Constitutionalizing Civil Commitment: Another Attempt—In re Harris, 98 Wn. 2d 276, 654 P.2d 109 (1982)

Betty L. Drumheller
CONSTITUTIONALIZING CIVIL COMMITMENT: ANOTHER ATTEMPT—In re Harris, 98 Wn. 2d 276, 654 P.2d 109 (1982).

In a recent case, In re Harris, the Washington Supreme Court found portions of the Washington involuntary commitment statute unconstitutional. Ms. Harris claimed that the statute allowed the state to deprive her of liberty without due process, and the Washington court agreed. To remedy the defect, the court required a greater showing of "dangerousness" and a judicial hearing prior to the issuance of a non-emergency summons.

The controversy began when Mary Ann Lee Harris hit her mother, inflicting bruises. Her mother immediately petitioned King County to commit Ms. Harris, alleging that she was dangerous. Acting pursuant to the summons procedure, a King County Mental Health Official ordered Ms. Harris to report for a seventy-two-hour commitment to be evaluated and treated. When Ms. Harris did not report, the county authorized the police to pick her up. Ms. Harris then became a fugitive. The following week her attorney obtained a temporary restraining order and requested a pre-detention, show cause hearing. When the King County Superior Court refused to grant a hearing, she petitioned the Washington Supreme Court for discretionary review, which was granted.

Ms. Harris claimed the statute violated her right to substantive due process because it permitted involuntary commitment of persons determined to be potentially dangerous. First, Ms. Harris argued that the standard was unconstitutional because dangerousness could not be predicted accurately, or, that if the court found the standard itself to be constitutional, it should at least require that the dangerousness be imminent and evidenced by a recent overt act. Second, Ms. Harris argued that the summons procedure described in the statute deprived her of liberty without procedural due process.

1. In re Harris, 98 Wn. 2d 276, 654 P.2d 109 (1982).
2. Brief for Respondent at 3, Harris.
4. WASH. REV. CODE § 71.05.150(a) (1983).
5. Id., 98 Wn. 2d at 277, 654 P.2d at 110.
6. Id.
7. Id. at 285, 654 P.2d at 113; Brief for Respondent at 3. Ms. Harris had been committed the previous year for allegedly breaking her mother's ribs and did not want to be committed again. Id.
8. Harris, 98 Wn. 2d at 278, 654 P.2d at 110. The summons was served at 11:30 p.m. the Friday of Memorial Day weekend, so no legal action could be taken until the next Tuesday.
9. Id.
10. Id. at 280, 654 P.2d at 111. See also Brief of Petitioner at 13-17, Harris.
11. Harris, 98 Wn. 2d at 281-82, 654 P.2d at 112.
12. Id. at 285, 654 P.2d at 113.
A unanimous Washington Supreme Court agreed in part with Ms. Harris. Although the court did not reject the dangerousness standard, it held that the standard must be interpreted to require evidence of a recent overt act in order to meet substantive due process requirements. It also found that the summons procedure violated procedural due process requirements because it permitted issuance of a summons for an allegedly dangerous individual without prior judicial review.

This Note first discusses recent statutory and judicial reforms of involuntary mental commitment procedures in the United States and Washington. It then analyzes the Washington Supreme Court’s decision in In re Harris, focusing on the court’s interpretation of the required standard for involuntary commitment and the new procedural requirements for issuance of a summons. The Note concludes that the Washington Supreme Court took a significant but incomplete step in conforming the Washington involuntary commitment procedures to the requirements of the United States Constitution.

I. LEGAL BACKGROUND

A. The Trend to Reform Involuntary Commitment Proceedings

Traditionally, courts have based their power to commit the mentally ill on two theories: parens patriae and police power. Under the parens patriae theory, the state operates as a parent to those of its citizens who are incapable of taking care of their own needs, such as children, the old, and the mentally ill. Actions the state takes under this power are to protect and advance the interests of these individuals. Under the police power theory, in contrast, the state’s primary function is to protect society. In exercising its police power, the state may infringe on the individual’s interests for the benefit of the society as a whole.

13. Id. at 284, 654 P.2d at 113.
14. Id. at 287, 654 P.2d at 114.
17. Developments, supra note 15, at 1222. Most state civil commitment statutes make provisions for both types of commitment. Provisions that permit involuntary commitment of people who are mentally ill and gravely disabled or are unable to care for themselves are parens patriae provisions. Provisions that permit commitment when an individual is dangerous to others or to property are police power commitments. Provisions for commitment when an individual is dangerous to herself include elements of both the parens patriae and police power theories. See La Fond, An Examination of the Purposes of Involuntary Civil Commitment, 30 BUFFALO L. REV. 499, 501 n.10 (1981) for a partial collection of statutes.
Involuntary Mental Commitment

Until the late 1960’s, most civil commitments occurred under the parens patriae power, with the most common commitment standard being “mentally ill and in need of treatment.” Under statutes that incorporated this standard, a family doctor, a psychiatrist, or, in many cases, a state official could order a person committed indefinitely for objectionable or erratic behavior. Because the state was acting in the best interests of the allegedly disturbed individual and because it was feared that the formality of a quasi-courtroom setting would upset the individual, a person could be committed with no notice, no opportunity to be heard, no right to confront the accuser, and no right to judicial review.

During the late sixties and early seventies, commentators increasingly criticized the vagueness of the commitment standard, the unbridled authority of the committing officials, and the lack of protection for the mentally ill individual. Action in two states set the stage for substantive changes in mental commitment law. First, the California legislature in 1969 passed the Lanterman-Petris-Short Act, which shifted the emphasis in California’s commitment law away from parens patriae commitments toward police power commitments. The Act has served as a model in a nationwide reform of commitment statutes. Second, a Wisconsin federal district court delivered a 1972 landmark decision which influenced mental commitment practices throughout the United States.

In Lessard v. Schmidt, the district court held that Wisconsin law entitled an individual to substantive and procedural due process in involuntary commitment proceedings. The court reasoned that the deprivations of liberty suffered by an individual committed involuntarily under the civil law are at least as great as those suffered by an individual in

23. 349 F. Supp. at 1090-1100.
carcerated under the criminal law. Therefore, the court concluded that civil commitment proceedings at least must meet the due process standards required for criminal convictions. Accordingly, the \textit{Lessard} court placed three significant restrictions on civil commitment proceedings. First, no confinement is permissible without a prior hearing unless there is an emergency. Second, before an individual may be committed, she is entitled to full procedural due process. Third, a mentally ill individual may not be committed unless it is the least restrictive alternative for protecting society or the individual.

The \textit{Lessard} court also clarified the commitment standard, holding that an individual has to be dangerous to herself or others to justify commitment. Furthermore, her dangerousness has to be great enough to justify the "massive curtailment of liberty" that involuntary civil commitment represents. The \textit{Lessard} court decided that the court must apply a bal-

\begin{itemize}
\item 24. The \textit{Lessard} court found that an individual who is committed loses many civil rights such as unrestricted rights to make contracts, to sue or be sued, to receive certain occupational licenses, to vote, to drive a car, to serve on a jury, or to be married. Furthermore, civil commitment results in a serious social stigma, making it difficult to find a job, sign a lease, or buy a house. The death rate is higher among those committed than among those in the population at large. \textit{Lessard}, 349 F. Supp. at 1088-90.

Most states have revised their statutes to eliminate the loss of civil liberties. See, e.g., \textsc{Wash. Rev Code} § 71.05.060 (1983): "A person subject to confinement resulting from any petition or proceeding pursuant to the provisions of this chapter shall not forfeit any legal right or suffer any legal disability as a consequence of any actions taken or orders made, other than as specifically provided in this chapter." The social stigma remains, however, and recent studies suggest that the morbidity rate remains higher than that for the general population. See Brief for Respondent, Attachment A. at 8–12, \textit{Harris}, for results of a 1981 Oregon study.


\item 26. \textit{Lessard}, 349 F. Supp. at 1091.

\item 27. \textit{id.} at 1103. The process must include adequate notice, a right to prompt hearing before a judge, an opportunity to be heard, \textit{id.} at 1092, proof beyond a reasonable doubt that the patient is mentally ill and dangerous, \textit{id.} at 1095, the right to effective counsel, \textit{id.} at 1097, the privilege and evidence protections of the criminal process, \textit{id.} at 1100-03, and the right to a jury, \textit{id.} at 1092.

\item 28. \textit{id.} at 1095-96.

\item 29. \textit{id.} at 1093. The \textit{Lessard} standard requires an extreme likelihood that if the person is not confined, she will do immediate harm to herself or others. \textit{id.}

\item 30. The \textit{Lessard} court based its holding on dicta in Humphrey v. Cady, 405 U.S. 504 (1972). In \textit{Humphrey}, a prisoner, convicted of contributing to the delinquency of a minor, a misdemeanor punishable by a maximum sentence of one year, was committed to a sexual deviate facility in lieu of a prison sentence. At the end of his one-year term he was recommitted after a hearing. Humphrey filed a petition in United States district court challenging the state's refusal to allow him a jury proceeding. On certiorari, the Supreme Court held that when a state's civil commitment laws make a jury determination generally available to persons subject to compulsory commitment, persons committed after criminal conviction are also entitled to a jury.

Under the Wisconsin law at issue in \textit{Humphrey}, an individual could be committed if a court or jury found that he was mentally ill and a proper subject for custody and treatment. \textit{id.} at 509 n.4. This standard was the same one at issue in the \textit{Lessard} case. In dicta, the Supreme Court stated that Wisconsin law conditioned confinement "not solely on the medical judgment that the defendant is
Involuntary Mental Commitment

ancing test: the state’s interest in confinement must outweigh the individual’s interest in liberty before she can be committed.\(^3\)

The *Lessard* court found that in order to establish a sufficient state interest in confinement, the state must prove beyond a reasonable doubt that (1) the individual is mentally ill, (2) there is an extreme likelihood that the individual will do immediate harm to herself or others if not confined, and (3) the likelihood has been evidenced by a “recent overt act, attempt, or threat to do substantial harm” to herself or another.\(^3\) The *Lessard* court did not define “extreme likelihood” or “immediate harm.” It did not indicate how recent and severe the “overt act,” “attempt,” or “threat” must be, or what comprises “substantial harm.” Nevertheless, the *Lessard* standards remain among the most specific and stringent required by the courts. Most courts have followed the *Lessard* court’s example in holding that strict standards and thorough procedures are necessary to ensure protection of the mentally ill individual’s rights.\(^3\)

Problems have arisen, however, in defining the standards, deciding what types of procedural safeguards are due, and trying to balance medical, social, and legal considerations. The United States Supreme Court has provided little help in resolving these problems. Subsequent to *Lessard*, the Supreme Court suggested that dangerousness is the proper standard in civil commitment proceedings.\(^3\) However, it has never specifi-

mentally ill and treatable but also on the social and legal judgment that his potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty.” *Id.* at 509.

The “massive curtailment of liberty” language in *Humphrey* is widely quoted and referred to as if it were the Court’s holding. It was in fact the Wisconsin federal district court and not the United States Supreme Court which held that commitment was contingent on finding an individual’s potential for danger great enough to justify the massive curtailment of liberty commitment entails.

31. 349 F. Supp. at 1093.

32. *Id.*


34. *O’Connor v. Donaldson*, 422 U.S. 563 (1975). *O’Connor* was the first civil commitment case the Court reviewed. In *O’Connor*, a nondangerous man, committed for 15 years, had been refused release despite the offers of friends to provide for him. The Court 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 and friends.” *Id.* at 576.

These statements are widely interpreted to mean that some degree of dangerousness is necessary in order for commitment standards to meet constitutional requirements. However, the case provides little guidance on the dangerousness issue because the decision is so closely tied to the *O’Connor* facts. The Court explicitly refused to decide if a state could compulsorily confine a nondangerously mentally ill person solely for purposes of treatment. *Id.* at 573. It also refused to determine how dangerous an individual must be to justify commitment. *See id.* at 575.

379
cally considered the degree of dangerousness required for commitment. Moreover, although the Supreme Court has said that the mentally ill cannot be confined involuntarily without due process,\textsuperscript{35} it has not indicated exactly what process is due and when. Instead, it has indicated that the states have wide discretion in setting standards and procedures so long as the state standards and procedures meet the constitutional minimum,\textsuperscript{36} as determined by the \textit{Mathews v. Eldridge}\textsuperscript{37} balancing test.

Since the \textit{Lessard} decision, the trend nationwide has been to limit the justifications for commitment, forcing states to bear a greater burden of proof and to provide more adequate safeguards against mistake. A majority of the states have revised their statutes to require a showing of dangerousness and procedural due process before commitment.\textsuperscript{38} In addition, most federal courts that have heard commitment cases have adopted the dangerousness standard in some form or another and required procedural due process for commitment.\textsuperscript{39}

\subsection{B. Involuntary Commitment in Washington}

Washington followed the national trend toward reform of involuntary


\textsuperscript{36} Addington, 441 U.S. at 431.

\textsuperscript{37} The Court has indicated that the proper test to use to determine the constitutional minimum is the test set forth in \textit{Mathews v. Eldridge}, 424 U.S. 319 (1976). The \textit{Mathews v. Eldridge} test involves balancing three factors:

\textit{[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.}

\textit{Id. at 335.}

For use of the \textit{Mathews v. Eldridge} test in other civil commitment cases, see, for example, Parham v. J.R., 442 U.S. 584, 599 (1979); Doe v. Gallinot, 657 F.2d 1017, 1022-23 (9th Cir. 1981); Luna v. Van Zandt, 554 F. Supp. 68, 74 (S.D. Tex. 1982).

\textsuperscript{38} For a listing of statutes as of 1982, see B. \textit{BEIS, MENTAL HEALTH AND THE LAW} 297-321 (1984).

\textsuperscript{39} See, e.g., Suzuki v. Yuen, 617 F.2d 173 (9th Cir. 1980) (extreme likelihood that an individual will do immediate and substantial harm to himself or others as evidenced by a recent overt act, attempt, or threat); Stamus v. Leonhardt, 414 F. Supp. 439 (S.D. Iowa 1976) (serious threat to themselves or others as evidenced by a recent overt act, attempt, or threat); Coll v. Hyland, 411 F. Supp. 905 (D.N.J. 1976) (if not committed, patient would be a probable danger to himself or the community); Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975) (a mentally ill person who poses a serious threat of substantial harm to himself and to others as evidenced by a recent overt act or threat); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974) (person must be mentally ill and pose a real and present threat of substantial harm to himself or to others as evidenced by a recent overt act); Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085 (E.D. Mich. 1974) (mentally ill and presents an imminent threat of physical harm to himself or others). Each of these courts adopted a full panoply of procedural rights, also.
commitment procedures with its 1973 decision in In re Levias\(^\text{40}\) and its enactment the same year of the Mental Health Act.\(^\text{41}\) In In re Levias, the Washington Supreme Court rejected the parens patriae doctrine as a basis for involuntary commitment, finding that dangerousness was a prerequisite to commitment.\(^\text{42}\) The Mental Health Act enacted later that year was consistent with the Levias court's opinion. Closely patterned after California's Lanterman-Petris-Short Act,\(^\text{43}\) the statute's purpose was to extend the rights of mental patients and to limit the use of involuntary commitment.\(^\text{44}\)

Under the Washington Mental Health Act, an individual may be committed only if he (1) poses a substantial risk of serious harm to himself, others, or the property of others,\(^\text{45}\) or (2) is gravely disabled.\(^\text{46}\) Civil com-

\(^{40}\) 83 Wn. 2d 253, 517 P.2d 588 (1973). The Washington Supreme Court held that the state must prove by clear, convincing, and cogent evidence that an individual is mentally ill and dangerous. \textit{Id.} at 256-58, 517 P.2d at 589. The court reasoned that civil commitment entailed as severe a deprivation as criminal conviction and therefore required the same due process protection. \textit{Id.} at 255, 517 P.2d at 589.

\(^{41}\) \text{Mental Health Act, ch. 142, 1973 Wash. Laws 1st Ex. Sess. 1014 (codified as amended at WASH. REV. CODE ch. 71.05 (1983)).}

\(^{42}\) 83 Wn. 2d at 257-58, 517 P.2d at 591. The court stated: [T]he doctrine of parens patriae ... can no longer provide an adequate basis for the incarceration of individuals who have committed no crime, who are able to function reasonably well in society, and who pose no threat to themselves or others, despite some degree of mental illness. Since the police power of the state is focused upon securing the safety of its citizenry, neither logic nor law permits any supportive basis for the involuntary incarceration of persons who are not unsafe. \textit{Id.} at 257, 517 P.2d at 591.

\(^{43}\) \textit{See supra} note 21 and accompanying text.

\(^{44}\) The objectives of the Mental Health Act as laid out in WASH. REV. CODE § 71.05.010 (1983) are:

(1) To end inappropriate, indefinite commitment of mentally disordered persons and to eliminate legal disabilities that arise from such commitment;

(2) To provide prompt evaluation and short term treatment of persons with serious mental disorders;

(3) To safeguard individual rights;

(4) To provide continuity of care for persons with serious mental disorders;

(5) To encourage the full use of all existing agencies, professional personnel, and public funds to prevent duplication of services and unnecessary expenditures;

(6) To encourage, whenever appropriate, that services be provided within the community.

\(^{45}\) \textit{Id.} §§ 71.05.150(a), .240, .280(1)-(3).

Section 71.05.020(3) defines "likelihood of serious harm" as:

(a) A substantial risk that physical harm will be inflicted by an individual upon his own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on one's self,

(b) a substantial risk that physical harm will be inflicted by an individual upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm, or (c) a substantial risk that physical harm will be inflicted by an individual upon the property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others.

Subsection 3(c) of WASH. REV. CODE § 71.05.020 was added in 1979. An act relating to civil commitment, ch. 215, sec. 5, 1979 Wash. Laws 1st Ex. Sess. 1872, 1876. Before that time, damage
mmitment under the Act occurs in three stages. The first stage is seventy-two-hour detention for evaluation and treatment. Commitment can occur at that stage either on an emergency basis or under the summons procedure without a hearing. Within seventy-two hours after detention, the individual is entitled to a full judicial hearing to determine whether he presents a likelihood of serious harm to himself or to others or is gravely
to property was not a cause for commitment. It is unclear whether it would withstand judicial scrutiny after the decision in Suzuki v. Yuen, 617 F.2d 173 (9th Cir. 1980), rejecting as cause for commitment the broad standard, any harm to any property. Arguably, the substantial loss or damage requirement would not be subject to the overbreadth problem the Suzuki court found with the Hawaii statute. See infra note 59.

46. WASH REV CODE §§ 71.05.150(1)(a), .240, .280(4) (1983).

The second standard for commitment is "gravely disabled" which is defined in WASH. REV. CODE § 71.05.020(1) (1983) as:

a condition in which a person, as a result of a mental disorder: (a) Is in danger of serious physical harm resulting from a failure to provide for his essential human needs of health or safety, or (b) manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety.

Subsection (1)(b) of § 71.05.020 was added in 1979 in response to widespread discontent with the severe restrictions to commitment under the 1974 Mental Health Act. An act relating to civil commitment, ch. 215, sec. 5, 1979 Wash. Laws 1st Ex. Sess. 1872, 1875. Under subsection (1)(b), "gravely disabled" is a medical definition and allows commitment of individuals found mentally ill who have fallen below a previously established plateau, often because they have stopped taking their medication. For an eloquent defense of the need for a medical standard of commitment, see Zusman, The Need for Intervention: the Reasons for State Control of the Mentally Disordered, in C. WARREN, supra note 16, at 110–33.

47. WASH REV CODE § 71.05.150 (1983). These provisions cover both emergency and non-emergency 72-hour detention and specify the exact procedure to be followed. Anyone who files a petition may initiate non-emergency commitment, although the decision to commit rests with the mental health official. The official can be any person with training in the field of human behavior and authorized by the state to recommend commitment. Id. § 71.05.020(11). In King County, this individual is seldom a psychiatrist, although he holds a masters degree in either psychology or social work. Lecture by James Stevenson, King County Mental Health Professional, University of Washington Experimental College (April 23, 1983) (notes on file with the Washington Law Review).

Police officers may take anyone they believe presents an imminent danger because of mental illness into custody and deliver him to a mental health facility. Those detained, however, must be examined by a mental health official within three hours. In California, about one-half of those involuntarily committed were initially detained by police. C. WARREN, supra note 16, at 24. Figures are not available for Washington.

48. WASH REV CODE § 71.05.150 (1983). The non-emergency summons procedure, described in WASH REV CODE § 71.05.150(1)(a) (1983) is the part of the statute challenged by Ms. Harris. Under § 71.05.150(1)(a), when a mental health professional receives information about a potentially dangerous, mentally disordered person, that professional must investigate and evaluate the facts alleged and the reliability and credibility of the reporting person. He may then issue a summons to the mentally ill person, requiring her to appear within 24 hours for evaluation and treatment. Should the person fail or refuse to appear within 24 hours, the mental health official may authorize the police to pick up the person and detain her involuntarily. Id. § 71.05.150(1)(d). Although initially the mental health officer exercises his own discretion in determining if the individual meets the commitment standards, within 72 hours of detention the person is entitled to a full probable cause hearing. Id. § 71.05.200(1)(a).
Involuntary Mental Commitment
disabled. If he is found dangerous or gravely disabled, the county may
detain him for fourteen days for further treatment and evaluation. Another
judicial hearing is required if the county wishes to detain him beyond fourteen days. Further hearings are required every ninety days thereafter, for as long as confinement continues.

II. THE HARRIS COURT’S REASONING

The Harris court’s goal was to conform the “law of involuntary civil commitment to the requirements of the constitution.” In its attempt to accomplish this, the court considered the commitment standard for Washington’s Mental Health Act and declared the procedure for non-emergency, seventy-two-hour commitment unconstitutional. While recognizing inherent problems, the court decided not to abandon the dangerousness standard. Instead, the court interpreted it to require evidence of both a substantial danger of serious harm and a recent overt act.

By choosing not to require a standard of “imminent danger,” the court declined to follow the 1980 decision of the United States Court of Appeals for the Ninth Circuit in Suzuki v. Yuen that “imminent danger” was a constitutionally mandated standard. The Washington court rejected the Suzuki standard for five reasons. First, as the Washington statute is drafted, “imminence” is required only under the emergency detention procedure. The court therefore assumed that the legislature knew how to require “imminence” when it wanted to and did not intend to require it

49. Id. § 71.05.180.
50. Id. § 71.05.240.
51. Id. § 71.05.280.
52. Id.
53. Harris, 98 Wn. 2d at 281, 654 P.2d at 111.
54. Id. at 280–81, 654 P.2d at 111.
55. Id. at 284, 654 P.2d at 113.
56. 617 F.2d 173 (9th Cir. 1980). The Suzuki litigation extended over four years. In Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Hawaii 1976), the district court declared the new Hawaii mental health code unconstitutional because it permitted commitment without proof of dangerousness. An individual could be committed if two physicians found him to be mentally ill or addicted to alcohol or drugs. Furthermore, the statute provided inadequate procedural protection. The judge retained jurisdiction pending revision of the Hawaii commitment law. In Suzuki v. Alba, 438 F. Supp. 1106 (D. Hawaii 1977), the same district judge found the amended act unconstitutional because it allowed commitment of an individual proven dangerous to property and because the dangerousness standard did not require the finding of a recent act, attempt, or threat of imminent danger. 438 F. Supp. at 1110. The Ninth Circuit affirmed this holding, but its opinion seems to narrow the holding somewhat by suggesting that protection of property might sometimes be a weighty enough state interest to justify commitment. The court found the Hawaii statute was overly broad because it allowed commitment for any damage to “any property.” Suzuki v. Yuen, 617 F.2d at 176.
for all commitments. Second, the United States Supreme Court has not determined the degree of dangerousness required. For this reason, the Washington court concluded that the *Suzuki* standard was not constitutionally mandated. Third, other courts have considered the question of commitment standards and have not required imminence. Fourth, release of persons who present a substantial risk of harm might be required under an "imminent danger" standard because once they are in custody they would no longer present an imminent danger. Fifth, if imminence were required for all civil commitments, mental health officials who feel commitment is necessary would dilute the "imminence standard" by incorporating it into the "substantial likelihood" standard.

In addition to defining the dangerousness standard, the *Harris* court interjected the courts between mental health officials and allegedly mentally ill individuals at the first stage of the commitment process. The *Harris* decision requires that before a summons is issued, a judge must determine that (1) the person is a substantial danger to himself or others as evidenced by a recent overt act, (2) the mental health official has conducted an adequate investigation, and (3) there is no reasonable alternative to requiring the person to appear for evaluation and treatment.

The court's analysis of the commitment procedure follows the approach set out in *Mathews v. Eldridge*. The *Harris* court worked through the balancing test and found that the individual interests affected by the summons were substantial and the risk of erroneous deprivation was great. Not only was the commitment standard inaccurate and problematic to apply, but the summons procedure itself was flawed for two reasons: (1) the statute provided for no review of the mental health professional's decision to commit, and (2) the statute did not require the mental health professional to exhaust all alternatives other than commitment.

The court then considered the counterweights in the balancing test and concluded that the state lacked adequate justification for permitting men-

---

58. *Harris*, 98 Wn. 2d at 284–85, 654 P.2d at 113. This interpretation of the dangerousness standard would apply to all levels of commitment in the state of Washington, although it would presumably not modify the standard for commitment under the gravely disabled standard.

59. Id. at 284, 654 P.2d at 113.

60. Id. at 283, 654 P.2d at 112.

61. Id. at 284, 654 P.2d at 113.

62. Id.

63. Id. at 287–88, 654 P.2d at 115.

64. Id. at 285, 654 P.2d at 113 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). For a description of the test, see *supra* note 37.

65. 98 Wn. 2d at 285, 654 P.2d at 114.

66. Id.

67. Id. at 286, 654 P.2d at 114.
Involuntary Mental Commitment

tal health officials to detain individuals without some check on the officials’ discretion. The court found that a judge is uniquely qualified to make decisions regarding the fairness and thoroughness of the standards and procedures that the mental health officials used in deciding to issue a summons. Therefore, the court ordered ex parte judicial review of the commitment decision prior to issuance of a summons.

III. ANALYSIS OF THE HARRIS DECISION

A. Modification of the Dangerousness Standard

The court rejected Ms. Harris’ argument that predictions of dangerousness are so inaccurate that the state can never meet its burden of proving anyone dangerous by clear and convincing evidence. Nevertheless, the court acknowledged that the dangerousness standard presents serious problems. These problems have been widely explored by commentators, courts, and administrators trying to apply civil commitment laws.

68. Id. at 286-87, 654 P.2d at 114.
69. Id. at 288, 654 P.2d at 115. The Harris court decided that judges were the appropriate decisionmakers despite the skepticism expressed by the Supreme Court of the appropriateness of judicial interference in medical decisionmaking. See Youngberg v. Romeo, 457 U.S. 307, 323 (1982); Parham v. J.R., 442 U.S. 584, 607 (1979).
70. Harris, 98 Wn. 2d at 281, 654 P.2d at 111.
71. Id.
Repeated studies have shown that mental health officials are unable to accurately predict dangerous behavior. Psychologists notoriously over-predict dangerousness. The courts, however, have repeatedly held that commitment cannot be legally justified unless the state has a compelling interest, and the means used to meet the state’s interest are reasonably related to the state’s goals. The courts have generally found that the state’s need to protect its citizens from dangerous, mentally ill people is compelling. However, commitment is arguably justified only when there is a high probability that the individual to be committed is in fact seriously dangerous. To base a commitment decision on probable dangerousness when dangerousness cannot be predicted accurately may, as Ms. Harris suggested, be a violation of substantive due process. Yet the Harris court declined to abandon the dangerousness standard because to do so would be to “eviscerate the entire law of involuntary commitment.”

The Harris court, however, tacitly acknowledged potential constitutional problems with the standard. The court appeared to leave the door majority of contested cases, we still find numerous instances of deference and commitment where a preponderance of evidence does not support imminent danger to self or others’); Morse, A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered, 70 CALIF. L. REV. 54, 76 (1982) (“[o]vercommitment is inevitable [because of] the procedural laxness that characterizes commitment proceedings nearly everywhere”). After examining 100 habeas corpus proceedings in a California metropolitan court, Warren concluded that the statutory criteria were not strictly applied, particularly that the courts were failing to try to predict imminence and seriousness of danger to others. Warren, Involuntary Commitment for Mental Disorder: The Application of California’s Lanterman-Petris-Short Act, 11 LAW & SOCY REV 629, 647 (1977). But see Hiday, Court Decisions in Civil Commitment: Independence or Deference, 4 INT’L J. LAW & PSYCHIATRY 159 (1981) (a recent study that found courts adhering more closely to statutory commitment standards and thereby reducing the number of people committed) [hereinafter cited as Hiday, Independence or Deference].

73. For a review of these studies, see E. MAGGIO, supra note 72, at 18. See also sources cited supra note 72.
74. Id.
75. See, e.g., Jackson v. Indiana, 406 U.S. 715 (1972). The Court held that prisoners committed to a mental health hospital in lieu of prison could not be held beyond their prison term without another hearing, stating that “due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.” Id. at 738. Accord, Youngburg v. Romeo, 457 U.S. 307, 324 (1982).
77. Harris, 98 Wn. 2d at 280-81, 654 P.2d at 111. The court’s rejection of Ms. Harris’ argument was predictable. The court was understandably reluctant to abandon the standard apparently mandated by the United States Supreme Court, see supra note 34, clearly required by the Washington legislature, see supra note 45, set forth in earlier Washington civil commitment cases, see supra notes 40–42 and accompanying text, and widely used in other jurisdictions, see supra notes 25–33, 38–39 and accompanying text.
78. Harris, 98 Wn. 2d at 280–81, 654 P.2d at 111.
open for a future challenge to the standard by dismissing the claim on the basis of an inadequate record. Presumably, had Ms. Harris presented more than "a doctor's affidavit and a few articles in the appendix," the court might have been willing to address the constitutionality of the dangerousness standard, an issue not fully analyzed since the Lessard court adopted it.80

1. The New Requirement for a Recent Overt Act

Although the Harris court decided that dangerousness can provide a basis for commitment, it determined that clear evidence of dangerousness is necessary to protect the individual. Accordingly, the court interpreted the legislatively defined standard of dangerousness to require evidence of a recent overt dangerous act. The court said that the act may be one that has caused harm or that creates a reasonable apprehension of dangerousness, thereby leaving substantial latitude in the standard. This requirement significantly increases the state's evidentiary burden for commitment.

The court's clarification of the standard is a welcome step toward improving the reliability of civil commitments under the "dangerous to others" standard. Studies have shown that predictions of dangerousness based on prior dangerous behavior are somewhat more accurate. The newly clarified standard will probably not, however, improve the reliability of civil commitments based on "dangerousness to self" or verbal threats. Although most jurisdictions consider threats which create a reasonable apprehension of harm to be overt acts, most studies indicate that mere threats to commit dangerous acts are not good predictors of future dangerousness. Nor are dangerous acts or threats of danger to oneself good predictors of future dangerousness. Thus, the Harris court's requirement of evidence of a recent overt act will probably improve the reliability of the mental health official's predictions only in those cases where there is behavior threatening others. Nevertheless, the Harris decision brings Washington's standard in line with a number of

79. Id.
80. Although numerous courts adopted the dangerousness standard after Lessard, they merely adopted the language of the Lessard court instead of providing an independent rationale for their holdings. See supra note 39.
81. Harris, 98 Wn. 2d at 284–85, 654 P.2d at 113.
82. See Comment, supra note 72, at 584.
83. See Developments, supra note 15, at 1244; Comment, supra note 72, at 579.
84. Developments, supra note 15, at 1244.
85. Comment, supra note 72, at 585.
other jurisdictions\textsuperscript{86} and, more importantly, indicates the court’s concern that civil commitment be based on tangible evidence reviewable by the courts.

Despite the potential value of the "recent overt act" requirement, its practical effect is unclear. The court did not define the word "recent" and defined "overt act" in broad language only. Thus, the standard remains quite subjective. Nevertheless, county procedures have varied widely across the state,\textsuperscript{87} so the new clarification of the standard should provide some uniformity in procedures followed by the mental health officials throughout the state, and in the courts’ review of their decisions.

2. Rejection of the "Imminent Danger" Standard

Loosely interpreted, the "imminent danger" standard which the Harris court rejected would probably not increase reliability in commitment decisions as much as will the "recent overt act" requirement. The "imminent danger" standard is a predictive standard and suffers from the same inherent inaccuracy as other predictive standards.\textsuperscript{88} Strictly interpreted, however, the "imminent danger" standard might improve the accuracy of commitment decisions. For example, if the standard were to be interpreted to mean that the fact-finder must determine that the individual would commit a dangerous act today, tomorrow, or in the next week, the imminence standard might provide a fairer and more accurate basis for committing individuals than the modified dangerousness standard that the Washington court adopted.\textsuperscript{89}

Three of the Harris court’s five reasons for rejecting the "imminence standard" have merit, nevertheless. First, requiring imminent dangerousness in all types of commitment proceedings would have altered the struc--


\textsuperscript{87} In King County, the criteria for commitment under the dangerousness standard are (1) harm to self as evidenced by written or verbal threats to commit suicide or to inflict physical harm to oneself; (2) harm to others as evidenced by written, verbal, or physical behavior which has caused harm or places others in a reasonable fear of sustaining harm; or (3) property damage as evidenced by behavior which has caused substantial loss or damage to the property of others. Lecture by James Stevenson, supra note 47.

\textsuperscript{88} See supra notes 73–76.

\textsuperscript{89} Hiday and Markell found in their study of the courtroom application of the dangerousness standard that "requiring evidence of recency and frequency to show imminence and likelihood of dangerousness would reduce the proportion committed to less than one-fifth of respondents." Hiday & Markell, Components of Dangerousness: Legal Standards in Civil Commitment, 3 INT’L J. LAW & PSYCHIATRY 405, 416 (1981).
ture of the Mental Health Act and would have been contrary to the apparent intent of the Washington legislature. As the court noted, the only section of the Act where the Washington legislature chose to require “imminence” was in the provisions pertaining to emergency detention. Absent a constitutional mandate to the contrary, the court’s decision to respect a clear legislative choice is understandable.

Second, an examination of the opinions of the United States Supreme Court supports the Harris court’s conclusion that the Constitution does not require an imminence standard. The United States Supreme Court has never articulated the degree of dangerousness required to commit an individual. Furthermore, recent cases suggest that the Supreme Court is moving away from such strict substantive and procedural protections as those adopted by the Lessard court and later by the Ninth Circuit in Suzuki. These Supreme Court cases reject some of the basic premises on which the Lessard and Suzuki courts based their arguments. By undermining these premises, the Supreme Court draws into question the con-

90. WASH. REV. CODE § 71.05.150(2) (1983). Had the court decided to require evidence of imminent dangerousness in all commitment proceedings, as urged by Ms. Harris, the distinction between the emergency and non-emergency detention standards, which the legislature deliberately created, would disappear. Moreover, the rationale for the non-emergency summons procedure would also disappear because it makes no sense to allow an individual to wander around for several days pending issuance of and response to a summons if she is likely to harm someone at any moment.

91. See supra note 34 and accompanying text.


93. In Addington v. Texas, 441 U.S. 418, 432 (1979), the Supreme Court rejected the Lessard holding that the same evidentiary standard is required in civil commitment cases as is required in criminal cases. The Court based its decision partly on its finding that civil commitment is not closely analogous to criminal conviction. Id. at 428–29. The Court held that “the reasonable doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment.” Id. at 432.

The Court reasoned that legal procedure is only one of the protections available to the mentally ill. It also acknowledged that the uncertainties of psychiatry make it virtually impossible to prove dangerousness beyond a reasonable doubt. Id. at 432. Acknowledging that the standard of proof allocates the burden between litigants, the Court stated: “The heavy standard applied in criminal cases manifests our concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go free . . . . [But] it cannot be said . . . that it is much better for a mentally ill person to ‘go free’ than for a mentally normal person to be committed.” Id. at 428–29 (citations omitted).
clusions based on them, including the conclusion that only imminent danger can justify commitment. 94

Third, as the Harris court correctly concluded, the refusal of other courts to adopt the imminence standard is a further indication that "imminence" is not constitutionally mandated. 95 The Supreme Court has stated that each state is free to determine its own standards for civil commitment as long as the standards meet the constitutional minimum. 96 The Washington court's choice not to adopt the more stringent standards established in Lessard and Suzuki appears to be a matter within its discretion, given the absence of a clear mandate from the Supreme Court.

The Harris court's fourth and fifth reasons for rejecting the imminence standard are less persuasive than the other three. The fourth concern the court expressed was that to require imminence for all commitments might prevent the state from continuing to detain potentially dangerous individuals. Obviously, the "imminence" requirement refers to the danger which would exist if the individual were not restrained. Therefore, requiring "imminence" does not promote the immediate release of dangerous people.

The court also expressed concern that mental health officials might dilute the imminent danger standard, if it were required at all levels of commitment, by "assimilating" it with the "substantial risk of harm" standard. 97 Analysis based on the assumption that administering officials will misapply the standard is always suspect. Since the court has concluded that "imminence" is not a constitutionally mandated standard, it should


97. Harris, 98 Wn. 2d at 284, 654 P.2d at 113.
have chosen to reject it on the grounds of social policy, not on the presumption that officials would misapply the law if the court decides otherwise.

The *Harris* court's decision not to adopt the imminence standard is a compromise position. The court attempted to balance the recent state trend towards relaxing commitment standards against the court's recognition of the importance of the rights of the mentally ill. Studies as to whether courts effectively apply the imminence requirement are conflicting. Also, policy issues as to the proper balance among the medical, social, and legal concerns of civil commitment are unresolved. Therefore, the Washington court's reluctance to increase the commitment standard is a realistic response to these unresolved problems. Nevertheless, the court's decision to require that dangerousness be proven by a recent overt act should significantly increase the protection afforded the mentally ill.

**B. Unconstitutionality of the Summons Procedure**

In addition to tightening and clarifying the substantive requirements for commitment, the *Harris* court declared the summons procedure under section 71.05.150 of the Washington Revised Code unconstitutional. The court decided that a judge must review a summons before it is issued. The court thereby supplemented the ex parte decisionmaking by the county-designated mental health official with ex parte judicial review of all non-emergency involuntary commitments. The court's decision

---

98. The court could have reached the same result more reasonably by acknowledging that current social policy supports the right of the state to commit people who are considered substantially dangerous.

99. The trend towards relaxing standards was evident in the 1979 amendments to the Washington Mental Health Act. In 1979, the legislature added provisions allowing commitment for danger to property and added a new subcategory to the gravely disabled category. See *supra* notes 45-46.

100. Although a recent study by Hiday indicates that the courts may be applying the imminence standard with more diligence than earlier studies suggested, Hiday, *Independence or Deference, supra* note 72, thereby reducing the number of commitments, many other studies have reached different conclusions, see *supra* note 72. An earlier study by Hiday and Markell based on observation in North Carolina courts found, however, that if "imminent dangerousness" were defined to be an assault or threat to assault that has occurred within one week of the petition for commitment, only 23.9% of the petitions filed cited adequate evidence on their face. They also found that requiring evidence of recency and frequency of harmful behavior would reduce the number of individuals committed to less than one-fifth of respondents. Hiday & Markell, *supra* note 89, at 411. See also Warren, *supra* note 72.

101. See *supra* notes 82-88 and accompanying text.

102. *Harris*, 98 Wn. 2d at 287, 654 P.2d at 114.

103. In January 1983, just weeks after the *Harris* decision, the Washington Senate Judiciary Committee passed an amendment to WASH. REV. CODE § 71.05.150. Substitute S. 3181, 48th Leg. (1983) (copy on file with the Washington Law Review). This bill passed the Washington Senate in 1983 and passed the Washington House in 1984 with amendments. At the time this Note went to
thus decreased the discretionary powers of the mental health officials. These changes will probably result in a decrease in the number of mentally ill individuals committed in Washington.104

The court, however, did not fully address some of the problems with ex parte review. First, the court failed to give full consideration to the prehearing detention issue. Second, the court did not adequately discuss the practical problems inherent in its solution. Third, the court failed to discuss the impact of its decision on those committed as "gravely disabled."

1. Decision Not to Require a Pre-Detention Hearing

The King County Superior Court's refusal to conduct a pre-detention, show cause hearing was the issue on review,105 yet the Harris court addressed the pre-detention hearing issue only in a footnote.106 Its failure to give the issue full analysis raises substantive due process problems with its remedy.

As the Harris court noted, even a short, seventy-two-hour commitment is a massive curtailment of an individual's liberty.107 Since civil commitment threatens a fundamental liberty interest, due process protection is required.108 To determine what process is due in civil commitment cases, the Supreme Court has indicated that the accepted approach is the Matthews v. Eldridge balancing test.109 Although the opinion provides no explicit analysis, the Harris court apparently used the balancing test to depress, a senate committee had rejected the house amendments and returned the bill to the house where it was awaiting further action.

The bill incorporates most of the Harris holdings:

(1) A judge is required to review the petition for initial detention and issue an order requiring the allegedly mentally ill person to appear not less than 24 hours after service of the order for not more than a 72-hour evaluation and treatment period.

(2) The mental health official is required to interview the individual before filing a petition unless the individual refuses to be interviewed.

(3) The mental health official must determine whether the individual will voluntarily accept appropriate treatment before filing the petition.

(4) The order must indicate whether the evaluation will be on an inpatient or outpatient basis, although it does not require that the judge review this determination nor does it delineate standards or require the county to develop standards for determining when inpatient care is necessary.

104. For a study on how requiring recent, frequent, and severe dangerous acts decreases the percentage of individuals committed, see Hiday & Markell, supra note 89.

105. Harris, 98 Wn. 2d at 278, 654 P.2d at 110.

106. Id. at 289 n.3, 654 P.2d at 115 n.3.

107. Id. at 285, 654 P.2d at 112.


109. See supra note 37 and accompanying text.
termine that the state's interest in compelling a psychiatric evaluation outweighs the individual's liberty interest. The *Harris* court stated, in a footnote following the opinion, that the state's interest in meeting the burden of proof in the fourteen-day commitment hearing justifies a short detention period without a hearing even when no emergency exists.\(^\text{110}\)

The state would have more difficulty meeting its burden of proof in the fourteen-day commitment hearing if it could not involuntarily detain individuals for evaluation. In fact, the *Harris* court determined that the state might never be able to meet its burden of proof without a compelled evaluation.\(^\text{111}\) Therefore, the state may have a substantial enough interest in committing those deemed dangerous to justify a compulsory psychological evaluation.

The court never explained, however, why the state's need for a compelled psychological evaluation justifies a seventy-two-hour, pre-hearing detention. Few evaluations would require seventy-two hours, yet neither the statute nor the court requires that the detention period be limited to the actual time spent in evaluation. A detention period limited to the actual time spent in evaluation would infringe less on the individual's liberty interest while meeting the state's need to prepare its case for the fourteen-day commitment hearing.\(^\text{112}\) Furthermore, limiting the detention period to the time consumed by evaluation would satisfy the substantive due process requirements enunciated by the Supreme Court.\(^\text{113}\)

If the detention period were limited to the time needed for evaluation, the county could apply to the judge for a summons. If approved, the
county could contact the individual and schedule an evaluation time within the twenty-four-hour period mandated by the existing statute. If the person failed to appear at the evaluation, the police would be authorized to take the person into custody when the hospital was ready to conduct an evaluation and to release him when the evaluation was complete. If the evaluation indicates that the person is unlikely to come to the fourteen-day commitment hearing scheduled after the evaluation or is, in fact, imminently dangerous, the burden should be on the state to show that further custodial detention is justified.

Furthermore, the court never discussed why the state's need to meet its burden of proof justifies submitting the individual to compulsory drug treatment without a hearing. The seventy-two-hour commitment encompasses treatment as well as evaluation. Therefore, an individual committed for seventy-two hours could be subjected to compulsory drug treatment without any right to refuse it or any independent determination that treatment was necessary. Only by limiting the pre-hearing deten-

---

114. Although the state might argue that this would waste hospital time, only about seven percent of those committed between 1977 and 1981 in Washington were summoned. Durham & Carr, Use of the Summons in Involuntary Civil Commitment 12 (January 1984) (copy on file with the Washington Law Review). Therefore, the impact of missed appointments would be slight; furthermore, there would be many emergency and voluntary commitments that could fill those appointment slots. Balanced against the individual's liberty interest, the administrative burden would be comparatively small.

115. The state already has a statute providing that a person is to be returned home by the police if he does not meet the commitment criteria. See WASH. REV. CODE § 71.05.190 (1983).

116. The state could meet this burden by showing at either an informal hearing or through a judicial ex parte proceeding that the individual had to be detained to prevent flight or imminent harm. These procedures should occur within a few hours of the decision to detain the person. Arguably, these protections should also be added to the emergency procedures currently in effect but not at issue in the Harris case.

Washington Substitute Senate Bill 3181, supra note 103, permits an individual ordered for evaluation and treatment to remain at home or in a place of his choice until the evaluation. A friend, advisor, relative, personal physician, or attorney may accompany him to the evaluation. The senate version of the bill allows the individual to decide who will be present during the evaluation, while the house version requires the treatment facility's permission for a third party to be present at the evaluation. The bill does not suggest, however, that the person be released immediately after evaluation, and seems to assume that the judicial determination that he needs to report for evaluation justifies detention for 72 hours.


118. See WASH. REV. CODE § 71.05.150 (1983). This statutory provision is titled "Detention of mentally disordered persons for evaluation and treatment—Procedure."

119. In Mills v. Rogers, 457 U.S. 291 (1982), the Supreme Court heard a case challenging the right of the state to force drugs on involuntarily committed patients. The Court reached no decision because the Supreme Judicial Court of Massachusetts had decided a case, after certiorari had been granted, finding that under the United States Constitution and the common law of Massachusetts a patient had a right to refuse treatment. The Supreme Court remanded the Mills case to the court of appeals to consider the effect of the intervening state decision.
tion period to the time actually consumed by evaluation and by banning the use of compulsory drug treatment during the pre-hearing, non-emergency detention can the state’s interest justify committing an individual without a hearing.

2. The Practical Effects of Judicial Review

The court not only failed to fully address the pre-detention hearing issue; it also left unexplored some of the practical ramifications of its decision. Requiring judicial review of the summons adds at least twenty-four hours to the commitment procedure.\textsuperscript{120} In King County, the \textit{Harris} ruling resulted in abandonment of the summons procedure for about five months.\textsuperscript{121} In smaller counties, where there is less timely access to judicial review, the extra procedural requirements could conceivably lead to permanent abandonment of the summons procedure. Although the \textit{Harris} court apparently concluded that protection of individual interests justified the extra procedural steps, the court might have accomplished the same purpose by abolishing the summons procedure. Apparently the court did not do so because it found that the state has an interest in committing those who are not imminently dangerous. Nevertheless, the practical effect of its decision could be the same.

Should county officials continue to use the summons procedure as modified by the \textit{Harris} court, judicial review will clearly add protection that was previously lacking. The degree of the protection added, however, depends upon how effectively a judge can function within the limits of ex parte review. For example, the \textit{Harris} court charged the judge with determining “not only that probable dangerousness exists, but that sufficient investigation has occurred, and that commitment is the least restrictive alternative.”\textsuperscript{122} The court did not delineate what constitutes “sufficient investigation.” The existing statute requires the mental health

\begin{footnotesize}
\begin{itemize}
  \item Washington Substitute Senate Bill 3181, \textit{supra} note 103, makes no distinction between authorization for evaluation and authorization for treatment.
  \item Interview with Mike Leake, Administrative Assistant, King County Department of Involuntary Commitment (February 1983) (notes on file with the \textit{Washington Law Review}).
  \item On June 1, 1983, King County resumed using the summons procedure following new guidelines designed to conform with the \textit{Harris} court mandate. After the county mental health official interviews the individual and if she feels the 72-hour detention is necessary, she files a petition with the prosecuting attorney. The prosecuting attorney then presents the petition to a judge, who reviews the information and issues the summons if he deems it proper. A mental health official then serves the summons and the individual has 24 hours to report for evaluation and treatment. If she fails to report, then the police are authorized to take her into custody. Interview with Mike Leake, Administrative Assistant, King County Department of Involuntary Commitment (February 10, 1984) (notes on file with the \textit{Washington Law Review}).
  \item \textit{Harris}, 98 Wn. 2d at 287–88, 654 P.2d at 115.
\end{itemize}
\end{footnotesize}
official to investigate the facts alleged and the reliability and credibility of the persons initiating commitment. The court implied that the mental health official should personally interview the individual to be committed. It also required that the alleged dangerousness be evidenced by a recent overt act. The reviewing judge can adequately evaluate the accuracy of the evidence in each of these areas on an ex parte basis.

More difficult to evaluate on an ex parte basis, however, is whether seventy-two-hour commitment is the least restrictive alternative. The statute requires that the mental health official determine whether inpatient or outpatient evaluation is appropriate before issuing the summons. Unless the courts require county agencies to establish clear guidelines as to which conditions require inpatient evaluation, the judges will have trouble evaluating the mental health official’s decision independently to determine if a summons is the least restrictive alternative. Because inpatient evaluation is more convenient for the county, the tendency will be to order it in borderline cases. Ex parte review of this decision may not provide adequate protection.

The Harris court also implied that the mental health official should encourage the patient to consent to voluntary treatment before issuing a summons. How a judge can effectively evaluate the official’s efforts to encourage voluntary treatment is unclear. Although the judiciary has effectively determined whether administering officials have used the least restrictive alternative in other areas of law, the lack of reviewable treatment guidelines here will make it difficult for the judge to be effective on an ex parte basis in the commitment area. The court’s insistence on use of the least restrictive alternative is important, however, in that it emphasizes the need to protect the rights of the mentally ill.

The effectiveness of the protection afforded by judicial review depends largely on the independence of the judicial review. If pre-summons judicial review is a rubber stamp routine, the delay and costs will outweigh

123. WASH. REV. CODE § 71.05.150(1)(a) (1983).
124. Harris, 98 Wn. 2d at 284, 654 P.2d at 113.
Washington Substitute Senate Bill 3181, supra note 103, codifies this requirement.
125. Harris, 98 Wn. 2d at 284, 654 P.2d at 113.
Washington Substitute Senate Bill 3181, supra note 103, does not modify the statutory definition of dangerous to require evidence of a recent overt act.
126. WASH. REV. CODE § 71.05.150(1)(a) (1983).
127. Harris, 98 Wn. 2d at 284, 654 P.2d at 114.
Washington Substitute Senate Bill 3181, supra note 103, codifies this requirement.
128. Furthermore, encouraging voluntary commitment may put the mentally ill individual in the position of providing evidence that could be used against her at a later commitment hearing unless the fact that she consented to voluntary commitment is excluded. Prior hospitalization is the most commonly used evidence in commitment hearings. See C. WARREN, supra note 16, at 163–76 (factors influencing judges in commitment hearings); Aronson, supra note 94, at 63–66 (evidence problems).
the protection it affords. Commentators are divided on the amount of independent judgment that the judiciary exercises in commitment decisions. Early studies showed substantial judicial deference to psychiatric decisions in involuntary commitment hearings. A more recent study suggests that the high correlation between judges and psychiatrists on commitment decisions may be due not to rubber stamping but to independent decisionmaking based on evidence presented at the commitment hearing. Whether the judge maintains the same degree of independence in an ex parte paper process is less certain. To ensure maximum judicial independence, the court should have either delineated standards against which a reviewing judge could test the summons to see if it was the least restrictive alternative or directed the administering agency to develop these standards.

3. Effect of Ex Parte Review on Commitment of the Gravely Disabled

The summons procedure is most widely used to commit those alleged to be gravely disabled. Although the Harris court did not directly address the commitment of the gravely disabled, its decision will have the greatest impact on this group because it mandates a change in the entire summons procedure. Yet ex parte judicial review before summons may be least effective for the gravely disabled.

Whether to issue a summons for an individual who is gravely disabled is primarily a medical, not a legal, decision. No easily reviewable, objective standard exists to identify individuals committable under the Washington statute as gravely disabled. Consequently, grave disability is the standard under which people who are considered nuisances or socially undesirable could most easily be committed, even though they are no threat to society. This is the group most in need of legal protection.

129. For a list of such studies, see Hiday, Independence or Deference, supra note 72, at 160 nn.2 & 3.
130. Hiday, Independence or Deference, supra note 72, at 169. As Hiday suggests in her study, the fact that both a judge and a psychiatrist agree on commitment decisions does not necessarily mean that the judge is rubber stamping psychiatric decisions. It may mean that through different processes, they have come to the same conclusion. Id. at 162-66.
131. From 1977 to 1981 in King and Pierce Counties, 74.1% of those committed under the summons procedure were classified as gravely disabled and 41.9% were classified as dangerous to others. Durham & Carr, supra note 114, at 17. Often more than one reason for commitment was cited, so people were committed under several standards. This suggests that even a stringent dangerousness standard can often be bypassed by using the less stringent grave disability standard.
132. See supra note 46.
133. A recent study conducted in King and Pierce Counties indicates that 62.5% of those summoned exhibited bizarre behavior, 38.1% exhibited deterioration of cognitive and volitional functions, 45.9% were in jeopardy for their health and safety, and 43.2% showed violent behavior. Durham & Carr, supra note 114, at 15. More than one characteristic appeared in many individuals which
Unfortunately, however, this is the group for whom the *Harris* remedy provides the least protection. Although the *Harris* court requires the judge to evaluate the sufficiency of the evidence of grave disability before issuing a summons, the medical nature of this evidence and the lack of clear, reviewable criteria for commitment under the grave disability standard make meaningful review very difficult. Review of grave disability is especially hard when the judge is acting ex parte and so has no opportunity to observe and question the person to be committed.

An informal pre-detention hearing may be necessary to protect the rights of the gravely disabled. At the very least, reviewing judges should require mental health officials to provide objective evidence of grave disability and should scrutinize that evidence carefully to counterbalance the inherent difficulties of ex parte review under the grave disability standard.134

IV. CONCLUSION

The *Harris* decision reaffirmed the Washington Supreme Court’s dedication to preserving the individual rights of the mentally ill. The clarification of the dangerousness standard by requiring evidence of a recent overt act should increase the accuracy of commitment decisions of mental health officials and will provide courts with a more concrete standard of review. Although the requirement that a judge review any summons before it is issued may be so burdensome that the summons procedure will be abandoned,135 the added protection it provides the mentally ill individual from unnecessary civil commitment justifies the administrative burden it presents. Judicial review will, however, provide less protection for those determined to be gravely disabled unless reviewing judges require substantial, objective evidence before issuing a summons.

The *Harris* court failed to resolve three basic issues. First, the court did not decide whether using a dangerousness standard is constitutionally valid, leaving open the possibility of a future challenge of that standard. Second, the court did not require that the detention period be limited to the time necessary to perform a psychological evaluation. Third, the court did not specify what steps the judge must take to ensure that seventy-two-hour commitment is the least restrictive alternative. Because the court

suggestions that even with a strong dangerousness standard, it is still relatively easy to commit an individual under the gravely disabled standard. For an analysis of the major factors influencing commitment decisions under the grave disability standard in California, see C. WARREN, supra note 16, at 165–67.

134. The *Harris* court did not discuss what standard of evidence the state must meet to acquire a summons, but logically it would be no greater than a preponderance of the evidence, since that is the standard the state must meet at the first commitment hearing. WASH REV CODE § 71.05.240 (1983).

135. See supra note 121 and accompanying text.
failed to fully analyze these issues, it only partially succeeded in conforming the law of involuntary commitment to the Constitution.

Betty L. Drumheller

Author's Note:

The statute referred to throughout the text is the statute in effect at the time of the *Harris* decision. On March 5, 1984, the last day of the 1984 legislative session, the Washington state House and Senate adopted a new statute which incorporated the *Harris* court's procedural holdings, see *supra* note 103, and added a new provision. Substitute S. 3181, 48th Leg. (1984) (copy on file with the *Washington Law Review*). The new statute allows an individual to remain at home prior to the time of evaluation and allows an attorney to be present during the admissions evaluation. In addition, another person may be present at the evaluation if the examining personnel decide that the presence of another person will not present a safety risk, delay the proceedings, or otherwise interfere with the evaluation. The statute does not indicate if the person to be evaluated or the attorney can exclude the third person from the admissions evaluation if either so desires.

Having an attorney and possibly another person present at the examination should provide a less threatening environment for the examination and may ensure a more accurate evidentiary record for the fourteen-day hearing. The new statute, however, does not indicate how active a role this third person may take in the evaluation proceedings, nor does the statute require that an attorney be present. Therefore, the degree to which the new evaluation procedure will protect the individual will depend on whether attorneys are, in fact, present at most examinations and how active a role they play. Whether the opportunity to have an attorney present during the examination will encourage pre-hearing release, discourage nonconsensual, pre-hearing drug therapy, or promote the individual's right to the least restrictive alternative, remains to be seen. The new statute is, however, a welcome improvement over the old summons procedure.