Civil Commitment in California: A Defense Perspective on the Operation of the Lanterman-Petris-Short Act

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The implementation of California's Lanterman-Petris-Short Act represented a major attempt by the state legislature to strike a balance between various libertarian, therapeutic, and public welfare concerns generated by involuntary hospitalization of the mentally ill. The act has sparked considerable initial interest and has prompted academic comment. In this article, we examine the application of the Lanterman-Petris-Short Act (LPS) during the first seven years of its operation, with special emphasis on its operation in Santa Clara County. Because our observations come from the perspective of a patient's advocate, the

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3. The authors are deputy public defenders in Santa Clara County. The public defender is appointed to represent the involuntarily committed in Santa Clara County. Indeed, the Office of the Public Defender handles virtually all litigation on behalf of involuntarily committed patients. Representation of such patients by private counsel in Santa Clara County is rare. See Statement of Nordin P. Blacker, private attorney and Deputy Magistrate of the Federal District Court, San Jose Annex of the San Francisco district, quoted by Ellanson, Administration of the Lanterman-Petris-Short Act in Santa Clara County, Aug. 1975 (unpublished thesis on file with the authors) [hereinafter cited as Ellanson].

It should be noted that some of the assertions in the text come from the authors' personal experience as public defenders.
article will focus principally upon the act's impact on the civil liberties of the allegedly mentally ill. We will trace the LPS framework in detail, seeking to highlight those elements of the act which provide crucial leverage for the patient's attorney as well as those which frustrate advocacy and protection of the patient's rights.

An Overview of the Act

In brief, the act provides for an initial involuntary detention period of seventy-two hours at an approved detention facility for a person thought to be a danger to others, a danger to himself, or gravely disabled as a result of mental disorder or inebriation. This initial holding period is unique among all stages of the act insofar as no statutory provision is made for judicial review or appointment of counsel.

Upon expiration of the seventy-two hour period, the patient may be "certified" for an additional period of detention not to exceed fourteen days. Again, the basis for confinement is the allegation that the patient is either a danger to self, to others, or is gravely disabled. During this time, the patient may request a writ of habeas corpus and has the right to be represented by counsel at a hearing to determine the merits of his petition.

After the fourteen day certification period, there are three statutory provisions for extending involuntary confinement. First, the act provides for a ninety day "postcertification hold" for a patient considered to be imminently dangerous. A filing by the state of a postcertification petition triggers a mandatory hearing. Upon such a filing the patient has the right to demand a jury trial. At either the hearing or the trial the patient must be found to have either threatened, attempted, or actually inflicted physical harm during the course of the earlier hospitalization or to have been admitted to the hospital because of such an act.

Second, LPS provides a fourteen day "recertification" procedure, involving the same statutory features as the original certification proce-

5. Id. § 5250 (West 1972).
6. Id.
7. Id. § 5275.
8. Id. § 5276.
9. Id. § 5300.
10. Id. §§ 5301-03.
11. Id. § 5302.
12. Id. § 5300.
Chart
The Lanterman-Petris-Short Act

Initial Involuntary Detention Period for Purposes of Evaluation and Treatment (Maximum 72 Hours)
Standard: Probable cause to believe patient is a danger to self or others, or grave disability due to mental disorder or inebriation.

Release
Voluntary Care

Temporary Conservator (Maximum 30 Days)

Habeas Corpus

Certification for Involuntary Intensive Treatment (Maximum 14 Days)
Standard: Staff finding that because of mental disorder or alcoholism, patient is a danger to self, others, or is gravely disabled.

Post-Certification Hold (Maximum 90 Days)
Standard: Threatened, attempted, or actual physical harm to others, plus future danger of harm to others because of mental disorder; mandatory hearing; jury if requested.

Habeas Corpus

Conservatorship (Maximum One Year)
Standard: Gravely disabled by mental disorder or alcoholism. Mandatory hearing; court or jury if requested.

Recertification for Involuntary Intensive Treatment (Maximum 14 Days)
Standard: Original detention for suicide threat or attempt, or threat or attempt during detention plus imminent suicide danger.

Review if Requested
No more than once every six months
dure, including appointed counsel and habeas corpus relief. The grounds for recertification are that the patient threatened or attempted to take his own life during the previous holding periods or was taken into custody as a result of such a threat or attempt.

Third, LPS provides for the appointment of a conservator to care for a patient who remains allegedly gravely disabled. The conservator has the power to place the conservatee in a locked mental treatment facility. A temporary conservator may be appointed to serve until resolution of the petition requesting appointment.

The proposed conservatee may seek statutory habeas corpus relief during the temporary conservatorship period and has the right to request a jury trial following the hearing on the petition for appointment of the conservator. Until recently the conservatorship trial was treated as a “civil” proceeding: decisions could be made by a non-unanimous verdict on a mere preponderance of the evidence. Recent decisions, however, have recognized that the deprivation experienced by a conservatee who is placed in a hospital or other institution is not unlike the plight of a convicted prisoner and that the stigma attached to a person found gravely disabled is not unlike the stigma attached to a criminal conviction. Accordingly, it has been concluded that the criminal standards of proof of grave disability beyond a reasonable doubt and jury unanimity are required in conservatorship trials.

14. Id. § 5260.
15. Id. § 5350 (West Supp. 1977). Conservatorships can also be established under the Probate Code. Section 1751 allows the establishment of a probate conservatorship if the proposed conservatee is unable “to provide for... personal needs for physical health, food, clothing or shelter...” Cal. Prob. Code § 1751 (West Supp. 1977). LPS, on the other hand, authorizes only for a person who is “gravely disabled as a result of mental disorder or impairment by chronic alcoholism,” and defines “gravely disabled” as inability “to provide for... basic personal needs for food, clothing, or shelter.” Cal. Welf. & Inst. Code §§ 5350, 5008(h)(1) (West Supp. 1977) (emphasis added). The important distinction between the two standards is that conservatorships under LPS can only be authorized where the disability is the result of mental disorder or alcoholism whereas probate conservatorships can be established regardless of the cause of the inability to provide. Accordingly, only LPS provides for placement of the conservatee in a psychiatric facility. Cal. Welf. & Inst. Code § 5358 (West 1972 & Supp. 1977).
16. Id. § 5358 (West Supp. 1977).
17. Id. § 5352.1.
18. Id. § 5353.
19. Id. § 5350. If the proposed conservatee, prior to the conservatorship hearing, demands a court or jury trial, he automatically waives the hearing. Id.
20. Conservatorship of Johnson, 135 Cal. Rptr. 741 (1977) (proof beyond a reasonable doubt required); Conservatorship of Turner, 136 Cal. Rptr. 64 (1977) (proof
a conservator is appointed, the conservatee may request a rehearing at any time, but not in excess of once every six months. The conservatorship automatically terminates at the end of one year, although the conservator may petition annually for reappointment.

This framework has ameliorated a number of the abuses which prompted reform of the civil commitment process. The act has provided, with the notable exception of the seventy-two hour holding period, counsel for the involuntarily confined and multiple opportunities for review of the basis for detention. The act has also made the treatment facility staff more responsive to the patient's discharge demands. Because the patient can elect to bring the staff into court, where they probably do not wish to spend their time, the patient and his attorney have both negotiating leverage and the attention of the psychiatrist. Additionally, LPS provisions for periodic review minimize the possibility that patients become lost or forgotten within the mental health system. Periodic inquiry into the patient's condition keeps alive the prospect of alternatives to involuntary hospitalization.

Unfortunately, some protective features of the act have been bypassed as the flow of commitment cases takes the path of least legal resistance. Although the framers of the act carefully crafted proce-

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22. Id. § 5361.
23. For a thorough study of pre-LPS commitment practices, see CALIFORNIA ASSEMBLY SUBCOMM. ON MENTAL HEALTH SERVICES, THE DILEMMA OF MENTAL COMMITMENTS IN CALIFORNIA (1966) [hereinafter cited as DILEMMA]. The report surveyed more than 300 hospitals caring for the mentally ill, and developed data on 83% of all hospitalized psychiatric patients in California. Another study pointed out that "serious inadequacies were discovered in the commitment process . . . . Often the patient was brought in in a manner similar to the apprehension of a criminal. While in the observation ward, the patient lost many of his civil rights, and there was little emphasis on treatment during this period. The Department of Mental Hygiene found that detention orders were routinely filed for all mental illness petitions in many counties. . . ."
dural requirements for extending hospitalization of the suicidal or imminently dangerous patient, these requirements presently can be defeated by seeking conservatorship under the vague "gravely disabled" standard. The overbreadth of this standard has swallowed up the purposefully explicit provisions governing confinement of the allegedly dangerous or suicidal.

Other provisions, while operating much as envisioned by the legislature, have also proven inadequate. For example, once the seventy-two hour detention is over, LPS provides for appointment of counsel if the patient requests release. With the inevitable delays of the appointment process this provision has left most patients without legal counsel during the first five or six days of involuntary confinement, a deprivation that is unnecessary and unwise. In addition, although the act makes provision for a rehearing following establishment of conservatorship, the section has not served to prevent the unnecessary institutionalization of conservatees. Unfortunately, the act places the burden of initiating this judicial review upon the often institutionalized conservatee. As we shall explain, this unrealistically delegates the responsibility of terminating unwarranted confinement upon a patient who may not be in a position to take such action. In our view, the state should properly assume this obligation by mandating that extended hospitalization pursuant to a conservator's authority be subject to a judicial ruling which limits the duration of commitment. Renewed legislative or judicial attention to these areas, examined in greater detail later, would bring the goals of the act closer to realization.

**The Seventy-Two Hour Hold**

As stated before, LPS does not require judicial supervision or approval before a patient can be detained involuntarily at a psychiatric facility. The act authorizes peace officers, members of a designated evaluation facility, or other professional persons designated by the county to take a person into custody upon probable cause of danger.

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25. Id. § 5364.
26. The announced legislative intent of LPS includes the following goals: "(a) To end the inappropriate, indefinite, and involuntary commitment of mentally disordered persons. . . . (d) To safeguard individual rights through judicial review . . . ." CAL. WELF. & INST. CODE § 5001 (West 1972).
27. When passed in 1967, LPS required only "reasonable cause" for detention. 1967 Cal. Stats., ch. 1667, § 36, at 4074. This provision was amended to the present "probable cause" requirement in 1971. 1971 Cal. Stats., ch. 1593, § 368, at 3337.
to self or others, or grave disability due to mental disorder. This custody for evaluation and treatment extends for seventy-two hours, excluding weekends and holidays, without statutory provision for judicial review.

The act is the product of legislative compromise over conflicting therapeutic and libertarian concerns. The absence of review at the first stage of commitment was a response to the contention of treatment professionals that cumbersome judicial interference at the outset of treatment would impede patient response to therapy.

Whether or not this assertion of therapeutic impairment is sound, it does not speak directly to the issue of whether a patient should have an immediate right to consult with an attorney at the first stage of commitment. Presently, most involuntary patients do not see an attorney until as long as five or six days after admission. In our view, a number of reasons militate in favor of an immediate right to counsel at this earliest phase of detention. First, the attorney can occupy an advisory role, apprising the involuntary patient of his current legal status and responding to questions concerning the nature and likelihood of further detention. As one commentator has noted, "The consequences of the seventy-two hour evaluation period are too critical for an individual

28. CAL. WELF. & INST. CODE § 5150 (West Supp. 1977). LPS also provides a procedure whereby private parties can obtain court ordered evaluation of persons alleged to be mentally disordered or impaired by chronic alcoholism or drug abuse. Id. §§ 5200-30 (West 1972 & Supp. 1977). In brief, this procedure contemplates that a private party will make allegations in a petition to a county officer designated to receive such petitions. The county officer will conduct a screening of the suspected person to see if he will submit to voluntary treatment. If such person refuses and if the county officer has probable cause to believe the person is, as a result of mental disorder, chronic alcoholism, or drug abuse, a danger to others, or to himself, or is gravely disabled, the county officer can file a petition with the superior court. The court may issue an order and may compel the suspected person, if still unwilling to cooperate, to undergo evaluation according to the procedures of the seventy-two hour hold.

29. Id. § 5151 (West 1972).

30. For discussions of the legislative history of the LPS Act, see ENKI, supra note 23, at 8-18; E. BARDACH, THE SKILL FACTOR IN POLITICS; REPEALING THE MENTAL COMMITMENT LAWS IN CALIFORNIA (1972).

31. See ENKI, supra note 23, at 15.

32. As noted above, practically all involuntary patients who are represented by counsel in Santa Clara County are represented by the public defender. See note 3 supra. The Welfare and Institutions Code provides for notice to the public defender only at certification, which occurs at the end of the seventy-two hour detention, if further detention is sought. Since the seventy-two hour detention period excludes holidays and weekends, and since weekends often intrude into the period, there is often no notice to appointed counsel until four or five days after detention has begun. CAL. WELF. & INST. CODE § 5253 (West 1972).
of questionable mental capacity to face without the aid of counsel.\(^{33}\) Not only does attorney involvement at this juncture provide information from one familiar with LPS, but the attorney-client privilege affords an opportunity for meaningful dialogue. The patient may inquire freely about the law's application to his particular circumstances without fear that the questions asked or the information imparted will be used against him to justify further confinement.

In addition, involuntary detainees are often estranged from family and friends—the attorney may well be their only contact with the world outside the institution. The advisory function can serve as a significant therapeutic tool, reassuring anxious patients that they have not been abandoned behind locked doors. The knowledge that significant legal protections attach if confinement is extended often allays concern and promotes acceptance of treatment.\(^{34}\)

It may also be tactically crucial for the attorney to be involved with his client at the outset of confinement. Should a protracted commitment ultimately result in judicial review, the patient's chances of prevailing at a hearing can depend upon the attorney's awareness of the circumstances precipitating admission. First, and most obvious, it may be that the doctor's conclusions concerning the patient's condition are grounded upon erroneous or misleading information. Psychiatrists themselves have shown that patient evaluations can be subject to serious errors of judgment and that errors in labeling persons as mentally ill can be self-perpetuating.\(^{35}\) Even if the initial diagnosis appears correct, counsel should nonetheless be fully cognizant of any improvement in his client's condition or behavior after admission. Judges may tend to presume the existence of some basis for confinement;\(^{36}\) it may


35. See Rosenhan, On Being Sane in Insane Places, 13 SANTA CLARA LAW. 379 (1973). Dr. Rosenhan, along with others, anonymously submitted himself to a period of detention in a mental facility. In describing the experience he noted that "[O]nce a person is designated abnormal, all of his other behaviors and characteristics are colored by that label. Indeed, that label is so powerful that many of the pseudopatients' normal behaviors [are] overlooked entirely or profoundly misinterpreted." Id. at 386-87.

36. One study found that under the pre-LPS standards "the medical examinations and recommendations to the court . . . tend to presume mental illness, be performed in a perfunctory manner, and are based on vague criteria." DILEMMA, supra note 23, at 177.
therefore be fruitful for the patient’s attorney to dwell on the disparity between the behavior which prompted the admitting diagnosis and the client’s recent, and presumably improved, behavior. While the staff notes available in the client’s medical chart offer some assistance in this regard, they reflect the observations of persons who don’t enjoy the advocate’s perspective.

Furthermore, there are concrete and pragmatic advocacy steps which can be taken in the patient’s behalf short of formal judicial review. The attorney can communicate and arbitrate on behalf of the involuntary patient. His advocacy skills, status, relative mobility, and presumptive sanity all put him in a better position to do so than his client.37

The final reason to require the appointment of counsel during the seventy-two hour hold is to protect against the improper transfer of a patient from the county in which he was originally detained to treatment facilities in another county.38 Swift transfer of the patient may well separate the patient from family or friends who could aid him in his attempts to be released. Intercounty transfer during the seventy-two hour hold can be blocked under the act only if the staff of the institution in the detaining county is informed in writing of the patient’s desire for future judicial review.39 Thus, in the absence of counsel to protect the patient’s right to block immediate transfer, a patient can be moved hundreds of miles to other treatment facilities, making attempts at gaining release significantly more difficult and possibly removing the patient from his only allies during his crisis.

37. An example from the authors’ experience in Santa Clara County is illustrative. A thirty-year-old patient stopped the public defender in the detaining facility and requested assistance. He had been placed on a seventy-two hour hold which alleged that he was a danger to others and gravely disabled. The patient was employed, and the psychiatric staff had indicated their reluctance to discharge him before they were convinced his condition was stable enough to foreclose the prospect of jeopardizing his position once released. The Director of Inpatient Services was contacted by the public defender who pointed out that speculation concerning the patient’s capacity to cope with work pressures would soon be moot, for one more day of absence would insure dismissal. In this instance, the principal problem involved cutting through layers of staff to one empowered to render an immediate discharge. The patient was discharged. Clearly, intervention at a later stage would have come too late to save the man’s job, and the patient’s unemployment would have served as a further factor to justify the allegation of grave disability.

38. The code allows patients to be transferred “from the county providing evaluation services to a different county for intensive treatment . . . .” Cal. Welf. & Inst. Code § 5276 (West 1972).

39. Id.
The importance of the seventy-two hour detention period cannot be overstated. During this period, the foundational facts necessary to justify further confinement can be obtained from the often disoriented and uncounseled patient. Often, an isolated patient will have no visitors during this period, so that observations are made only by treatment personnel, whose training and assumptions may cause them to overlook information favorable to the patient. The provision for immediate counsel would act as a check on this tendency and would give the patient contact with someone not a part of the treatment establishment. It would also give the patient someone to voice his concerns and requests and would express the concern of the community not just for treatment, but also for protection of patients' rights and individual liberty.

Fourteenth Day Certification: The Right to Habeas Corpus

Following expiration of the seventy-two hour hold, continued detention and treatment requires certification of the patient for a period of intensive treatment not to exceed fourteen days. The basis of this fourteen day certification is a staff determination that the individual, as a result of mental disorder or impairment by chronic alcoholism, is a danger to others, a danger to himself, or is gravely disabled. In addition, LPS requires that the person has been advised of but has not accepted voluntary treatment and that the facility providing intensive treatment is equipped and staffed to provide such treatment. Notice of the fourteen day certification must be filed with the superior court and copies of the certification sent to the patient, his attorney, the district attorney, and the public defender, if the relevant county has created a public defenders office.

The individual who delivers the notice of certification to the patient is required by the act to inform him of his right to habeas corpus, to explain the term, and to inform him of his right to counsel, including the right to appointed counsel. The patient may immediately make his request for judicial review to the informing party or to any member of the treatment staff at any time during the fourteen day period.
The requested hearing must be held within two judicial days of the filing of the patient's petition and the court must release the petitioner if any of the conditions for certification are found not to exist.\(^4\)

In our experience, habeas hearings tend to focus on the broad "gravely disabled" standard as opposed to the more specific alternatives of danger to self or others. The patient-petitioner may enlist the aid of neighbors and friends who are either in a position to controvert the alleged facts upon which the doctors base their diagnosis or who will commit themselves to providing sufficient support and guidance to prevent a recurrence of the situation which precipitated commitment. However, community assistance of this sort is frequently unavailable, and the petitioner generally must rely upon his demeanor to persuade the court that the alleged mental disorder, if it exists, does not render him dangerous or incapable of providing for his basic personal needs. This may prove extremely difficult, for the doctor may seek to introduce everything unfavorable he has ever heard about the petitioner. While such testimony would seem to constitute blatant hearsay, it is admitted not for the truth of the matter stated but as the basis for the doctor's opinion that grounds for certification exist.\(^5\)

Nonetheless, the effectiveness of the habeas corpus provisions in reducing the potential for inappropriate commitment is not entirely dependent upon the integrity of the review itself. For example, any contested habeas hearing necessarily involves the commitment of at least one staff member's time, an extremely limited resource. Accordingly, the filing of the petition for habeas corpus often triggers an informal but no less significant review by the attending staff. Counsel must be active in promoting such prehearing screening, for many inappropriate detentions are terminated by the holding facility prior to formal judicial intervention.

Counsel's role at the habeas corpus stage, of course, involves much more than out-of-court negotiation for release of a patient. In Santa

\(^4\) Id. § 5275. Such a request by a patient must be transmitted to the superior court without delay. Failure to notify the court of a patient's request for a writ of habeas corpus is a misdemeanor. Id.

\(^5\) Id. § 5276. The various procedures described above were declared constitutional in Thorn v. Superior Ct., 1 Cal. 3d 666, 464 P.2d 56, 83 Cal. Rptr. 600 (1970).

\(^6\) See CAL. WELF. & INST. CODE § 5250 (West 1972). However, vigorous resistance to the admission of such testimony in a trial by jury should have considerably more success. Even if deemed relevant, such evidence is manifestly prejudicial and only minimally probative. Counsel might stress additionally that the purpose of annual review is frustrated when the proposed conservatee can be condemned by his past acts.
Clara County, for instance, the public defender personally advises every certified individual of his rights and remedies. In a county with a large number of certifications, the public defender must make frequent, often daily visits to the detaining facilities. Such contact with treatment facilities alerts the attorney to hospital conditions which prompt actions or statements by clients which otherwise appear inexplicable or indicative of the patient's abnormality.

Indeed, the public defender's activities within evaluation and detention facilities can and should go beyond those of a legal advocate to reflect the responsibilities of an informal patient's ombudsman as well. Obviously, a staff member prepared to listen and respond to patient complaints can serve to ameliorate much dissatisfaction with the involuntary hospitalization. Unfortunately, hospital officials attempting to serve in this capacity may be inextricably cast in the role of the patient's adversary or may lack the requisite independence to act on the patient's requests. Thus, there may be compelling reasons for a patient to express dissatisfaction to an independent party rather than a staff member. First, the patient will want to appear as cooperative as possible to the treatment personnel with the power to recommend release. Moreover, if the complaint focuses on a treating psychiatrist, it would be purposeless to address it to the lower echelon personnel. Similarly, the lower level staff members with whom the patient has greatest contact may not be eager to act upon complaints which challenge longstanding hospital policy. Finally, sheer work pressure can prevent staff members from dealing adequately with patient grievances.

These considerations lend strong support to the concept of a formally appointed independent patient's ombudsman. However, in the absence of such an official, the public defender should assist in preventing irritations from festering to the point at which treatment is subverted.

Frequent visitation to the evaluation facility by the public defender will also benefit those patients who do not initially oppose involuntary

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47. In a Santa Clara County case known to one of the authors, a patient's medical chart reported that she spent all day in bed, an observation that seemed to support the allegation that she was gravely disabled. The patient, however, was provided with a small living area, with space for only a bed and one hardbacked chair. Although there was a communal space for all patients, that area was extremely smoky and noisy. The patient enjoyed reading and required some quiet spot where she could do so. That limited her to her room and her bed was more comfortable than the single chair. Counsel's awareness of these facts, gained through visitation and observation, enabled him to respond to the contention, made at the habeas hearing, that the patient's behavior indicated that she was so "withdrawn" as to be gravely disabled.
hospitalization but who soon chafe under the restrictions and desire release. The physical presence of an attorney consulting with fellow patients is a powerful reminder to a certified patient that legal means for release are available. Because of the problems of disorientation and institutionally induced apathy among patients, such reminders serve to make the patient’s right to habeas corpus a real as well as a formal right.

Finally, the California Supreme Court’s decision in *Thorn v. Superior Court* should be noted. In *Thorn*, the superior court in San Diego County, soon after LPS was enacted, appointed a public interest law firm as attorneys for all patients certified in San Diego health care facilities. The superior court reasoned that since a patient cannot be certified unless he refuses voluntary treatment, each patient who is in fact certified is being treated against his will and would prefer to be released. Thus, certification was equated with a request for a habeas corpus hearing under LPS, logically precluding the possibility that any patient in San Diego could be certified without impliedly requesting a habeas corpus hearing.

The supreme court refused to issue a writ of prohibition against the superior court, commenting that the superior court’s approach “is sound and should be sustained at this stage of . . . experimental legislation in the field of the care and treatment of the mentally ill.” The supreme court observed that the superior court’s action was consistent with the general legislative policy in LPS favoring due process for incarcerated mental patients. Also, the supreme court argued that certified patients might not be able to understand the right of habeas corpus or might be unable to request it. Finally, the court suggested that there was a conflict of interest to the extent that the same hospital personnel responsible for the patient’s intensive care was also responsible for explaining to the patient his rights.

In so holding, the *Thorn* court resisted a mechanical application of the act, focusing instead on the humanitarian goals which had inspired its passage. The court thus sanctioned an activist approach to the pursuit of due process for the involuntarily committed. Similarly, counsel for confined patients must take an active role within the institu-

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50. *Id.* at 672, 464 P.2d at 60, 83 Cal. Rptr. at 604.
51. *Id.*
52. *Id.* at 673, 464 P.2d at 62, 83 Cal. Rptr. at 606.
tion, seeking to ensure that patients are accorded the full benefit of both the act's technical provisions and its underlying intent. The role of unofficial ombudsman is only one example of the extra-judicial efforts which patients' rights advocates must assume in furtherance of LPS goals.

Imprecise and Inconsistent Certification Standards

Clearly, not all commitment cases can be resolved by the public defender's threat of court proceedings or by reducing friction within the detention facility. Where certification litigation is required, the certification standards themselves become important. Unfortunately, the vagueness and imprecision of certain of the commitment standards has impaired the efficacy and integrity of the certification hearing.

As stated before, LPS was the product of compromise. As part of the compromise, the specificity of commitment standards tends to be positively correlated to the length of confinement. With the exception of the "gravely disabled" standard, which applies to both certification and conservatorship, the longer one remains confined, the more narrow and precise the basis for detention becomes. For example, an individual may be certified for a fourteen-day commitment because he is allegedly "a danger to others." By contrast, extended "postcertification" hospitalization of the same individual requires that he have "threatened, attempted, or inflicted physical harm upon the person of another" either before or after having been taken into custody. Similarly, while fourteen-day certification of the allegedly suicidal patient can be based on an undefined "danger to self," recertification requires that during the previous holding period the patient must have "threatened or attempted to take his own life or . . . was detained for evaluation and treatment because he threatened or attempted to take his own life . . . ." By so narrowing and refining the standards, the legislature seems to be saying that something less than attempted or threatened suicide or attempted or threatened physical harm is

53. See text accompanying notes 9-17 supra.
54. "In designing the actual provisions of the Act, some obstacles were deliberately created to discourage longer periods of involuntary treatment. The involuntary system established in LPS was viewed as a funnel with a relatively large and simple entrance and increasingly narrow criteria and complex procedural requirements for every extended period of involuntary treatment." ENKI, supra note 23, at 17.
56. Id. § 5300.
57. Id. § 5260.
sufficient to justify detention for the initial fourteen days. The failure
to specify how much less is required has invited the speculation of
doctors and judges alike.\textsuperscript{58} Ironically the need for specific standards
was a major consideration during pre-LPS debate.\textsuperscript{59}

The third basis for confinement, the "gravely disabled" standard,
is perhaps the most vague. This standard is equally applicable to
fourteen-day certifications and to conservatorships. The Welfare and In-
stitutions Code now defines "gravely disabled" as "[a] condition in which
a person, as a result of a mental disorder, is unable to provide for his
basic personal needs for food, clothing or shelter . . . ."\textsuperscript{60} In first art-
iculating this standard, the Subcommittee on Mental Health Services
pointed to those "exceptional emergency cases where the person is so
disabled or so uncontrolled that he is incapable of participating in plan-
ning for his own needs."\textsuperscript{61} Examples cited by the subcommittee in-
cluded the young man who becomes uncommunicative, refuses to leave
his room or eat and begins to soil himself, and the young woman who

\textsuperscript{58} Two recent habeas corpus hearings in Santa Clara County illustrate the
uncertainty of present certification criteria. In the first case a petitioner was certified, in
part, as a danger to others. While the testifying psychiatrist could recall no occasion in
which the petitioner had assaulted or threatened to assault another person, he was aware
that the patient had verbally abused a member of his family. This, the doctor concluded,
rendered the petitioner a "psychological" danger to others. The judge apparently agreed
with the psychiatrist's interpretation of the "danger to others" standard and denied the
petition.

In the second case, an individual was certified as a danger to self after the seventy-
two hour hold and was removed from an unstructured ward to a locked, tightly
supervised floor. Although the patient had never attempted or even threatened to hurt
himself, his treating psychiatrist explained that he was so meddlesome and provocative
that it was feared other patients would assault and injure him. Apparently the doctor
was uninfluenced by the fact that the only patient who had been overtly hostile to this
person was in the facility because he was alleged to be a danger to others. Such
reasoning produced a unique inversion of the criminal justice system in which the victim
was locked up for the actions of the aggressor. This patient's petition for habeas corpus
was also denied.

\textsuperscript{59} Prior to the passage of LPS, commitment could be recommended pursuant to
former Welfare and Institutions Code section 5550 if the person's mental state rendered
him "(A) . . . in need of supervision, treatment, care or restraint. (B) . . . dangerous
to themselves or to the person and property of others . . . ." 1965 Cal. Stats., ch. 391, §
5550, at 1654 (repealed 1969). One superior court judge commented on the effect of
the vague pre-LPS commitment standards: "Section A is so vague that one does not
actually know what it means . . . . And I'm frank to say that the result of the vagueness of 'A' [was]
that as a judge for many, many months, I went along with the
system just because commitment was recommended and without asking any questions, I
committed. In other words, I was proceeding on the theory [that since] they were there,
they were presumed to be mentally ill." \textit{Dilemma}, supra note 23, at 40.

\textsuperscript{60} \textit{Cal. Welf.} \& \textit{Inst. Code} § 5005(h) (West Supp. 1977).

\textsuperscript{61} \textit{Dilemma}, supra note 23, at 137.
faints and thereafter acts as if unconscious. The definition finally adopted by the legislature has proven susceptible of a wide range of interpretations.

As noted, the current imprecision of the gravely disabled standard is somewhat ironic, since the vagueness of the pre-LPS standards and the resulting evils of overcommitment and inconsistent application were major criticisms in the legislative study that led to LPS. As that study noted, there appears to be "a tendency at the hearings to recommend commitment." It is only human for the examiner to fear that the petitioner may create or be the victim of some misfortune and to conclude that the potential for disaster is foreclosed when release is denied. When standards are vague and indefinite, this tendency toward commitment of patients is encouraged.

A second evil of imprecise commitment standards is that they promote certification based upon the subjective moral and social standards of the fact finder. In the context of will contests and contract invalidation, Professor Milton Green has discussed the effect of mental incompetence standards which were vague and imprecise. Professor Green notes that in obvious cases, these vague standards proved adequate. Green points out, however, that most cases are not obvious. In these cases, he states, courts fall back on an inarticulate standard, the essence of which is the abnormality of the transaction in question. In such a hearing, the result is governed more by the fact finder's moral judgment of the individual's actions than on evidence bearing on the express standard. In civil commitment hearings, no less than in will contests, the substitution of fact finder's mores for the three expressed

62. Id.

63. Stephen Donoviel, program director of acute psychology at Napa State Hospital in Northern California has said, "There is a great deal of variance on how counties interpret the meaning of grave disability (unable to provide for food, clothing, and shelter). To provide for food, clothing, and housing in some counties is taken extremely literally, to the point of saying, can he put the spoon to his mouth, while other counties have a much broader definition it seems." Ellanson, supra note 3. at 65. As program director at Napa State Hospital, Dr. Donoviel comes into contact with mental patients from many Northern California counties and thus is in a unique position to assess county-to-county variation in interpreting the gravely disabled standard.

64. See note 59 supra.

65. DILEMMA, supra note 23, at 41.


67. Id. at 274, 310-11.

68. Id. at 310.

69. Id.
standards is greatly facilitated by their indefinite criteria. While such a procedure may arguably be suitable for determinations of who gets what in property disposition, such standards are inappropriate in the civil commitment process where fundamental personal liberties hang in the balance.

In addition, the gravely disabled standard can operate in a bootstrapping fashion to justify commitment for supervision, treatment or care. Hospitalization which results in the loss of a patient's job or apartment may make him temporarily unable to provide food or shelter which renders him gravely disabled under some interpretations of the present test. The contention that the hospitalization is responsible for any inability to provide meets with the circular retort that mental illness is responsible for the hospitalization and is therefore the true source of the incapacity.

Finally, the question of what constitutes basic personal needs is largely dependent upon the fact finder's idiosyncratic view of appropriate lifestyles. Here, too, the inarticulate standard of normality will largely dictate the resolution of the issue. Thus, the real danger presented by the "gravely disabled" standard is that it allows the commitment procedure to operate on the basis of subjective rather than objective considerations.

One possible way to insure that the "gravely disabled" standard will be applied objectively rather than subjectively would be to amend the statute to utilize the test suggested by the earlier legislature study: whether the individual is "incapable of carrying on transactions necessary to survival . . . ." This test avoids inquiry into the manner in which the patient acquires his necessities and avoids any inference by courts, juries or doctors that the patient is gravely disabled if he is not actively engaged in the process of procuring food, clothing, and shelter by his own efforts.

70. See Cal. Welf. & Inst. Code § 5008 (West Supp. 1977). The serious impact of hospitalization on the patient has long been noted. "Ex-patients often found their former way of life shattered beyond repair with each release . . . . They underwent a constant drainage and depletion of their social resources with each hospital stay." D. Miller & W. Dawson, Worlds That Fail, Part II: Disbanded Worlds: A Study of Returns to the Mental Hospital 45 (California Department of Mental Hygiene, California Mental Health Research Monograph No. 7, 1965).

71. Dilemma, supra note 23, at 133 (emphasis omitted).

72. That inference has been recently found to be an unconstitutional basis for confinement. O'Connor v. Donaldson, 422 U.S. 563 (1975). The Court in O'Connor held that "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." Id. at 576.
In the case of *Conservatorship of Turner,* a California court of appeal appeared to suggest another test. The court in *Turner* examined the contention that the term “gravely disabled” is unconstitutionally vague and overbroad. In an opinion that has been recently vacated for a rehearing the court found that the term was sufficiently precise to withstand a constitutional attack. The court noted that grave disability required more than adherence to a “nonconformist” lifestyle and stated that the term “connote[d] an inability on the part of the proposed conservatee to care for his own basic personal needs.”

The court went on to point out that “[a] jury can made a determination, based on common experience, that a proposed conservatee is malnourished, inadequately clothed, or suffering from exposure.”

If the *Turner* court was suggesting that exposure or malnourishment are examples of grounds that a jury can use in reaching a finding of grave disability, then the court did not answer the claim that the standard is susceptible of too many interpretations. If, on the other hand, the court was declaring that “gravely disabled” refers to a condition in which the individual, by reason of mental disorder, is “malnourished, inadequately clothed, or suffering from exposure,” then the court was essentially providing a new working definition. It may well be that the court was exercising its general power to construe statutes in such a way as to avoid constitutional defects. If so, the construction offered by the court answers many of the objections previously made concerning the “gravely disabled” language. It remains to be seen, however, what the *Turner* court will do after rehearing, and whether the courts will accept the *Turner* language as the working definition for grave disability.

As indicated earlier, the “gravely disabled” standard is the only one of the three bases for confinement which does not become more narrowly defined as fourteen-day certification ripens into more lengthy confinement. As a result, it has become a broad catch-all to ensure continuing detention for treatment of the dangerous patient as well as the gravely disabled. While it is true that some of the patients initially certified as dangerous are transferred to a state facility in another

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74. *Id.* at 397, 136 Cal. Rptr. at 67.
75. *Id.*
77. *See text accompanying notes 54-55 supra.*
78. *Not one postcertification petition for a dangerous person, for example, was filed in Santa Clara County between October 1975 and October 1976.*
county or channeled into the criminal justice system, the postcertification petition is shunned principally because "it is a very formidable procedure . . . ." The procedure requires not only a jury trial but also a unanimous verdict on the question whether the patient "presents an imminent threat of substantial physical harm to others." Furthermore, the trial must be held within ten judicial days of the filing of the petition. Rather than confronting these stringent requirements, psychiatrists turn to the concededly "inappropriate method of applying for conservatorship, which is done in many cases." Hence, not only is the requirement of a unanimous jury verdict bypassed, but the jury trial itself may be postponed for up to forty days from the filing of the petition. Thus the statutory protections for the allegedly dangerous

79. Under the act, a criminal defendant who appears imminently dangerous or gravely disabled due to chronic alcoholism or the use of narcotics or other restricted drugs can be ordered by a judge to a facility for evaluation. CAL. WELF. & INST. CODE § 5225 (West 1972). Upon evaluation such a patient can be put on seventy-two hour hold, certified for intensive treatment, or recommended for conservatorship and thus removed from the criminal justice system. Id. § 5230. During the period of evaluation and treatment criminal charges must be dismissed or suspended. Id. § 5226.1. If at the conclusion of any evaluation and treatment charges remain, the defendant must be returned to custody for disposition of those charges. Id.

Similarly, a criminal defendant found mentally incompetent to stand trial under Penal Code section 1370 may be placed under a conservatorship. When the conservator certifies that the conservatee has recovered his mental competence, however, he must be taken back into custody for disposition of the criminal charges. CAL. WELF. & INST. CODE § 5303, 5304 (West 1972).

80. Statement of Dr. Harold Wollack, M.D., Ph.D., Chief of Medical Staff, Westwood Manor, Fremont, California, quoted in Ellanson, supra note 3, at 45.


82. Id.

83. Statement of Dr. Barbara Arons, M.D., psychiatric medicine, quoted in Ellanson, supra note 3, at 44. See also Comment, Civil Commitment of the Mentally Ill in California: 1969 Style, 10 SANTA CLARA LAW. 74, 81 (1969). The author of that comment, a California psychiatrist studying law, stated that, as of 1969, conservatorships for the allegedly gravely disabled were "being used to detain the person who is thought to be 'potentially dangerous' but who has not actually threatened or performed an assaultive act during the initial fourteen day certification period."

84. As indicated earlier, recent appellate decisions indicate that conservatorship trials also require a unanimous verdict. Conservatorship of Atkinson, L.A. 30753 (4 Civ. 14989); Conservatorship of Turner, 136 Cal. Rptr. 64 (1977). The California Supreme Court has granted petition for a hearing on the question thus vacating Atkinson and the court of appeal has granted a rehearing in Turner thereby vacating that decision as well.

85. LPS gives a patient who is named in a petition as imminently dangerous the right to a jury trial within ten judicial days of the filing of the petition. CAL. WELF. & INST. CODE § 5303 (West 1972). If a conservatorship on account of grave disability is sought, however, a thirty day temporary conservatorship with no right to jury trial may be established. Id. § 5352.1 (West Supp. 1977).
patient are circumvented by reclassifying those patients as gravely disabled.

In summary, because the legislature ten years ago recognized the invitation to abuse presented by vague commitment standards, it narrowed the bases for detention under the “danger to self” and “danger to others” standards. The gravely disabled standard, however, still lacks necessary specificity. The narrowed construction of the standard presented by the vacated opinion of the court in Consuelorship of Turner\textsuperscript{86} offers a definition which can minimize uncertainty, subjectivity, and inconsistency when the question of grave disability is passed upon. Further legislative or judicial attention is necessary to make “gravely disabled” a standard which can be understood and applied.

**Conservatorship**

LPS vests extensive powers in the conservator of one found gravely disabled at a conservatorship hearing or trial. In addition to the powers granted a conservator over the conservatee’s person and property pursuant to the California Probate Code,\textsuperscript{87} the LPS conservator has the power to place the conservatee in a private psychiatric institution, state hospital, sanitorium, or nursing facility.\textsuperscript{88}

The establishment of a conservatorship is triggered by the recommendation of the director of an evaluation and treatment center that conservatorship is necessary.\textsuperscript{89} This recommendation is made to a

\textsuperscript{86} 136 Cal. Rptr. 64 (1977).

\textsuperscript{87} Welfare and Institutions Code section 5357 provides that all LPS conservators "shall have the general powers specified in Section 1852 of the Probate Code and such additional powers specified in Section 1853 of the Probate Code as the court may designate." Cal. Welf. & Inst. Code § 5357 (West Supp. 1977). Under the Probate Code the conservator has care, custody, and control of the conservatee and may fix the conservatee's residence at any place within the state. Cal. Prob. Code § 1851 (West Supp. 1977). That section also states that, as of July 1, 1977, the probate conservator does not have the power to place the conservatee in a mental health facility. Id. The conservator may also petition the court for power to take complete control of the conservatee's assets, to operate the conservatee's "business, farm, or enterprise," to enter into and to perform contracts for the conservatee, and to do virtually anything with the conservatee's property or business necessary to protect the conservatee's estate. Cal. Prob. Code § 1853 (West Supp. 1977).


\textsuperscript{89} See id. § 5352. Under this section, only the director can make this recommendation. This does not necessarily mean that the proposed conservatee must have been evaluated or treated in the facility under section 5150 or under court order. See id. §§ 5200-13 (West 1972 & Supp. 1977). A 1972 amendment allows the director of an evaluation and treatment facility to make such a recommendation if he or a designee has examined the proposed conservatee and has determined that the proposed conservatee is so
county agency charged with conservatorship investigations. If an officer of such an agency concurs with the recommendation, he petitions the superior court to establish a conservatorship. If he pleads for a temporary conservatorship, as, in our experience, is very frequently the case, the director of the patient's treatment facility can keep the patient for three days past the fourteen-day certification period if the additional time is necessary for the establishment of a temporary conservatorship. The act thus encourages doctors who wish to perpetuate involuntary therapy to begin conservatorship proceedings when the need for conservatorship and its profound consequences are not the real basis for the proceedings. One public guardian officer working for Santa Clara County has complained that just such a practice has been used to extend treatment time.

Upon petition of the county officer in charge of conservatorship investigations, the superior court typically establishes a temporary conservatorship. LPS provides that the petitioning county officer or other officer designated by the county is to be the temporary conservator. The temporary conservatorship extends for a period not to exceed thirty days, although it may be extended if the proposed conservatee requests a trial on the proposed conservatorship. During the thirty day tenure of the temporary conservatorship, the proposed conservatee has the same statutory right to habeas corpus review accorded to him during the fourteen-day certification period. While such a hearing is subject to the same infirmities discussed earlier, it may assume a new importance when used during the temporary conservatorship. Even if the writ application is denied, the hearing can be used obviously gravely disabled that examination on an inpatient basis is unnecessary. Id. § 5352 (West Supp. 1977).

In contrast, a probate conservatorship may be sought by “[a]ny person or any relative or friend of any person, other than a creditor of the proposed conservatee . . . .” Cal. Prob. Code § 1754 (West Supp. 1977). Under that section the proposed conservatee has the right to a hearing or jury trial to oppose the petition for a conservatorship and the right to counsel, including the right to appointed counsel if he cannot retain one himself.

91. See id. § 5352 (West Supp. 1977).
92. Id. § 5352.3 (West 1972).
93. Ellanson, supra note 3, at 51.
94. Cal. Welf. & Inst. Code § 5352.1 (West Supp. 1977). Under this section, the court can base its decision on either investigation of the county officer or the affidavit of the professional person who originally recommended conservatorship to the county officer. See id. §§ 5352, 5354.
95. Id. § 5352.1.
96. Id. § 5353.
97. See text accompanying note 46 supra.
as a valuable pretrial discovery tool. The attorney can elicit information of strategic significance and can familiarize himself with the courtroom comportment of both the doctor and the proposed conservatee. Also at this time, informal avenues for terminating the conservatorship proceedings may be explored.

LPS calls for an independent investigation to be conducted during this period. The investigating officer is required to explore all alternatives to conservatorship and can recommend conservatorship only if no suitable alternatives are available. The ultimate recommendation must be made in light of all relevant aspects of the proposed conservatee's medical, psychological, financial, family, vocational, and social condition. One can reasonably expect the investigator to be conversant with the circumstances supporting the recommendation of the doctor or other professional. Counsel for the patient can aid the investigation, both by channeling favorable information about the client to the investigator and by suggesting and promoting alternatives to conservatorship.

Within thirty days of the filing of the petition, there must be a conservatorship hearing in superior court. Such a hearing may seem unnecessary in light of the two habeas corpus hearings previously available. However, this is the first and only point in the conservatorship proceedings scheme at which review is mandatory. Because judicial review at this point is not dependent on the initiative of the patient or his counsel, it assures that those patients who have been overlooked at earlier stages are not again ignored. Moreover, the hearing on the petition for appointment of a conservator embraces issues not raised earlier. The focus may shift from the condition of the proposed conservatee to the qualifications of the proposed conservator. Welfare and Institutions Code section 5355 provides, in part, that "no person, corporation, or agency shall be designated as conservator whose interests, activities, obligations or responsibilities are such as to compromise his or their ability to represent and safeguard the interests of the conservatee."

Thus, the proposed appointment of a private party—for example, a relative—may provoke inquiry into potential conflicts of interest. While the appointment of a public agency is unlikely to produce a simi-
lar conflict, the agency's capacity to protect the conservatee's interests can be measured by its past performance with respect to other conservatees. A host of problems, ranging from understaffing to inflexible policies, may undermine the public agency's ability to perform competently within the meaning of section 5355.

It is interesting that the act specifically provides for waiver of the hearing if the proposed conservatee demands a court or jury trial before the date of hearing. This provision impliedly recognizes that the jury trial may represent the most potent weapon in the LPS attorney's arsenal. First, there is a diffusion of responsibility inherent in a determination by twelve people, rather than by one person. This diffusion tends to minimize paternalism. When the burden of all the remotely possible adverse consequences of discharge does not rest on one individual, the decision is more likely to reflect the state of the evidence on the issue of grave disability, rather than a paternalistic concern for the proposed conservatee's "best interest."

Extensive voir dire can also help assure that the decision is a product of neither paternalism nor mere deference to presumed psychiatric expertise. While the range of useful questions is extremely broad, some specific inquiries which find their way into virtually every conservatorship trial illustrate the utility of vigorous voir dire. For example, the attorney should focus on the bifurcated "gravely disabled" standard, educating the jury to demand that both the mental disorder and the inability to provide are proven. Also, jurors should be sought who are not reluctant to look beyond the opinion of the psychiatrist to the facts upon which he bases his decision and to reject his opinion if they consider it unreasonable. The attorney must be sensitive to the presence of prospective jurors for whom the proposed conservatee's need for treatment assumes fundamental importance. Active inquiry into these and related areas can yield a finder of fact prepared to apply the legal test for grave disability with great care.

Beyond the increased likelihood of an objective judgment, the prospect of trial itself before twelve citizens has a significant impact on the psychiatric community. As one Santa Clara county psychiatrist stated, "no psychiatrist wants to . . . be cross-examined and accused of lying before a jury." Moreover, the investment of time is likely to be even more substantial for the doctor than it is at a habeas corpus hearing.

102. Id. § 5350.
103. Ellanson, supra note 3, at 79.
Accordingly, the scheduling of a jury trial creates pressure for cooperation and compromise within the psychiatric community. Such an attitude is useful not only in procuring the outright dismissal of a conservatorship petition but also in promoting compliance with sound principles of mental health law not yet accorded express statutory or constitutional status in California. For example, many patients have no objection to having their assets controlled by a conservator, but strongly desire transfer from a locked facility to a board and care home. Those patients who remain gravely disabled yet do not require confinement seem to fall within the ambit of the humane and sensible "least restrictive alternative" rule articulated recently by a federal court in the District of Columbia in *Dixon v. Weinberger.*

In *Dixon,* plaintiffs asked for a declaratory judgment that those patients in a locked facility who did not require such confinement be removed to nursing homes and halfway houses. The federal district court agreed, grounding its decision on statutory law. The court further ordered the District of Columbia and the federal government to develop the unlocked facilities required. As yet, neither LPS itself nor any California court has expressly held that a conservatee may not be deprived of any more liberty than is absolutely necessary. While it

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105. LPS contains some provisions which show a legislative intent that the conservatee's freedom be restricted only if necessary. The act provides, for example, that "[t]he officer providing conservatorship investigation shall investigate all available alternatives to conservatorship and shall recommend conservatorship to the court only if no suitable alternatives are available. The officer shall render to the court a written report of investigation prior to the [conservatorship] hearing. Cal. Welf. & Inst. Code § 5354 (West Supp. 1977). Once a conservator has been appointed, however, the act directs only that if commitment or treatment is required, priority should be given to a "suitable" facility as close as possible to the conservatee's home or the home of a relative. Cal. Welf. & Inst. Code §§ 5354, 5358 (West Supp. 1977).

The temporary conservator is under a qualified duty to find least restrictive placement for the conservatee through the requirement that he give preference to "arrangements which allow the [conservatee] to return to his home, family or friends." Id. § 5353. A full-fledged conservator, on the other hand, is only required to find alternative placement for his conservatee "after he is notified by the person in charge of the facility serving the conservatee that the conservatee no longer needs the care or treatment offered by that facility. . . ." Id. § 5359 (West 1972). The conservator has seven days after such notice to place the conservatee. Even the 7 day requirement is diluted by the provision that if "unusual conditions or circumstances" are present, the conservator has 30 days to find alternative placement, and, furthermore, that "if alternative placement cannot be found at the end of the 30 day period the conservator shall confer with the professional person in charge of the facility and they shall then
seems surprising that no appellate case has spoken to this issue, we believe that the reexamination of alternatives by doctors which frequently follows the setting of a postcertification or conservatorship trial has operated to blunt this issue. In the face of a trial, members of the psychiatric community have tended to recognize and comply with the patient's desire to be transferred away from unnecessary confinement.

Significantly, the spirit of compromise is not unilateral. The prospect of exposing oneself to the scrutiny and judgment of twelve strangers is not an attractive one. Proposed conservatees, therefore, tend to make a reflective decision, often considering or proposing modified circumstances under which they would desire or accept conservatorship. Such modifications include a change of facility, guaranteed discharge date, financial adjustments, or outpatient status. Thus, the jury trial has not only failed to overburden the judicial system, as some feared, but has also facilitated therapeutic goals. There is widespread agreement within the psychiatric community that voluntary rather than involuntary treatment of patients is far more efficacious. LPS has, in many cases in our experience, transformed disgruntled, involuntary patients into those who have decided for their own reasons to accept psychiatric intrusion into their lives.

Conservatorship Rehearings

One of the most important reforms of LPS was the prohibition of indefinite periods of confinement. To that end, the act limited the period of conservatorship to one year, provided for mandatory review with the right to a jury trial as a condition for reappointment of a conservator, and provided the conservatee the right to request a rehearing during the course of conservatorship.

The section of LPS affording conservatees the right to rehearing was, before its recent amendment, brief and ambiguous. It read in its
At any time but not to exceed six months, the conservatee may petition the superior court for a rehearing as to his status as a conservatee." In *Heinreid v. Superior Court*, a California Court of Appeal held that a conservatee was not entitled to a rehearing until six months after the establishment of a conservatorship at the jury trial. The *Heinreid* decision was quickly overruled by the legislature with enactment of Assembly Bill 4131 on September 12, 1976. As-}

sembly Bill 4131 amended section 5364 to read:

> At any time, the conservatee may petition the superior court for a rehearing as to his status as a conservatee. However, after the filing of the first petition for rehearing pursuant to this section, no further petition for rehearing shall be submitted for a period of six months.

Remaining unanswered, however, is the question whether the right to rehearing creates the right to another jury trial or merely the right to a court hearing. *Heinreid* declared the right to a jury trial on rehearing "uncertain" but noted that academic opinion supported such a right. Further support for a jury trial comes from Assembly Bill 4131. The bill amends section 5358.3 to create a new right to a hearing for a conservatee to attempt to regain specific rights, such as the power to enter into contracts, taken from him at the establishment of the conservatorship. In creating the new right, the legislature specifically provided that hearings "pursuant to this section shall not include trial by jury." This new section suggests that the legislature did not intend to deny the right to a jury trial by its silence as to section 5364 conservatorship rehearings.

Aside from matters of procedure there is a basic question whether the rehearing provisions effectively curtail inappropriate confinement. It is not unusual for a public defender to contact an individual whose conservatorship is up for renewal and discover that the conservatee has been dissatisfied with conservatorship for many months. Although the

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112. *Id.* at 558, 130 Cal. Rptr. at 896.
114. *Id.*
117. *Id.*
act requires prominent posting within institutions of the right to habeas corpus, to a jury trial, and patients' civil rights, there is presently no provision for notice to conservatees of the right to a rehearing. Procedures should be developed to guarantee that conservatees are notified periodically of this right.

Even with knowledge of the availability of rehearing, the legislative assumption that inappropriate confinement will be actively resisted by the conservatee or his conservator may be unrealistic. The vast majority of those under conservatorship have a public agency serving as conservator. Such agencies rarely receive enough staffing, at least in large counties, to allow the conservatorship officers to know their wards on the basis of more than a dozen brief meetings a year, if that. While these conservators generally respond to a doctor's recommendation that restrictions be terminated, they lack the time to investigate independently the propriety of further confinement.

Reliance on the patient's initiative to warn officials of improper confinement also clashes with institutional realities. Placing the burden of identifying improper confinement on the conservatee, rather than the committing authority, assumes a depth of self-actualization often inconsistent with institutional existence. Laymen often perceive the psychiatric institution as a setting in which people heal and grow stronger. While this ideal is sometimes achieved, many patients instead adjust to the hospital setting (with resulting loss of work and social skills) and begin to identify with the "sick" hospital community. Moreover, it is often in the interest of an overburdened psychiatrist to keep the patient "cooperative" and thus resigned to his placement in a mental hospital.

For all patients, but particularly those with a promising prognosis, there is a need for protective measures to deter unnecessary confinement. That protection should be augmented by shifting responsibility for minimizing inappropriate detention from the conservatees to the committing system. For example, at the conservatorship hearing, testi-

119. Citizens Advisory Council, Mental Health Advisory Board Project, Report of Aug. 10, 1976, Comparative Chart by County, of Statistics Regarding Conservatorship and Staff (on file with the authors). This chart discloses that the percentage of LPS conservatees who have a public guardian or other public agency serving as conservator ranges from a low of 65% in San Joaquin County to 100% in five different counties. In Santa Clara County, 90% of those under conservatorship have a public guardian.
120. Id. The comparative chart shows, for example, an average caseload of 100 conservatees per guardian in Sonoma and San Bernardino counties, 200 per guardian in San Joaquin County, and 220 per guardian in Santa Clara County.
mony could be taken and a finding made as to the length of time hospitalization is required. When that period expires, the conservatee should be discharged, unless the staff can show cause at a hearing for that purpose why confinement should be extended.\textsuperscript{122}

Under Welfare and Institutions Code section 5353, the awesome power to institutionalize has been turned over to the conservators, who may defer actively or by oversight to the opinion of the psychiatrist. In the absence of effective measures to preclude inappropriate confinement, mental health law goes full circle, placing hospitalization back in the hands of the hospital authorities. The present rehearing provision, even coupled with the ever present right of habeas corpus, does not operate to foreclose this lamentable prospect.

**Conclusion**

In so far as LPS has increased legal and judicial involvement in the civil commitment structure it has furthered its announced goals.\textsuperscript{123} Indeed, the intensified involvement of patient advocates has produced benefits beyond those expressly sought by the drafters of the act. We noted, for example, that advocates often occupy the mediating position of an ombudsman, and that they can thereby perform a significant therapeutic function. Contact between lawyers and treating physicians can work to prompt further screening of patients, and even to generate modification of confinement conditions.

LPS has failed, however, where it has limited the impact of legal safeguards. In some areas, the failure has been through legislative omission, such as the failure to allow a right to counsel during the seventy-two hour hold. In other areas LPS fails because of vague or inadequate definitions or protections. The inadequacy of the test for determining grave disability falls under this category. While the approach of the act may have been born of the compromises necessary for initial reform, LPS has moved beyond infancy. As LPS approaches the end of its first decade, it is time for legislative and judicial reexamination of an act which affects the lives and freedom of thousands of Californians.

\textsuperscript{122} Under present law, if the facility determines that a conservatee no longer needs the care or treatment of the facility, the conservator is under a qualified duty to find alternative placement. See CAL. WELF. & INST. CODE § 5359 (West 1972). Reliance on the facility, however, to terminate \textit{sua sponte} all inappropriate confinement of conservatees compromises one of the basic premises of the act: that mental health professionals should not be the ultimate or only decisionmakers regarding the liberty of the mentally ill.

\textsuperscript{123} See note 26 \textit{supra}.