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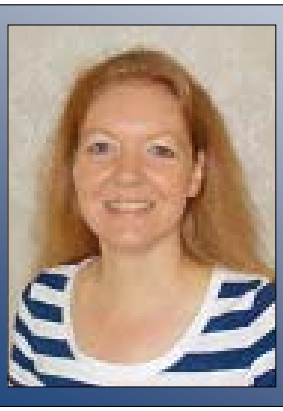
Constitutional Considerations of Involuntary Commitment for Substance Use Disorder and Alcoholism - *Part 1 of 2*

By Heather Gray



Heather Gray
NAMSDL Senior Legislative Attorney
703.836.6100, Ext. 114
hgray@namsdl.org

Specialties: *Involuntary Commitment, Prescribing of Controlled Substances, Neonatal Abstinence Syndrome, Telemedicine*

Persons with mental illnesses in the United States have been subject to involuntary commitment by statute since the late 18th century.[1] Prior to that time, mentally ill persons "could be detained as necessary in order to prevent harm," but were primarily "left to their own devices or were confined in workhouses, almshouses, or prisons."[2] It wasn't until the latter half of the 19th century that laws began to be enacted for the civil commitment of individuals with substance use disorders and/or alcoholism.[3] With the advent of civil commitment laws arose questions regarding whether such laws violated the civil rights of persons subject to commitment and were, thus, unconstitutional. This edition of *NAMSDL News* will explore those questions and how the courts have answered them and comprises Part 1 of a two-part *NAMSDL News* series related to involuntary commitment of individuals with substance use disorders and/or alcoholism. Part 2 of the series will explore current state involuntary commitment laws. An overview of those laws can be found on the NAMSDL website at http://www.namsdl.org/continuum-of-addiction-treatment.cfm.

Courts have used two bases for justifying the involuntary commitment of individuals with substance use disorders and/or alcoholism. The first is for the protection of the community at large.[4] Drug addiction and alcoholism have long been associated in the judicial system with criminal activity, and every state and territory in the United States has at least one drug court to service drug addicted individuals who have been charged with a crime.[5] The primary focus of this paper will be on the second purpose for involuntary commitment – for the protection and treatment of the individual with a substance use disorder and/or alcoholism. " … [T]he appropriate response of the state, acting under its *parens patriae* power, is to provide the individual with treatment, not punishment."[6]

Parens patriae literally means "father of his country," and is the means by which the State can act on behalf of an individual who lacks the capacity to act in his or her own behalf.[7] The doctrine of *parens patriae* was first introduced in England as early as the 15th century and is often used in cases involving children and incapacitated

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adults. It is the doctrine of *parens patriae* that gives states the authority to involuntarily commit individuals with mental illness, substance use disorders, and/or alcoholism based on the idea that those individuals cannot protect themselves and are incapable of determining their need for care, protection, and treatment. It is essentially the State acting as the parent of the individual in question and forms the backbone of most of the cases involving civil commitment of persons with substance use disorders and/or alcoholism.

Involuntary civil commitment statutes have several Constitutional implications. There are questions of due process, the right to a jury trial, the right to an attorney, and the right against self-incrimination, to name a few. The United States Supreme Court case of *Robinson v. California* is the basis on which most current civil commitment statutes are upheld.[8] Decided in 1962, the case involved the arrest and conviction of Lawrence Robinson for violation of a California statute which made it a crime to be addicted to the use of narcotics.[9] At the time of his arrest, Mr. Robinson was "neither under the influence of narcotics nor suffering withdrawal symptoms" according to the officer who examined Mr. Robinson the morning following his arrest.[10] Mr. Robinson's arrest was based on the arresting officer's observation of alleged scar tissue, discoloration, and what appeared to be needle marks on Mr. Robinson's arm.[11] Upon conviction, Mr. Robinson was sentenced to 90 days in the county jail.[12]

The *Robinson* case is important for two reasons. First, the Supreme Court ruled that a state cannot make the status of being an addict a crime as it amounts to cruel and unusual punishment in violation of the Fourteenth Amendment.[13] Second, the Court, in a dictum, opined that "a State might establish a program of compulsory treatment for those addicted to narcotics."[14] The Court went on to say: "Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures."[15] The Court gave two reasons for its opinion that such programs of treatment might be implemented: first, to discourage the violation of controlled substances laws; and second, "in the interest of the general health and welfare of [the State's] inhabitants."[16] Despite the fact that this provision only appears in dictum, meaning that it is authoritative but not binding, it has been used by the lower courts to uphold challenges to commitment statutes and has been cited over 2,000 times.

Another important Supreme Court case is that of *O'Connor v. Donaldson*.[17] In January 1957, Kenneth Donaldson was committed to a Florida state hospital, where he was held for nearly 15 years, following a hearing that determined that he was mentally ill.[18] Throughout the 15 years of his confinement, Mr. Donaldson sought to secure his release on the basis that he was not dangerous to himself or others and could provide for himself outside the confines of the hospital and, further, that responsible persons outside the hospital had offered to help care for him if he could not care for himself.[19] Failing to earn his release on the basis that the hospital superintendent did not believe Mr. Donaldson could adjust to life outside the hospital, Mr. Donaldson filed suit under 42 U.S.C. § 1983 alleging that he had intentionally and maliciously been deprived of the right to liberty.[20]

The Court deferred ruling on "whether mentally ill persons dangerous to themselves or to others have a right to treatment upon compulsory confinement by the State, or whether the State may compulsorily confine a non-dangerous, mentally ill individual for the purpose of treatment," but confined its ruling to the question of "every man's constitutional right to liberty."[21] As to that question, the Court ruled –

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> … a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.[22]

This case is important in the context of involuntary commitment of individuals with substance use disorders and/or alcoholism in that it ostensibly imposes those two requirements – the individual must be dangerous to himself or others or must be incapable of caring for himself or with the help of others – on all cases of civil commitment, not just those involving mental illness.

More than one hundred years ago, the New York Supreme Court addressed questions of due process for individuals committed to the state inebriate asylum pursuant to an *ex parte*[23] proceeding.[24] Adrian Janes was committed to the New York State Inebriate Asylum on the affidavits of two physicians and two "respectable citizens and freeholders" for a period not to exceed one year as a person "lost to self control, unable from such inebriation to attend to business, and dangerous to remain at large."[25] Mr. Janes did not even realize he was being committed until he was dropped off at the asylum by his son and a police officer.[26] Mr. Janes did not receive notice of the proceeding, there was no hearing, and there was no method by which Mr. Janes could accelerate his discharge from the facility except through a writ of habeas corpus.[27] The court found that this violated both the United States and New York constitutions, stating:

> When a person is adjudged without being heard or having an opportunity of being heard, to be unfit for the enjoyment of the liberty to which all good citizens are entitled, and is thereupon committed to an asylum for a term which he cannot, on his own motion, have made less than one year, is he not deprived of his liberty without due process of law? I answer he is; and I am constrained to say that any act of the legislature that authorises [sic] *ex parte* proceedings, which result in depriving persons of their liberty for any considerable time without their being heard or having an opportunity of being heard, upon the accusation on which they are restrained of their liberty, is repugnant to the constitution of this state, and also that of the United States, and is therefore void.[28]

This ruling was expanded upon in the case of *People ex rel. Ordway v. St. Saviour's Sanitarium*.[29] The New York statute under which Elizabeth Ordway was committed to St. Saviour's Sanitarium as an inebriated woman provided for both the voluntary surrender of women to the institution or their involuntary commitment by order of a judge with the consent of the facility's trustees and upon a certificate of two physicians taken under oath that the individual is an adult female who is "incapable or unfit to properly conduct herself or her affairs.[30] Ms. Ordway was ordered to be committed by order of a justice of the supreme court of New York based upon the affidavits of two physicians and Ms. Ordway's brother after which Ms. Ordway voluntarily surrendered herself to the facility and acknowledged that such commitment would be for the period of one year.[31] The People filed for a writ of habeas corpus on behalf of Ms.

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Ordway on the basis that her detention was ordered without a hearing, without notice to Ms. Ordway, and without an opportunity for Ms. Ordway to contest the allegations made against her which was denied, and an appeal to the appellate division of the New York Supreme Court followed.[32] The court reasoned that the process by which Ms. Ordway was committed violated her right to due process under the United States Constitution –

> No matter what may be the ostensible or real purpose in restraining a person of his liberty, whether it is to punish for an offense against the law, or to protect the person from himself, or the community, from apprehended acts, such restraint cannot be made permanent or of long continuance, unless by due process of law.[33]

The court went on to state that instances where an individual is detained pursuant to an *ex parte* hearing until an investigation can be completed if such individual is allegedly dangerous or incompetent does not violate due process as such detention is temporary in nature, but where "a person is confined by what is, upon its face, final process, and by which he is consigned to … restraint of his person by adjudication for a long period … that is not due process of law, unless he has had notice and a hearing, or, at least, such a hearing as implies notice."[34]

> It may, however, be stated, generally, that due process of law requires an orderly proceeding, adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing, or an opportunity to be heard, is absolutely essential. We cannot conceive of due process of law without this.[35]

This is one of the first cases to distinguish between emergency detention of individuals with substance use disorders and/or alcoholism and involuntary commitment. It is a distinction that survives to this day.

The ruling in the case of *Lessard v. Schmidt*, decided by the United States District Court for the Eastern District of Wisconsin, contains many of the elements found in modern-day civil commitment statutes.[36] Originally heard by a three judge panel in 1972, the *Lessard* case has a complicated history.[37] For purposes of this paper, we will concern ourselves only with the facts as set out in the first *Lessard* case and the ruling as set out in the second order of the District Court.

The facts of the case are these – on October 29, 1971, Alberta Lessard was taken to the Mental Health Center North Division in Milwaukee, Wisconsin by two police officers.[38] Between that date and November 24, 1971, three *ex parte* emergency detention hearings were held, each one confining Ms. Lessard for an additional ten day period until the final hearing on November 24, at which Ms. Lessard was represented by an attorney she had hired on her own initiative and after which she was ordered committed to the facility for an additional thirty days, an order that was extended for one month each month following the hearing.[39] Ms. Lessard filed a class action lawsuit seeking an injunction against enforcement of the Wisconsin civil commitment statutes on behalf of herself and all persons 18

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years or older who were being involuntarily detained pursuant to "any emergency, temporary or permanent commitment provision."[40] Ms. Lessard alleged that the Wisconsin procedure for involuntary commitment violated the U.S. Constitution and denied her due process of law in the following ways: 1) by permitting the involuntary detention of an individual for a maximum of 145 days without a hearing; 2) by failing to make notice of hearings mandatory; 3) failing to give adequate and timely notice when notice is given; 4) failing to provide for mandatory notice of the right to a jury trial; 5) failing to provide for the right to counsel or appointment of counsel; 6) failing to allow the presence of counsel during psychiatric interviews; 7) by not excluding hearsay evidence from commitment hearings; 8) failing to provide the privilege against self-incrimination; 9) failing to provide for an independent psychiatric examination by a physician of the individual's choice; 10) by requiring the burden of proof be only by a preponderance of the evidence; and 11) by failing to describe the standard for commitment.[41]

The District Court addressed each of Ms. Lessard's allegations in turn. In its 1974 order, the court ruled as follows:

1. Written and oral notice must be provided to the individual with notice of: a) the factual basis for detention; 2) the right to a jury trial; 3) the standards upon which they may be detained; 4) the names of examining psychiatrists and other witnesses scheduled to testify; and 5) a summary of the testimony to be given by those witnesses;
2. Section 51.02 of the Wisconsin statutes was declared invalid to the extent that it authorized the omission of notice;
3. A hearing to determine whether there is probable cause to believe that a person is mentally ill and dangerous to self or others must be held within 48 hours of the emergency detention of an individual, the individual and his or her family must receive notice of the probable cause hearing, and the individual has an unwaivable right to be present and be heard at the hearing;
4. Individuals must be informed of their right against self-incrimination;
5. An individual may not be detained more than 14 days without a full hearing on the issue of commitment;
6. The individual has the right to counsel or to the appointment of counsel if he or she cannot afford an attorney;
7. The rules against hearsay are applicable to all commitment hearings; and,
8. Evidence of mental illness and dangerousness must be proven beyond a reasonable doubt. Evidence must also show beyond a reasonable doubt that alternatives to commitment have been investigated and are not suitable for the individual in question.[42]

As discussed in footnote 37, the *Lessard* cases made it to the United States Supreme Court twice and, although the Court did not rule on the particular elements of the District Court's order, many of those elements can be found in modern civil commitment statutes, including the right to an attorney or appointment of counsel, the right to notice of all hearings, and the right to a probable cause hearing within a very limited time after detention on an emergency basis.[43] However, other states have determined that certain aspects of the *Lessard* ruling are not constitutionally required, and at least one provision of that ruling was overturned by a subsequent Supreme Court case; namely, the standard of proof.

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In the case of *Addington v. Texas*, the Supreme Court ruled that due process requires more than a preponderance of the evidence but less than the beyond a reasonable doubt standard used in criminal cases, stating that "determination of the precise burden equal to or greater than the 'clear and convincing' standard which we hold is required to meet due process guarantees is a matter of state law."[44] Most states require clear and convincing evidence by statute.

In the *Doremus v. Farrell* case, the United States District Court for the District of Nebraska ruled in 1975 that a Nebraska statute allowing commitment of individuals solely on the basis of mental illness and a need for care and treatment was unconstitutional.[45]

> Considering the fundamental rights involved in civil commitment, the *parens patriae* power must require a compelling interest of the state to justify the deprivation of liberty … Due process and equal protection require that the standards for commitment must be (a) that the person is mentally ill and poses a serious threat of substantial harm to himself or to others; and (b) that this threat of harm has been evidenced by a recent overt act or threat. The threat of harm to oneself may be through neglect or inability to care for oneself.[46]

In several other respects, the *Doremus* court agreed with the *Lessard* court. The court found that individuals subject to commitment were entitled to notice of hearings sufficiently in advance to allow the individual to prepare; that there must be a preliminary hearing to establish probable cause held promptly after an individual is detained on an emergency basis; and, that there is a right to be present at any hearing unless waived by the individual.[47] However, in contrast to the ruling in the *Lessard* case, the *Doremus* court found that there was no right to a jury trial in a civil commitment proceeding reasoning that the costs to the state outweighed other interests, but left the ultimate decision regarding whether to allow juries in commitment hearings to the legislature.[48] This is an area where the state and federal courts are in disagreement; however, close to 50% of states with involuntary commitment laws do provide for the right to a jury trial by statute.

In a decision affirmed by the Supreme Court,[49] the United States District Court for the District of Connecticut ruled in the case of *Logan v. Arafeh* that a statute providing that an individual can be detained for 45 days prior to a hearing on commitment is constitutional.[50] The statute in question provided that an individual could be detained for up to 15 days on an emergency basis and an additional 30 days if judicial proceedings were instituted prior to the expiration of the 15-day period.[51] The court found that "the time provisions set by the legislature are fully supported by the opinions of competent physicians" and the delay did not amount to a denial of due process.[52]

The United States District Court for the Middle District of North Carolina disagreed with the *Lessard* court on several aspects of its ruling. The plaintiff in the case of *French v. Blackburn* brought suit alleging that the North Carolina civil commitment statutes violated his right to due process in that they provide for a final hearing on commitment within ten days after the individual is detained rather than 48 hours; the notice provision did not include information regarding the basis for his detention, the standard of proof required, the right to a jury trial, or the names of the

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witnesses who will be testifying; he was not notified of his right against self-incrimination; and there is no right to a jury trial in civil commitment proceedings for persons alleged to be mentally ill or an inebriate and imminently dangerous to himself or others.[53] In essence, the plaintiff was arguing that the North Carolina statutes were deficient because they did not follow the ruling as set out in *Lessard*.

The North Carolina District Court disagreed. On the first point, as noted above, the Supreme Court had already affirmed an order upholding a statute providing for a hearing after 45 days of detention; therefore, ten days was certainly a valid length of time between initial detention and a preliminary hearing.[54] As to the plaintiff's argument regarding the notice requirements, the court held, "Due process requires that the notice of a hearing be appropriate to the occasion and reasonably calculated to inform the person to whom it is directed of the nature of the proceedings."[55] Since the notice given to the plaintiff in this case included the date, time and place of the hearing; the purpose of the hearing; the right to counsel; the right to be present at the hearing and present evidence on his own behalf; and the nature of the proceedings, the court deemed it to be constitutional.[56]

In contrast to the *Lessard* court, the *French* court held that individuals subject to civil commitment have no right against self-incrimination in those proceedings.[57] The court reasoned that, to apply the privilege to civil commitment proceedings "would be to destroy the valid purposes which they serve as it would make them unworkable and ineffective."[58] State and federal courts are divided on this particular issue with the majority holding that the privilege against self-incrimination does not apply.

Finally, in addressing the question of whether or not individuals subject to civil commitment have the right to a jury trial, the court stated:

> . . . privacy and informality [of the proceedings], which are obviously legislated for the purpose of protecting one subjected to the proceedings from suffering additional trauma, would be totally lost if a jury were present. Indeed the persons subjected to such a proceeding may not be capable of dealing with a full-blown adversary process. We find these purposes and justifications not only sufficient to pass constitutional muster, but laudible, and conclude that the failure to provide a jury trial in involuntary commitment proceedings does not violate the equal protection clause.[59]

In summary, the courts agree that in order to serve due process and protect the rights of the individual, there must be a showing of both mental illness (which includes substance use disorders and alcoholism) and dangerousness to self or others which must be shown through evidence of a recent or overt act on the part of the individual. Evidence of mental illness and dangerousness must be proven by clear and convincing evidence, although states are free to require more (clear, unequivocal, and convincing evidence, for example).

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Further, the individual has the right to an attorney, although jurisdictions differ on whether that right extends to the right to have counsel present during psychiatric or physician examinations. Additionally, due process requires that the individual be afforded a hearing within a limited amount of time and that he or she be given adequate notice of the hearing. Finally, due process does not require a hearing prior to the emergency detention of an individual, but a hearing must be held if the individual is subject to confinement for a long or permanent period of time.

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[1]Myers, John E.B. *Involuntary Civil Commitment of the Mentally Ill: A System in Need of Change*, 29 Vill. L. Rev. 367, 375 n. 39 (1984). Available at: http://digitalcommons.law.villanova.edu/vlr/vol29/iss2/2

[2]*Id*. at 375.

[3]Hall, Kathleen Thompson, MD and Paul S. Appelbaum, MD. "The Origins of Commitment for Substance Abuse in the United States." The Journal of the American Academy of Psychiatry and the Law 30 (2002): 30:33-45.

[4]Hafemeister, Thomas L. and Ali John Amirshahi. *Civil Commitment for Drug Dependency: The Judicial Response*, 26 Loy. L.A. L. Rev. 39, 45-46 (1992). Available at: http://digitalcommons.lmu.edu/llr/vol26/iss1/4

[5]"History: Justice Professionals Pursue a Vision." *National Association of Drug Court Professionals*, 1 Sept. 2016, www.nadcp.org/learn/what-are-drug-courts/drug-court-history

[6]Hafemeister at 47 (internal citations omitted).

[7]Garner, Bryan A., ed. *Black's Law Dictionary*. 10th ed. St. Paul, MN: West Group, 2014.

[8]370 U.S. 660 (1962).

[9]*Id*. at 660 – 661.

[10]*Id*. at 661.

[11]*Id*.

[12]*Id*. at 660.

[13]*Id*. at 667.

[14]*Id*. at 665.

[15]*Id*.

[16]*Id*. at 664-665.

[17]422 U.S. 563 (1975).

[18]*Id*. at 565 – 566.

[19]*Id*. at 566 – 569.

[20]*Id*. As an aside, the hospital superintendent retired prior to the lawsuit being filed, and Mr. Donaldson was released subsequent to its filing with the support of the hospital staff, whereupon he immediately secured a job.

[21]*Id*. at 573.

[22]*Id*. at 576.

[23]*Ex parte* proceedings are proceedings that take place outside the presence of the respondent and are typically used in emergency situations where a delay might lead to irreparable harm. In general, if a judge or magistrate makes an order in an *ex parte* proceeding, a full hearing with the respondent present is scheduled to take place within a short time after the order is entered to limit any deprivation of the respondent's rights.

[24]*In re Janes*, 30 How. Pr. 446 (1866).

[25]*Id*. at 447.

[26]*Id*. at 448.

[27]*Id*. at 447 – 450.

[28]*Id*. at 454.

[29]56 N.Y.S. 431 (N.Y. App. Div. 1898).

[30]*Id*. at 432.

[31]*Id*. at 432-433.

[32]*Id*. at 431.

[33]*Id*. at 436.

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[34]*Id*.
[35]*Id*., quoting *Stuart v. Palmer*, 74 N.Y. 183, 191 (1878).
[36]379 F.Supp. 1376 (1974).
[37]See, *Lessard v. Schmidt*, 349 F.Supp. 1078 (E.D. Wis. 1972); *Schmidt v. Lessard*, 414 U.S. 473 (1974); *Lessard v. Schmidt*, 379 F.Supp. 1376 (E.D. Wis. 1974); *Schmidt v. Lessard*, 421 U.S. 957 (1975); and *Lessard v. Schmidt*, 413 F.Supp. 1318 (E.D. Wis. 1976). Alberta Lessard originally filed a class action lawsuit to declare the Wisconsin civil commitment statutes unconstitutional in 1972. The ruling was appealed to the United States Supreme Court, who vacated the order and remanded it to the District Court for a more definite order that described in detail the portions of the Wisconsin statutes that were unconstitutional. There followed the second order from the District Court, which set out in particular detail its ruling. Following another appeal to the Supreme Court, that Court again vacated and remanded the case back to the District Court for consideration of a recent Supreme Court case that might have some bearing on the outcome of the question of jurisdiction. In its third and final order in this case, the District Court determined that jurisdiction was proper and affirmed its prior order.
[38]*Lessard v. Schmidt*, 349 F.Supp. 1078, 1081 (1972).
[39]*Lessard* at 1081 – 1082 (1972).
[40]*Lessard* at 1082 (1972).
[41]*Lessard* at 1082 (1972).
[42]*Lessard v. Schmidt*, 379 F.Supp. 1376, 1378 – 1379 (1974).
[43]See, *Involuntary Commitment for Individuals with a Substance Use Disorder or Alcoholism*, National Alliance for Model State Drug Laws, www.namsdl.org, for more information.
[44]*Addington v. Texas*, 441 U.S. 418, 433 (1979).
[45]407 F.Supp. 509, 514 (1975).
[46]*Id*. at 514 – 515.
[47]*Id*. at 515 – 516.
[48]*Id*. at 516.
[49]See, *Briggs v. Arafeh*, 411 U.S. 911 (1973).
[50]346 F.Supp. 1265, 1268 – 1269 (1972).
[51]*Id*.
[52]*Id*. at 1269.
[53]428 F.Supp. 1351, 1355 – 1361 (1977).
[54]*Id*. at 1356.
[55]*Id*.
[56]*Id*. at 1356 – 1357.
[57]*Id*. at 1358 – 1359.
[58]*Id*. at 1359.
[59]*Id*. at 1361 – 1362.

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