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Civil commitment is an often forgotten part of our legal system. Individuals involved in the civil commitment process have sometimes been equally neglected and statutorily deprived of their liberty without fundamental procedural rights. Recently, however, several challenges against state civil commitment statutes have demonstrated that the mentally ill are entitled to due process protections. In this article, the author conducts an extensive analysis of Wyoming's constitutionally-suspect civil commitment statutes in light of these recent decisions.

A CONSTITUTIONAL ANALYSIS OF INVOLUNTARY CIVIL COMMITMENT IN WYOMING

*Robert B. Keiter**

The law in Wyoming governing the involuntary commitment of patients to the state mental hospital has remained virtually unchanged since 1963 when the current statutes were adopted.¹ The almost total absence of reported challenges to the civil commitment statutory scheme suggests that the procedure has served its purposes reasonably well.² Notwithstanding this apparently satisfactory state of affairs, the present Wyoming involuntary civil commitment statutes reflect serious constitutional shortcomings, and are unre-

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1. WYO. STAT. § 25-3-101 et seq. (1977).
2. *Holm v. State*, 404 P.2d 740 (Wyo. 1965). In *Holm*, the Wyoming Supreme Court struck down as unconstitutional that portion of Section 25-3-112(h) of the Wyoming Statutes which provided that the court "shall not be bound by the rules of evidence" in an involuntary civil commitment hearing. The *Holm* decision is the only reported post-1963 decision in the annotated statutes under Title 25. See also *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968). In *Heryford*, the Court of Appeals ruled that Section 9-6-504 of the Wyoming Statutes governing commitment of mentally retarded persons to the state training school was constitutionally defective since the individual facing commitment was not guaranteed representation by counsel.

sponsive to recent developments in the delivery of mental health services.

The United States Supreme Court has made it clear that civil confinement in a state institution constitutes an invasion of an individual's constitutionally protected liberty interests and requires attachment of due process safeguards.³ In *Specht v. Patterson*⁴ the Court concluded that to label state commitment proceedings as either "civil" or "criminal" in nature was constitutionally insignificant; and that the defendant, who there faced indefinite commitment under a state sex offender statute, was entitled to the protection of the due process clause.⁵ *O'Connor v. Donaldson*⁶ recognized that constitutionally a state was limited to involuntarily confining in a mental institution only those persons who were dangerous or who could not safely survive in freedom.⁷ At the conclusion of its 1978-79 term, the Court affirmed the *Specht* principle in *Addington v. Texas*⁸ and *Parham v. J.R.*,⁹ two cases specifically addressing the scope of due process protections to be accorded persons facing state civil commitment proceedings. In *Addington*, the Court not only recognized that commitment constituted a significant deprivation of liberty but also noted that "adverse social consequences" tantamount to enduring stigmatization were likely to accompany an individual committed to a mental institution.¹⁰ *Parham v. J.R.* reaffirmed the *Addington* conclusions in the context of the commitment of children to state mental hospitals.¹¹ With these decisions, the Court has erased all doubt that substantial constitutional protections extend to state

3. *Specht v. Patterson*, 386 U.S. 605 (1967); *Humphrey v. Cady*, 405 U.S. 504 (1972); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Addington v. Texas*, _____ U.S. _____, 99 S.Ct. 1804 (1979); *Parham v. J.R.*, _____ U.S. _____, 99 S.Ct. 2493 (1979). See also *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1939); *Baxstrom v. Herold*, 383 U.S. 107 (1966); *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972).

4. *Specht v. Patterson*, *supra* note 3.

5. *Id.* at 608. See also, *O'Connor v. Donaldson* 422 U.S. 563, 580 (1975) (Burger, C.J., concurring).

6. *O'Connor v. Donaldson*, *supra* note 5.

7. *Id.* at 575, 576.

8. *Addington v. Texas*, *supra* note 3. In *Addington*, however, the Court did distinguish civil commitment proceedings from criminal proceedings in ultimately concluding that the beyond a reasonable doubt standard of proof did not apply in commitment proceedings. 99 S.Ct. at 1810.

9. *Parham v. J.R.*, *supra* note 3.

10. *Addington v. Texas*, *supra* note 3 at 1809.

11. *Parham v. J.R.*, *supra* note 3 at 2503.

civil commitment proceedings where vital liberty interests are at stake.

Drawing upon the Supreme Court's decisions in the mental health field and extrapolating from the Court's significant expansion of due process and equal protection safeguards in a variety of contexts,¹² state and federal courts have increasingly scrutinized the constitutional underpinnings of local mental health laws and practices. Courts in Wisconsin,¹³ Michigan,¹⁴ Alabama,¹⁵ West Virginia,¹⁶ Nebraska,¹⁷ Pennsylvania,¹⁸ Hawaii,¹⁹ Iowa,²⁰ and Kentucky²¹ have found multiple constitutional deficiencies in those states' mental health codes.²² Singular statutory deficiencies have been judicially recognized and overturned in California,²³ Oregon,²⁴ Connecticut,²⁵ the District of Columbia²⁶ and Utah.²⁷ The courts have made it clear that the protections of the Constitution attach during the commitment process and even after the hospital's doors close behind the patient.²⁸ Additionally, courts have required incorporation of alternative treatment methodologies into state commitment

12. See e.g. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (revocation of parole); *Bell v. Burson*, 402 U.S. 535 (1971) (suspension of a driver's license); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (denial of welfare benefits based on residency). See also R. BERGER, *GOVERNMENT BY THE JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (Harvard 1977).
13. *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972) *vacated and remanded*, 414 U.S. 473 (1973), 379 F. Supp. 1376 (E.D.Wis. 1974) *vacated and remanded*, 421 U.S. 457 (1975), 413 F. Supp. 1318 (E.D.Wis. 1976).
14. *Bell v. Wayne County General Hospital*, 384 F. Supp. 1085 (E.D.Mich. 1974).
15. *Lynch v. Baxley*, 386 F. Supp. 378 (M.D.Ala. 1974).
16. *State ex rel Hawks v. Lazaro*. 202 S.E.2d 109 (W.Va. 1974).
17. *Doremus v. Farrell*, 407 F. Supp. 509 (D.Neb. 1975).
18. *Dixon v. Attorney General*, 325 F. Supp. 966 (M.D.Pa. 1971).
19. *Suzuki v. Quisenberry*, 411 F. Supp. 113 (D.Hawaii 1976).
20. *Status v. Leonhardt*, 414 F. Supp. 439 (S.D.Iowa 1976).
21. *Kendall v. True*, 391 F. Supp. 413 (E.D.Ky. 1975).
22. To be sure, not all recent court challenges to state mental health procedures have been successful. See, e.g., *Coll v. Hyland*, 411 F. Supp. 905 (D.N.J. 1976); *French v. Blackburn*, 428 F. Supp. 1351 (M.D.N.C. 1977); *In re Beverly*, 342 So.2d 481 (Fla. 1977); See also *Parham v. J.R.*, *supra* note 3; *Secretary of Public Welfare of Pennsylvania v. Institutionalized Juveniles*, _____ U.S. _____, 99 S.Ct. 2523 (1979).
23. *Heap v. Roulet*, 23 Cal.3d 219, 590 P.2d 1 (1979).
24. *Oregon v. O'Neil*, 545 P.2d 97 (Or. 1976).
25. *Fasulo v. Arafteh*, 173 Conn. 473, 378 A.2d 553 (1977).
26. *In re Ballay*, _____ U.S.App. D.C. _____, 482 F.2d 648 (D.C.Cir. 1973).
27. *Colyar v. Third Judicial Court for Salt Lake County*, 469 F. Supp. 424 (D.Utah 1979).
28. See e.g., *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973); *Scott v. Plante*, 532 F.2d 939 (3rd Cir. 1976); *Wyatt v. Aderhold*, 503 F.2d 1305 (5th Cir. 1974) *affirming* *Wyatt v. Stickney*, 344 F. Supp. 373, 387 (M.D.Ala. 1972).

procedures which previously provided only for indefinite hospitalization.²⁹

The legislatures of many states, likewise conscious of serious shortcomings in their mental health codes, have undertaken major statutory revisions to meet perceived or adjudicated constitutional deficiencies. California,³⁰ Washington,³¹ Nebraska,³² West Virginia,³³ Hawaii,³⁴ Minnesota,³⁵ and Alabama,³⁶ to name but a few states, have revised their mental health statutes to assure procedural fairness during commitment proceedings, and to incorporate and utilize the concept of community based mental health care into their procedures. Likewise, legal commentators have not hesitated to examine and expose perceived deficiencies in state mental health practices.³⁷ Consequently, the legal protections accorded mental patients have increased dramatically during the past decade as states have striven to meet their constitutional obligations.

Despite these developments, Wyoming commitment procedures have remained unchanged during the past sixteen years. For the year ending June 30, 1978, 806 persons were admitted to the Wyoming state hospital in Evanston for evaluation, care and treatment for an average stay of 44 days.³⁸ Over one quarter of these patients were committed

29. See e.g., *Lessard v. Schmidt*, *supra* note 13; *Lnych v. Baxley*, *supra* note 15; *Doremus v. Farrell*, *supra* note 17.

30. CAL. WELF. & INST. CODE § 5000 et. seq. (1969) (West).

31. WASH. REV. CODE ANN. § 71.05.010 et. seq. (1976).

32. NEB. REV. STAT. § 83-1001 et. seq. (1976).

33. W. VA. CODE § 27-5-1 et. seq. (1974).

34. HAW. REV. STAT. § 334-59 et. seq. (1976).

35. MINN. STAT. ANN. § 253A.01 et. seq. (1971).

36. ALA. CODE tit. 22, § 52-1 et. seq. (1975).

37. See e.g., *Lockney, Constitutional Problems with Civil Commitment of the Mentally Ill in North Dakota*, 52 N.D. L. REV. 83 (1975); *Bezanson, Involuntary Treatment of the Mentally Ill in Iowa: The 1975 Legislation*, 61 IOWA L. REV. 261 (1975); Note, *Civil Commitment of the Mentally Ill in Kentucky*, 62 KY. L. J. 769 (1974).

38. See 1978 Report from the Wyoming State Hospital, p. 30, published in the 1978 ANNUAL REPORT OF THE BOARD OF CHARITIES AND REFORM (Oct. 16, 1978) (hereinafter cited as 1978 ANNUAL REPORT). It should be noted that the 806 admissions during 1977-78 included 343 first time admissions, 384 readmissions, and 79 patients returned from convalescent leave. See also the testimony of Dr. William N. Karn, Superintendent of the Wyoming state hospital, before the Subcommittee of the Joint Judiciary Interim Committee on Involuntary Commitment Procedures, June 8, 1979 (hereinafter cited as the Joint Interim Subcommittee). A copy of the minutes from the Subcommittee hearings is on file in the office of the LAND & WATER LAW REVIEW.

involuntarily, and nearly one half of them were readmissions.³⁹ During the past five years the state hospital has recorded over 3,800 admissions.⁴⁰ While Wyoming compares favorably to national averages for admissions to the state hospital and for average length of stay,⁴¹ it still is significant that those 806 persons were not accorded by statute the minimum constitutional protections to which they were entitled. Moreover, Wyoming district court judges who are charged with the responsibility of handling commitment cases in the first instance, apparently recognizing statutory deficiencies, have tended to adopt their own local variations on the mandated procedures preliminary to commitment.⁴² These practices differ noticeably from district to district, undercutting any standard of statewide uniformity.⁴³ Additionally, the present statutory framework makes no provision for community based treatment alternatives.⁴⁴ The court has the unenviable choice of either committing an individual to the state hospital for an indefinite period of time or refusing commitment, thereby assuring that, in all likelihood, the individual will receive no treatment for the condition which brought him to the court's attention in the first place. And as energy impact continues to make itself felt in Wyoming communities, it is reasonable to predict that the incidence of mental illness will accelerate.⁴⁵

39. See 1978 ANNUAL REPORT, *supra* note 38, at 30, 33. From July 1, 1977 to June 30, 1978, 208 persons were involuntarily committed to the state hospital, and 384 persons were readmitted as patients, not including the 79 patients returned to the hospital from convalescent leave status.

40. See 1978 ANNUAL REPORT, *supra* note 38, at 30.

41. See Stone, *Mental Health and the Law: A System in Transition* 41 (Dept. of Health Education and Welfare, National Institute of Mental Health 1975) (hereinafter cited as Stone). During 1971, the median length of stay of patients admitted to state and county mental hospitals was 41 days. See also, SURVEY AND REPORTS BRANCH, DIVISION OF BIOMETRY AND EPIDEMIOLOGY, NATIONAL INSTITUTE OF MENTAL HEALTH, ADDITIONS AND RESIDENT PATIENTS AT END OF YEAR FOR STATE AND COUNTY MENTAL HOSPITALS BY AGE AND DIAGNOSIS, BY STATE, UNITED STATES 1976 (Sept. 1978).

42. Testimony of Dr. William N. Karn and Steve Aron, Attorney at Law, before the Joint Interim Subcommittee, *supra* note 38.

43. *Id.*

44. Wyoming presently is able to assure access to a community based mental health program for every citizen in the state, but is only able to provide comprehensive local care for approximately one half of the state. Testimony of W. Don Nelson, Director of the Department of Health and Social Services and Dr. Ray Muhr, Southeast Wyoming Mental Health Center, before the Joint Interim Subcommittee, *supra* note 38.

45. See Watson, *Measuring and Mitigating Socio-Economic Environmental Impacts of Constructing Energy Projects: An Emerging Regulatory Issue*,

The Wyoming legislature has not been blind to the problems existing under the present statutory system. Several efforts to revise Title 25 of the Wyoming Statutes have been introduced, only to fail, as much through inattention as hostility.⁴⁶ For instance, during the 1979 legislative session, House Bill 134, which represented a thorough overhaul of the existing law, was introduced and passed in the House by a 61-1 vote late in the legislative session. But it died in the Senate on General File at the end of the session despite a "do pass" recommendation from the Senate committee which reviewed it.⁴⁷ Nevertheless, at the conclusion of the 1979 legislative session a joint House and Senate subcommittee was appointed from the Judiciary Committee to study the state's civil commitment laws and to present recommended changes to the full body for the 1981 session. As this article intends to demonstrate, their efforts are critical to assuring that Wyoming mental health law is brought into conformance with current constitutional standards, and further that it reflects a farsighted and resourceful approach to dealing with the problems of the state's mentally ill citizens.

In addressing perceived constitutional deficiencies with the present Wyoming law, this article will first outline the civil commitment process established under Title 25 of the Wyoming Statutes. Next the article will address the sufficiency of the existing statutory standards governing commitment to the state hospital. The doctrine of the least restrictive alternative and its implementation in state civil commitment proceedings will be explored. The article then will examine the procedural framework implementing emergency commitment to the state hospital. The procedures

10 NATURAL RESOURCES LAWYER 393 (1978); DEPARTMENT OF THE INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED DEVELOPMENT OF COAL RESOURCES IN THE EASTERN POWDER RIVER COAL BASIN OF WYOMING, Vol. I, pp. 428-437 (1974).

46. In 1975, a bill to revise the commitment procedures was introduced in the Senate and passed by the Senate on a 21-7 vote after amendment, but it then died in a House committee. DIGEST OF SENATE JOURNAL, 43rd Legis. Gen. Sess. 114-116 (1975). In 1977, another bill revising the procedure was introduced in the House, but it died at the conclusion of the legislative session after being placed on General File. DIGEST OF HOUSE JOURNAL, 44th Legis. Gen. Sess. 411 (1977). Again, in 1979, a bill revising the commitment procedures was passed by the House, but died in the Senate. DIGEST OF HOUSE JOURNAL, 45th Legis. Gen. Sess. 139-140 (1979).
47. DIGEST OF HOUSE JOURNAL, 45th Legis. Gen. Sess. 139-140 (1979).

governing the conduct of involuntary commitment hearings will be scrutinized. Then the statutory provisions governing hospital review, release and transfer decisions will be examined. In conclusion, suggestions and recommendations for change will be set forth.

I. WYOMING COMMITMENT PROCEDURES

Presently Wyoming law provides for the commitment of mentally ill persons to the state hospital by either voluntary or involuntary procedures. An individual may voluntarily place himself in the state hospital as a patient if he has sufficient insight to make application to the hospital for assistance.⁴⁸ So long as the hospital examines the patient within ten (10) days after his admission and agrees that his admission is appropriate,⁴⁹ the individual may remain voluntarily until he requests his release.⁵⁰ Alternatively, an individual who is mentally ill⁵¹ and either 1) likely to injure himself or others if not hospitalized, or 2) in need of care or treatment in a hospital and lacking the capacity to apply for his own admission to the hospital, may be involuntarily committed to the state hospital either on a short or long term

48. WYO. STAT. § 25-3-106(a) (i) (1977). The statutory provision applies to competent adults, while minors or incompetent adults may be voluntarily admitted to the hospital upon application by their parents or legal guardians. This voluntary admission procedure for minors and incompetents provides them with no formal procedural safeguards such as notice of the commitment decision or the opportunity to be heard in opposition to the decision prior to commitment. However, WYO. STAT. § 25-3-117 (1977) requires an immediate examination of the patient upon his admission by the hospital staff, and their concurrence that hospitalization is appropriate, otherwise the person must be discharged. This provision should meet minimum due process requirements in light of the Supreme Court's recent decisions in *Parham v. J.R.*, *supra* note 3, and *Secretary of Public Welfare v. Institutionalized Juveniles*, *supra* note 22, where the Court upheld similar Georgia and Pennsylvania practices against constitutional due process attack.

49. WYO. STAT. § 25-3-117 (1977).

50. WYO. STAT. § 25-3-108(a) (1977). Significantly, once a patient voluntarily admitted under WYO. STAT. § 25-3-106(a) (i) (1977) requests his release, the hospital is not obligated to release the patient, but may institute involuntary commitment proceedings. WYO. STAT. § 25-3-108(a) (iv) (1977). It has been shown that the possibility or threat of a judicially mandated involuntary commitment frequently will deter patients from exercising their right to request release from their voluntary patient status. See Gilboy and Schmidt, *Voluntary Hospitalization of the Mentally Ill*, 66 NW. U. L. REV. 429 (1971). See also Dix, *Hospitalization of the Mentally Ill in Wisconsin: A Need for a Re-examination*, 51 MARQ. L. REV. 1, 11-14 (1967).

51. A "mentally ill individual" is defined as "an individual having a psychiatric or other disease which substantially impairs his mental health." WYO. STAT. § 25-3-101(a) (i) (1977).

basis.⁵² Virtually anyone, including a friend, spouse, peace officer or the head of any institution, may initiate involuntary commitment proceedings so long as their application is accompanied by the appropriate physician's certificate.⁵³

Considerable ambiguity appears on the face of the statutory procedures governing short term or emergency involuntary commitment. Short term hospitalization may be accomplished through certification of a physician who has examined the patient and certified that the individual's condition meets the noted commitment standards.⁵⁴ If the basis for the commitment is the individual's mental illness and potential dangerousness to himself or others, then he is entitled to an "appropriate hearing" in the district court before hospitalization commences.⁵⁵ However, if the basis for the individual's hospitalization is his mental illness and his lack of capacity to make responsible application for his own hospitalization, then he apparently is not entitled to the benefit of judicial intervention before his commitment commences.⁵⁶ The nature of the required precommitment hear-

52. WYO. STAT. § 25-3-106(a)(ii) (1977), (short term admission by certificate of a medical officer); WYO. STAT. § 25-3-112 (1977), (involuntary civil commitment after a judicial hearing).

53. WYO. STAT. § 25-3-106(a)(ii) (1977); WYO. STAT. § 25-3-110(a) (1977); WYO. STAT. § 25-3-112(b) (1977).

54. WYO. STAT. §§ 25-3-106(a)(ii) and 25-3-110(c) (1977). Admission and detention under this latter provision does not necessarily require a physician's certification that the individual's condition meets the commitment standards; rather a public health, welfare or peace officer who has the individual in his custody also is authorized to state his belief that the individual is mentally ill and potentially dangerous to himself or others and the hospital then is authorized to receive the patient.

55. WYO. STAT. § 25-3-110(b) (1977).

56. WYO. STAT. § 25-3-106(a)(ii)(C) (1977). It is noteworthy that WYO. STAT. § 35-2-110(a), (b) and (c) (1977), which require a judicial hearing before involuntary placement in the hospital, only apply to commitments where the basis of the commitment is dangerousness to self or others. Commitment under the standard of mental illness and lack of capacity to provide for his own hospitalization does not call for a judicial hearing prior to placement in the hospital. WYO. STAT. § 25-1-110(b) (1977). The only basis for the difference in the procedural safeguards accorded the two classes of involuntary mental patients would be an apparent legislative judgment that since commitment under the dangerousness standard entailed exercise of the state's police power, it was tantamount to preventive detention, and thus required some procedural regularity to permit the individual to judicially test the validity of his detention; whereas commitment under the lack of capacity standard involved exercise of the state's *parens patriae* authority and thus did not call for the same procedural safeguards since the purpose of the hospitalization was to treat the patient rather than detain him. See *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1207-1212, 1223 (1974) (hereinafter cited as *Developments*).

ing for potentially dangerous persons is not precisely specified but the individual has the right to appear and testify and to be accompanied by counsel.⁵⁷ The statute makes no provision for notice of the proceedings to the individual, nor for appointed counsel. It would appear that this hearing was intended as an informal proceeding preliminary to an emergency commitment to the hospital, and was not intended to serve as a full adversary hearing.⁵⁸ Once an individual is committed to the state hospital under these procedures he is entitled to be released from the hospital within ten (10) days if he applies for his release unless the hospital initiates formal involuntary commitment proceedings against him pursuant to Section 25-3-112 of the Wyoming Statutes.⁵⁹ Thus initial hospital commitment may be accomplished with minimum judicial involvement and with only scant procedural protections available to the prospective patient.

Section 25-3-112 of the Wyoming Statutes sets forth the standards and procedures governing long term involuntary commitment to the state hospital. The commitment standard is the same bifurcated test employed for short term medical certification commitment: a showing that the individual is mentally ill and 1) likely to injure himself or others, or 2) in need of hospital care or treatment but lacking the capacity to make a responsible decision concerning his hospitalization.⁶⁰ Although the statute originally contemplated non-adversarial proceedings,⁶¹ the Wyoming Supreme Court found unconstitutional that portion of the statute which permitted proceedings where the rules of evidence did not apply.⁶² The court made it clear that involuntary hospitaliza-

57. Wyo. STAT. § 25-3-110(b) (1977).

58. This conclusion is buttressed by the presence of WYO. STAT. § 25-3-112 (1977) which sets forth an alternative procedure for the initiation and conduct of involuntary commitment proceedings including significant procedural safeguards where commitment apparently is contemplated for a long period of time. Commitment under WYO. STAT. § 25-3-112 (1977) is called for whenever the hospital determines that it would like to further detain a patient who either was admitted voluntarily or who was committed by medical certification pursuant to WYO. STAT. § 25-3-106(a) (ii) (1977), WYO. STAT. § 25-3-108(a) (vi) (1977).

59. WYO. STAT. § 25-3-108(a) (1977).

60. WYO. STAT. § 25-3-112(k) (1977).

61. WYO. STAT. § 25-3-112(c) (1977) ("Proceedings hereunder shall not be considered adversary. . .").

62. *Holm v. State*, *supra* note 2. Significantly, the *Holm* decision did not comment upon WYO. STAT. § 25-3-112(c) (1977) which provides that in-

tion constituted a deprivation of liberty which required procedural regularity under the due process clause.⁶³

The commitment hearing may be held in any of three counties: where the patient is found, where his residence is located, or where he is hospitalized.⁶⁴ Notice of the filing of an application for involuntary hospitalization must be provided to the individual, but upon a finding that such notice may be injurious to the person, it is not required.⁶⁵ However, notice of the scheduled commitment hearing must be provided.⁶⁶ The individual is entitled to be represented by retained or court appointed counsel.⁶⁷ The statute contemplates that the proposed patient will be present at the hearing and that he will have the opportunity to present and cross examine witnesses, but his presence is not required.⁶⁸ A six person jury is available upon request,⁶⁹ and formal evidentiary rules apply to the proceedings.⁷⁰ The statute is either silent or ambiguous in defining the role of appointed counsel, the applicable standard of proof, the procedure for waiver of an individual's presence or his rights, availability of the privilege against self incrimination, and the propriety of medicating the proposed patient before the hearing. At the conclusion of the hearing, the court must decide whether the individual meets the prescribed commitment standards, and if he does, the court must involuntarily hospitalize him for an indefinite period of time.⁷¹ Alternative dispositions less drastic than involuntary commitment to the state hospital are not available to the court.

voluntary commitment proceedings were not to be considered adversary, finding instead only that the rules of evidence were applicable. Since the decision excised only that portion of the statute which the court found objectionable, the remainder of WYO. STAT. § 25-3-112 (1977) survived, and would appear to govern involuntary commitment proceedings.

63. *Id.* at 742.

64. WYO. STAT. § 25-3-112(a) (1977).

65. WYO. STAT. § 25-3-112(d) (1977). The statute provides that this notice shall advise the individual of the purpose of the proceedings, the identity of the court-appointed psychiatric examiner who is responsible for reporting his findings on the individual's mental condition to the court, the availability of court-appointed counsel, and the contingency that actual commitment proceedings will depend upon the examiner's report.

66. WYO. STAT. § 25-3-112(f) (1977).

67. WYO. STAT. § 25-3-112(g) (1977).

68. WYO. STAT. § 25-3-112(h) (1977).

69. WYO. STAT. § 25-3-112(j) (1977).

70. *Holm v. State*, *supra* note 2.

71. WYO. STAT. § 25-3-112(k) (1977).

After an individual has been involuntarily committed to the state hospital, he is entitled to have the hospital re-evaluate the appropriateness of his commitment at six (6) month intervals and to discharge him if he no longer meets the commitment criteria.⁷² The hospital also has the authority to release an involuntary patient on convalescent status for a trial visit or placement outside the institution.⁷³ Unless the hospital revokes a patient's convalescent status release, he is entitled to a discharge from the original involuntary commitment after two (2) years.⁷⁴ The hospital also has the authority to transfer patients between state institutions.⁷⁵ Additionally, the Wyoming Statutes provide that patients are entitled to humane care and treatment in accordance with the highest professional standards to the extent that resources permit.⁷⁶ Commitment does not deprive a patient of his civil or contractual rights unless he has been declared incompetent.⁷⁷ However, once a patient is committed to the state hospital, decisions concerning his placement, discharge and treatment rest with the hospital, which is vested with considerable discretion in handling the patient.⁷⁸

II. COMMITMENT STANDARDS

The constitutional basis upon which a state derives its power to coercively deprive an individual of his liberty for

72. WYO. STAT. § 25-3-120 (1977).

73. WYO. STAT. § 25-3-121(a) (1977).

74. WYO. STAT. § 25-3-121(c) (1977).

75. WYO. STAT. § 25-3-119 (1977). In most situations, this means that a patient may face transfer between the Wyoming state hospital in Evanston, which is designed to accommodate the mentally ill, and the Wyoming state training school in Lander, which is designed for the mentally retarded. Testimony of Dr. William N. Karn before the Joint Interim Subcommittee, *supra* note 38.

76. WYO. STAT. § 25-3-122 (1977).

77. WYO. STAT. § 25-3-124(d) (1977). Wyoming statutes also provide that admission to the state hospital, either voluntarily or involuntarily, does not create any presumption as to a person's mental or legal competency, and that proof beyond the mere fact of admission is necessary to establish incompetency. WYO. STAT. § 25-3-125 (1977).

78. It should be noted that violation of a patient's statutorily recognized rights is punishable as a felony. WYO. STAT. § 25-3-141 (1977). Significantly, the statute makes no provision for civil liability in the event of a statutory or constitutional violation of a patient's rights. In view of the doctrine of sovereign immunity as interpreted by the Wyoming Supreme Court, it would be virtually impossible to maintain a civil action against the state for monetary damages, *Worthington v. State of Wyoming*, ___ P.2d ___ (Wyo. 1979), although an action against a state official acting in his individual capacity may succeed.

purposes of involuntary treatment in a mental hospital arises either through the police power or the *parens patriae* doctrine.⁷⁹ Basically, the police power authorizes a state to take action to protect the public health, welfare, safety and morals.⁸⁰ The *parens patriae* power is predicated upon the state acting in a protective role to assure the health, welfare, and well-being of individual citizens who cannot care for themselves.⁸¹ State civil commitment schemes reflect these principles in various ways through the statutory standards governing commitment. The statutes almost uniformly require a showing of mental illness and additionally prescribe standards encompassing the notion of dangerousness to self or others, need for care and treatment, the welfare of the individual or others, and fitness for hospitalization.⁸² The Wyoming Statute sets forth a bifurcated, alternative commitment standard which reflects both a police power and *parens patriae* rationale: commitment is authorized if the individual is mentally ill and either 1) likely to injure himself or others or 2) in need of care or treatment and lacking the capacity to apply for his own hospitalization.⁸³ Commitment predicated on the state's police power is sanctioned if it is shown that a mentally ill individual is likely to injure another person. Commitment predicated either upon the state's police power or its *parens patriae* role is justified by a showing that the individual is likely to injure himself.⁸⁴ Alternatively, commitment is authorized on a *parens patriae* basis upon a showing that a mentally ill individual needs care or treatment and lacks the capacity to provide for his own admission to the hospital. Viewed thusly, the Wyoming

79. See *Matter of Josiah Oakes*, 8 LAW REP. 123, 125 (Supreme Judicial Court of Massachusetts, 1845); *Lynch v. Baxley*, *supra* note 15, at 389-391. See also *Developments*, *supra* note 56, at 1201-1245.

80. See *Jacobson v. Massachusetts*, 197 U.S. 11, 24-25 (1905); *State v. Langley*, 53 Wyo. 332, 84 P.2d 767 (1938).

81. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972), quoting 3 W. BLACKSTONE, COMMENTARIES 47; *State ex rel. Hawks v. Lazaro*, *supra* note 16, at 117-120; *Holm v. State*, *supra* note 2, at 741. [“[T]he 1963 law (Wyoming civil commitment statute) is a well-intentioned statute meant to protect people who are thought to be mentally ill. We agree with this statement” 404 P.2d at 741.]

82. See *Developments*, *supra* note 56, at 1202-1204.

83. WYO. STAT. §§ 25-3-106(a) (ii); 25-3-112 (1977).

84. See *Lynch v. Baxley*, *supra* note 15, at 390 (distinguishing police power and *parens patriae* commitment rationale and concluding that dangerousness to self reflected *parens patriae* notions).

commitment statutes provide the state with rather broad authority to involuntarily hospitalize a variety of individuals suffering from mental disorders.

The constitutionality of the Wyoming statutory commitment standards appropriately is measured under substantive due process concepts.⁸⁵ Recent Supreme Court decisions have established that where the state acts to deprive an individual of a right as fundamental as his liberty, the state must demonstrate a compelling justification for its action and choose narrowly tailored means.⁸⁶ Necessarily, therefore, the question posed by the Wyoming civil commitment standards is whether the state's exercise of its police power or its *parens patriae* role represents a compelling enough justification and the least restrictive means available in view of the substantial liberty deprivation entailed in involuntary hospitalization.⁸⁷ Subsidiary to this main issue is whether the Wyoming standards can withstand a constitutional vagueness challenge.⁸⁸ Several recent lower court decisions considering state commitment standards suggest that constitutional problems are evident on the face of similar statutes and that the statutes only can be saved, if at all, with a narrowing judicial interpretation.⁸⁹

The Supreme Court has not yet directly considered the constitutional validity of state involuntary civil commitment

85. See *Jackson v. Indiana*, *supra* note 3, at 731-739; *Doremus v. Farrell*, *supra* note 17, at 514.

86. *Humphrey v. Cady*, *supra* note 3, at 509. *Cf. Roe v. Wade*, 410 U.S. 113, 115 (1973).

87. See *Addington v. Texas*, *supra* note 3, at 1809. Consequences of involuntary mental hospitalization include, among other things, loss of liberty, the likelihood of being subjected to coercive treatment, infringement of privacy, possible loss of civil rights such as the right to vote, serve on a jury, obtain a driver's license and social stigmatization. See generally, *Developments*, *supra* note 56, at 1193-1201; *Lessard v. Schmidt*, *supra* note 13, at 1088-1090. Significantly, commitment in Wyoming does not automatically trigger a finding of incompetency, WYO. STAT. §§ 25-3-121, 25-3-124(d) (1977), thus the individual does not necessarily lose his civil rights. However, he does face the prospect of undesired, coercive treatment, WYO. STAT. § 25-3-123 (1977), and the above noted social consequences almost inevitably can be expected to flow from an involuntary commitment.

88. See *Kendall v. True*, *supra* note 21, at 418; *Bell v. Wayne County General Hospital*, *supra* note 14, at 1096; *Stamus v. Leonhardt*, *supra* note 20, at 452.

89. See *e.g.*, *Lessard v. Schmidt*, *supra* note 13; *Lynch v. Baxley*, *supra* note 15; *State ex rel. Hawks v. Lazaro*, *supra* note 16; *But see In re Beverly*, *supra* note 22; *Fhagen v. Miller*, 29 N.Y.2d 348, 278 N.E.2d 615 *cert. denied*, 409 U.S. 845 (1972).

standards;⁹⁰ however, its recent decisions concerning tangential legal issues in the mental health field provide some guidance in evaluating the Wyoming commitment standards.⁹¹ In invalidating Indiana's commitment scheme for mentally incompetent criminal defendants, the Court observed that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."⁹² In 1972, the Court upheld a Wisconsin mentally disordered sex offender statute which sanctioned commitment upon the showing of a "mental disease to such extent that a person so afflicted requires care and treatment for his own welfare, or the welfare of others, or of the community."⁹³ In approving this standard, the Court interpreted it to encompass necessarily the notion that a person's "potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty."⁹⁴ Three years later, in *O'Connor v. Donaldson*,⁹⁵ the Court expressed its view that commitment solely on the basis of mental illness was unconstitutional:

90. Justice Blackmun writing for the Court in *Jackson v. Indiana*, *supra* note 3, observed:

The States have traditionally exercised broad power to commit persons found to be mentally ill. . . . Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated. 406 U.S. at 736-37 (footnotes omitted).

Notwithstanding Justice Blackmun's observations, the Court demonstrated a real reluctance to review the 1972 *Lessard v. Schmidt*, *supra* note 13, decision of a three judge federal district court in Wisconsin, where the lower court had directly addressed the issue of the constitutionality of Wisconsin commitment standards. Twice the Supreme Court vacated and remanded the lower court's decision on procedural grounds. *Lessard v. Schmidt*, *supra* note 13. See also *Fhagan v. Miller*, 29 N.Y.2d 348, 278 N.E.2d 615 *cert. denied* 409 U.S. 845 (1972).

91. See cases cited note 3, *supra*. See also *O'Connor v. Donaldson*, *supra* note 5. Cf. *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966).

92. *Jackson v. Indiana*, *supra* note 3, at 738.

93. *Humphrey v. Cady*, *supra* note 3.

94. *Id.* at 509.

95. *O'Connor v. Donaldson*, *supra* note 5. *O'Connor* involved appeal of a jury verdict awarding damages to the plaintiff in a civil rights action alleging that the actions of the superintendent of a Florida state hospital and other personnel in confining him in the hospital, allegedly because of his mental condition, had deprived him of his constitutional due process rights. Although plaintiff successfully raised and argued the novel proposition that he possessed a constitutional right to treatment before the court of appeals, 483 F.2d 507 (5th Cir. 1974), the Supreme Court declined to pass on this question. 422 U.S. at 570 n. 6, 572. Instead, the Court upheld plaintiff's due process theory that defendants' actions constituted a violation of his right to liberty. 422 U.S. at 576.

A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the "mentally ill" can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.⁹⁶

The Court in *O'Connor* specifically declined to address the issue of whether involuntary commitment based upon the state's *parens patriae* authority was constitutionally sanctioned.⁹⁷ The Court's decisions concerning state juvenile delinquency procedures, an area where the *parens patriae* rationale had long applied, tended to discredit the state's *parens patriae* authority as it concerned minors, therefore suggesting that its applicability to the mentally ill likewise was suspect.⁹⁸ However, the Court's recent decision in *Addington v. Texas* suggests that the *parens patriae* rationale is constitutionally valid as a basis for civil commitment: "The state has a legitimate interest under its *parens patriae* power in providing care to its citizens who are unable because of emotional disorders to care for themselves. . . ." ⁹⁹ Thus, the Court has

96. *Id.* at 575.

97. *Id.* at 571. ("[T]here is no reason now to decide . . . whether the State may compulsorily confine a nondangerous, mentally ill individual for the purpose of treatment.") *But see O'Connor v. Donaldson*, *supra* note 5, at 583 (Burger, C.J., concurring) ["[T]he States are vested with the historic *parens patriae* power, including the duty to protect persons under legal disabilities to act for themselves." (citations omitted)].

98. The confusion stemmed from the Court's rulings in a series of juvenile cases where the Court indicated that although the state professed an intention to act benevolently toward minors accused of criminal offenses, the state's *parens patriae* intentions more often were honored in the breach, as children found themselves indefinitely confined to outdated and unhealthy detention facilities upon findings of delinquency, without the benefit of basic constitutional due process protections. *See Kent v. United States*, *supra* note 91; *In re Gault*, *supra* note 91, at 27; *In re Winship*, 397 U.S. 358, 365 (1970). Lower courts confronting similar constitutional due process challenges to state civil commitment schemes analogized the proceedings and concluded that the *parens patriae* power was an inadequate basis upon which civil commitment could be justified. *See Dixon v. Attorney General*, *supra* note 18, at 972; *State ex rel. Hawks v. Lazaro*, *supra* note 16, at 120. *Cf. Heryford v. Parker*, *supra* note 2, at 396 ("civil-criminal" label is irrelevant for due process purposes).

99. *Addington v. Texas*, *supra* note 3 at 1809. The quoted passage seems to be dictum, but Chief Justice Burger was speaking for a unanimous Court; Justice Powell took no part in the consideration of the case. *Cf. Parham v. J.R.*, *supra* note 3, at 2505. In *Parham*, the Court recognized the state's *parens patriae* interest in assisting parents to care for the mental health of their children.

restored the vitality of the *parens patriae* doctrine, at least in the context of state provision of care and treatment for the mentally ill who may harm themselves absent state intervention. Additionally, *Addington* explicitly recognized the state's police power to protect the community from dangerous mentally ill persons.¹⁰⁰

Lower courts faced with mounting challenges to civil commitment standards consistently have relied upon the state's police power in upholding statutory criteria permitting commitment on the basis of dangerousness to others,¹⁰¹ even while several have struck down or limited *parens patriae* based commitment standards.¹⁰² For instance, the seminal *Lessard v. Schmidt* ruling, while upholding Wisconsin's commitment standards, construed rather broad statutory language to permit commitment only in those cases where the state demonstrated that there was "an extreme likelihood that if the person is not confined he will do immediate harm to himself or others."¹⁰³ The court further required that dangerousness must be based upon a finding that the individual has committed a recent overt act, attempt, or threat to do substantial harm to himself or another.¹⁰⁴ The proscriptive *Lessard* ruling has been widely followed by other courts confronted with similar constitutional attacks on state commitment standards.¹⁰⁵ Subsequent rulings have distinguished the constitutional basis underlying the *Lessard* rationale, noting that while the state's police power justifies commitment based on the substantial likelihood of harm to others, it is the *parens patriae* doctrine which underlies commitment predicated upon the likelihood of injury to self.¹⁰⁶

100. *Id.* at 1809.

101. See e.g., *Lessard v. Schmidt*, *supra*, note 13; *Lynch v. Baxley*, *supra* note 15; *Bell v. Wayne County General Hospital*, *supra*, note 14; *State ex rel. Hawks v. Lazaro*, *supra* note 16; *Wessel v. Pryor*, 461 F. Supp. 1144 (E.D.Ark. 1978).

102. See e.g., *Lessard v. Schmidt*, *id.* (limiting *parens patriae* commitment); *Lynch v. Baxley*, *id.* (limiting *parens patriae* commitment); *State ex rel. Hawks v. Lazaro*, *id.* (striking down *parens patriae* commitment).

103. *Lessard v. Schmidt*, *supra* note 13. at 1093.

104. *Id.*

105. See, e.g., *Lynch v. Baxley*, *supra* note 15; *Bell v. Wayne County General Hospital*, *supra* note 14; *State ex rel. Hawks v. Lazaro*, *supra* note 16.

106. *Lynch v. Baxley*, *supra* note 15, at 890; *Colyar v. Third Judicial Court for Salt Lake County*, *supra* note 27, at 431; See also, *Developments*, *supra* note 56, at 1223-1228.

While the dangerousness standard has been widely accepted as constitutionally sound by the courts, the notion that the state can commit persons for the purpose of care and treatment if it determines that this is in their best interests has not been as widely accepted. In *State ex rel. Hawks v. Lazaro* the West Virginia Supreme Court of Appeals, after exhaustively examining and ultimately discrediting the state's historic *parens patriae* power, found unconstitutional that portion of the West Virginia Code which permitted commitment based upon an individual's need for care or treatment where the person lacked the capacity to provide for his own hospitalization.¹⁰⁷ Similarly, federal district courts have found that *parens patriae* based commitment is unconstitutional.¹⁰⁸ Other courts, though accepting a *parens patriae* rationale as a basis for state action, have limited commitment to only those cases in which the state met its burden of demonstrating a compelling interest by showing that the individual posed an imminent threat to his own well-being.¹⁰⁹ The traditional notion that the *parens patriae* power justifies state intervention via involuntary hospitalization upon a showing that an individual is mentally ill or that commitment would be in the individual's best interests no longer passes constitutional muster.

Additionally, the courts have scrutinized state commitment standards to assure that they are not fatally overbroad. Courts in Michigan,¹¹⁰ Kentucky,¹¹¹ Iowa¹¹² and Utah¹¹³ have ruled that those states' statutory commitment standards were impermissibly vague. Michigan required simply a showing of mental illness,¹¹⁴ while Kentucky, Iowa and Utah required a showing of mental illness coupled with the need or fitness for custody or treatment.¹¹⁵ In each in-

107. *State ex rel. Hawks v. Lazaro*, *supra* note 16, at 123.

108. *Kendall v. True*, *supra* note 21; *Dixon v. Attorney General*, *supra* note 10.

109. See, e.g., *Lynch v. Baxley*, *supra* note 15; *Doremus v. Farrell*, *supra* note 17; *Colyar v. Third Judicial Court for Salt Lake County*, *supra* note 27; *Wessel v. Pryor*, *supra* note 101; *State v. O'Neil*, 545 P.2d 97 (Or. 1976).

110. *Bell v. Wayne County General Hospital*, *supra* note 14.

111. *Kendall v. True*, *supra* note 21.

112. *Stamus v. Leonhardt*, *supra* note 20.

113. *Colyar v. Third Judicial Court for Salt Lake County*, *supra* note 27.

114. MICH. COMP. LAWS ANN. §§ 330.21, 330.54 (1967).

115. KY. REV. STAT. ANN. § 202.100 (1970) (Baldwin); IOWA CODE ANN. §§ 229.1, 229.9 (1949) (West); UTAH CODE ANN. § 64-7-36(6) (1953).

stance the courts objected that the statutory guidelines were inadequate to cabin the essentially unbridled discretion which was granted to the decisionmakers at civil commitment hearings.

The courts also have appeared troubled by the inclusion of the term "mental illness" as a necessary element in statutory commitment standards.¹¹⁶ Michigan¹¹⁷ and Hawaii¹¹⁸ courts have stricken down commitment standards predicated solely on mental illness. Legal and medical commentators have reached the almost universal conclusion that the term is inherently imprecise and perhaps incapable of concrete definition:

[T]he definition of mental illness is left largely to the user and is dependent upon the norms of adjustment that he employs. Usually the use of the phrase "mental illness" effectively masks the actual norms being applied . . . [T]he diagnostician has the ability to shoehorn into the mentally diseased class almost any person he wishes, for whatever reason, to put there.¹¹⁹

Statutory definitional attempts, frequently circular or ambiguous in nature, generally fail to give the term any content.¹²⁰ Consequently, for years the courts have been at the whim of the medical profession relying exclusively upon

116. See e.g., *Lessard v. Schmidt*, *supra* note 13, at 1094; *Doremus v. Farrel*, *supra* note 17, at 513.

117. *Bell v. Wayne County General Hospital*, *supra* note 14.

118. *Suzuki v. Quisenberry*, *supra* note 19.

119. Livermore, Malmquist and Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 74, 80 (1968). See also Postel, *Civil Commitment: A Functional Analysis*, 38 BROOKLYN L. REV. 1, 34 (1971) ("Mental illness" embraces an enormous variety of disorders, functional and organic. Psychiatric nomenclature encompasses a truly vast number of disturbances of mental functioning, and each of these disturbances is capable of an inordinate concatenation of symptoms and shadings."); Dix, *Hospitalization of the Mentally Ill in Wisconsin*, 51 MARQ. L. REV. 111, n. 40 (1967); Hardisty, *Mental Illness: A Legal Fiction*, 48 WASH. L. REV. 735 (1973) (the author asserts that the terms "mental illness" or "mental disease" have no accepted medical meaning, and that to predicate legal determinations on these terms obscures important underlying decisions and judgments which are being made); Dershowitz, *Psychiatry in the Legal Process: A Knife that Cuts Both Ways*, 4 TRIAL 29 (Feb.-Mar. 1968).

120. See e.g., DEL. CODE ANN. tit. 16, § 5125(4) (Cum. Supp. 1970) (mental illness is defined as "any condition which substantially impairs an individual's mental health"); IDAHO CODE § 66-317 (Supp. 1972) (a mentally ill individual is one who is "in such mental condition that he is in need of supervision, treatment, care or restraint"). See also, *Developments*, *supra* note 56, at 1202.

medical judgment in determining abnormal behavior and deciding whether commitment is appropriate.¹²¹ Largely in recognition of this fact, the recent court decisions and statutory revisions reflect an attempt to bring objective criteria (e.g., dangerousness to self or others manifested by overt acts, attempts or threats) into the commitment decision to assure that minimal constitutional standards of clarity are met. Nevertheless, the difficult problem of defining mental illness persists, and renders suspect statutory schemes which fall far short of the mark of precision and clarity.

In evaluating the Wyoming commitment standards it will be helpful to examine and measure each of the component parts against the above cited developments. As in most states, commitment in Wyoming requires initially a finding that the individual is mentally ill.¹²² Wyoming statutes define a mentally ill individual as "an individual having a psychiatric or other disease which substantially impairs his mental health."¹²³ None of the operative definitional terms (e.g., disease, substantial impairment of mental health) are elsewhere defined in the statute. The definition appears circular: impaired mental health is determinative of mental illness. Also, mental illness is defined in medical terms; thus, the court is forced to rely almost exclusively upon a medical judgment in deciding whether the person facing commitment meets at least the necessary element of being mentally ill, notwithstanding the inevitable subjectivity of such judgments: "[T]he commitment decision is a process of social definition, of rejection by society, of deviance from norms of behavior; there is nothing honestly scientific, let alone medical, about it."¹²⁴ While it is admittedly difficult (perhaps impossible) to define mental illness precisely, the law fairly can demand a more exacting standard than that set forth in

121. Dershowitz, *supra* note 119, at 29; Dix, *supra* note 119 at 1.

122. WYO. STAT. §§ 25-3-106(a) (ii), 25-3-112 (1977). See *Developments, supra* note 56, at 1202.

123. WYO. STAT. § 25-3-101(a) (i) (1977).

124. Shaffer, Introduction, *Symposium: Mental Illness, the Law and Civil Liberties*, 13 SANTA CLARA LAWYER 369 (1973). See also Roth, Dayley and Lerner, *Into the Abyss: Psychiatric Reliability and Emergency Commitment Statutes, id.* at 400.

this statute.¹²⁵ Failure to do so arguably renders the commitment standards unconstitutionally vague,¹²⁶ although a court recognizing the inherent definitional problem may be willing to salvage the statute by relying upon the accompanying standards of dangerousness or need for care or treatment to provide necessary objective criteria upon which a legal judgment may be based.¹²⁷

Nevertheless, for constitutional purposes, the incorporation into the definition of mental illness of nonmedical terminology reflecting behavioral characteristics, rather than the present conclusory medical terminology, could provide a more objective basis upon which courts might determine whether commitment is appropriate.¹²⁸ For instance, Ohio defines a mentally ill person as an individual with a disorder which "substantially impairs the capacity of the person to use self-control, judgment and discretion in the conduct of his affairs."¹²⁹ Alternatively, Washington defines "mental disorder" as "any organic, mental or emotional impairment which has substantial adverse effects on an individual's cognitive or volitional functions."¹³⁰ A more functional definition expressed in behavioral terms would restore to the courts their proper role of deciding whether commitment is appropriate rather than abdicating this judgment to the medical profession. After all, the commitment decision treads upon significant constitutional liberty interests.¹³¹ At least such a definitional change should serve to insulate that por-

125. *Cf. Durham v. United States*, 94 U.S. App. D.C. 228, 214 F.2d 862 (D.C. Cir. 1954) and *United States v. Brawner*, _____ U.S. App. D.C. _____, 471 F.2d 969 (D.C. Cir. 1972). In *Durham*, the Court of Appeals adopted a purely medical model definition for criminal insanity: "an accused is not responsible if his unlawful act was the product of a mental disease or defect." 214 F.2d at 874. After 18 years of experimentation with the so-called "Durham Rule" the Court, in *Brawner*, concluded that it was an unworkable legal standard and reversed *Durham* adopting the American Law Institute standard to define insanity. See generally, Dershowitz, *supra* note 119.

126. See e.g., *Bell v. Wayne County General Hospital*, *supra* note 14; *Suzuki v. Quisenberry*, *supra* note 19; *Stamus v. Leonhardt*, *supra* note 20.

127. See e.g., *Lessard v. Schmidt*, *supra* note 13; *Doremus v. Farrell*, *supra* note 17. See also, *Developments*, *supra* note 56, at 1258.

128. Rosenhan, *On Being Sane in Insane Places*, 13 SANTA CLARA LAWYER 379, 398 (1973); Wexler and Scoville, *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 65 (1971).

129. OHIO REV. CODE ANN. § 5122.01(A) (Page Supp. 1972).

130. WASH. REV. STAT. ANN. § 71.05.020(2) (West 1975).

131. *Humphrey v. Cady*, *supra* note 3, at 509; *Addington v. Texas*, *supra* note 3, at 1809.

tion of the statute from a vagueness challenge while providing additional guidance and clarity to the lawyers and judges involved in commitment hearings.

Every court which has considered whether the state's police power sanctions involuntary commitment based upon a determination that an individual is mentally ill and potentially dangerous to others has concluded that the state may constitutionally deprive an individual of his liberty and commit him to a mental institution on this basis.¹³² The underlying due process rationale recognizes that the state has a compelling interest in protecting its citizens from harm, and that commitment may represent the least restrictive alternative available to the state to fulfill its responsibility.¹³³ Notwithstanding the preventive detention implications¹³⁴ and the lurking equal protection problems evident where the mentally ill and non-mentally ill are treated differently despite equivalent dangerous propensities,¹³⁵ the courts have sustained such police power-grounded commitments. Likewise, courts considering the validity of dangerousness to self commitment standards have had no difficulty upholding them.^{135a} Thus, the Wyoming statutory commitment standard of mental illness and likelihood of injury to self or others appears constitutionally sound on its face.

Although similar statutory dangerousness standards have been upheld by the courts, they have been noticeably narrowed by judicial interpretation to meet due process requirements. Psychiatric predictions of an individual's potential for engaging in future harmful conduct, regardless of whether he suffers from mental illness, are highly unreliable, usually subjective, and often inherently biased toward the over-prediction of dangerousness.¹³⁶ Recognizing this,

132. See cases cited note 101, *supra*.

133. *Id.*

134. See Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277 (1973).

135. See *Developments, supra* note 56, at 1229.

135a. See *e.g.*, cases cited at note 106, *supra*.

136. *Addington v. Texas, supra* note 3 at 1811; Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974). See also Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 J. CRIME & DELINQUENCY 371 (1972); Rubin, *Predictions of Dangerousness in Mentally Ill Criminals*,

courts have found that the state's interest underlying a dangerousness-based commitment rises to the compelling level when the state has demonstrated a substantial likelihood that the individual will engage in conduct harmful to others, and that this likelihood is manifested by his recent overt acts, threats or attempts.¹³⁷ The potentially dangerous conduct comprehends physical, and possibly emotional, injury to others,¹³⁸ but probably not injury to property.¹³⁹ Basically, the courts seem to be balancing the magnitude and likelihood of harm against the individual's liberty interests in order to satisfy themselves that the stringent due process criteria are met.¹⁴⁰ By incorporating the requirement that the state prove that the dangerousness prediction is based upon the individual's recent actions, an objective criteria is injected into the proceedings, thus releasing the court from total dependence upon psychiatric predictions and providing the court with a basis for judgment—a factual inquiry—that is familiar to it.

This approach appears constitutionally sound, and also serves procedural due process considerations by safeguarding against erroneous commitment decisions.¹⁴¹ Moreover, it is constitutionally required that such a showing of dangerousness be made by "clear and convincing evidence," thereby providing a further safeguard against an erroneous commitment.¹⁴² Thus, assuming that the Wyoming courts have

27 ARCH. GEN. PSYCH. 397 (1972); Wenk, Robison & Smith, *Can Violence Be Predicted?*, 18 J. CRIME & DELINQUENCY 393 (1972).

137. *Lessard v. Schmidt*, *supra* note 13, at 1093; *Lynch v. Baxley*, *supra* note 15, at 391. *But see* United States ex rel. Mathew v. Nelson, 461 F. Supp. 707, 711 (N.D.Ill. 1978) ("We find that there are instances in which a psychiatrist can determine from a psychiatric criminal examination that a mentally ill person is reasonably likely to injure himself or another even though the person's history does not include a recent overt act . . ."); *Colyar v. Third Judicial Court for Salt Lake County*, *supra* note 27, at 434; Note, *Overt Dangerous Behavior as a Constitutional Requirement for Involuntary Commitment of the Mentally Ill*, 44 U. CHI. L. REV. 562 (1977).

138. *See Lynch v. Baxley*, *supra* note 15, at 391.

139. *Suzuki v. Alba*, 438 F. Supp. 1106 (D.Hawaii 1977).

140. *See Note*, *supra* note 137. *See also Developments*, *supra* note 56, at 1236.

141. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *See also* text accompanying notes 233 and 234, *infra*.

142. *Addington v. Texas*, *supra* note 3. *See* Section IV, *infra*, for a discussion of the standard of proof constitutionally required in civil commitment proceedings. Additionally, the constitutional argument that commitment is proper only if it is to the least restrictive environment consistent with the state's or individual's interests provides an additional safeguard against inappropriate commitments. *See* Section III, *infra*.

recognized that dangerousness to others as a grounds for commitment entails a showing of a substantial likelihood of serious harm to others, the standard should pass constitutional muster. Alternatively, however, refinement of the dangerousness standard through statutory amendment to incorporate these additional balancing criteria would further clarify the commitment standard and provide greater guidance to the courts as they confront the elusive notion of potential dangerousness.

Wyoming's alternative commitment standard sanctions involuntary hospitalization upon a showing that an individual is mentally ill and is in need of care or treatment in a hospital and because of his illness lacks sufficient capacity to make responsible application in his own behalf.¹⁴³ Commitment on this basis clearly arises from the state's *parens patriae* power.¹⁴⁴ The basic question to be addressed is whether the *parens patriae* rationale represents a compelling enough state interest to meet substantive due process requirements in view of the liberty interests involved in civil commitment.¹⁴⁵ As noted, the Supreme Court recently has suggested in *Addington v. Texas* that the *parens patriae* doctrine is constitutionally viable in the context of state commitment proceedings.¹⁴⁶ Notwithstanding the *Addington* language, *O'Connor v. Donaldson*¹⁴⁷ noticeably limits *parens patriae* based commitments to those cases where an individual cannot "live safely in freedom" by himself or with the assistance of family members or friends.¹⁴⁸ Further, some lower courts expressly have found commitment standards phrased in terms of an individual's need for care or treatment unconstitutional, noting that the *parens patriae* rationale was an inadequate justification.¹⁴⁹ Thus, a court predisposed against the *parens patriae* doctrine would likely

143. WYO. STAT. §§ 25-3-106(a) (ii), 25-3-112 (1977).

144. See State ex rel. Hawks v. Lazaro, *supra* note 16; In re Beverly, *supra* note 22; See also, *Developments*, *supra* note 56, at 1209-10.

145. See generally, *Developments*, *supra* note 56, at 1210.

146. *Addington v. Texas*, *supra* note 3.

147. *O'Connor v. Donaldson*, *supra* note 5.

148. *Id.* at 575-76. See *Doremus v. Farrell*, *supra* note 17, at 514; In re Beverly, *supra* note 22, at 486.

149. See State ex rel. Hawks v. Lazaro, *supra* note 16; *Kendall v. True*, *supra* note 21; *Dixon v. Attorney General*, *supra* note 18. *But see*, In re Beverly, *supra* note 22; *Lynch v. Baxley*, *supra* note 15.

have little difficulty invalidating the Wyoming care or treatment standard for commitment.

Assuming, however, that the standard could withstand a challenge on these grounds, it is clear that it can be saved constitutionally only with a narrowing judicial interpretation to meet the *O'Connor* guidelines.¹⁵⁰ The critical question is not whether the individual requires care or treatment, or whether he lacks capacity to provide for his own hospitalization; rather it is whether he can survive safely outside of the restricted hospital environment. The courts which have provided judicial gloss on similarly worded or intentioned commitment standards have limited commitment to those cases where an individual poses a threat to his own health or safety because of his inability to provide for his basic personal needs.¹⁵¹ Some courts have further required that the threat of harm be demonstrated by a recent overt act, threat or attempt.¹⁵² It would seem that accepting this judicial narrowing of the need for care or treatment standard leads to the conclusion that it is redundant in view of the alternative dangerousness-to-self standard.¹⁵³ Therefore, the standard serves little or no purpose, other than perhaps to confuse the decision-maker as to the appropriate commitment standard to be applied.

Additionally, it has been held that the state must demonstrate not only that continued freedom may be harmful to the individual but also that he lacks the capacity to decide about his own hospitalization needs.¹⁵⁴ Essentially this further requirement, which is reflected in the Wyoming standard, suggests that although an individual may potentially

150. *Doremus v. Farrell*, *supra* note 17; *In re Beverly*, *supra* note 22; *Wessel v. Pryor*, *supra* note 101.

151. *Id. Cf. Colyar v. Third Judicial Court for Salt Lake County*, *supra* note 27. *Compare CAL. WELF. AND INST. CODE* § 5008(h), 5213, 5250 (1969 West) (commitment authorized upon a finding of grave disability which is defined as the inability of a person as a result of a mental disorder to provide his basic personal needs for food, clothing or shelter).

152. *Doremus v. Farrell*, *supra* note 17, at 515; *Lynch v. Baxley*, *supra* note 15, at 391; *Lessard v. Schmidt*, *supra* note 13, at 1093. But see *Colyar v. Third Judicial Court for Salt Lake County*, *supra* note 27, at 434.

153. *WYO. STAT.* §§ 25-3-106(a) (ii) (A) and (B); 25-3-112(k) (1977).

154. *Lessard v. Schmidt*, *supra* note 13, at 1094; *Lynch v. Baxley*, *supra* note 15, at 391; *Wessel v. Pryor*, *supra* note 101, at 1148; *Colyar v. Third Judicial Court for Salt Lake County*, *supra* note 27, at 431. See also, *Developments*, *supra* note 56, at 1212.

be harmful to himself, if he has the capacity to weigh the risk of harm to himself against the benefits of hospitalization, then it is inappropriate to commit him to an institution against his wishes.¹⁵⁵ This principle fully prevails in the instance of physically ill persons who can decide for themselves whether to accept or risk various treatments,¹⁵⁶ and it would seem likewise to apply here so long as the individual capably recognizes and willingly accepts the risks entailed in freedom. Not all mental illnesses impair an individual's decision-making abilities.¹⁵⁷ Thus, that aspect of the Wyoming standard which embraces an individual's lack of capacity to make responsible application for his own hospitalization could be retained, so long as its application is directly coupled to the notion that commitment can only be predicated upon a showing of likelihood of personal injury *and* lack of capacity to decide about hospitalization needs. This should meet the basic *parens patriae* rationale which places the state essentially in the role of a substitute decision-maker for the individual, responsible for proceeding in his best interests.

Moreover, the Wyoming care or treatment standard suffers from potential vagueness problems.¹⁵⁸ The standard suggests a certain circularity of reasoning and can be applied in a Catch 22 fashion: care or treatment is proffered through the commitment proceedings and the individual objects; his objection establishes his lack of capacity to decide about his own hospitalization *and* his need for care or treatment.¹⁵⁹ In addition, since the requirement of establishing

155. See Colyar v. Third Judicial Court for Salt Lake County, *supra* note 27.

156. Dershowitz, *Psychiatry in the Legal Process: A Knife that Cuts Both Ways*, *supra* note 119.

157. Colyar v. Third Judicial Court for Salt Lake County, *supra* note 27, at 430, 431; Comment, *Involuntary Civil Commitment of the Nondangerous Mentally Ill: Substantive Limitations*, 18 So. DAK. L. REV. 407, 416 (1973); Siegel, *The Justifications for Medical Commitment—Real or Illusory*, 6 WAKE FOREST INTRA. L. REV. 21, 31-33 (1969).

158. See *e.g.*, State ex rel. Hawks v. Lazaro, *supra* note 16:

The standard of hospitalization for the benefit of the individual leaves an entirely subjective determination for the committing authority which violates due process because it forecloses a meaningful appeal and places the individual in jeopardy of losing his freedom without providing an objective standard against which the committing authority's determination can be measured. (citations omitted.) 202 S.E.2d at 123.

159. Colyar v. Third Judicial Court for Salt Lake County, *supra* note 27, at 432.

that the person suffers from mental illness is linked with the standard of need for care and treatment, the potential for misapplication increases. The commentators have noted a tendency on the part of courts handling commitment proceedings under such a standard to simply equate mental illness with a lack of capacity and to sanction commitment on such bootstrap reasoning.¹⁶⁰ The standard is inherently ambiguous, and provides little or no guidance to the decision-maker in a commitment hearing. While strict judicial interpretation might save it, this standard should be deleted from the Wyoming Code. As noted, the individual's capacity to decide for himself about hospitalization could be coupled with the requirement that a real likelihood of personal harm be demonstrated before a *parens patriae* based commitment would follow.

The importance of coherent, unambiguous commitment standards is highlighted by the Supreme Court's recent observations in *Addington*:

At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. [T]here is the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior.¹⁶¹

Carefully tailored commitment standards should assure that inappropriate hospitalizations are avoided while still providing the state adequate leeway to assist its citizens who suffer severe disorders, rendering them potentially harmful to themselves or others. Legislative revision or judicial interpretation of the Wyoming standards consistent with the

160. Brakel and Rock, *The Mentally Disabled and the Law* 36 (1971); Stone, *supra* note 41, at 47; Cf. *United States v. Brawner*, *supra* note 125, at 983; Rosenham, *supra* note 128, at 398; Comment, *Involuntary Civil Commitment of the Nondangerous Mentally Ill: Substantive Limitations*, *supra* note 157, at 416.

161. *Addington v. Texas*, *supra* note 3, at 1809-1810.

above discussed principles governing the state's police power or *parens patriae* authority would promote these goals while meeting constitutional requirements. Additionally, however, incorporation of the least restrictive alternative doctrine into the Wyoming commitment scheme would further assure that the state met its constitutional obligations while validating contemporary mental health practice by encouraging treatment in a less onerous setting than the state hospital.¹⁶²

III. LEAST RESTRICTIVE ALTERNATIVE

Present Wyoming statutory commitment procedures provide that a court faced with an individual who properly meets the commitment criteria has but one alternative: to order his commitment to the state hospital.¹⁶³ No flexibility is available to the court to provide less restrictive alternative care or treatment,¹⁶⁴ notwithstanding the substantial body of contemporary literature in the mental health field recognizing that even short term hospitalization has serious adverse effects on individuals so confined, and that local, community based treatment programs frequently are superior methods of patient treatment to involuntary hospitalization.¹⁶⁵ The notion that individuals facing civil commitment are entitled to treatment in the least restrictive setting derives from the constitutional doctrine of the least restrictive alternative.¹⁶⁶ The principle has been widely recognized and applied judicially to state civil commitment proceedings;¹⁶⁷ and it has been incorporated, either explicitly or implicitly, into the civil commitment statutes of thirty-five (35)

162. See Section III, *infra*.

163. WYO. STAT. § 25-3-112(k) (1977).

164. Despite the apparent statutory inflexibility, several Wyoming courts regularly seek alternatives to involuntary commitment to the state hospital as part of their conduct of the commitment hearing. Testimony of Steve Aron, Attorney representing the Wyoming State Bar, before the Joint Interim Subcommittee, *supra* note 38.

165. See e.g., Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107, 1121-1137 (1972) (hereinafter cited as Chambers); Wexler and Scoville, *supra* note 128, at 118-127.

166. *Id.* See also, *Developments*, *supra* note 56, at 1245.

167. *Lessard v. Schmidt*, *supra* note 13, at 1094; *Lynch v. Baxley*, *supra* note 15, at 392; *Stamus v. Leonhardt*, *supra* note 20, at 452; *Davis v. Watkins*, 384 F. Supp. 1196, 1203 (N.D. Ohio 1974); *Dixon v. Attorney General*, *supra* note 18, at 974; *Cf. Welsch v. Likins*, 373 F. Supp. 487, 501 (D. Minn. 1974) (applied to the mentally retarded).

states.¹⁶⁸ Practically, as the district court explained in *Lynch v. Baxley*,¹⁶⁹ the doctrine requires judicial inquiry into the suitability of treatment alternatives such as voluntary or court-ordered out-patient treatment, day treatment in the hospital, night treatment in the hospital, placement in a private hospital, placement in the custody of a willing and responsible relative or friend, placement in a nursing home, referral to a community health clinic, home health aid services, or prescribed medication.¹⁷⁰

In Wyoming the availability of alternative treatment programs necessarily is limited as a practical matter, owing both to the state's small population and the long distance involved in travel from one community to another. But the state presently can provide professional mental health services to virtually everyone through accessible community mental health programs, although local comprehensive care programs are not yet fully available.¹⁷¹ Thus, application of the doctrine of the least restrictive alternative to Wyoming civil commitment procedures presently is realistically possible. This suggests that the all-or-nothing commitment requirement presents constitutional problems.

The constitutional genesis of the least restrictive alternative doctrine generally is traced to *Shelton v. Tucker*,¹⁷² in which the Supreme Court stated:

[E]ven though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in light of less drastic means for achieving the same basic purpose.¹⁷³

168. Hoffman and Foust, *Least Restrictive Treatment of the Mentally Ill: A Doctrine in Search of its Senses*, 14 SAN DIEGO L. REV. 1100, 1115 (1977).

169. *Lynch v. Baxley*, *supra* note 15.

170. *Id.* at 392.

171. Testimony of W. Don Nelson, Director of the Wyoming Department of Health and Social Services, and Dr. Ray Muhr, Southwest Wyoming Community Mental Health Center, before the Joint Interim Subcommittee, *supra* note 38.

172. *Shelton v. Tucker*, 364 U.S. 479 (1960).

173. *Id.* at 488.

Courts construing and applying the *Shelton* doctrine in the context of civil commitment have recognized that since involuntary hospitalization involves "a massive curtailment of liberty," due process requires the state to demonstrate that the proposed commitment is to the least restrictive environment consistent with the patient's treatment needs.¹⁷⁴ Generally recognizing the inability of a proposed patient to examine and present these alternatives to the court, the burden has been placed on the state to show that all less drastic treatment alternatives have been exhausted before an individual is committed to a state hospital.¹⁷⁵ It should be noted that there is contrary precedent indicating that the least restrictive alternative doctrine is not constitutionally applicable to state civil commitment proceedings,¹⁷⁶ and its application has been criticized as stretching the institutional competence of the courts,¹⁷⁷ often engaging them in a futile inquiry owing to the sad lack of available community treatment alternatives.¹⁷⁸

174. See cases cited note 167, *supra*.

175. See e.g., *Lessard v. Schmidt*, *supra* note 13, at 1096; *Lynch v. Baxley*, *supra* note 15, at 392.

176. *State v. Sanchez*, 80 N.M. 438, 457 P.2d 370 (1969), *appeal dismissed for want of a substantial federal question*, 396 U.S. 276 (1970). The New Mexico Supreme Court ruled that the state had no constitutional obligation to consider less drastic alternatives to involuntary hospitalization. Subsequently the United States Supreme Court dismissed the appeal for want of a substantial federal question. The matter of Sanchez' precedential value has been questioned seriously, and other courts confronted with the Supreme Court's disposition of Sanchez either have distinguished it or felt that they were not bound by it. See *Lynch v. Baxley*, *supra* note 15, at 392 n. 10; *Welsch v. Likins*, *supra* note 167, at 501; See also, *Developments*, *supra* note 56, at 1247; *Chambers*, *supra* note 165, at 1151-53.

177. *Lake v. Cameron*, _____ U.S. App. D.C. _____, 364 F.2d 657, 663 (D.C. Cir. 1966) (Burger, J., dissenting) ("[t]his Court now orders the District Court to perform functions normally reserved to social agencies by commanding search for a judicially approved course of treatment or custodial care for this mentally ill person who is plainly unable to care for herself. Neither this Court nor the District Court is equipped to carry out the broad geriatric inquiry proposed or to resolve the social and economic issues involved.") Cf. *Parham v. J.R.*, *supra* note 3, at 2507 (independent medical evaluation of propriety of juvenile commitment to a state hospital is adequate to meet due process requirements; a more formal judicial or administrative hearing will not necessarily assure any greater protection to the child).

178. See the decision on remand of the district court in *Lake v. Cameron*, 267 F. Supp. 155 (D.D.C. 1967), where after exploring a variety of alternatives, the court was unable to find a suitable alternative placement for the 67 year old Mrs. Lake who suffered from chronic brain syndrome leading to periodic mental lapses during which time she wandered aimlessly about the city without knowing where she was. Ultimately, Mrs. Lake lived out the final five years of her life confined to St. Elizabeth's Hospital, the maximum security mental institution for the District of Columbia. *Chambers*, *supra* note 165, at 1189.

Regardless, however, of the constitutional basis for the least restrictive alternative doctrine, and although it necessarily imposes additional burdens on courts in the commitment process, the possibility of an alternative disposition presents likely therapeutic benefits to the individual,¹⁷⁹ pre-sages the establishment and maintenance of mutually cooperative relationships between the judiciary, prosecutors, and local mental health agencies, and is consistent with the present practices of several Wyoming courts.¹⁸⁰ Implementation of the doctrine also would encourage courts to mandate treatment for the mentally ill individual who qualifies for commitment and seemingly requires some treatment, although perhaps not hospitalization, rather than to simply release the individual.¹⁸¹ Moreover, judicial utilization of the least restrictive alternative doctrine during commitment hearings presumably would complement existing state hospital treatment policies which provide that patients should be returned to society at the earliest practicable date.¹⁸² To the extent that local resources can be utilized to avoid commitment in the first instance, hospital staff time would be freed to concentrate on seriously ill patients. Additionally, effective local treatment would likely undercut the "revolving door syndrome" of so many mental patients who periodically find themselves recommitted to the state hospital after having difficulties with the community adjustment.¹⁸³ This may ultimately result in a saving of judicial time as well.

179. See note 165, *supra*.

180. See note 164, *supra*.

181. Of course, such an alternative may encourage additional commitments; however, it would seem that commitment or judicially mandated treatment would be improper unless the individual met the commitment standards in the first instance. See *Developments, supra* note 56, at 1250.

182. 1978 ANNUAL REPORT, *supra* note 38, at 1 ("The objectives of the Wyoming State Hospital are to render, in keeping with sound medical practices, the best possible patient treatment and care in the most economical fashion in keeping with sound medical practices; and to return treated and rehabilitated patients to society at the earliest practicable date.")

183. *Id.* at 30. A ten year admission survey for the Wyoming state hospital reflects that from July 1, 1968 to June 30, 1978, the number of patients readmitted annually varied from 179 during the 1969-70 period, to 466 during the 1976-77 period. More significantly, during the last two years of the survey, more patients were admitted to the hospital as readmissions than were admitted for the first time. In fact, including patients who were returned from convalescent leave status as readmissions, during the past five years, the hospital saw more patients for a second or third time than it saw newly admitted patients.

Although the present reality in Wyoming may be that only minimal local mental health resources are available to implement the least restrictive environment principle, it is clear that some alternatives are available to the courts. In view of this, the failure of the statute to provide for dispositions short of commitment to the state hospital raises possible constitutional problems, and it is unresponsive to currently accepted mental health treatment practices. To their credit, some Wyoming courts already are implementing the principle, but statutory recognition of the least restrictive alternative doctrine would assure uniformity in its application and avoid the noted constitutional shortcomings. Moreover, such a statutory provision may well spur the development of sorely needed alternative treatment facilities.¹⁸⁴

IV. EMERGENCY COMMITMENT

Emergency commitment procedures in Wyoming are statutorily prescribed in those cases where an individual is suspected of being mentally ill and likely to injure himself or others.¹⁸⁵ The statute provides that an individual who is

184. See *Dixon v. Weinberger*, 405 F.Supp. 974 (D.D.C. 1975); but see *Welsch v. Likins*, 550 F.2d 1122 (8th Cir. 1977).

185. WYO. STAT. § 25-3-110 (1977). However, the Wyoming statutes are not free of ambiguity on this point since WYO. STAT. § 25-3-106(a) (ii) (1977) provides that upon application and certification by a physician, a mentally ill individual may be admitted to a hospital if he is dangerous to himself or others, or in need of care or treatment and unable to make responsible application for his own hospitalization. Seemingly an application for admission under WYO. STAT. § 25-3-106(a) (ii) (1977) could be processed as expeditiously as one initiated under WYO. STAT. § 25-3-110 (1977), and thus bypass the safeguards provided in the latter section since the commitment standard is broader and no procedural protections necessarily adhere in the former provision. It is reasonably clear from the statutory language that the legislature's intent was that the WYO. STAT. § 25-3-110 (1977) procedures govern in the case of an emergency situation where the alleged mentally ill person potentially may be harmful to himself or others and he likely would refuse to cooperate in obtaining a medical diagnosis of his condition. Based on this author's conversations with various judges and prosecutors within Wyoming, the prevailing interpretation of these statutes seems to be that WYO. STAT. § 25-3-110 (1977) sets forth the applicable emergency commitment procedures. Additionally, state hospital statistics for fiscal year 1978 reflect that 22 patients were admitted on a "physician's certificate" (presumably under WYO. STAT. § 25-3-119 (1977)) and none were admitted as "emergency" commitments (presumably under WYO. STAT. § 25-3-106(a) (ii) (1977)). See 1978 ANNUAL REPORTS, *supra* note 38, at 33. Yet WYO. STAT. § 25-3-106(a) (ii) (1977) provides a possible "back door" alternative to circumvent the emergency commitment proceedings. See also text accompanying footnotes 54-59, *supra*, and text accompanying footnotes 220-224, *infra*.

potentially dangerous may, upon order of a court, be taken into custody and held for a twenty-four hour period pending a mental examination by a court-appointed physician.¹⁸⁶ If the examining doctor certifies that the proposed patient is mentally ill and liable to injure himself or others, and the court concurs after an "appropriate hearing" held within forty-eight hours after the doctor's certification is filed, then the individual may be committed to the state hospital.¹⁸⁷ The statute further provides that the individual may be present and testify at the hearing, and he may be accompanied by counsel.¹⁸⁸ During these proceedings the detained individual may be held in appropriate facilities, and during an "extreme emergency" he may be placed in the county jail.¹⁸⁹ No comparable procedural requirements accompany the hospitalization of an individual who qualifies for admission by virtue of his mental illness and his need for care or treatment.¹⁹⁰ Therefore, this section will first focus on the sufficiency of the prescribed emergency commitment procedures in the case of potentially dangerous persons, then address the propriety of *parens patriae*-based emergency commitment.

The constitutional problems inherent in state emergency commitment statutes include the validity of the standards governing detention, the necessity for a precommitment hearing, the timing of such a hearing and the applicability of procedural safeguards at the hearing.¹⁹¹ Necessarily in the emergency commitment context the interests of the individual and the state come into tension: the individual's interest includes retention of his liberty and the avoidance of the stigmatization and possible adverse effects of even short term involuntary hospitalization; the state's interest is the need for prompt action to protect society and its need for time to accurately diagnose and provide for the allegedly

186. WYO. STAT. § 25-3-110(a) (1977).

187. WYO. STAT. § 25-3-110(b), (d) (1977).

188. WYO. STAT. § 25-3-110(b) (1977).

189. WYO. STAT. § 25-3-114 (1977).

190. WYO. STAT. § 25-3-106(a)(ii)(C) (1977). See also text accompanying footnotes 54-59, *supra*.

191. See Roth, Dayley and Lerner, *supra* note 124; *Developments, supra* note 56, at 1275-1279.

mentally ill person.¹⁹² The Supreme Court has provided some guidance with its recognition that basic constitutional requirements are satisfied so long as the nature and duration of commitment are reasonably related to the purpose for which the individual is committed.¹⁹³ Further, in *McNeil v. Director, Patuxent Institution*,¹⁹⁴ the Court observed: "If the commitment is properly regarded as a short-term confinement with a limited purpose . . . then lesser safeguards may be appropriate, but by the same token, the duration of the confinement must be strictly limited."¹⁹⁵ Relying upon this precedent, lower courts have held that state emergency commitment proceedings properly limited to potentially dangerous persons and properly conducted to assure reasonably prompt judicial involvement and basic procedural protections, satisfy minimum due process requirements.¹⁹⁶ By limiting summary emergency proceedings to dangerousness-based commitments, the Wyoming statute appears to address compelling state interests in assuring protection of the individual or society, and therefore seems to meet substantive due process standards applicable when individual liberty is at stake.¹⁹⁷ Similarly, the Wyoming statutory requirement of a judicial hearing within forty-eight (48) hours after an individual has been medically certified as mentally ill and likely to injure himself or others¹⁹⁸ meets or exceeds the most stringent time limitations suggested by any of the courts which have considered and imposed specific time requirements for initial probable cause hearings after an individual has been taken into custody for emergency reasons.¹⁹⁹

192. See *Developments*, *supra* note 56, at 1275-76.

193. *Jackson v. Indiana*, *supra* note 3, at 738.

194. *McNeil v. Director, Patuxent Institution*, *supra* note 3. In *McNeil*, the Court discharged the petitioner from the respondent's custody after finding that his *ex parte* commitment for observation as a defective delinquent, which had lasted for six years, was unreasonable in view of the state's original purpose in committing him.

195. *Id.*, at 249.

196. See *e.g.*, *Lessard v. Schmidt*, *supra* note 13; *Lynch v. Baxley*, *supra* note 15; *Bell v. Wayne County General Hospital*, *supra* note 14; *Doremus v. Farrell*, *supra* note 17. *But see* *Fhagan v. Miller*, 29 N.Y.2d 348, 278 N.E.2d 615 (1972); *Coll v. Hyland*, *supra* note 22.

197. See *Byers v. Solier*, 16 Wyo. 232, 93 P. 59 (1907). See also text accompanying footnotes 85-87, *supra*.

198. WYO. STAT. § 25-3-110(d) (1977).

199. See, *e.g.*, *Lessard v. Schmidt*, *supra* note 13, at 1091 (48 hours maximum period before a probable cause hearing must be held); *Bell v. Wayne*

However, while the statute provides for a prompt judicial hearing, it fails to give content to the hearing requirement other than to provide that the individual *may* be present and testify and he *may* be accompanied by counsel. The question posed by these optional procedural safeguards is whether they meet minimum due process requirements for an initial, emergency detention proceeding. It should be noted that some courts, recognizing that due process is a flexible concept designed to assure fundamental fairness, have suggested that an initial hearing upon an individual's emergency confinement is not required so long as a long term commitment hearing is available promptly and so long as other safeguards, such as medical review of the commitment or habeas corpus relief, are available to protect against an improper commitment.²⁰⁰ The Supreme Court's recent decision in *Parham v. J.R.*, a case involving parental commitment of minor children to a state hospital, lends additional credence to this position since the Court held that judicial review of the commitment was not necessary and it found adequate protection through the independent medical review procedure of the hospital.²⁰¹ Contrary to the state statutes involved in these cases, however, the Wyoming statutes do not provide specific time limitations within which a full commitment hearing under Section 25-3-112 of the Wyoming Statutes must be held.²⁰² Other courts, after balancing the

County General Hospital, *supra* note 14, at 1098 (five day maximum period before a probable cause hearing must be held); *Lynch v. Baxley*, *supra* note 15, at 388 (seven day maximum period before a probable cause hearing must be held). See also *Logan v. Arafeh*, 346 F. Supp. 1265 (D.Conn. 1972) *aff'd sub nom.*, *Briggs v. Arafeh*, 411 U.S. 911 (1973) (45 day commitment prior to a hearing was not unreasonably long and did not constitute a due process violation).

200. *Logan v. Arafeh*, *supra* note 199; *French v. Blackburn*, *supra* note 22; *Coll v. Hyland*, *supra* note 22.

201. *Parham v. J.R.*, *supra* note 3. *Parham* clearly is distinguishable from the situation of the commitment of an adult to a state institution because the Court was straining in *Parham* to reconcile the conflicting interests of a parent and child which adhere in the juvenile commitment context. It was as a result of the Court's balancing of these interests that relaxed procedural protections were accepted. 99 S.Ct. at 2506. The same conflict does not arise in the case of an adult commitment. But it still is significant that the Court did not think that judicial review was constitutionally required or that it assured any greater protection to the individual than other forms of independent review given the medical nature of the underlying commitment decision. 99 S.Ct. at 2506 *But cf.* *Morrissey v. Brewer*, *supra* note 12 (initial probable cause hearing required before parole revocation; judicial involvement not required).

202. The only time limitation provided in Wyoming commitment statutes applicable to the commitment hearing is found in Wyo. STAT. § 25-3-112

individual and state interests at stake, have concluded that due process requires a prompt probable cause hearing preceded by notice to the individual, his presence at the proceedings unless it is waived by his counsel, and representation by counsel (appointed if necessary).²⁰³ These courts generally have stopped short of requiring that all adverse witnesses, including the certifying physician, be present and available for cross examination; rather they suggest that their presence be required only if the proposed patient's counsel offers contrary proof or desires to challenge the factual accuracy of their reports.²⁰⁴ The significant liberty interests implicated, and the real possibility of stigmatization and deleterious consequences attached to an erroneous commitment, even a short term one, suggest that this minimum procedural regularity is required.²⁰⁵

Therefore, the optional language in Section 25-3-110(b) of the Wyoming Statutes regarding the individual's presence and his right to counsel at this preliminary hearing renders the statute constitutionally suspect. Also, no provision is made to provide notice to the individual of the pro-

(d) (1977) which provides that the initial medical examination by the court-appointed physician must be completed within seven days after the individual is provided notice of the hearing. The statute does provide, however, that the hearing must be scheduled expeditiously. WYO. STAT. § 25-3-112(f) (1977). Also the Wyoming statutes recognize that if a hospitalized individual (presumably an emergency patient) requests his release from the hospital, the hospital must initiate involuntary hospitalization proceedings within forty-eight (48) hours by filing an application for WYO. STAT. § 25-3-112 (1977) proceedings. Additionally, medical review of the original commitment is assured since the state hospital must examine all patients within 10 days of their admission. WYO. STAT. §§ 25-3-111, 25-3-117 (1977). See also Section V, *infra*.

203. In re Barnard, 455 F.2d 1370 (D.C.Cir. 1971); Bell v. Wayne County General Hospital, *supra* note 14; Lessard v. Schmidt, *supra* note 13; Doremus v. Farrell, *supra* note 17; Wessell v. Pryor, *supra* note 101. Cf. Heryford v. Parker, *supra* note 2 (right to counsel at all stages in commitment of mentally retarded person). But see Stone, *supra* note 41, at 58. Stone argues that the function of an attorney at an emergency commitment hearing should be similar to that served by an attorney at a grand jury hearing—simply to advise the client outside of the hearing, but not to participate as an adversary.

204. See e.g., In re Barnard, *id.* at 1374; Kendall v. True, *supra* note 21, at 419.

205. In re Barnard, *id.* at 1375. ("When personal freedom is at issue due process at least demands that a person's legal status be determined at the earliest possible time.") See Addington v. Texas, *supra* note 3, at 1809; Wexler and Scoville, *supra* note 128, at 118. See also, In re Curry, 452 F.2d 1360 (D.C.Cir. 1971) (During 1970, of 1,702 persons in the District of Columbia who were authorized to be committed on an emergency basis for seven days, only 331 eventually were judicially committed on a long-term basis.).

ceedings, which breaches fundamental due process notions.²⁰⁶ Additionally, the statute fails to set forth who bears the burden of proof and which standard of proof applies.²⁰⁷ It seems clear that the state must bear this burden since it is acting to detain an individual; and, after the *Addington v. Texas* ruling,²⁰⁸ it appears that the "clear and convincing" evidentiary standard of proof should apply. Application of these procedural safeguards perhaps alters the nature of the proceedings from a rather summary probable cause hearing to a more substantial inquiry into the basis of the state's commitment action, but it should not impose impossible burdens on the courts who already are charged with the responsibility for carrying out this initial hearing. By not imposing an absolute right to cross examination of the certifying physician, severe logistical problems of coordinating judicial and medical schedules can be avoided while still assuring that a court independently scrutinizes the initial commitment decision to assure that hospitalization is proper. Moreover, adoption of these basic procedures would clarify the ambiguous "appropriate hearing" language in Section 25-3-110(b) of the Wyoming Statutes and assure statewide regularity in the handling of emergency commitments. While it might be argued that imposition of a more formal preliminary hearing requirement might undercut the prompt treatment rationale of the emergency commitment provisions, it must be recognized that persons who find themselves summarily institutionalized and subjected to unwanted psychiatric treatment are likely to be suspicious and resist efforts to assist them. They may also suffer additional psychological difficulties, as feelings of paranoia or persecution likely would be reinforced as a result of this experience.²⁰⁹ Thus, imposition of these minimal procedural safe-

206. See cases cited note 198, *supra*.

207. See Note, "We're Only Trying to Help": The Burden and Standard of Proof in Short Term Civil Commitment, 31 STAN. L. REV. 425 (1979).

208. *Addington v. Texas*, *supra* note 3. See text accompanying notes 287-291, *infra*.

209. See *Lessard v. Schmidt*, *supra* note 13, at 1091, n. 18 citing the testimony of Arthur Cohen, National Capital Area Civil Liberties Union and American Civil Liberties Union, before a 1970 congressional committee:

Although 7 days may not appear to some to be a very long time, experience has indicated that any kind of forcible detention of a person in an alien environment may seriously affect him in the first few days of detention, leading to all sorts of acute traumatic

guards during the emergency commitment process would clarify existing statutory requirements and insulate the Wyoming procedures from constitutional challenge without substantially increasing the workload of local courts.

An additional problem in the emergency commitment context is the question of whether the state may legally confine alleged mentally ill individuals facing examination by a doctor or an emergency commitment hearing in a county jail, as provided for in Section 25-3-114 of the Wyoming Statutes. As noted, the Supreme Court has held that due process requires the nature and duration of a commitment to be reasonably related to the purpose for the commitment.²¹⁰ The Court also has held that the infliction of penal sanctions based upon an individual's status constitutes cruel and unusual punishment.²¹¹ Additionally, the Court has recognized in the procedural due process context that the state may act summarily in an emergency situation.²¹² Relying upon these principles, lower courts have concluded that improper institutional placement upon commitment can constitute a constitutional violation, but there do not appear to be any cases directly addressing the question of the propriety of temporary detention in a jail of a mentally ill person who has not committed a criminal offense.²¹³

and iatrogenic symptoms and troubles. By 'iatrogenic' I mean things that are caused by the very act of hospitalization which is supposed to be therapeutic; in other words, the hospitalization process itself causes the disturbance rather than the disturbance requiring hospitalization.

See also Roth, Dayley and Lerner, *supra* note 124, at 416.

210. Jackson v. Indiana, *supra* note 3, at 738.

211. Robinson v. California, 370 U.S. 660, 666 (1962). While Robinson dealt with the imprisonment of a drug addict, its rationale proscribing imprisonment based upon an individual's status seems directly analogous to the situation posed when a mentally ill individual who has committed no criminal offense is incarcerated in a penal facility.

212. Boddie v. Connecticut, 401 U.S. 371, 379 (1971). See also, Ploof v. Brooks, 342 F. Supp. 999, 1005 (D.Vt. 1972).

213. Ploof v. Brooks, *supra* note 212 (transfer of moderately mentally ill patient to maximum security state hospital); Kesselbrenner v. Anonymous, 33 N.Y.2d 161, N.E.2d 903 (1973) (transfer of civilly committed patient to maximum security hospital operated by state department of corrections). Lower court cases also indicate that once the state deprives an individual of his liberty for purposes of involuntary civil commitment, then the state is obligated to provide treatment to the person. Welsch v. Likins, *supra* note 184, approving Welsch v. Likins, *supra* note 167; Wyatt v. Aderhold, 503 F.2d 1305 (5th Cir. 1974). Incarceration in a county jail is plainly anti-therapeutic and it is highly unlikely that any treatment will be provided there.

Frequently emergency commitment situations are brought to the attention of the police in the first instance. Prompt action often is called for in a psychiatric emergency and after initial intervention, some continuing restraint may be necessary to protect either the individual or the public. Unfortunately, appropriate detention facilities are not uniformly available throughout Wyoming although some form of professional attention should be.²¹⁴ Where detention is necessary, the Wyoming statute provides that commitment to the county jail is proper only in an emergency.²¹⁵ This implies that all alternative detention facilities must be exhausted before the proposed patient may be placed in jail.²¹⁶ Additionally, the statutes governing emergency commitment do provide for a prompt hearing within forty-eight hours, thus assuring that the detention will be temporary.²¹⁷ Given these facts, relevant constitutional principles may not be offended by temporary detention in a jail facility so long as the detention is compelled by emergency circumstances that cannot otherwise be handled and its duration is brief. Additionally, segregation from the facility's criminal population is appropriate to assure that the confinement is not penal in nature.²¹⁸ Further, the authorities rather clearly have a constitutional duty under these circumstances to insure the individual against any bodily harm, either at the hands of other inmates or staff.²¹⁹

The Wyoming statutes also seem to provide for *parens patriae*-based emergency commitments.²²⁰ Section 25-3-106

214. Testimony of W. Don Nelson, Director of the Department of Health and Social Services, and Dr. Ray Muhr, Southwest Wyoming Mental Health Center, before the Joint Interim Subcommittee, *supra* note 38.

215. WYO. STAT. § 25-3-114 (1977).

216. Assuming the accuracy of the estimates of Mr. Nelson and Dr. Muhr in their testimony before the Joint Interim Subcommittee, *supra* note 38, comprehensive mental health services presently should be available in approximately one half of the state's counties. Therefore, at least in these counties, detention of proposed patients in the county jails should be avoided in *all* cases, including extreme emergency situations.

217. WYO. STAT. § 25-3-110(d) (1977).

218. *Cf. Robinson v. California*, *supra* note 211.

219. *Goodman v. Parwatarikar*, 570 F.2d 801, 804, (8th Cir. 1978); *Harper v. Cserr*, 544 F.2d 1121, 1123 (1st Cir. 1976); *New York State Association for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 764 (E.D.N.Y. 1973).

220. Although the article distinguishes dangerousness-based commitments from *parens patriae*-based commitments, the line between the two is not so clear. As the court noted in *Lynch v. Baxley*, *supra* note 15, at 390,

(a) (ii) (C) of the Wyoming Statutes provides for hospital admission of mentally ill individuals who require care or treatment but are unable to provide responsibly for their own hospitalization. No statutory provision requires judicial intervention prior to their commitment to the hospital, although they are entitled to request their release after they have been admitted, which will trigger judicial proceedings if the hospital determines that they should remain as patients.²²¹ Since this article takes the position that *parens patriae*-grounded commitments are constitutionally suspect and essentially unnecessary in view of the expansive potential of the dangerousness commitment standard,²²² it is even more difficult to justify the possibility of such a *parens patriae* commitment on an emergency basis. It is hard to imagine that a *parens patriae*-based emergency commitment would present a situation not already covered by the existing statutes establishing procedures for the emergency commitment of potentially dangerous persons: a person who may require care or treatment hardly presents an emergency situation justifying reduced procedural safeguards unless he also is possibly dangerous either to himself or others. In that event, the existing statutes provide the state with a vehicle for dealing with the problem and assuring the individual of some procedural regularity before he is committed to the state hospital.²²³ Additionally, in the absence of a real emergency situation, the complete lack of procedural safeguards cannot be justified; particularly since the critical question in such a commitment is the individual's capacity to decide about his own hospitalization—an issue that tra-

commitments accomplished because the individual potentially is harmful to himself derive from both the state's police power and its *parens patriae* authority. Reference to *parens patriae*-based emergency commitments here is confined to those commitments sanctioned on the basis of the individual's need for care or treatment as specified in WYO. STAT. § 25-3-106(a) (ii) (C) (1977).

221. WYO. STAT. § 25-3-108(a) (iv) (1977). Significantly, WYO. STAT. § 25-3-108(b) (1977) provides that no judicial proceedings concerning patients hospitalized pursuant to WYO. STAT. § 25-3-106 shall be commenced until the patient requests release from the hospital. Notwithstanding the fact that the hospitalization may have been involuntary in the first instance (WYO. STAT. § 25-3-106(a) (ii) (1977)), the statute puts the burden on the patient to secure a judicial hearing on the legality of his commitment. Therefore, no judicial review is assured—it is available only if the patient is able to make his way to the courthouse!

222. See Section II, *supra*.

223. WYO. STAT. § 25-3-110 (1977). See preceding text in this Section.

ditionally has been resolved by the courts.²²⁴ Therefore, retention of the *parens patriae* alternative for emergency commitment, even though it is widely avoided by the authorities charged with administration of the mental health system, is confusing, unnecessary and most likely unconstitutional.

V. HEARING PROCEDURES

Measuring the procedural protections statutorily incorporated into the Wyoming civil commitment hearing provisions against the plethora of recent court decisions considering the constitutionality of state hearing procedures reveals some potential constitutional shortcomings in the Wyoming scheme, along with some generous extensions of constitutional safeguards. Basically, the Wyoming statute provides that upon initiation of commitment proceedings and upon affirmation from an appointed examining physician that the individual requires hospitalization, the court shall give the individual notice of the scheduled commitment hearing.²²⁵ The court is required to appoint counsel to represent the proposed patient²²⁶ and to advise the individual of counsel's identity before the initial examination is conducted.²²⁷ The proposed patient is entitled to be present at the hearing, but his presence is not required.²²⁸ The hearing is to be conducted informally,²²⁹ but the rules of evidence apply.²³⁰ The right to a jury trial is statutorily provided.²³¹ Also, the court may utilize a commissioner to conduct the proceedings.²³² The basic constitutional issue posed by these procedures is

224. See *Lynch v. Baxley*, *supra* note 15, at 391; *Colyar v. Third Judicial Court for Salt Lake County*, *supra* note 27 at 434. The courts historically and contemporarily have been charged with responsibility for determining the competence of individuals brought before them, either in the commitment context or in other contexts. See *e.g.*, WYO. STAT. § 3-2-101 *et. seq.* (1977).

225. WYO. STAT. § 25-3-112(f) (1977). See also, WYO. STAT. § 25-3-112(d) (1977) specifying that notice should be provided to the proposed patient upon the initial filing of an application for involuntary hospitalization, but permitting the court to forego notice to the proposed patient if, in the court's judgment, it would be in his best interests not to send him notice.

226. WYO. STAT. § 25-3-112(g) (1977).

227. WYO. STAT. § 25-3-112(d) (1977).

228. WYO. STAT. § 25-3-112(h) (1977).

229. *Id.*

230. *Holm v. State*, *supra* note 2.

231. WYO. STAT. § 25-3-112(j) (1977).

232. WYO. STAT. § 25-3-112(m) (1977).

whether minimum procedural due process requirements are satisfied.

The Supreme Court has adopted a balancing approach in determining the scope of procedural protections constitutionally required where state action infringes protected liberty or property interests.²³³ According to the Court, it is necessary to balance:

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, including the function involved and the fiscal and administrative burdens that the additional or substitute procedures requirement would entail.²³⁴

In the civil commitment context, the Court has recognized that a significant liberty interest is at stake when the state acts to involuntarily hospitalize someone for an indefinite period of time.²³⁵ In recognition of this fact, several courts have felt constitutionally compelled to extend virtually the full complement of criminal law procedural protections to state civil commitment proceedings,²³⁶ while others have stopped short of such a wholesale expropriation.²³⁷ For the sake of clarity, and in order to properly evaluate the Wyoming provisions, this article will examine the statutory requirements individually, mindful of the Court's balancing test, then proceed to consider additional protections which might be required.

The Wyoming statute provides that notice be twice given to an individual facing possible commitment. Initially, no-

233. See e.g., *Morrissey v. Brewer*, *supra* note 12; *Mathews v. Eldridge*, *supra* note 141.

234. *Mathews v. Eldridge*, *supra* note 141, at 335; *Smith v. O.F.F.E.R.*, 431 U.S. 816, 847-848 (1977). See also *Parham v. J.R.*, *supra* note 3, at 2502.

235. *Huhphrey v. Cady*, *supra* note 3; *Addington v. Texas*, *supra* note 3, at 1809; *Parham v. J.R.*, *supra* note 3, at 2503.

236. *Lessard v. Schmidt*, *supra* note 13; *Lynch v. Baxley*, *supra* note 15; *Bell v. Wayne County Memorial Hospital*, *supra* note 14; *State ex rel. Hawks v. Lazaro*, *supra* note 16; *Doremus v. Farrell*, *supra* note 17; *Stamus v. Leonhardt*, *supra* note 20; *Denton v. Commonwealth*, 383 S.W.2d 681 (Ky. 1962); *Dixon v. Attorney General*, *supra* note 18.

237. *Coll v. Hyland*, *supra* note 22; *In re Beverly*, *supra* note 22; *French v. Blackburn*, *supra* note 22.

tice is given to the proposed patient upon the filing of an application for involuntary hospitalization, unless the court finds that such notice may be injurious to the person.²³⁸ This notice must inform the individual of the purpose of the proceeding, the identity of the physician appointed to examine the individual, the individual's right to counsel or the identity of legal counsel appointed to represent him, and that a hearing will be conducted if the physician certifies that hospitalization is required.²³⁹ The statute also provides that after the examining physician has submitted his report, if he recommends hospitalization, a second notice will be given to the individual of the date of the hearing, which must be scheduled as expeditiously as practicable.²⁴⁰ This two-part notice scheme presents possible constitutional problems in view of statutory ambiguity as to the necessity, timing and content of notice.

The Supreme Court has held that prior notice of pending proceedings is an elementary and fundamental aspect of due process.²⁴¹ The Court has held that notice must afford a reasonable time for those interested to appear and it must provide adequate information to enable them to prepare to present their objections.²⁴² Elaborating upon these concepts in *In re Gault*, the Court held that in juvenile delinquency proceedings, prior notice of the hearing must be provided at the earliest practicable date, and must include particular allegations of the misconduct and advise the juvenile of his right to representation by counsel.²⁴³ Analogizing to this precedent, courts confronted with challenges to the adequacy of notice in civil commitment statutes uniformly have held that notice must be given sufficiently in advance to allow adequate preparation.²⁴⁴ It also has been held that notice to the individual facing commitment is mandatory.²⁴⁵ In addi-

238. WYO. STAT. § 25-3-112(d) (1977).

239. *Id.*

240. WYO. STAT. § 25-3-112(f) (1977).

241. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950).

242. *Id.* at 314.

243. *In re Gault*, *supra* note 91, at 33, 41.

244. *See e.g.*, *Lynch v. Baxley*, *supra* note 15, at 388; *French v. Blackburn*, *supra* note 22, at 1357.

245. *Lessard v. Schmidt*, *supra* note 13, at 1092; *Suzuki v. Quisenberry*, *supra* note 19, at 1127. The courts made short shrift of the argument that mandatory notice may aggravate the individual's mental condition, point-

tion, it has been held that the notice must advise the individual of his right to counsel, contain a statement of the standards governing commitment, include a detailed statement of the basis for the proposed commitment and the underlying facts or supporting testimony.²⁴⁶ The courts appear to be split over whether it is necessary to advise the individual of the names of witnesses who may testify against him or to include a summary of their proposed testimony.²⁴⁷

Based upon this precedent, the Wyoming provision which makes initial notification to the individual of the filing of an involuntary hospitalization application optional may be constitutionally inadequate.²⁴⁸ It can be argued that the statutory requirement of notice before the actual hearing appears to be mandatory,²⁴⁹ thus assuring the individual notice of the proceedings. However, it is the first notice, not the second, which requires advisement of the right to counsel and the purpose of the proceedings.²⁵⁰ The statute is silent as to whether the second notice must contain anything other than notice of the time and place of the hearing. Therefore, to the extent that the second notice fails to meet minimum due process content requirements, the optional nature of the initial notice is constitutionally deficient.

Secondly, assuming that the proposed patient receives the prescribed initial notice, he still is not assured that he will be advised of the ultimate basis for the commitment hearing since no provision is made to advise him of the factual basis or reasons underlying the proceedings.²⁵¹ Pre-

ing out that this assumed the individual was mentally ill and a proper subject for commitment — a fact yet to be determined at the commitment hearing. *See also, Developments, supra* note 56, at 1274.

246. *Lynch v. Baxley, supra* note 15, at 388; *Lessard v. Schmidt, supra* note 13, at 1092; *Suzuki v. Quisenberry, supra* note 19, at 1127; *State ex rel. Hawks v. Lazaro, supra* note 16, at 124. *But see* *Coll v. Hyland, supra* note 22, at 911; *French v. Blackburn, supra* note 22, at 1357 n. 10.

247. *Compare Lessard v. Schmidt, supra* note 13, at 1092 and *Suzuki v. Quisenberry, supra* note 19, at 1127 with *Coll v. Hyland, supra* note 22, at 911 and *French v. Blackburn, supra* note 22, at 1356-1357.

248. *See Suzuki v. Quisenberry, supra* note 19, at 1127.

249. WYO. STAT. § 25-3-112(f) (1977).

250. WYO. STAT. § 25-3-112(d) (1977).

251. WYO. STAT. § 25-3-112(d) (1977) provides that notice shall advise the individual of the purpose of the proceeding; however, this does not mean that he will be apprised of the basis upon which his commitment is sought. *But cf. French v. Blackburn, supra* note 22, at 1357 (the court found it adequate that the notice advised the individual that he was a proper

sumably, however, he will be represented by counsel by this time,²⁵² and it has been held that the availability of counsel mitigates detailed notice requirements including the supporting facts or testimony to be marshalled in support of the commitment.²⁵³ But the weight of authority supports disclosure of the basis for the commitment proceedings,²⁵⁴ and this appears consistent with fundamental due process principles.

Finally, the Wyoming statute makes no express provision for when notice must be given. Generally, the courts addressing the question have contented themselves with the requirement that notice must be given sufficiently in advance of the proceedings to allow adequate preparation.²⁵⁵ As short a time as forty-eight (48) hours in advance has been held constitutionally adequate in view of the availability of a continuance.²⁵⁶ While the Wyoming statute implies that the hearing will follow quickly once notice has been given,²⁵⁷ there is no reason to suppose that a continuance would not be available to unprepared counsel.²⁵⁸ Moreover, assuming that the initial notice following the filing of the application has been given and that counsel has been appointed, that should provide sufficient prior warning of the possibility of an eventual commitment hearing to permit initial preparation and investigation. Therefore, the statute's failure to establish a detailed time schedule for notice prior to the hearing probably is not constitutionally invalid on its face, although the possibility exists for unconstitutional application.

Representation by counsel is constitutionally required in civil commitment proceedings,²⁵⁹ and the Wyoming statutes

subject for commitment and that it was unnecessary to serve a copy of the original petition or affidavit filed to initiate the proceedings).

252. WYO. STAT. § 25-3-112(d) (1977) provides for court appointment of counsel immediately upon the filing of the application for commitment and simultaneous with the appointment of an examining physician.

253. Coll v. Hyland, *supra* note 23, at 911.

254. See cases cited note 21, *supra*.

255. *Id.*

256. French v. Blackburn, *supra* note 22, at 1357.

257. WYO. STAT. § 25-3-112(f) (1977) provides that once the appointed examining physician certifies to the court that the individual qualifies for commitment, then the court must schedule a hearing "expeditiously."

258. WYOMING UNIFORM DISTRICT COURT RULES, Rule 7.

259. Lynch v. Baxley, *supra* note 15, at 389. Cf. Heryford v. Parker, *supra*

provide for such representation, including appointed counsel if the individual cannot afford an attorney.²⁶⁰ Since the statute provides for the appointment of counsel immediately upon the filing of the involuntary hospitalization application, the proposed patient is assured the assistance of counsel continuously throughout the proceedings.²⁶¹ Facially, the statute is constitutionally adequate. But, the difficult questions concern not the right to counsel, but the role which counsel is required to play in representing the individual during the commitment proceedings.²⁶² Here the statute provides only that counsel shall represent the proposed patient at hearings, advise him of his rights, and advise him or his spouse or relative as to the advisability of guardianship proceedings.²⁶³ The statute also states that the commitment proceedings are not adversary and shall be conducted as informally as possible.²⁶⁴ To the extent that this suggests counsel's role differs from his traditional adversarial role, it is inconsistent with pertinent ethical strictures²⁶⁵ and the weight of authority.²⁶⁶ It is clear that counsel is charged with the responsibility to forcefully advocate his client's interests, including the assertion of defenses to the commitment even if he may harbor the personal opinion the commitment might be appropriate.²⁶⁷ However, the

note 2 (right to counsel at all stages in commitment proceedings for the mentally retarded).

260. WYO. STAT. § 25-3-112(d) and (g) (1977).

261. The courts consistently have held that the right to counsel attaches prior to any preliminary hearing which might be scheduled to determine whether the patient should be hospitalized pending a final commitment hearing. See, e.g., *Lynch v. Baxley*, *supra* note 15, at 388; *Doremus v. Farrell*, *supra* note 17, at 515. To the extent that WYO. STAT. § 25-3-110(b) (1977) does not provide an absolute right to appointed counsel at the preliminary detention hearing for those persons hospitalized upon medical certification, it is constitutionally deficient. See Section IV, *supra*.

262. See *Developments*, *supra* note 56, at 1288-1291; Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424 (1966); Lockney, *Constitutional Problems with Civil Commitment of the Mentally Ill in North Dakota*, 52 N. DAK. L. REV. 83, 92-95 (1975).

263. WYO. STAT. § 25-3-112(g) (1977).

264. WYO. STAT. § 25-3-112(c) and (h) (1977). *But see* *Holm v. State*, *supra* note 2.

265. Canon 7 of the CODE OF PROFESSIONAL RESPONSIBILITY, requires a lawyer to represent his client zealously within the bounds of the law. See Canon 7, *Ethical Considerations* 4 and 19. See also *State ex rel. Hawks v. Lazaro*, *supra* note 16, at 126.

266. *Lynch v. Baxley*, *supra* note 15, at 399. *State ex rel. Hawks v. Lazaro*, *supra* note 16, at 126; *Lessard v. Schmidt*, *supra* note 13, at 1099-1100.

267. See *Developments*, *supra* note 56, at 1288-1291. (This article does suggest that in the instance of certain *parens patriae*-based commitments, counsel

courts have noted that the right to counsel does not extend to preliminary information-gathering proceedings such as psychiatric interviews.²⁶⁸ Insertion of counsel into this phase of the commitment process could interfere with the objectivity of medical judgments critical to the question of whether to proceed with the hearing. Thus, while recognizing that counsel plays a crucial role in representing the proposed patient's interests, the courts have stopped short of bringing counsel into every phase of the commitment process. Application of the Wyoming statute consistent with these principles should meet constitutional requirements.

The Wyoming statute recognizes that the proposed patient may be present at the proceedings, but that his presence is not required.²⁶⁹ No standards are set forth to guide the court in determining when the patient's presence is not required. The question of whether the individual's presence is absolutely required at the hearing has been much litigated,²⁷⁰ with the usual result that in appropriate cases he may be excused.²⁷¹ Courts have held that the proposed patient must be present unless his presence is waived either by himself or his counsel,²⁷² or unless his presence is so disruptive that the hearing cannot reasonably continue.²⁷³ While it has been recognized that subjecting an individual to commitment proceedings may be detrimental to his psychological health,²⁷⁴ contrary benefits are evident: the individual can participate and assure that his interests are being protected; he presumably will feel that he at least was accorded rudimen-

may be excused from his traditional adversarial role.) See also Cohen, *supra* note 262.

268. See cases cited note 266, *supra*.

269. WYO. STAT. § 25-3-112(h) (1977).

270. See, e.g., Lynch v. Baxley, *supra* note 5, at 388-389; Kendall v. True, *supra* note 21, at 419; Bell v. Wayne County General Hospital, *supra* note 14, at 1094; Stamus v. Leonhardt, *supra* note 20, at 447.

271. See cases cited note 270, *supra*. *Contra*, State ex rel. Hawks v. Lazaro, *supra* note 16, at 124-125 ("The subject individual, just as a criminal defendant, must be present in person and cannot waive that right.").

272. See Lynch v. Baxley, *supra* note 15, at 388-389; Kendall v. True, *supra* note 21, at 419. With respect to waiver of the right to be present by the individual's counsel, the court in Lynch went so far as to hold that an adversary hearing must first be held to ascertain the appropriateness of the waiver. 386 F. Supp. at 389.

273. Bell v. Wayne County General Hospital, *supra* note 14, at 1094; Doremus v. Farrell, *supra* note 17, at 515.

274. Coll v. Hyland, *supra* note 22, at 912-913. See also H. DAVIDSON, FORENSIC PSYCHIATRY 282 (1965).

tary due process in the event that he ultimately is committed, thus perhaps making him more cooperative as a patient; and his presence enables the court to observe his demeanor and speak with him at the hearing.²⁷⁵ Additionally, the courts have held that the right to be present necessarily embraces the right to be free from drugs or medication at the time of the hearing.²⁷⁶ Psychotropic medication is widely used to treat a variety of mental illnesses, and often is effective in initially stabilizing and beginning treatment with severely disturbed individuals.²⁷⁷ But the seriousness of the commitment decision argues against presentation of the patient to the court in a heavily medicated or sedated state since this may preclude his effective participation in the proceedings and, more importantly, likely will provide the court with an inaccurate or unrepresentative picture of the individual.²⁷⁸ While the Wyoming statute fails to incorporate any standards governing the proposed patient's absence from the proceedings, he should be excused only under compelling circumstances.²⁷⁹ Likewise, unless exceptional circumstances intervene, medication should cease prior to the hearing.²⁸⁰ Implementation of the statute in this fashion should avoid any objections based upon its improper application.

275. See *Developments, supra* note 56, at 1282-1283; Wexler and Scoville, *supra* note 128, at 69-73. See also *Stamus v. Leonhardt, supra* note 20, at 447. Cf. *Parham v. J.R., supra* note 3, at 2508 (requiring a confrontational due process hearing before a parent commits his child to a mental institution may exacerbate family tensions).

276. *Lynch v. Baxley, supra* note 15, at 389; *Doremus v. Farrell, supra* note 17, at 515; *Lessard v. Schmidt, supra* note 13, at 1092. The involuntary application of psychiatric treatment in any form, including drugs, before an individual has been afforded an opportunity to contest his detention also potentially violates the constitutional right of privacy. *Bell v. Wayne County General Hospital, supra* note 14, at 1199.

277. See *Tourney, Therapeutic Fashions in Psychiatry*, 124 AM. J. PSYCHIATRY 784 (1968). But see *Roth, Dayley and Lerner, supra* note 124, at 418.

278. See *Developments, supra* note 56, at 1282-1283. But see *Stone, supra* note 41, at 53.

279. Here, the compelling circumstances properly should include only those situations where the proposed patient in the presence of the court voluntarily, knowingly and intelligently waives his right to be present, and those situations where the individual's conduct is so disruptive that the proceedings cannot continue. See 2 MENTAL DISABILITY LAW REPORTER 99 (1977). See also, text accompanying notes 314-319, *infra*.

280. In this instance, the compelling circumstances should be limited to the case where continued medication is critically important to assure the health of the patient. Necessarily, this does not include medication for the sake of simply controlling the patient or easing the therapeutic demands on institutional staff. Even this may constitute an invasion of of the individual's privacy. See note 276, *supra*.

While the Wyoming statutes indicate that the hearing should be conducted informally and nonadversarially,²⁸¹ the Wyoming Supreme Court's decision in *Holm v. State*²⁸² essentially obviates these guidelines, and instead dictates a more formal proceeding where the rules of evidence are applied. After the *Holm* decision, it should be clear that the individual facing commitment has the right to present his own witnesses²⁸³ and to confront and cross examine adverse witnesses. The *Holm* decision is consistent with the holdings of other courts which have addressed the question of whether a right to cross examination exists constitutionally in civil commitment hearings.²⁸⁴ Although this presents logistical problems to the courts in satisfying the schedules of participating physicians, it offers both the individual, his counsel and the court an opportunity to fully inquire into the medical basis for the doctor's judgment that commitment is appropriate.²⁸⁵ More importantly, perhaps, the requirement that physicians appear, testify and subject themselves to cross examination emphasizes the fact that a legal, rather than medical decision, ultimately is required when the state seeks an individual's involuntary hospitalization.²⁸⁶ With incorporation of the *Holm* requirement into Wyoming commitment proceedings, there should be no constitutional basis for objection to proceedings which conform to that mandate.

281. WYO. STAT. § 25-3-112(c) and (h) (1977).

282. *Holm v. State*, *supra* note 2. In *Holm*, the Wyoming Supreme Court ruled unconstitutional on due process grounds that portion of WYO. STAAT. § 25-3-112(h) (1977) which provided that the court conducting a civil commitment hearing was not bound by the rules of evidence.

283. Since the proceedings occur in the district court, the court's subpoena power should be available to the proposed patient. WYO. R. CIV. P., Rule 45.

284. See cases cited not 236, *supra*.

285. It has been argued that rigid application of the rules of evidence may infringe substantially on the ability of mental health facilities to effectively treat patients since a considerable amount of staff time would be taken up appearing and testifying at hearings. Stone, *supra* note 41, at 56. The traditional response to this argument has been that where liberty is at stake due process demands no less. See, e.g., *Holm v. State*, *supra* note 2, at 743. Also, the hearsay rules admit of numerous exceptions, and there is no reason why courts could not adopt bifurcated proceedings in the civil commitment context as utilized by juvenile courts, initially inquiring as to whether the individual meets the commitment criteria and, secondly, pursuant to less formal procedures, inquiring into the appropriate disposition for the patient. See JOHNSON, INTRODUCTION TO THE JUVENILE JUSTICE SYSTEM (1975).

286. Compare *Addington v. Texas*, *supra* note 3, at 1811 with *Parham v. J.R.*, *supra* note 3, at 2507.

No statutory provision sets forth the applicable standard of proof in Wyoming commitment proceedings. The question of whether the stringent "beyond a reasonable doubt" criminal standard of proof applies in state civil commitment proceedings or whether a lesser standard is appropriate has been widely debated²⁸⁷ and variously decided,²⁸⁸ but the Supreme Court's recent decision in *Addington v. Texas*²⁸⁹ holds that an intermediate standard requiring "clear and convincing" proof is sufficient to meet federal due process constitutional requirements.²⁹⁰ In refusing to apply the more stringent criminal evidentiary standard, the Court emphasized the inherent uncertainty surrounding psychiatric diagnosis and, balancing this against the individual interests at stake, it felt that adequate protection was assured under the intermediate evidentiary standard without thwarting the State's interest in providing treatment to those who required it. Of course, states are free to adopt a more stringent standard if they so desire or, as already has occurred, a state's highest court may find a more rigorous due process requirement in the state constitution.²⁹¹ In any event, absent a judicial determination of the applicable standard of proof in Wyoming, the courts should be on firm constitutional footing if they comply with the *Addington* standard.

Wyoming's extension of the right to a jury trial in civil commitment proceedings probably exceeds minimum constitutional requirements.²⁹² Confronted with the analysis of the Supreme Court in *McKeiver v. Pennsylvania*,²⁹³ where the Court held that due process did not require jury trials in

287. See Share, *The Standard of Proof in Involuntary Civil Commitment Proceedings*, 1977 DET. COLL. L. REV. 209; Ennis and Litwack, *supra* note 136; Slovenko, *Criminal Justice Procedures in Civil Commitment*, 24 WAYNE L. REV. 1 (1977).

288. Compare *In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973) (beyond a reasonable doubt) and *Lessard v. Schmidt*, *supra* note 13 (beyond a reasonable doubt) with *Lynch v. Baxley*, *supra* note 15 (clear, unequivocal and convincing) and *State ex rel. Hawks v. Lazaro*, *supra* note 16 (clear, cogent and convincing).

289. *Addington v. Texas*, *supra* note 3.

290. *Id.* at 1812.

291. *Superintendent of Worcester State Hospital v. Hagburg*, _____ Mass. _____, 372 N.E.2d 242 (1978); *Lasche v. Commissioner of Public Welfare*, 302 Minn. 65, 225 N.W.2d 366 (1974); *cert. denied*, 420 U.S. 993 (1974); *Heap v. Roulet*, 23 Cal. 3d 219, 590 P.2d 1 (1979).

292. WYO. STAT. § 25-3-112(j) (1977).

293. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

state juvenile delinquency proceedings, the lower courts have not found a constitutional right to a jury trial in state civil commitment proceedings.²⁹⁴ Nevertheless, under the Wyoming provision, the benefits of a jury trial are available in appropriate cases, enabling the judgment of the community, predicated upon local values, to be brought to bear on the question of whether the individual facing commitment truly poses a threat of harm to the populace or himself.²⁹⁵

The Wyoming statute also provides that the court can appoint a commissioner to hear civil commitment cases.²⁹⁶ A due process challenge in Nebraska to a nonjudicial hearing board charged with responsibility for conducting civil commitment hearings has been rejected.²⁹⁷ The Supreme Court in *Parham v. J.R.* clearly indicated its approval of nonjudicially-conducted commitment proceedings in the context of parental commitment of children to state mental institutions.²⁹⁸ This aspect of the Court's rationale in *Parham* seemingly is applicable to regular commitment proceedings.²⁹⁹ Given this precedent and the firm legal basis for the use of court-appointed commissioners in Wyoming,³⁰⁰ there is no reason to suspect that any federal constitutional difficulty adheres to their participation in civil commitment hearings.

294. *Doremus v. Farrell*, *supra* note 17, at 516; *Lynch v. Baxley*, *supra* note 15, at 394. However, the court in *Lynch* found an equal protection violation because the Alabama statutory scheme provided the right to a jury trial in habeas corpus challenges to a commitment. The court perceived no rational basis for distinguishing between the two classes of civilly confined persons. *Id.* at 395.

295. See *Humphrey v. Cady*, *supra* note 3, at 509. See also *Developments*, *supra* note 56, at 1291-1295.

296. WYO. STAT. § 25-3-112(m) (1977).

297. *Doremus v. Farrell*, *supra* note 17, at 516.

298. *Parham v. J.R.*, *supra* note 3, at 2507.

299. Although we acknowledge the fallibility of medical and psychiatric diagnosis, see *O'Connor v. Donaldson*, 422 U.S. 563, 584 (1975) (concurring opinion), we do not accept the notion that the shortcomings of specialists can always be avoided by shifting the decision from a trained specialist using the traditional tools of medical science to an untrained judge or administrative hearing officer after a judicial-type hearing. Even after a hearing, the nonspecialist decisionmaker must make a medical-psychiatric decision. Common human experience and scholarly opinions suggest that the supposed protections of an adversary proceeding to determine the appropriateness of medical decisions for the commitment and treatment of mental and emotional illness may well be more illusory than real. (citations omitted.) *Id.* at 2507-2508.

300. WYO. CONST. art. V, § 14; WYO. STAT. § 5-3-301 (1977).

Two additional procedural rights — the privilege against self-incrimination and the right to an independent psychiatric examination—have been asserted on behalf of individuals facing civil commitment; however, neither has been widely accepted by the courts. Wyoming statutes do not provide for either right and there is no reported Wyoming litigation involving either claim. Application of the privilege against self-incrimination to protect against the disclosure of prior criminal activity in the civil commitment context is consistent with the Supreme Court's recognition that the privilege is applicable in any type of proceeding,³⁰¹ and that application has been recognized as proper.³⁰² However, it has been argued that the privilege is available during the psychiatric examination to permit the individual to refuse to divulge non-criminal information which may render him subject to commitment.³⁰³ With two exceptions,³⁰⁴ the courts have uniformly refused to extend the privilege into the psychiatric interview.³⁰⁵ Invocation of the privilege during the psychiatric interview likely would undercut any possibility of obtaining a medical diagnosis or evaluation of the patient's condition.³⁰⁶ Since most state statutes, like the Wyoming statutes, require a showing of mental illness as part of the basis for commitment, use of the privilege also might frustrate all commitments regardless of the surrounding circumstances.³⁰⁷ Moreover, in *Add-*

301. *Murphy v. Waterfront Commission*, 378 U.S. 552, 94 (1964) (White, J. concurring); *In re Gault*, *supra* note 91, at 49-50.

302. *Lynch v. Baxley*, *supra* note 15, at 394; *In re Beverly*, *supra* note 22, at 488.

303. *Lessard v. Schmidt*, *supra* note 13; *Lynch v. Baxley*, *supra* note 15; *State ex rel. Hawks v. Lazaro*, *supra* note 22; *French v. Blackburn*, *supra* note 22.

304. *Lessard v. Schmidt*, *supra* note 13; *Suzuki v. Quisenberry*, *supra* note 19.

305. *See cases cited note 303. Cf. Tippet v. State of Maryland*, 436 F.2d 1153 (4th Cir. 1971) (privilege unavailable in Maryland defective delinquency proceedings.).

306. *See French v. Blackburn*, *supra* note 22, at 1359. *See also, Stone*, *supra* note 41, at 54; *Developments*, *supra* note 56, at 1312. *See generally, Aronson, Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examinations?*, 26 STAN. L. REV. 55 (1973); Note, *Application of the Fifth Amendment Privilege Against Self-Incrimination to the Civil Commitment Proceeding*, 1973 DUKE L. J. 729. *But see Suzuki v. Quisenberry*, *supra* note 19, at 1130-1131 ("The resolution of the conflict is that if there is no other basis for depriving a person of his liberty than statements obtained from him for that purpose by an examining physician who has never seen him before, there should not be any order of commitment.")

307. *See State ex rel. Hawks v. Lazaro*, *supra* note 16, at 126.

ington v. Texas,³⁰⁸ the Supreme Court recognized the importance of medical diagnosis and interpretation in the commitment process,³⁰⁹ which suggests that the Court would not look favorably upon the imposition of a barrier such as the privilege between the proposed patient and the doctor during the diagnostic process.

Commentators have suggested that an independent psychiatric witness would provide additional protection to the individual facing commitment,³¹⁰ but no court has yet required the state to afford an independent expert. While state provision of an independent psychiatrist would be costly, and probably frequently unnecessary, it might provide the benefit of removing any appearance of official impropriety or bias arising from the use of doctors employed by the state hospital to conduct the psychiatric examination.³¹¹ However, this may not be a serious problem in Wyoming since the statute provides for local venue for commitment hearings,³¹² and the practice generally is to conduct the hearings in the proposed patient's home county before he is transferred to the state hospital.³¹³ Therefore, in view of the tenuous legal underpinnings for the use of the privilege or independent experts in the commitment process, and the burden that their recognition would place upon the state, it can fairly be concluded that the constitution does not compel their inclusion among the rights available to individuals facing involuntary hospitalization.

308. *Addington v. Texas*, *supra* note 3.

309. "There may be factual issues to resolve in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists." *Id.* at 1811.

310. Cohen, *supra* note 262, at 458; 2 MENTAL DISABILITY LAW REPORTER 104 (1977).

311. See 2 MENTAL DISABILITY LAW REPORTER 104 (1977).

312. WYO. STAT. § 25-3-112(a) (1977).

313. Statement of Judge Robert Hill, District Court Judge for the Second Judicial District, made to the author during a telephone interview on August 10, 1979. Additional benefits from holding commitment hearings in the proposed patient's home county is that evidence should be readily available, the family can be consulted and participate, and there is the likelihood that the court and other officials may have some familiarity with the individual and his situation. Such a practice also avoids a judicial overload in Uinta County where the state hospital is located.

Finally, considering the substantial due process safeguards which are constitutionally compelled in civil commitment proceedings, it is important to address the question of when and how these rights may be waived. The standard for waiver of procedural rights in criminal proceedings provides a useful starting point: the waiver must be made knowingly, intelligently and voluntarily.³¹⁴ Since even after a commitment has been ordered no presumption of incompetence attaches,³¹⁵ it is appealing to simply utilize the criminal waiver standard. However, as a practical matter many individuals facing commitment proceedings manifest substantial mental disability which impairs their ability to comprehend either the gravity of the proceedings or the importance of the rights available to them.³¹⁶ This fact suggests that careful judicial scrutiny with an acute sensitivity to the standard of voluntariness and intelligence is necessary to guard against the improper surrender of a right. Therefore, it seems advisable to consider the right to counsel unwaivable.³¹⁷ Counsel can provide invaluable assistance to the courts, as well as the individual, by assuring that the proposed patient has been carefully advised of his rights and the nature of the proceedings. But counsel often can experience real frustration in dealing with the seriously disabled or uncommunicative individual. Thus, the court must carefully evaluate waivers offered by counsel to assure that they are forthcoming with the client's consent.³¹⁸ Perhaps, most importantly, any waiver of the individual's presence at the hearing should call for careful judicial review, including at least a meeting between the court and the individual to ascertain that he appreciates and understands the decision to waive his presence.³¹⁹ This serves the additional purpose of enabling the court to observe the individual and his behavior, thereby providing the court with further

314. *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Boyd v. Dutton*, 405 U.S. 1 (1973).

315. WYO. STAT. § 25-3-125 (1977); WYO. STAT. § 25-3-124(d) (1977). It should be noted that as a practical matter, unless a person has substantial property or assets, the question of his competency often will not be presented to a court.

316. See *Developments*, *supra* note 56, at 1315.

317. *Id.* at 1316.

318. See *Quesnell v. State*, 517 P.2d 568 (Wash. 1973); *Lynch v. Baxley*, *supra* note 15, at 396.

319. See note 279, *supra*. Cf. *Lynch v. Baxley*, *supra* note 15, at 389.

insight into the commitment question. Although this might entail some additional judicial time, the allowance for waiver through the careful application of the criminal standard coupled with the requirement of representation by counsel in every instance should assure constitutionally adequate proceedings without imposing a rigid straight-jacket on counsel or the court.

VI. REVIEW, RELEASE AND TRANSFER

Current Wyoming statutes governing review of a patient's condition, his release from the hospital, or his transfer to another institution provide the head of the hospital with the authority to reach these decisions. Specifically, the head of the hospital is required to periodically examine each patient within six month intervals to determine whether the patient's condition justifies continued hospitalization.³²⁰ He is granted the authority to discharge patients³²¹ or to release them temporarily on convalescent leave status.³²² The hospital head must review annually all convalescent status patients and he may subsequently discharge them.³²³ He also may revoke a patient's leave and rehospitalize him if such action is in the patient's "best interests."³²⁴ Additionally, patients may be administratively transferred from institution to institution.³²⁵ Substantial

320. WYO. STAT. § 25-3-120 (1977).

321. *Id.* A discharge terminates an outstanding commitment order and frees the patient from all legal restraint on his liberty.

322. WYO. STAT. § 25-3-121 (1977). Convalescent leave status permits a visit or placement outside of the hospital but it does not alter an involuntarily committed patient's legal status. Convalescent status release essentially places the patient in limbo since he finds himself out of the hospital and functioning in the community, yet he remains subject to control by the hospital since the hospital may revoke his release at any time, thus causing his return to the hospital as an involuntary patient.

323. WYO. STAT. § 25-3-121(a) (1977).

324. WYO. STAT. § 25-3-121(b) (1977).

325. WYO. STAT. § 25-3-119 (1977). Oddly, this transfer authority is given to the Board of Charities and Reform, the governmental body charged with the general oversight and supervision of Wyoming penal and mental institutions. WYO. STAT. § 9-3-706 (1977). Presumably, vesting this authority with the Board rather than with the institutional superintendent is based upon the Board's oversight role which provides it with a broader perspective on services available in the various institutions, thus enabling it to better evaluate the appropriateness of proposed transfers. As a practical matter, however, the initial decision of whether to seek an institutional transfer from the state hospital is left to the discretion of the superintendent. Testimony of Dr. William N. Karns, Superintendent of the Wyoming state hospital, before the Joint Interim Subcommittee, *supra* note 38.

numbers of patients are affected by these administrative decisions. For instance, from July 1, 1977 to June 30, 1978, 613 patients were discharged from the state hospital, 210 patients were placed on convalescent status release, and 35 patients were transferred to other state institutions.³²⁶ During this same period, 79 patients were returned to the hospital from convalescent leave status.³²⁷ Although the considerable discretion vested in the hospital in these matters facilitates the accomplishment of staff medical objectives, it also raises possible due process problems. Because significant patient interests are affected by the decisions, summary procedures may be constitutionally inadequate.

An involuntarily hospitalized patient may not be confined for a period longer than that necessary to accomplish the purpose for his original commitment.³²⁸ This principle is not theoretical: *O'Connor v. Donaldson*³²⁹ suggests that prolonged improper commitment opens the officials involved, and possibly the State, to possible liability through a damage suit.³³⁰ Most state statutes provide for periodic medical or judicial review of a patient's mental condition on a regular basis.³³¹ The Wyoming statutes specify that such a review must be conducted at six month intervals, and that when "the conditions justifying hospitalization no longer exist," the patient must be discharged.³³² This review-release standard, while perhaps inartfully drafted, appears to incorporate by implication the same standards applied

326. See 1978 ANNUAL REPORT, *supra* note 38, at 31, 34. During the 10 year period between 1968-1978, an average of 292 patients per year were released from the hospital on convalescent leave status. *Id.* at 31.

327. *Id.* at 10, 33. During the 10 year period between 1968-1978, an average of 95 patients per year were returned to the hospital from convalescent status release. Significantly, the number of returned convalescent leave patients during the past three years has been noticeably less than this average figure. *Id.* at 30.

328. *Jackson v. Indiana*, *supra* note 3, at 738; *McNeil v. Director, Patuxent Institution*, *supra* note 3.

329. *O'Connor v. Donaldson*, *supra* note 5. Mr. Donaldson recovered \$38,500 in a jury verdict against the superintendent of a Florida hospital where he was confined illegally for 15 years. The Supreme Court remanded the case for reconsideration of the award, and eventually the suit was settled for \$20,000.

330. See also, *Maniaci v. Marquette University*, 50 Wis.2d 287, 184 N.W.2d 168 (1971); *Goodman v. Parwatarikar*, *supra* note 219. *Cf.* *Harper v. Cserr*, *supra* note 219.

331. See generally, *Developments*, *supra* note 56, at 1382.

332. WYO. STAT. § 25-3-120 (1977).

in the case of initial hospitalization and, thus, should meet minimum constitutional requirements.³³³ Any release standard which deviated substantially from the state commitment criteria potentially would violate due process and equal protection standards since it might permit continued confinement on a basis inconsistent with the original underlying commitment rationale.³³⁴ Likewise, the Wyoming minimum requirement of six month periodic patient reviews would appear adequate to meet constitutional considerations underlying the duration of a patient's commitment. The Wyoming standard is consistent with, or more rigorous than, those applicable in many other states.³³⁵

The potential problem with the Wyoming periodic review provision is the fact that review and discharge determinations are discretionary and are vested in institutional authorities, with no provision for judicial involvement.³³⁶ Recently, the Connecticut Supreme Court in *Fasulo v. Arafah*³³⁷ invalidated on due process grounds a Connecticut institutional patient review procedure similar to the Wyoming provision because there was no provision for subsequent judicial review of the original commitment:

The state's power to confine terminates when the patient's condition no longer meets the legal standard for commitment. Since the state's power to confine is measured by a legal standard, the expiration of the state's power can only be determined in a judicial proceeding which tests the patient's present mental status against the legal standard for confinement. That adjudication can-

333. See *Developments, supra* note 56, at 1386; Note, *Commitment and Release Standards and Procedures: Uniform Treatment for the Mentally Ill*, 41 U. CHI. L. REV. 825, 830 (1974).

334. *Id.*

335. See *Developments, supra* note 56, at 1382. (The periodic interval for statutory review of patient status varies from 3 to 12 months among the 30 states which require a review, but some statutes simply specify that the review must be accomplished as often as "practicable".)

336. Wyoming statutes make no specific provision for judicial review of a patient's commitment status, but provision is made generally for a patient to secure review of any proceedings under WYO. STAT. § 25-3-101 to § 25-3-141 (1977) by habeas corpus or a direct appeal to the district court. WYO. STAT. § 25-3-124(c) (1977). No detail is provided as to how the district court is to handle such an appeal: is review *de novo* or does the court simply examine the institutional record to determine whether a reasonable decision was reached?

337. *Fasulo v. Arafah, supra* note 25.

not be made by medical personnel unguided by the procedural safeguards which cushion the individual from an overzealous exercise of state power when the individual is first threatened with the deprivation of his liberty.³³⁸

Although the *Fasulo* ruling is based upon the Connecticut due process clause, the opinion is entitled to more universal consideration since the court interpreted and applied recent Supreme Court rulings in arriving at its conclusion that periodic judicial review was constitutionally mandated. While the Supreme Court's recent *Parham* ruling implies that the Court may not be inclined to extend the hand of the judiciary too far into the commitment process, the Court's reluctance may be limited to the special circumstances and conflicting familial interests involved in the parental commitment of a child to a mental institution.³³⁹ However, the Court also expressed its view that the time of psychiatric and mental health specialists could more profitably be spent treating patients rather than in making courtroom appearances.³⁴⁰ Notwithstanding the rationale of *Parham*, *Fasulo* may foment a series of due process challenges to those state commitment schemes which make no provision for periodic judicial review of a patient's commitment. If this occurs, Wyoming's provision is vulnerable.

A civilly committed patient may be released on convalescent status if the head of the hospital deems placement

338. *Id.* at 556. Although Connecticut statutes permitted a patient to initiate judicial proceedings to review his commitment, the court was concerned that as a practical matter mental patients would have difficulty overcoming their isolated environment and possible incompetence to initiate review proceedings. *Id.* at 557. Furthermore, patient initiated judicial review proceedings threatened to place the burden of proof on the patient rather than the state. *Id.* Cf. *Parham v. J.R.*, *supra* note 3. While holding that a formal judicial hearing was not constitutionally mandated prior to parental commitment of a minor to a mental hospital, the court did hold that periodic, independent review of the initial commitment decision was necessary. 99 S.Ct. at 2506. See also Note, *Procedural Safeguards for Periodic Review: A New Commitment to Mental Patients' Rights*, 88 YALE L. J. 850 (1979).

339. Applying the balancing test of procedural due process in *Parham* the Court noted that the private interests at stake included both the child's interest in the commitment decision and the parents' interest in the child's welfare and health. 99 S.Ct. at 2503-2504. In balancing these differing interests the court struck the balance with the parents and concluded that a formal judicial hearing was not mandated prior to commitment, and that independent medical review of the parental decision was adequate to meet due process requirements.

340. *Parham v. J.R.*, *supra* note 3 at 2506.

outside of the hospital to be in the patient's best interests.³⁴¹ In view of the constitutional least restrictive alternative doctrine³⁴² and contemporary professional recognition of the values of community treatment,³⁴³ it is appropriate to permit, and even encourage, the hospital staff to proceed toward outside placement of the patient whenever, in their judgment, the patient's condition warrants such a change, even though the patient may still meet the initial commitment criteria. Medically discretionary judgments appear appropriate here, and imposition of rigid statutory standards could undermine often beneficial treatment decisions and placements.

Nevertheless, once a patient has been discharged on convalescent status he is entitled to constitutional protection to assure that he is treated similarly to other civilly committed patients and that his liberty interests, even though conditional, are protected.³⁴⁴ In this respect, the Wyoming statute falls short of the constitutional mark. Patients released on convalescent status are assured a medical review of their commitment status annually, while involuntarily hospitalized patients are reviewed at six month intervals.³⁴⁵ Considering the growing recognition of the constitutional requirement of periodic review of a patient's status,³⁴⁶ this disparity in treatment between two classes of patients may not survive equal protection analysis. In all likelihood the classification is subject to stringent judicial review requiring the state to demonstrate that no other alternative is available to accomplish its purpose.³⁴⁷ Semi-

341. WYO. STAT. § 25-3-121 (a) (1977).

342. See Section III, *supra*.

343. See Stein, Test and Marx, *Alternatives to the Hospital: A Controlled Study*, 132 AMERICAN JOURNAL OF PSYCHIATRY 517 (1975); Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107 (1972). *But see* Arnhoff, *Social Consequences of Policy Towards Mental Illness*, 188 SCIENCE 1277 (1975).

344. See *Meisel v. Kremens*, 405 F. Supp. 1253 (E.D.Pa. 1975); *Lewis v. Donahue*, 437 F. Supp. 112 (W.D.Okl. 1977); *In re Anderson*, 73 Cal. App.3d 78, 140 Cal. Rptr. 546 (1977). *Cf. Morrissey v. Brewer*, *supra* note 12; *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). *But see Dietrich v. Brooks*, 558 P.2d 357 (Ore. Ct. App. 1976).

345. Compare WYO. STAT. § 25-3-121(1) (1977) with WYO. STAT. § 25-3-120 (1977).

346. *Fasulo v. Arafah*, *supra* note 25. *Cf. Parham v. J.R.*, *supra* note 3.

347. *Fasulo v. Arafah*, *supra* note 25, at 560 (Bogdanski, J. concurring). *Cf. Shapiro v. Thompson*, *supra* note 12.

annual review for convalescent status patients suggests itself as an alternative.

The release standard for patients on convalescent status poses both due process and equal protection problems. Release is sanctioned if hospitalization is no longer anticipated in view of the patient's condition.³⁴⁸ In addition to suffering from ambiguity and lack of clarity, the standard bears no resemblance to either the initial commitment standard or the basic discharge standard.³⁴⁹ Imposition of any standard less rigorous than that required for initial hospitalization cannot be justified under due process analysis in view of the liberty interests at stake and the strict justification required of the state where involuntary hospitalization is concerned.³⁵⁰ The same stringent analysis would apply under equal protection doctrine and, absent a compelling state interest for the disparate treatment, the statutory release standard appears deficient.³⁵¹

The Wyoming statute provides that a patient's convalescent release status may be summarily revoked if this is deemed to be within his best interests.³⁵² Initially, this procedure poses a problem similar to that raised by the statutory release procedures: recommitment under a standard less onerous than the initial commitment standard runs afoul of due process and equal protection guarantees.³⁵³ The standard of a patient's best interests does not approach the threshold commitment requirements of mental illness and potential dangerousness to self or others, or need for care or treatment.³⁵⁴ Moreover, the summary revocation procedure cannot withstand a procedural due process challenge. The

348. WYO. STAT. § 25-3-121(a) (1977).

349. Compare WYO. STAT. § 25-3-121(a) (1977) with WYO. STAT. §§ 25-3-112(k), 25-3-120 (1977).

350. Jackson v. Indiana, *supra* note 3. See also, *Developments, supra* note 56, at 1386; Note, *Commitment and Release Standards and Procedures: Uniform Treatment for the Mentally Ill*, 41 U. CHI. L. REV. 825, 830 (1974).

351. *Id.*

352. WYO. STAT. § 25-3-121(b) (1977). The head of the hospital is charged with the responsibility of reporting to the Board of Charities and Reform which has the final authority to issue an order for the patient's return to the hospital that there is reason to believe that the best interests of the patient would be furthered by rehospitalization.

353. See text accompanying footnotes 350 and 351, *supra*.

354. See WYO. STAT. §§ 25-3-106(a) (ii), 25-3-112(k) (1977).

Supreme Court held in *Morrissey v. Brewer*³⁵⁵ that the conditional liberty enjoyed by a parolee is constitutionally significant and is protected against arbitrary deprivation. Relying upon the *Morrissey* holding, several lower courts have held that summary revocation of a patient's convalescent status release violates due process because the patient's liberty interest is substantial enough to entitle him to prior notice and a hearing before he is returned to the hospital.³⁵⁶ The courts recognized that although medical judgment was a critical element in the recommitment decision, due process still would not brook summary revocation procedures.³⁵⁷ While additional administrative burdens may result from the requirement of a prior hearing, the constitutional interests implicated by the recommitment decision are substantial enough to justify the procedures. Probably the two stage *Morrissey* parole revocation procedures are not mandated,³⁵⁸ but some form of independent review is.³⁵⁹ The *Parham* holding suggests that it may be sufficient for the hospital to engage in its own review of the revocation decision upon the patient's return if this assures an adequate independent check against an erroneous revocation of a patient's convalescent status.³⁶⁰ The present statutes mandate that each patient admitted to the state hospital by any statutory means must be examined by the staff within ten days of his admission, and he must be released if his hospitalization is inappropriate.³⁶¹ Since the Supreme Court

355. *Morrissey v. Brewer*, *supra* note 12. See also *Gagnon v. Scarpelli*, *supra* note 344. But see *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, _____ U.S. _____, 99 S.Ct. 2100 (1979).

356. See cases cited note 344, *supra*.

357. *Lewis v. Donahue*, *supra* note 344, at 113; *In re Anderson*, *supra* note 344, at 551.

358. See *Meisel v. Kremens*, *supra* note 343; *Lewis v. Donahue*, *supra* note 344; *In re Anderson*, *supra* note 344. In *Anderson*, the court specifically refrained from requiring a preliminary probable cause hearing before initial revocation of a patient's leave status; instead, the court required a single adversary hearing which included fundamental due process safeguards. The courts in *Meisel* and *Lewis* indicated a reluctance to dictate any particular procedure for the revocation proceedings.

359. Cf. *Fasulo v. Arafah*, *supra* note 25; *Parham v. J.R.*, *supra* note 3.

360. See footnotes 339 and 340, *supra* and accompanying text.

361. WYO. STAT. § 25-3-117 (1977). Dr. William N. Karn, Superintendent of the Wyoming state hospital, in his testimony before the Joint Legislative Subcommittee on Involuntary Commitment Procedures, expressed his opinion that present hospital review procedures for returned convalescent status patients adequately protect the patient against an erroneous recommitment. Testimony of Dr. Karn before the Joint Interim Subcommittee, *supra*, note 38.

in *Parham* declined to consider the scope or nature of the independent periodic review required in that case,³⁶² it is difficult to predict whether the Court would require an adversary hearing before an independent decision-maker upon revocation of a patient's convalescent status release, as has been required by the lower courts. A strict interpretation of the *Morrissey* rationale suggests that such a procedure may be required constitutionally. Therefore, the absence of an independent review requirement in the Wyoming statutory scheme may prove fatally defective.

Similar constitutional problems adhere to the Wyoming statutory transfer provisions which permit the summary transfer of patients from the state hospital to other institutions, including the penitentiary.³⁶³ No procedural rights are accorded the patient to provide him an opportunity to challenge the decision if he objects to it. While medical judgments usually underlie inter-institutional transfer decisions, this fact does not isolate the decision from constitutional scrutiny since liberty interests of the patient potentially are affected by any substantial change in the terms or conditions of his confinement.³⁶⁴ The courts are reluctant to intrude in a hospital's administrative decision-making process, particularly where medical judgments are involved.³⁶⁵ Nevertheless, it has been held that transfer of a patient from a less restrictive institutional setting to a more restrictive setting requires some procedural regularity—at least the patient is entitled to an opportunity to contest the decision at an administrative hearing, if he so desires.³⁶⁶ However, in the context of the inter-institutional transfer of prisoners from one prison to another, the Supreme Court has held that no liberty interest is implicated; absolute administrative discretion is permissible.³⁶⁷ These

362. *Parham v. J.R.*, *supra* note 3, at 2506 n. 15.

363. WYO. STAT. § 25-3-119 (1977).

364. *Williams v. Robinson*, 432 F.2d 637 (D.C.Cir. 1970); *Eubanks v. Clarke*, 434 F. Supp. 1022 (E.D.Pa. 1977); *Kesselbrenner v. Anonymous*, *supra* note 213; *Cruz v. Ward*, 424 F. Supp. 1277 (S.D.N.Y. 1976).

365. *Covington v. Harris*, 419 F.2d 617, 624 (D.C.Cir. 1969); *Ploof v. Brooks*, *supra* note 212. *Cf.* *Tribby v. Cameron*, 379 F.2d 104 (D.C.Cir. 1967).

366. *Id.*

367. *Meachum v. Fano*, 427 U.S. 215 (1976); *Montayne v. Haymes*, 427 U.S. 236 (1976).

rulings have been distinguished from patient transfer decisions upon the theory that committed mental patients, unlike prisoners, are entitled constitutionally to treatment in the least restrictive setting.³⁶⁸ Although there is little precedent in this area, to the extent that a patient transfer from the Wyoming state hospital to another institution might result in the patient's confinement in a more restrictive environment, the patient may be entitled to prior opportunity to contest the transfer.³⁶⁹ The absence of such a procedure in Section 25-3-110 of the Wyoming Statutes at least opens the door to a possible challenge by a patient dissatisfied with his transfer.

CONCLUSION

As illustrated, numerous constitutional problems present themselves on the face of the Wyoming statutes governing involuntary civil commitment; additional problems potentially arise in the application of the statutes. Comparing the Wyoming commitment scheme to others which have been challenged judicially, it is clear that the Wyoming provisions fall short of evolving constitutional standards. Although difficult balancing judgments necessarily are involved in weighing the respective interests of the state and the individual, the state's administrative convenience rarely will suffice to justify the deprivation of liberty inherent in civil commitment absent additional countervailing considerations. Even with due deference to the state's considerable interests in the existing statutory scheme, the constitutional shortcomings are manifest.

The statutory commitment standards present definitional and possible vagueness problems. "Mental illness" is poorly defined. No definition is offered for the concept "likely to injure himself or others." Revision of this portion

368. *Eubanks v. Clarke*, *supra* note 364, at 1028. *See also*, Note, *The Inter-institutional Transfer of Involuntarily Committed Mental Patients to More Restrictive Facilities Without Notice or a Hearing Constitutes a Violation of the Due Process Clause of the Fourteenth Amendment*, 51 *TEMPLE L. Q.* 357 (1978). *Cf.* *Covington v. Harris*, *supra* note 365, at 623.

369. But the *Parham* holding suggests that the Supreme Court may strike the balance against any type of formal administrative hearing in this situation because of the burden such a proceeding might place upon the hospital's limited staff resources. 99 S.Ct. at 2506.

of the statute to clearly define and elaborate upon these terms should protect its validity, and it would provide guidance for the courts and attorneys involved in commitment proceedings while assuring proper and uniform application of the commitment criteria. The second commitment standard (mental illness and need for care or treatment) is inherently overbroad and probably exceeds the state's *parens patriae* authority. It should be deleted from the statute. The purpose underlying the provision is accomplished as effectively by providing an inclusive definition for the concept of potential dangerousness to oneself which would embrace the notion of an individual's inability because of his mental illness to provide for his subsistence. Alternatively, incorporation of an additional commitment standard such as the "grave disability" criteria utilized in California³⁷⁰ could accomplish the same purpose. This would assure compliance with the principle of *O'Connor v. Donaldson*: it is illegal for a state to commit an individual who safely can survive in freedom simply because he may benefit from, or even require, some form of treatment.³⁷¹

The statutes fail to provide for treatment or placement in an environment less restrictive than the state hospital. From the standpoint of modernizing the Wyoming civil commitment procedure and assuring constitutional compliance, it is imperative to incorporate alternate treatment dispositions into the statute. Also, the statute presently fails to involve local mental health programs in the commitment process. With the availability and widespread use of chemotherapy, community-based care offers the patient an alternative to institutionalization which can provide stability in his relationships, proximity to his family or friends, and a greater degree of independence, and hence self-assurance. During the initial stages of the commitment process, local programs could provide valuable assistance in the examination, diagnosis and treatment of individuals who manifest symptoms of mental illness. Effective early intervention and treatment could obviate the necessity for commitment,

370. See CAL. WELF. & INST. CODE § 5008(h) (West 1969).

371. *O'Connor v. Donaldson*, *supra* note 5, at 576.

thus avoiding lengthy judicial proceedings and relieving the hospital of the need to divert its limited resources from seriously ill patients to patients who only require short term stabilization and limited monitoring. Clearly, this makes more sense than the all-or-nothing choice presently confronting Wyoming courts.

The provisions governing emergency commitment border on the unintelligible and invite arbitrary and disparate application. The statute should be revised to clearly reflect those limited situations in which the state can act with dispatch to detain and treat a seriously mentally ill person. An appropriate limitation would permit emergency detention only in those cases which present a life-threatening situation. Absent such extreme circumstances, the state is not justified in acting without procedural regularity. Even in the emergency case, the state is obligated to assure procedural fairness to the detained patient — a probable cause type of hearing with counsel available should be scheduled as soon as possible. This assures an independent review of the detention decision and protects against arbitrariness or mistake. Further, it would seem advisable and useful to involve local mental health care facilities in emergency commitment situations in an effort to assure prompt treatment for the individual and to avoid institutionalization if possible.

The statutory procedures governing the conduct of involuntary commitment hearings appear constitutionally adequate if they are applied properly. Nevertheless, some technical problems are evident. If initial notice to the individual is not provided, the second notice provided immediately prior to the hearing probably is inadequate to meet due process requirements. Waiver of the proposed patient's presence at the hearing should not be allowed lightly. The court at least should have the opportunity to observe the individual at some juncture during the proceedings; this could be accomplished with an informal waiver interview between the court and the individual without taxing valuable judicial time. The statute profitably could specify in

some additional detail the role of counsel in commitment proceedings. Supplementation of the statute to include the evidentiary standard of clear and convincing proof is necessary to meet minimum due process mandates. Finally, inclusion of a statutory provision governing the procedure necessary for waiver of the provided rights should assist courts and counsel in handling the difficult legal, as well as ethical, issues which naturally arise.

The courts have recognized that an individual's constitutional rights do not lapse once he has been committed as a patient to a mental hospital. Unfortunately, the present Wyoming statutes do not assure procedural regularity or equal treatment in the handling of patient discharges, transfers, or readmissions. The statutes fail to provide discharge or readmission standards consistent with the initial commitment criteria. It makes little sense to carefully cabin the state's authority for initial commitment purposes only to confer virtual unbridled discretion on hospital officials in the handling of the patient once the commitment order has been entered. This is particularly true when the commitment order may be several years old and the patient's condition undoubtedly will have undergone several changes during the interim. Procedural fairness dictates the necessity for independent administrative, if not judicial, review of the patient's condition periodically to justify continued hospitalization. Procedural fairness also requires some independent review before a patient on convalescent status release is summarily recommitted to the hospital. While judicial review may not be necessary here, independence in the decision-maker is required. Perhaps the creation of an independent ombudsman or administrative judge position within the state mental health system would fulfill these requirements and assure meaningful administrative review. Alternatively, more extensive use of commissioners at the county level to conduct administrative review procedures along with commitment proceedings could satisfy constitutional review requirements. Either alternative would add some administrative structure to the existing system and involve an additional financial outlay, but the benefit would

lie in relieving the hospital staff of burdensome administrative duties. They could then focus their attention fully on providing treatment for their patients.

Substantial changes in the existing statute have been suggested. Their adoption may prove cumbersome at first, but they presage improvement in a system that has not changed noticeably in the past sixteen years despite medical and legal developments which have outstripped the 1963 framework in which the Wyoming system initially was conceived. Failure to recognize and implement these changes through legislative revision of the existing statutory scheme invites piecemeal judicial action — an ultimately unsatisfactory method for weighing the important interests at stake and structuring a workable mental health system. But, in the absence of legislative change, the courts most likely would be compelled to act to assure that minimum constitutional standards are met. Preferrably, however, favorable legislative action will be taken on the revised commitment statutes which will be forthcoming from the interim subcommittee appointed for this purpose.