and the realities of civil commitment. Justice Clark's concurring and dissenting opinion in *Roulet II* focused upon a fundamental issue when he wrote in his opening paragraph:

> The thesis of the majority opinion appears to be that because the state has failed in caring for persons suffering mental disabilities, only persons with the gravest disabilities—those who by unanimous opinion beyond any reasonable doubt are gravely disabled—should be exposed to the degradations of adjudication as mentally ill. If what the majority say of the chamber-of-horrors atmosphere at our mental institutions (none of which ap-

349. 23 Cal. 3d at 234, 590 P.2d at 10, 152 Cal. Rptr. at 434.

> pears in the record of this case) is true, does it follow that only those needing the greatest help should be subjected to such a defective program?[350]

This is a wise observation. The essence of the vast problems in mental health law can be found in the system itself. The California Supreme Court in *Roulet II* was concerned with the requisite levels of due process to incarcerate a woman under a grave disability statute. But in the wake of that decision society must focus its attention on mental illness, treatability and competence to make one's own mental health care decisions.

This approach is discussed in the State Bar of California's Report of the Commission on Law and Mental Health.[351] The Commission began its discussion by showing that detention on the basis of grave disability and dangerousness is inaccurate. Grave disability, according to the Commission, is not only the least well defined basis for involuntary detention, but it "has been distorted in practice to permit treatment to be provided to those who are chronically mentally ill and who constitute public nuisances or embarrassments, but who could survive on their own if left in society."[352] Dangerousness, reports the Commission, is not predictable and should not be a concern of the mental health care system.[353] People who have committed dangerous acts should be housed by the criminal justice system or by a new system designed to assist them. Psychiatrists and the mental health care system should concern themselves with the mentally ill, not predictions of dangerousness. The Commission suggested a revolutionary approach to mental health. The criteria for commitment it set forth are: 1) a judgment by a mental health professional as to a person's mental illness, a finding that there is a diagnosable disorder; 2) the likelihood of his treatability; and 3) and evaluation by the judicial system as to the individual's competence to make decisions concerning his mental health care.[354]

It is the Commission's belief that mental health facilities should be used only for treatment of the mentally ill. If a person is untreatable, he should be placed in a facility other than one which is used for the treatable mentally ill. The primary reason for this is the debilitating atmosphere of a mental hospital which houses incurable or untreatable people. This atmosphere engenders a feeling of hopelessness which makes it difficult to fight off a worsening condition of dependence when one is surrounded by incurable mentally ill people. Further, the right

350. *Id.* at 235-36, 590 P.2d at 11, 152 Cal. Rptr. at 435 (Clark, J., concurring and dissenting).

351. Committee Report, *supra* note 29.

352. *Id.* at 3.

353. *Id.* at 10.

354. *Id.* at 30.

to be mentally ill may be added to the list of fundamental civil liberties. A person may be perfectly competent under the law to make the decision that he does not want mental health care (as, for example, a Christian Scientist) despite being aware that he is in need of mental health care according to societal norms. For this reason each person must be given the freedom to choose or refuse mental health care.

Requiring the highest standard of proof and a unanimous jury verdict will undoubtedly create problems in the treatment of the mentally ill, as Justice Clark pointed out. It must not be felt that the decision in *Roulet II* signals the end of all mental health problems. Requiring a higher standard of proof may be a milestone for those people who do not belong in the mental health system, but for those who do, as Justice Clark noted, *Roulet II* may be a roadblock to treatment and freedom from mental illness. The present system still labors under the problem engendered by people who do need mental health care but who, because they can appear competent for a brief court appearance, will not be civilly committed. For these people the *Roulet II* decision, requiring the highest standard of proof, may mean that they will not receive mental health treatment except on a voluntary basis. But if they are severely mentally ill, they may not recognize the need for treatment.

Roulet II represents a decision which mandates procedural safeguards in response to the demonstrated effects of civil commitment upon individual liberty and reputation, but which also has the potential for hindering the treatment of those whom the California Supreme Court sought to protect. It demonstrates that, ultimately, the solution to the problem of treating the mentally ill must come from within the medical profession and not from the courts.