

Conservatorship for the “Gravely Disabled”: California’s Nondeclaration of Nonindependence

GRANT H. MORRIS*

“Give me your tired, your poor,
Your huddled masses . . .
The wretched refuse . . .
Send these, the homeless,
tempest-tost to me . . .”¹

[G]ravely disabled means . . . [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 shelter²

INTRODUCTION: CALIFORNIA’S MENTAL HEALTH EXPERIMENT

Twelve years ago a California legislative subcommittee issued a report entitled *The Dilemma of Mental Commitments in California—A Background Document*.³ Questioning the legal, moral, and practical worth of California’s civil commitment laws—and by implication those in all other states—the report recommended fundamental changes in the commitment system.⁴ Through the civil commitment

* Professor of Law and Acting Dean (1977-1978), University of San Diego. B.A., 1962; J.D., 1964, Syracuse University; LL.M., 1971, Harvard Law School.

1. Lazarus, “The New Colossus” (inscribed on the Statue of Liberty).

2. CAL. WELF. & INST. CODE § 5008(h) (West Supp. 1977).

3. SUBCOMM. ON MENTAL HEALTH SERVICES, ASSEMBLY INTERIM COMM. ON WAYS AND MEANS, CAL. LEGIS., *THE DILEMMA OF MENTAL COMMITMENTS IN CALIFORNIA—A BACKGROUND DOCUMENT* (1966).

4. E. BARDACH, *THE SKILL FACTOR IN POLITICS 1* (1972). For a description of the civil commitment practice in San Francisco prior to the enactment of the

process, society attempts to further both the police power objective of confining the dangerous and the *parens patriae* objective of treating the ill. Combining these different, and often conflicting, goals into a single system creates the dilemma referred to in the title of the legislative subcommittee's report.⁵ The subcommittee concluded:

[I]t is clear that the dual mental health objectives—treatment and custody—can be better achieved in two separate systems. What is required is a voluntary system for providing prompt and appropriate assistance to citizens suffering from mental disorders without any stigma or loss of liberty; and an involuntary system for identifying and separating dangerous persons from the community, with full due process of law, and providing them with such treatment and custody as may be required.⁶

In 1967, the California Legislature enacted the Lanterman-Petris-Short Act⁷ (LPS),⁸ embodying the subcommittee's recommendations.⁹ LPS, which became operative on July 1, 1969,¹⁰ repealed the

major new legislation, see Note, *The Need for Reform in the California Civil Commitment Procedure*, 19 STAN. L. REV. 992, 993-1002 (1967).

5. SUBCOMM. ON MENTAL HEALTH SERVICES, ASSEMBLY INTERIM COMM. ON WAYS AND MEANS, CAL. LEGIS., THE DILEMMA OF MENTAL COMMITMENTS IN CALIFORNIA—A BACKGROUND DOCUMENT (1966).

6. *Id.* at 19-20. See also *id.* at 180. The subcommittee's commitment-court survey determined that only eight percent of the individuals seen by the commitment court appeared "dangerous to others," while 18% appeared a "danger to themselves." *Id.* at 18. The subcommittee's survey of state hospital patients determined that 90% of the patient population was classifiable as "nondangerous." *Id.* at 19. "Further, among nondangerous patients, only 2 percent receive individual or group therapy, 12 percent receive drug therapy, 1 percent receive electroconvulsive therapy—while 41 percent receive 'milieu therapy' and 40 percent receive only long-term custodial care." *Id.*

7. Division 5 of the California Welfare and Institutions Code, entitled Community Mental Health Services, was added by the California Mental Health Act of 1967, ch. 1667, § 36, 1967 Cal. Stats., ch. 1667, § 36. Division 5 consists of two parts: the Lanterman-Petris-Short Act, CAL. WELF. & INST. CODE, §§ 5000-5401 (West 1972), and the Short-Doyle Act, *id.* §§ 5600-5767. The Short-Doyle Act provides the legislative framework for the organizing and financing of "community mental health services for the mentally disordered in every county through locally administered and locally controlled community mental health programs." *Id.* § 5600 (West Supp. 1977).

8. *Id.* § 5000 (West 1972) declares: "This part shall be known and may be cited as the Lanterman-Petris-Short Act." Nevertheless, the Act is more commonly referred to by its even shorter title, LPS.

9. See E. BARDACH, *THE SKILL FACTOR IN POLITICS* (1972), for an in-depth analysis of the political process through which the subcommittee members and their staff identified the problem, designed solutions, gathered public support, and obtained the approval of the legislature and the governor. In discussing the objectives of LPS, the Supreme Court of California noted that the legislation was enacted after a two-year legislative study, citing the subcommittee's report. *Thorn v. Superior Court*, 1 Cal. 3d 666, 668, 464 P.2d 56, 57, 83 Cal. Rptr. 600, 601 (1970). One commentator has described LPS as the "culmination" of the subcommittee's study. Note, *Civil Commitment of the Mentally Ill in California: The Lanterman-Petris-Short Act*, 7 LOY. L.A. L. REV. 93, 98 (1974).

10. LPS was amended by 1968 Cal. Stats., ch. 1374, § 13, prior to its effective date of July 1, 1969.

existing indeterminate civil commitment scheme, removed legal disabilities previously imposed upon civilly committed individuals, and enacted a system that emphasized community-based voluntary treatment of the mentally disordered.¹¹ LPS limits involuntary commitment to a series of short confinement periods: seventy-two hours, fourteen days, and ninety days. The progression in length of confinement authorized varies directly with the severity of mental disorder established and the stringency of procedural safeguards imposed at each stage. If as a result of mental disorder, a person is believed to be a danger to others, or to himself, or gravely disabled, he may be detained for an initial seventy-two-hour evaluation period.¹² Thereafter, he may be certified for a fourteen-day intensive treatment period if any of these three criteria is determined to exist¹³ and for an additional fourteen-day period if the person is suicidal.¹⁴ Finally, the person may be detained for ninety-day post-certification treatment periods, but only if he presents "an imminent threat of substantial physical harm to others."¹⁵

11. *Thorn v. Superior Court*, 1 Cal. 3d 666, 668, 464 P.2d 56, 57, 83 Cal. Rptr. 600, 601 (1970). See CAL. WELF. & INST. CODE §§ 5600-5767 (West 1972) for the statutes governing the organization and funding of community mental health services.

12. CAL. WELF. & INST. CODE §§ 5150-5177 (West Supp. 1977) authorize a peace officer or a member of an attending staff of an evaluation facility who has probable cause to believe that the individual's condition meets the specified criteria to take him into custody and detain him for 72 hours of evaluation and treatment. *Id.* §§ 5200-5213 provide for a court-ordered 72-hour evaluation and treatment hold as an alternative. *Id.* §§ 5525-5530 (West 1972) authorize a court-ordered 72-hour evaluation and treatment hold for criminal defendants who, as a result of chronic alcoholism or the use of narcotics or restricted drugs, meet the specified criteria.

13. *Id.* §§ 5250-5258 (West Supp. 1977).

14. *Id.* §§ 5260-5265. *Id.* § 5260 (West 1972) narrowly defines a suicidal person as one

who, as a result of mental disorder or impairment by chronic alcoholism, during the 14-day period or the 72-hour evaluation period, threatened or attempted to take his own life or who was detained for evaluation and treatment because he threatened or attempted to take his own life and who continues to present an imminent threat of taking his own life

15. *Id.* §§ 5300-5306 (West Supp. 1977). LPS articulates criteria limiting the appropriateness of 90-day holds to a small group of demonstrably dangerous, physically assaultive individuals. For an initial 90-day hold, *id.* § 5300 (West 1972) requires a finding that the person:

(a) Has threatened, attempted, or inflicted physical harm upon the person of another after having been taken into custody for evaluation and treatment, and who, as a result of mental disorder, presents an imminent threat of substantial physical harm to others, or

The seventy-two-hour evaluation provisions authorize detention without judicial review.¹⁶ The fourteen-day intensive treatment certification provisions, and the additional fourteen-day recertification provisions for suicidal patients, require that the person certified receive notice¹⁷ and be informed of his rights to counsel and to judicial review by habeas corpus.¹⁸ The ninety-day post-certification provisions require a court hearing prior to a detention order.¹⁹ At this hearing the prospective detainee has a right to be represented by an attorney and to demand a jury trial.²⁰

LPS has been acclaimed "the Magna Carta of the mentally ill."²¹ It has been lauded for its emphasis on voluntary, community-based treatment²² and its limitations on preventive detention.²³ LPS has served as a model of progressive legislation, has been commended by

(b) Had attempted or inflicted physical harm upon the person of another, that act having resulted in his being taken into custody and who presents, as a result of mental disorder, an imminent threat of substantial physical harm to others.

For subsequent 90-day holds, *id.* § 5304 (West Supp. 1977) requires a finding that the person "has threatened, attempted, or actually inflicted physical harm to another during his period of postcertification treatment, and he is a person who, by reason of mental disorder, presents an imminent threat of substantial physical harm to others."

16. See note 12 *supra*. For a more detailed explanation of the 72-hour hold provisions, see Comment, *Compulsory Counsel for California's New Mental Health Law*, 17 U.C.L.A. L. REV. 851, 852-53 (1970). The article discusses the importance of counsel during the 72-hour hold and recommends that compulsory counsel be provided during this initial detention period. *Id.* at 855-67.

17. CAL. WELF. & INST. CODE §§ 5253 & 5263 (West Supp. 1977).

18. *Id.* § 5252.1 (West 1972). See also *id.* §§ 5275-5278 (judicial review provisions).

19. *Id.* § 5303. The statute does authorize the continued detention and treatment of the individual in the intensive treatment facility pending a trial court decision on the merits of the postcertification petition. *Id.*

20. *Id.* § 5302. For a more detailed explanation of the LPS commitment criteria and procedural safeguards, see Note, *Civil Commitment of the Mentally Ill in California: The Lanterman-Petris-Short Act*, 7 LOY. L.A.L. REV. 93, 99-103 (1974).

21. The statement is attributed to Maurice Rodgers, spokesperson for the California State Psychological Association. E. BARDACH, *THE SKILL FACTOR IN POLITICS* 126 (1972). Other writers also state that LPS has been described as the Magna Carta of the mentally ill, but they do not reveal the source of the statement. See, e.g., *Hearings on the Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st & 2d Sess. 316 (1970) (statement of Dr. Roger Egeberg, Assistant Secretary for Health and Scientific Affairs, Department of Health, Education and Welfare); Abramson, *The Criminalization of Mentally Disordered Behavior: Possible Side-Effect of a New Mental Health Law*, 23 HOSPITAL & COMMUNITY PSYCH. 101, 105 (1972).

22. *Hearings on the Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st & 2d Sess. 316 (1970).

23. *Id.* at 266 & 278 (statement of Bruce J. Ennis, American Civil Liberties Union).

authors²⁴ and judges,²⁵ and copied by other state legislatures.²⁶

Because the LPS model's bifurcation of mental health programs into a voluntary system for nondangerous individuals and an involuntary system for dangerous individuals is conceptually sound, attempts to evade the LPS procedural safeguards for involuntary commitment should be resisted.²⁷ Such attempts have taken several

24. Two recent coursebooks print portions of the LPS statutes verbatim for study by law students enrolled in law and psychiatry courses. In F. MILLER, R. DAWSON, G. DIX, & R. PARNAS, *THE MENTAL HEALTH PROCESS* 175-96 (2d ed. 1976), statutes from Wisconsin, New York, and the District of Columbia are also presented. *Id.* at 196-225. The preface of this coursebook describes the California experiment as "innovative" and declares that LPS "must be considered throughout any discussion of mental health programs." *Id.* at xvi. In A. BROOKS, *LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM* 769-76 (1974), editorial comments and articles on LPS are also found. *E.g., id.* at 677, 691-99, 701, 718, 767-69 & 801.

25. Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742, 753 (1969). Judge Bazelon noted that LPS "promises virtually to eliminate involuntary hospitalization except for short term crisis situations. . . . The procedural protections it promises are impressive indeed when compared with commitment proceedings in other states." *Id.*

26. *E.g.*, WASH. REV. CODE ANN. §§ 71.05.010-71.05.920 (1974). This legislation was added by 1973 Wash. Laws, ch. 142, 1st Ex. Sess., and became effective on January 1, 1974. WASH. REV. CODE § 71.05.930 (1974). For an analysis of the Washington statutes, see Comment, *Progress in Involuntary Commitment*, 49 WASH. L. REV. 617 (1974).

27. A California legislative committee has proposed expanding 90-day commitment holds to patients considered dangerous despite the absence of threats or overt acts of violence. SENATE SELECT COMM. ON PROPOSED PHASEOUT OF STATE HOSPITAL SERVICES, CAL. LEGIS., FINAL REPORT (1974). The committee cited testimony of several medical professionals that clinical judgment of imminent danger should be given great weight in determining the propriety of 90-day postcertification, even in the absence of a threat or overt act by the individual. *Id.* at 38.

In my opinion, that proposal is premature. I concur with Dr. Alan Stone's judgment that the available studies of the California model are inconclusive. A. STONE, *MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION* 64 (1975). Dr. Stone's evaluation of the California data suggests that involuntary commitment of the mentally ill on a dangerousness criterion should be further restricted rather than expanded. He wrote:

Two percent of the patients were found dangerous to others and 1 percent were found dangerous to self at the hearing held at the end of 17 days. My own judgment is that if the hearing had been held at the end of 3 days; i.e., close to the time required by the Lessard court, those numbers would have been no more than doubled. Thus, involuntary confinement based on the objective measures of dangerousness would affect only 6 percent of those actually confined. Perhaps that estimate is too low, but surely not by much based on the data presented

Id. at 64-65.

The legislative committee has also proposed vesting authority in a court-appointed psychiatrist to decide the propriety of 90-day holds in individual cases. SENATE SELECT COMM. ON PROPOSED PHASEOUT OF STATE HOSPITAL SERV-

forms. For example, mentally ill individuals are often processed into the criminal justice system as a convenient alternative to LPS civil commitment.²⁸ LPS's rigorous requirements²⁹ for securing a ninety-

ICES, CAL. LEGIS., FINAL REPORT 42 (1974). In my opinion, that proposal is unsound. The reliability and validity of psychiatric evaluations and predictions have been questioned throughout medical and psychiatric literature. See the authorities collected and analyzed in Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974). See also A. STONE, *supra* at 25-40; Monahan, *The Prevention of Violence*, in COMMUNITY MENTAL HEALTH AND THE CRIMINAL JUSTICE SYSTEM 13-34 (J. Monahan ed. 1976); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439 (1975); Steadman & Cocozza, *We Can't Predict Who is Dangerous*, PSYCH. TODAY 32-35, 84 (Jan. 1975). Authors who reviewed the professional literature concluded: "[P]redictions of dangerous behavior are wrong more often than they are right even in those cases in which the subject of the prediction has actually done or threatened something dangerous in the past. And without such evidence of past dangerous behavior, predictions of dangerous behavior are even more inaccurate." Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 749 (1974).

Given this demonstration of psychiatric inexpertise, a legislative decision to substitute a psychiatrist's judgment for the court's judgment in determining the propriety of a 90-day commitment does not further the LPS objective of due process for those subjected to involuntary confinement.

28. Arrest and prosecution for nuisance offenses is regarded as a more reliable method of securing involuntary detention than is LPS civil commitment. Abramson, *The Criminalization of Mentally Disordered Behavior: Possible Side Effect of a New Mental Health Law*, 23 HOSPITAL & COMMUNITY PSYCH. 101, 103 (1972). Other criminal-control mechanisms used as alternatives to LPS include revoking probation for psychiatric drug abusers and then confining them in the county jail, and finding criminal defendants mentally incompetent to stand trial and then committing them for treatment. *Id.* at 104. *But cf. In re Davis*, 8 Cal. 3d 798, 50 P.2d 1018, 106 Cal. Rptr. 178 (1973), in which the California Supreme Court held that if no reasonable likelihood exists that a defendant will recover his competence to stand trial in the foreseeable future, he must be released from confinement or committed pursuant to LPS.

In 1974, the California Legislature amended LPS to ensure that long-term civil commitment could be achieved for mentally incompetent defendants charged with violent felonies. This legislative response to *In re Davis* is defended in Parker, *California's New Scheme for the Commitment of Individuals Found Incompetent To Stand Trial*, 6 PAC. L.J. 484 (1975), and criticized in note 58 *infra*.

The existence of a "criminalization-of-the-mentally-ill" trend has been questioned. Dr. James Lowry, former director of the California Department of Mental Hygiene, serving as a psychiatric consultant to the California Department of Health, conducted a study of 5,058 prisoners confined in the San Diego County Jail between September 12 and October 12, 1973. Only 85 prisoners showed symptoms of mental disorder. Of these, only 29 were diagnosed as psychotic. J. Lowry, *Mentally Ill Prisoners in the San Diego County Jail* (Jan. 5 1974) (unpublished manuscript on file with the author). In Dr. Lowry's judgment, the data imply that LPS does not result in more mentally ill people being processed through the criminal justice system. *Id.* at 9.

Dr. Lowry also examined instances in which prisoners were transferred to mental hospitals for a competency-to-stand-trial determination. During the study period, only seven of the 5,058 prisoners were so transferred. *Id.* at 6 & 9. As a result of a review of competency-to-stand-trial cases in San Diego County during an eight-year period—four years prior to and four years subsequent to

day hold can also be avoided by persuading mental patients to accept voluntary treatment.³⁰

LPS—he concluded that this device was not being used as a convenient alternative to LPS. Although the incidence of competency-to-stand-trial commitments increased in the two years immediately following LPS's introduction, the number decreased in the third and fourth years to a level below the number in the year before LPS became effective. *Id.* at 7 & 9.

Moreover, even if some data confirm the finding that the criminal justice system is being used to deal with mentally disordered individuals, this use may have socially beneficial effects. See Monahan, *The Psychiatrization of Criminal Behavior: A Reply*, 24 HOSPITAL & COMMUNITY PSYCH. 105 (1973). Unlike the mental health system, the criminal justice system forces society to confront its level of tolerance of deviant behavior. Behavior that society wishes to prohibit must be clearly defined and labelled "criminal" before it occurs, and the state may incarcerate an individual only after he is convicted of engaging in the proscribed activity. *Id.* at 106. Additionally, Dr. Monahan asserts that if mental health professionals view imprisonment as a brutalizing experience for the mentally disordered, their compassion should be expanded to the mentally normal offender, and their energies should be spent in improving the criminal justice system for all who are subjected to it. *Id.* at 107.

29. *Quaere*: How rigorous are the LPS requirements? For example, the operative words of the LPS commitment statutes—"mental disorder," "a danger to others, or to himself," "has threatened . . . physical harm," "presents . . . an imminent threat"—are not further defined by the statutes themselves or by court interpretations of the statutes. The term "mental disorder" is defined, not very helpfully, in the California Administrative Code as meaning "any of the mental disorders as set forth in the Diagnostic and Statistical Manual of Mental Disorders (Current Edition) of the American Psychiatric Association." CAL. ADMIN. CODE tit. 9, § 813 (Register 76, No. 19—5-8-76). One author has asserted that the LPS "definitional standards, while certainly more specific than those of other jurisdictions, are still so vague that the psychiatrist can manipulate them to assure that the individual will receive the benefits of "needed hospitalization . . ." Note, *Civil Commitment of the Mentally Ill in California: The Lanterman-Petris-Short Act*, 7 LOY. L.A. L. REV. 93, 134 (1974). The data from one study confirm the assertion that physicians' clinical judgments that a certain individual needed treatment were a more frequent basis for initial admission than the statutory criteria. ENKI RESEARCH INSTITUTE, A STUDY OF CALIFORNIA'S NEW MENTAL HEALTH LAW (1969-1971) 116 (1972). However, ENKI also reports that the requirements for a 90-day postcertification order have been narrowly interpreted by professionals, resulting in underutilization of this order. *Id.* at 155.

30. Studies in California and elsewhere have disclosed that under the threat of involuntary commitment proceedings which may result in long-term commitment, individuals who are in custody on temporary commitment holds are coerced into converting to a voluntary status. See, e.g., ENKI RESEARCH INSTITUTE, A STUDY OF CALIFORNIA'S NEW MENTAL HEALTH LAW (1969-1971) 121-22 (1972); Gilboy & Schmidt, "Voluntary" Hospitalization of the Mentally Ill, 66 NW. U.L. REV. 429, 430 & 452 (1971).

Truly voluntary treatment is favored by the law. See, e.g., CAL. WELF. & INST. CODE § 5250 (West 1972), which requires as a condition for a 14-day involuntary treatment certification that the person to be certified has been advised of, but has not accepted, voluntary treatment. A similar condition is imposed for 14-day recertification of suicidal patients. *Id.* § 5260. Nevertheless, the voluntary status

Unfortunately, LPS itself contains statutes that can be construed and administered to circumvent the fundamental objectives of LPS. Through the LPS conservatorship device, the conservator may "voluntarily" admit his conservatee to a mental health treatment facility. Thus, involuntary treatment of nondangerous individuals can be and is being achieved. Surprisingly, this device has not received significant³¹ scholarly attention. This Article addresses the evolution and current use of LPS conservatorships. In addition, the adequacy of counsel in representing potential conservatees is evaluated through a study of the conservatorship adjudicatory process.

OF GUARDIANSHIPS, CONSERVATORSHIPS, AND CONSERVATORSHIPS

The California Legislature has created three distinct but overlapping statutory schemes to deal with the problem of individuals who are either unable mentally or physically to provide for their personal needs or to manage their property interests. Through the Probate Code guardianship provisions,³² a court declares a person incompetent³³ and appoints a guardian for the incompetent ward.³⁴ Through

may be legally disadvantageous because of the absence of procedural protections imposed as a condition of involuntary commitment. See *In re Buttonow*, 23 N.Y.2d 385, 390, 244 N.E.2d 677, 680, 297 N.Y.S.2d 97, 101 (1968); *People ex rel. Kamenstein v. Brooklyn State Hosp.*, 49 Misc. 2d 57, 266 N.Y.S.2d 916, *rev'd on other grounds, sub nom. Kamenstein v. Beckenstein*, 26 App. Div. 2d 669, 272 N.Y.S.2d 641 (1966).

31. *But see* A. STONE, *supra* note 27, at 63-64; ENKI RESEARCH INSTITUTE, A STUDY OF CALIFORNIA'S NEW MENTAL HEALTH LAW (1969-1971) 156-66 (1972); Wexler, *Mental Health Law and the Movement Toward Voluntary Treatment*, 62 CALIF. L. REV. 671, 676 n.17 (1974).

32. CAL. PROB. CODE §§ 1460-1462 (West Supp. 1977), as amended by 1976 Cal. Stats., ch. 1357, §§ 5-13 (effective July 1, 1977).

33. Prior to the enactment of 1976 Cal. Stats., ch. 1357 (operative July 1, 1977), the guardianship statutes in Division 4, Chapter 4 of the California Probate Code provided for the appointment of a guardian for "an insane or incompetent person." Use of the disjunctive *or* between the words "insane" and "incompetent" apparently did not signify that a guardian could be appointed for an insane person who was not incompetent. Rather, the word *or* signified that a guardian could be appointed for a person who was incompetent either as a result of insanity or some other cause. In *Sullivan v. Dunne*, 198 Cal. 183, 194, 244 P. 343, 347 (1926), the Supreme Court of California stated: "The only thing determined in a proceeding of this kind is that a guardian should be appointed by reason of incompetency. Incompetency is but a preliminary step, but necessary to support the order appointing a guardian." See also *Estate of Hill*, 1 Coffey's Prob. Dec. 380, 387 (1886): "But it is not clear to my mind that 'insane' and 'incompetent' are . . . convertible terms. A person may be incompetent by reason of insanity, or from some other cause . . ."

The California Legislature attempted to eliminate any potential confusion by deleting the words "insane or" from §§ 1460, 1461, 1461.3, 1461.5, & 1470-1472 of the Probate Code. 1976 Cal. Stats., ch. 1357, §§ 5, 6, 8, 9, & 11-13 (effective July 1, 1977). However, in an apparent oversight, the legislature did not delete the words "insane or" in CAL. PROB. CODE § 1462 (West 1956). The oversight is particularly important because § 1462 specifies the criteria the court must find before it may appoint a guardian. Thus, the statute provides in pertinent part:

the Probate Code³⁵ and LPS³⁶ conservatorship provisions, a conservator is appointed for a conservatee³⁷ without an adjudication of incompetency. Probate conservatorships do not require a finding of mental disorder in the proposed conservatee,³⁸ such a finding is, however, a prerequisite to an LPS conservatorship.³⁹

California's guardianship provisions can be traced to the state's first legislative session. Chapter 115 of the laws of 1850 authorized probate judges to appoint a guardian of the person and estate of an individual "incapable of taking care of himself, and managing his property."⁴⁰

The guardianship device remained the exclusive solution to the problem of personal and property management until 1957. Then, at the urging of the State Bar Association,⁴¹ the legislature enacted the Probate Code conservatorship provisions.⁴² The legislature was responding to the concern that the stigma associated with being adjudicated "incompetent" discouraged many elderly or physically or mentally ill people from using the guardianship provisions even though they were unable to conduct their affairs without assistance.⁴³ However, as enacted, the criteria for the appointment of a probate conservator so paralleled the criteria for the appointment of

"If, upon the hearing, it appears to the court that the person in question is insane or incompetent, the court must appoint a guardian of his person and estate, or person or estate."

34. CAL. PROB. CODE § 1462 (West 1956). See note 33 *supra*.

35. *Id.* §§ 1701-2207 (West Supp. 1977), as amended by 1976 Cal. Stats., ch. 1357, §§ 25-35 (effective July 1, 1977).

36. CAL WELF. & INST. CODE §§ 5350-5371 (West Supp. 1977).

37. CAL. PROB. CODE § 1751 (West Supp. 1977), as amended by 1976 Cal. Stats., ch. 1357, § 25 (effective July 1, 1977); CAL. WELF. & INST. CODE § 5350 (West Supp. 1977).

38. CAL. PROB. CODE § 1751 (West Supp. 1976), as amended by 1976 Cal. Stats., ch. 1357, § 25 (effective July 1, 1977). See note 44 *infra*.

39. CAL. WELF. & INST. CODE § 5350 (West Supp. 1977). See text accompanying notes 56-58 *infra*.

40. 1850 Cal. Stats., ch. 29, § 13, at 156-57. The statute has been revised and codified and is currently CAL. PROB. CODE § 1460 (West Supp. 1977), as amended by 1976 Cal. Stats., ch. 1357, § 5 (effective July 1, 1977). See note 44 *infra*. For a discussion of the degree and nature of incompetency authorizing the appointment of guardians in various states, see text and cases collected in Annot., 9 A.L.R.3d 774 (1966).

41. Mull & Farley, *1957 Legislative Program*, 32 J. ST. BAR CAL. 13, 23 (1957).

42. CAL. PROB. CODE §§ 1701-2207 (West Supp. 1977), as amended by 1976 Cal. Stats., ch. 1357, §§ 25-35 (effective July 1, 1977).

43. 1 J. CAL. SEN. 487 (app.) (Reg. Sess. 1957). See also Lord, *Conservatorship vs. Guardianship*, 32 L.A. BAR BULL. 5 (1957); *Selected 1957 Code Legislation*, 32 J. ST. BAR CAL. 501, 585 (1957).

a probate guardian that either could be appointed for a person who was for any cause unable properly to care for himself or his property or who was "likely to be deceived or imposed upon by artful or designing persons."⁴⁴ The similar language in the two statutory schemes caused one California appellate court to conclude that "for all practical purposes a conservator, in the case of adults, is merely a guardian under another name"⁴⁵ One authority cautioned:

This law remains [*sic*] me of the bank clerk who has his salary reduced but was consoled with the title "vice president." If the ward was really smart he might prefer to be called "incompetent" and be protected by the guardianship law rather than be called "conservatee" with less protection for his estate and with greater difficulty of being restored to the management of his own property.⁴⁶

44. At the time the Probate Code conservatorship laws were enacted, the Probate Code guardianship law authorized the appointment of a guardian for an "incompetent person," who was defined as

any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons.

1931 Cal. Stats., ch. 272, § 1460 (current version at CAL. PROB. CODE § 1460 (West Supp. 1977)).

As enacted, the Probate Code conservatorship law authorized the appointment of a conservator for:

any adult person who by reason of advanced age, illness, injury, mental weakness, intemperance, addiction to drugs or other disability, or other cause is unable properly to care for himself or for his property, or who for said causes or for any other cause is likely to be deceived or imposed upon by artful or designing persons, or for whom a guardian could be appointed . . . or who voluntarily requests the same and to the satisfaction of the court establishes good cause therefor.

1957 Cal. Stats., ch. 1902, § 1 (current version at CAL. PROB. CODE § 1751 (West Supp. 1977)).

Both §§ 1460 and 1751 of the Probate Code were amended by 1976 Cal. Stats., ch. 1357 (effective July 1, 1977), and the similarity in criteria for appointment has become even more pronounced. Probate Code § 1460 is amended to authorize the appointment of a guardian for an "incompetent person," defined as "any adult person who, in the case of a guardianship of the person, is unable properly to provide for his own personal needs for physical health, food, clothing or shelter, and in the case of a guardianship of the estate, is substantially unable to manage his own financial resources." 1976 Cal. Stats., ch. 1357, § 5.

Probate Code § 1751 is amended to authorize the appointment of a conservator for

any adult person who, in the case of a conservatorship of the person, is unable properly to provide for his personal needs for physical health, food, clothing or shelter, and, in the case of a conservatorship of the property, is substantially unable to manage his own financial resources, or resist fraud or undue influence or for whom a guardian could be appointed . . . or who voluntarily requests the same and to the satisfaction of the court establishes good cause therefor, or who is an absentee

. . . .
Id. § 25.

45. *Place v. Trent*, 27 Cal. App. 3d 526, 531, 103 Cal. Rptr. 841, 844 (1972), language disapproved, *Board of Regents v. Davis*, 14 Cal. 3d 33, 533 P.2d 1047, 120 Cal. Rptr. 407 (1975).

46. 3 N. CONDEE, CALIFORNIA PRACTICE - PROBATE COURT PRACTICE 315 (2d ed. 1964). The author also stated:

In 1975, the Supreme Court of California distinguished the two statutes and placed restrictions on the power of a probate conservator. In *Board of Regents v. Davis*,⁴⁷ the court stated that through the probate conservatorship law the legislature had attempted to achieve two major objectives. The first was to avoid the stigma of the incompetency label for incompetent individuals. For such cases, "a conservator is merely another linguistic designation for a guardian."⁴⁸ The second objective was to provide the legal protection of conservatorship to people who need such protection but who are not incompetent. The *Davis* court held that because the conservatee had not been adjudicated incompetent,⁴⁹ the imposition of a probate conservatorship did not deprive him of the capacity to contract. Thus, a probate conservatee's pledge of \$150,000 on a matching basis for construction of a stadium for his alma mater was upheld against his conservator's attempt to rescind.

LPS was enacted only ten years after the probate conservatorship laws became effective. Because the criteria for the appointment of a probate conservator include both mental and physical disabilities,⁵⁰ the need for creating a new conservatorship device in LPS is not readily apparent. Research does not disclose a complete explanation. The LPS background document contains 204 pages, but it devotes only four pages to the LPS conservatorship question.⁵¹ The discus-

[T]he new [probate code conservatorship] law permits anything that can be accomplished in a guardianship and goes much further. . . .

The new California statute is in fact a complete modern guardianship law furbished with new nomenclature designed to remove the sting of such words as "incompetent," "guardian," "ward," and "mentally ill." It has eliminated many of the unworkable features of the old law, such as delaying all action until the person to be protected has been personally served with a citation. These changes were hard to obtain piecemeal. It seems quite likely that this new law will eventually be used exclusively and the guardianship section as to incompetents will fall into disuse.

Id. at 315-16.

47. 14 Cal. 3d 33, 533 P.2d 1047, 120 Cal. Rptr. 407 (1975).

48. *Id.* at 38, 533 P.2d at 1051, 120 Cal. Rptr. at 411.

49. The supreme court expressly disapproved the language of the previously decided court of appeal decision, *Place v. Trent*, 27 Cal. App. 3d 526, 103 Cal. Rptr. 841 (1972), that a probate conservatee is necessarily incapable of making a valid contract. The supreme court noted that in an appropriate case a probate conservatee may be adjudicated incompetent "and hence without the capacity to contract by providing in the order appointing a conservator that the conservatee is a person 'for whom a guardian could be appointed' under the Probate Code." *Board of Regents v. Davis*, 14 Cal. 3d 33, 38 n.6, 533 P.2d 1047, 1051 n.6, 120 Cal. Rptr. 407, 411 n.6 (1975).

50. See note 44 *supra*.

51. SUBCOMM. ON MENTAL HEALTH SERVICES, ASSEMBLY INTERIM COMM. ON WAYS AND MEANS, CAL. LEGIS., THE DILEMMA OF MENTAL COMMITMENTS IN CALIFORNIA—A BACKGROUND DOCUMENT 133-37 (1966).

sion clarifies only that the LPS conservatorship was designed to provide continuing assistance in managing the affairs of those gravely disabled patients who need such assistance following treatment during a fourteen-day certification order.⁵²

LPS conservatorships parallel and supplement probate conservatorships. In fact, LPS states that unless otherwise specified, the procedure for establishing, administering, and terminating LPS conservatorships shall be the same as that for probate conservatorships.⁵³ Nevertheless, the LPS conservatorship law establishes new criteria⁵⁴ and procedures for the appointment of conservators, limiting LPS conservatorships to those mentally disordered people who are involuntarily detained on LPS commitment orders at the time the LPS conservatorship process is initiated.⁵⁵

An LPS conservator may be appointed for a person "who is gravely disabled as a result of mental disorder or impairment by chronic alcoholism."⁵⁶ "Gravely disabled" is defined as "a condition in which a person, as a result of a mental disorder,⁵⁷ is unable to provide for his basic personal needs for food, clothing, or shelter."⁵⁸ The LPS

52. *Id.* at 133. See text accompanying note 13 *supra*.

53. CAL. WELF. & INST. CODE § 5350 (West Supp. 1977).

54. *Id.* But see note 44 *supra* for text of 1976 Cal. Stats., ch. 1357, §§ 5 & 25, which amend Probate Code §§ 1460 & 1751 to conform significantly more closely with the criteria for appointment of an LPS conservator.

55. CAL. WELF. & INST. CODE § 5352.5 (West Supp. 1977).

56. *Id.* § 5350.

57. This statute unnecessarily reiterates the requirement of "mental disorder" found in *id.* *Quaere*: Does the definition of "gravely disabled," which requires mental disorder, limit the authority of a court acting pursuant to § 5350 to appoint conservators for people impaired by chronic alcoholism only to those who also have a mental disorder? If so, why is the disjunctive *or* used in § 5350?

58. *Id.* § 5008(h)(1). 1974 Cal. Stats., ch. 1511, § 12, added subdivision 2 to § 5008. The definition of "gravely disabled" was expanded to mean:

(2) A condition in which a person has been found mentally incompetent under Section 1370 of the Penal Code and all of the following facts exist:

(i) The indictment or information pending against the defendant at the time of commitment charges a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person.

(ii) The indictment or information has not been dismissed.

(iii) As a result of mental disorder, the person is unable to understand the nature and purpose of the proceedings taken against him and to assist counsel in the conduct of his defense in a rational manner.

Such expansion of the LPS conservatorship criteria is not warranted. In *Jackson v. Indiana*, 406 U.S. 715 (1972), the Supreme Court held that the mere filing of criminal charges does not justify fewer procedural and substantive protections against indefinite commitment than those generally available to nondefendants. The Court struck down as violative of the equal protection clause an Indiana statute that subjected mentally incompetent criminal defendants to commitment standards more lenient and release standards more stringent than those applicable generally to civil commitment.

California's attempt to create a new category of civilly committable patients—a category into which only mentally incompetent defendants charged with vio-

conservatorship process is initiated by the professional person in charge of an agency providing comprehensive evaluation or of a facility providing intensive treatment.⁵⁹ When the professional determines that a person in his care⁶⁰ meets the statutory criteria and that the person "is unwilling to accept, or incapable of accepting, treatment voluntarily, the professional may recommend conservatorship to the officer providing conservatorship investigation."⁶¹ The conservatorship investigator is required to conduct a comprehensive investigation⁶² and is authorized to petition the superior court for the appointment of a conservator only if he concurs in the professional's recommendation⁶³ and if no suitable alternatives to conservatorship are available.⁶⁴ On the basis of this report or of the affidavit of the professional who recommended conservatorship, the court may issue an ex parte order establishing a temporary conservatorship.⁶⁵ Pending the conservatorship determination, the temporary conservator may detain his conservatee in a facility providing intensive treatment.⁶⁶ Within five days after the date of the petition, the court is required to appoint the public defender or another attorney to represent the proposed conservatee and to conduct a hearing within thirty days of the date of the petition.⁶⁷

An LPS conservator is appointed by the court if the court is satisfied by sufficient evidence of the need for the appointment.⁶⁸ Within

lent crimes can fit—is an obvious attempt to circumvent the requirements of *Jackson* and should not be sanctioned. Proof of the commission of a violent felony—that is, a finding of guilt in a criminal trial—is not, without more, proof of the future dangerousness of the individual. *A fortiori*, proof only of probable cause to believe that the defendant committed a violent felony and an adjudication of mental incompetence to stand trial do not in themselves justify a prediction of future dangerousness and preventive detention of this presumably innocent individual.

59. CAL. WELF. & INST. CODE § 5352 (West Supp. 1977).

60. In 1972, CAL. WELF. & INST. CODE § 5352 (West Supp. 1977) was amended by 1972 Cal. Stats., ch. 692, § 1, to permit the professional to recommend conservatorship for a person who was not an inpatient of the facility if the person has been examined and evaluated.

61. CAL. WELF. & INST. CODE § 5352 (West Supp. 1977).

62. *Id.* § 5354. The investigator's comprehensive written report to the court "shall contain all relevant aspects of the person's medical, psychological, financial, family, vocational and social condition, and shall contain all available information concerning the person's real and personal property." *Id.*

63. *Id.* § 5352.

64. *Id.* § 5354.

65. *Id.* § 5352.1.

66. *Id.* § 5353.

67. *Id.* § 5365.

68. *Id.* § 5352, incorporating by reference CAL. PROB. CODE § 1751 (West Supp. 1977).

five days after the hearing, the conservatee may demand a court or a jury trial on the issue of whether he is gravely disabled.⁶⁹ An LPS conservatorship terminates automatically one year after the appointment of the conservator, unless the conservator petitions for and obtains a court order reappointing him for a succeeding one-year period.⁷⁰

An LPS conservator has all the general powers and certain special powers accorded to guardians and probate conservators.⁷¹ Additionally, the LPS conservator may be granted the right, if specified in the court order, of placing his conservatee in a mental facility⁷² and of requiring him to receive treatment.⁷³ This grant of power to confine and to coerce treatment is unique to the LPS conservator, distinguishing him from probate conservators and guardians.

Statistical evidence supports the conclusion that this conservatorship device is used as an "escape hatch" to prolong institutional confinement of nondangerous people.⁷⁴ The California Department of Health disclosed that in the 1972-1973 fiscal year, 36,133 individuals were detained on seventy-two-hour evaluation holds—of which 6,247 were detained on fourteen-day intensive treatment certifications—of which *only eighteen* were detained for ninety-day post-certification periods because they were found to be imminently dangerous. However, during that year 3,296 individuals were declared "gravely disabled" and became conservatees.⁷⁵ Even more

69. CAL. WELF. & INST. CODE § 5350 (West Supp. 1977).

70. *Id.* § 5361 (West 1972).

71. *Id.* § 5357, incorporating by reference the general powers specified in CAL. PROB. CODE § 1852 (West Supp. 1977) and those additional powers in *id.* § 1853 designated by the court.

72. CAL. WELF. & INST. CODE § 5358 (West Supp. 1977) provides:

A conservator appointed pursuant to this chapter shall have the right, if specified in the court order, to place his conservatee in a medical, psychiatric, nursing, or other state-licensed facility, or a state hospital, county hospital, hospital operated by the Regents of the University of California, a United States government hospital, or other nonmedical facility approved by the State Department of Health or an agency accredited by the State Department of Health.

73. 1976 Cal. Stats., ch. 905, § 2, *amending* CAL. WELF. & INST. CODE § 5358 (West Supp. 1977). For the text of the statute, *see* text accompanying note 98 *infra*.

74. "Since the time constraints [72 hours, 14 days, 90 days] are obviously arbitrary when viewed against the realities of mental illness and the limited service resources, it was inevitable that all the stresses for prolonging confinement would be directed at that one escape hatch [LPS conservatorships]." A. STONE, *supra* note 27, at 64.

75. Data entitled "Involuntary Detentions," prepared by the Program Analysis and Statistics Section, California Department of Health, dated May 31, 1974 (on file with the author). Statistics released for the prior fiscal year (1971-1972) were similar: 33,640 individuals detained on a 72-hour evaluation hold; of whom 5,319 were detained on a 14-day intensive treatment certification. Of the latter, *only 17* were detained for a 90-day postcertification period as imminently

recent data reveal the use of the conservatorship status as a substitute for the ninety-day post-certification hold in state hospitals.⁷⁶ On June 30, 1975, the patient population of the California state mental hospitals consisted of eighty-seven individuals on seventy-two-hour evaluation holds, 337 on fourteen-day intensive treatment certifications, one suicidal patient on a fourteen-day intensive treatment recertification, seven patients on ninety-day post-certifications, one on a subsequent ninety-day post-certification, 282 on temporary LPS conservatorships, and 1,225 on LPS conservatorships.⁷⁷

THE LPS CONSERVATOR'S POWER TO CONFINE AND COERCE TREATMENT:
CIVIL COMMITMENT WITHOUT THE CRUNCH

Historical Development

A guardian of the person has the care and custody of the person of his ward and may establish the ward's residence anywhere in the

dangerous. In the 1971-1972 fiscal year, 2,613 individuals were declared gravely disabled and placed under a conservatorship.

76. Patients committed on 90-day postcertification holds may be detained in community facilities. However, because the postcertification process requires a finding that the person to be confined is imminently dangerous (*see note 15 supra*), one would expect that many, if not most, patients on 90-day holds would be transferred from community treatment centers to the more secure facilities of the state mental hospitals.

77. Data provided by Jerome A. Lackner, M.D., Director, California Department of Health, in response to a letter dated March 1, 1976, from James V. Lowry, M.D., Chairman of the State Hospitals Utilizations Task Force of the California Association for Mental Health (data on file with the author). The data disclosed a state hospital patient population total of 7,011 on June 30, 1975. For the 1974-1975 fiscal year, the data revealed that the state hospitals received 26,747 patients, of whom 13,746 were detained on 72-hour evaluation holds without court order, 16 on 72-hour holds with court order (*see note 12 infra*), 958 on 14-day intensive treatment certifications, three on 14-day intensive treatment recertifications, 18 on 90-day postcertifications, 433 on temporary LPS conservatorships, and 767 on LPS conservatorships.

Statistics for San Diego County contained in data entitled "Involuntary Detentions," prepared by the Program Analysis and Statistics Section, California Department of Health, dated May 31, 1974 (on file with the author), reveal that in fiscal year 1972-1973, there were 1,662 detentions for a 72-hour evaluation, 976 detentions for a 14-day certification, no detentions for a 90-day postcertification, and 209 LPS conservatorships. The statistics for fiscal year 1971-1972 were similar: 1,495 detentions for a 72-hour evaluation, 728 detentions for a 14-day certification, no detentions for a 90-day postcertification, and 162 conservatorships.

The number of LPS conservatorships in San Diego County has risen dramatically in recent years. In the six-month period of July 1 - December 31, 1976, there were 575 LPS conservatorships established. In the first three months of 1977, there were 352 LPS conservatorships established. Quarterly Report on

state.⁷⁸ However, the guardian's power is not absolute. The ward is not his prisoner and may not be constrained without just cause.⁷⁹ For example, a guardian may not order his ward detained in a mental hospital. The civil commitment statutes set forth procedures that must be observed in order to secure institutionalization of any person, even if that person has been adjudicated incompetent and placed under the protection of a guardian.⁸⁰ In 1926, the California Supreme Court carefully distinguished guardianship from civil commitment, stating: "Under guardianship proceedings no purpose of confinement is contemplated. In fact, the adjudication of incompetency . . . would not justify a commitment [of the ward] to a state hospital for the insane. And this would be so even if the court had pronounced him insane."⁸¹

In 1959, two years after the probate conservatorship law became effective, the California Attorney General reiterated this position. He issued a formal opinion stating that the authority of the guardian of the person to place his ward in a mental facility was limited by the specific provisions of the existing civil commitment laws. These statutes did not authorize the "voluntary" admission of a ward by his guardian.⁸² Implicitly, the probate conservator also lacks the authority to compel mental hospitalization of his conservatee. The probate conservator is not statutorily granted greater placement authority than the guardian of the person of an incompetent ward, and the probate conservatee has not even been adjudicated incompetent.

In January, 1975, the Attorney General issued an opinion⁸³ stating that a guardian may not place his ward in a "Long-Term Facility," which was defined as a "medical institution . . . intended primarily for the admission of chronic mentally ill, or mentally disordered or other incompetent persons."⁸⁴ The Attorney General noted that no relevant, substantive change in the provisions governing the guardian's powers had occurred since the 1959 Attorney General's opinion.⁸⁵ LPS, enacted in the interim between the two opinions, was cited to support the Attorney General's conclusion. Because the LPS conservator is given the powers of a guardian, the legislature would

Involuntary Detentions, submitted by San Diego County to California Department of Health, Quarters Ending Sept. 30, 1976, Dec. 31, 1976, Mar. 31, 1977.

78. CAL. PROB. CODE § 1500 (West Supp. 1977).

79. *Browne v. Superior Court*, 16 Cal. 2d 593, 600-01, 107 P.2d 1, 4 (1940).

80. *Sullivan v. Dunne*, 198 Cal. 183, 193-94, 244 P. 343, 347 (1926).

81. *Id.* at 194, 244 P. at 347.

82. 34 OP. CAL. ATT'Y GEN. 313 (1959).

83. 58 OP. CAL. ATT'Y GEN. 50, 58 (1975).

84. CAL. ADMIN. CODE tit. 9, § 23 (repealer filed June 13, 1975, effective 30 days thereafter). "Long-Term Facilities" have been recatalogued as "Skilled Nursing Facilities." CAL. HEALTH & SAFETY CODE § 1250 (West Supp. 1977).

85. 58 OP. CAL. ATT'Y GEN. 50, 59 (1975).

not have expressly and separately conferred the mental facility placement power on the LPS conservator, unless the guardian lacked such authority.⁸⁶ The Attorney General also stated that a ward cannot decide to become a voluntary patient in a mental facility because of the judicial determination of his incompetence involved in establishing the guardianship.⁸⁷

The LPS conservator's authority over his conservatee has not been completely unquestioned. In December, 1975, the Attorney General issued an opinion concluding that an LPS conservator may not consent to medical treatment on behalf of his conservatee unless the conservatee is unable to give informed consent because of his incompetency.⁸⁸ That the Attorney General intended to include psychiatric treatment within the "medical treatment" terminology is evidenced by his footnote statement that the definition of medical treatment "may be very broad."⁸⁹ Only *Winters v. Miller*⁹⁰ was cited as supporting authority. In *Winters* the plaintiff-patient was a practicing Christian Scientist. Over her continued objection, she was given heavy doses of tranquilizers, both orally and intramuscularly, from the time she was admitted until the time she was discharged from Bellevue Hospital.⁹¹

The Attorney General relied on *Board of Regents v. Davis*⁹² to justify his conclusion that the LPS conservatorship adjudication does not, of itself, determine that the conservatee lacks the capacity to withhold his consent to treatment.

A conservatee, like any patient, may rationally understand the nature of the proposed medical treatment, but may refuse such treatment for reasons which a conservator may think absurd. If no hearing is held on the issue of whether the conservatee is competent to give or withhold medical consent, both the conservator and the physician run the risk of forcing medical treatment on a competent conservatee⁹³

Although, as in *Winters*, the right to refuse medical treatment usually has been premised on first amendment religious grounds,⁹⁴

86. *Id.* at 58.

87. *Id.*

88. *Id.* at 849.

89. *Id.* n.2.

90. 446 F.2d 65 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971).

91. *Id.* at 68.

92. 14 Cal. 3d 33, 533 P.2d 1047, 120 Cal. Rptr. 407 (1975). *See text accompanying notes 47-49 supra.*

93. 58 OP. CAL. ATT'Y GEN. 849, 852 (1975).

94. U.S. CONST. amend. I.

the Attorney General asserted a broader constitutional basis for his opinion. “[W]e hold that the Legislature did not intend to deprive a conservatee of his right to self-determination, right to be left alone, and right to bodily integrity, all of which are fundamental rights inhering in the right of privacy under both the federal and state constitutions.”⁹⁵

If the LPS conservator believes his conservatee is incapable of giving or withholding consent to medical treatment, his remedy is to apply to a superior court for an adjudication of incompetency pursuant to the Probate Code.⁹⁶

Until [an LPS] conservatee is found to be incompetent to withhold medical consent, we have nothing more than a difference of opinion between the adult conservatee on the one hand and the conservator and the attending physician on the other. Absent such a finding, the Legislature clearly did not intend to subordinate the opinions of the conservatee to those of the conservator.⁹⁷

Apparently in response to the Attorney General’s opinion, the California Legislature in 1976 amended LPS to expand the conservator’s authority to force treatment on his conservatee.

A conservator shall also have the right, if specified in the court order, to require his conservatee to receive treatment related specifically to remedying or preventing the recurrence of the conservatee’s being gravely disabled, or to require his conservatee to receive other medical treatment unrelated to remedying or preventing the recurrence of the conservatee’s being gravely disabled which is necessary for the treatment of an existing or continuing medical condition.⁹⁸

In another statute,⁹⁹ the legislature clarified that neither an incompetent ward nor a probate conservatee may be placed in a mental health treatment facility against his will.¹⁰⁰ Involuntary civil mental health treatment may be obtained for these individuals only pursuant to LPS—including the LPS conservatorship provisions.

Lack of a Theoretical Foundation

The status of an LPS conservatee is an enigma riddled with inconsistencies. Is the LPS conservatee a voluntary patient? An involuntary patient? Competent? Incompetent? The answer to all questions is “yes.”

95. 58 OP. CAL. ATT’Y GEN. 849, 852 (1975).

96. *Id.* at 850-51.

97. *Id.* at 852.

98. 1976 Cal. Stats., ch. 905, § 2, amending CAL. WELF. & INST. CODE § 5358 (West Supp. 1977).

99. *Id.*, ch. 1357, §§ 14 & 29, amending CAL. PROB. CODE §§ 1500 & 1754 (West Supp. 1977) (effective July 1, 1977).

100. *Quaere*: If a person has been adjudicated mentally incompetent, is it appropriate to consider that he has a “will” and that his will is to be given legal protection to such an extent that it determines the propriety of voluntary mental health treatment?

California statutes provide that a mentally disordered adult may apply for voluntary admission to a mental treatment facility and be admitted into such facility if he is suitable for care and treatment there.¹⁰¹ Application for voluntary admission is made by the person at a time when he is mentally competent to make it,¹⁰² or, if he is an LPS conservatee, by his conservator if his conservator has the court-specified right to place his conservatee in a mental treatment facility. A voluntary patient may leave the facility at any time by giving notice of his desire to leave and completing the usual departure procedures. An LPS conservatee may leave only if notice is given by his conservator.¹⁰³

Although the LPS conservatee is, by statute, a voluntary patient, other California statutes acknowledge that he is, in reality, an involuntary patient, detained in the mental treatment facility because of a decision by his conservator. As mentioned previously, in 1976 the California Legislature enacted statutes declaring that involuntary civil mental health treatment for incompetent wards and probate conservatees may be obtained only through LPS. The statutes enumerated the specific provisions of LPS that were applicable to involuntary hospitalization and included the LPS conservatorship provisions within the prescribed list.¹⁰⁴

Further evidence to demonstrate that an LPS conservatee is viewed as an involuntary patient is presented by the case of *Aden v. Younger*¹⁰⁵ and legislation that followed. In *Aden*, a court of appeal held unconstitutional California's statutes regulating the administration of psychosurgery and electroconvulsive therapy. The court ruled that once the competency of a voluntary patient has been confirmed and the truly voluntary nature of his consent has been determined, the state may not invoke a substitute decisionmaking process. By so doing, the statutes infringed upon the voluntary, competent patient's right to privacy in selecting and consenting to treatment. After this court decision, legislation was enacted articulating new procedures to be followed prior to administering electroconvulsive therapy on voluntary and involuntary patients. In distinguishing

101. CAL. WELF. & INST. CODE §§ 6000 & 6002 (West Supp. 1977).

102. *Id.* § 6000 ("at a time when he is in such condition of mind as to render him competent to make it"); *id.* § 6002 ("who is at the time of making the application mentally competent to make the application").

103. *Id.* §§ 6000 & 6002.

104. 1976 Cal. Stats., ch. 1357, §§ 14 & 29, *amending* CAL. PROB. CODE §§ 1500 & 1754 (West Supp. 1977) (effective July 1, 1977).

105. 57 Cal. App. 3d 662, 129 Cal. Rptr. 535 (1976).

the two types of patients, the new law declares that an involuntary patient includes anyone under guardianship or conservatorship.¹⁰⁶

The LPS conservatorship process may be initiated only if the professional person who recommends that a conservatorship investigation be performed has determined that the proposed conservatee is unwilling *or* unable to accept treatment voluntarily.¹⁰⁷ Can it possibly be asserted that those conservatees who were able but unwilling to accept treatment are voluntary patients?

The establishment of a conservatorship, even an LPS conservatorship, is not an adjudication of incompetency. In *Board of Regents v. Davis*,¹⁰⁸ the California Supreme Court held that absent a specific adjudication of incompetency, the imposition of a probate conservatorship does not deprive the conservatee of contractual capacity. LPS conservatorships are merely one form of conservatorship.¹⁰⁹ Relying on *Davis*, the Attorney General concluded that absent a specific adjudication of incompetency, the imposition of an LPS conservatorship does not deprive the conservatee of his right to refuse treatment.¹¹⁰

Although no statute declares that an LPS conservatee is incompetent solely because he is a conservatee, legislation enacted in 1976 characterizes the LPS conservatee as less competent than an adjudicated incompetent person. The statute declares that an incompetent ward may not be placed in a mental health treatment facility against his will.¹¹¹ However an LPS conservatee may be involuntarily¹¹² confined and treated on the decision of his conservator. Similarly, the incompetent ward's "will" may be disregarded if he becomes an LPS conservatee.

At a time when the law has become increasingly responsive to the need for curtailing involuntary civil commitment of the mentally ill,¹¹³ California's conservatorship law has had an opposite effect.

106. 1976 Cal. Stats., ch. 1109, § 8 (codified at CAL. WELF. & INST. CODE § 5326.7 (West Supp. 1977)).

107. CAL. WELF. & INST. CODE § 5352 (West Supp. 1977).

108. 14 Cal. 3d 33, 533 P.2d 1047, 120 Cal. Rptr. 407 (1975). See text accompanying notes 47-49 *supra*.

109. With certain exceptions, the procedure for establishing, administering, and terminating an LPS conservatorship and the powers accorded an LPS conservator are governed by the Probate Code conservatorship provisions. CAL. WELF. & INST. CODE §§ 5350 & 5357 (West Supp. 1977).

110. 58 OP. CAL. ATT'Y GEN. 849 (1975). See text accompanying notes 88-97 *supra*.

111. 1976 Cal. Stats., ch. 1357, § 14, amending CAL. PROB. CODE § 1500 (West Supp. 1977) (effective July 1, 1977).

112. The statute states that mental health treatment of LPS conservatees is "involuntary." *Id.*

113. Wexler, *Mental Health Law and the Movement Toward Voluntary*

Identifying the LPS conservatee as a voluntary, but involuntary, competent, but incompetent, mental patient has resulted in an expansion of the civil commitment concept. In a typical civil commitment hearing, the court examines the prospective patient's mental condition and determines whether, at the time of the hearing, it meets the statutory criteria for commitment. If it does, the person is confined immediately. Under the LPS conservatorship statutes, the court determines only whether, as a result of mental disorder, the person is unable to provide for his basic personal needs for food, clothing, or shelter.¹¹⁴ This condition of "grave disability" is determined to exist at the time of the court hearing and presumably will continue to exist during the life of the conservatorship. However, the court does not order commitment and, in fact, is not statutorily empowered to do so. The finding of grave disability, in itself, is not a finding of civil commitment. Rather, the finding results merely in the appointment of a conservator.¹¹⁵

All LPS conservators are granted the powers of a guardian.¹¹⁶ Although a guardian is responsible for the care and custody of the person of his ward, he is statutorily prohibited from placing his ward in a mental treatment facility unless he follows the LPS provisions for involuntary commitment.¹¹⁷ This limitation on authority also applies to LPS conservators unless the court order establishing the conservatorship specifically grants the conservator the additional authority to place his conservatee in a mental treatment facility and to require him to receive treatment.¹¹⁸

But what factual finding must be made by the trial court to support the grant of this extraordinary placement power to the LPS conservator? The statute provides no new criteria. In fact, the statute does not even require that the court make any additional determination. Apparently the finding of grave disability, although not statutorily sufficient to warrant the court's commitment of the conservatee, is sufficient to warrant the court's "delegation" of the commitment

Treatment, 62 CALIF. L. REV. 671, 675 (1974). See also *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1193 (1974).

114. CAL. WELF. & INST. CODE §§ 5008(h)(1) & 5350 (West Supp. 1977).

115. *Id.* § 5350.

116. *Id.* § 5357, which incorporates by reference CAL. PROB. CODE §§ 1852 & 1853 (West Supp. 1977), which in turn incorporates by reference CAL. PROB. CODE, §§ 1500-1561 (West Supp. 1977).

117. CAL. PROB. CODE § 1500 (West Supp. 1977), as amended by 1976 Cal. Stats., ch. 1357, § 14 (effective July 1, 1977).

118. CAL. WELF. & INST. CODE § 5358 (West Supp. 1977).

authority to the conservator. The conservator's placement power, if granted by the court order, is plenary. Subject only to his general fiduciary obligations,¹¹⁹ the conservator may exercise it at any time during the life of the conservatorship and for any reason.

The LPS conservatee's statutory protection against improptious granting of the placement authority by the court and improptious exercise of that authority by the conservator is woefully inadequate. The conservatee may demand a jury trial only on the issue of whether he is gravely disabled.¹²⁰ Because of the stigma attached to the status and the possibility of incarceration, appellate court decisions have required that grave disability be established by proof beyond a reasonable doubt¹²¹ and found by a unanimous verdict.¹²² The cases in which these issues are raised are before the California Supreme Court.

At six-month intervals,¹²³ the conservatee may petition for a rehearing on his status as a conservatee¹²⁴ and a hearing to contest the disabilities imposed on him and the powers granted the conservator.¹²⁵ However, the statutes establishing the conservatee's rights to these hearings neither suggest that the court that established the conservatorship is required to make a new factual finding prior to granting the conservator the placement power nor articulate a standard for determining inappropriate exercise of the authority by the conservator. In the absence of legislative or judicial clarification, the conservatee's petition, like the labor of Sisyphus, is apt to be an exercise in futility.

119. *Id.* § 5350, incorporating by reference CAL. PROB. CODE § 1951 (West Supp. 1977).

120. CAL. WELF. & INST. CODE § 5350(d) (West Supp. 1977). The demand for a court or jury trial must be made within five days following the hearing on the conservatorship petition. A demand made before this hearing constitutes a waiver of the hearing. *Id.*

121. *In re Conservatorship of Johnson*, 66 Cal. App. 3d 87, 135 Cal. Rptr. 740, hearing granted, No. 77-43 (Cal. Sup. Ct. Mar. 14, 1977); *In re Conservatorship of Turner*, 66 Cal. App. 3d 391, 136 Cal. Rptr. 64, rehearing granted pending resolution of *In Re Conservatorship of Roulet*, Civ. No. 38400 (Div. 2, Cal. Ct. App. Feb. 8, 1977), motion to vacate rehearing denied, Civ. No. 38400 (Div. 2, Cal. Ct. App. Sept. 19, 1977); *In re Conservatorship of Roulet*, 64 Cal. App. 3d 719, 134 Cal. Rptr. 722 (1976), hearing granted, No. 77-20 (Cal. Sup. Ct. Jan. 31, 1977); *In re Conservatorship of Thorn*, 4 Civ. No. 14737 (unpublished opinion), hearing granted, No. 77-42 (Cal. Sup. Ct. Mar. 14, 1977); *In re Conservatorship of Atkinson*, 4 Civ. No. 14989 (unpublished opinion), hearing granted, No. 77-44 (Cal. Sup. Ct. Mar. 14, 1977).

122. *In re Conservatorship of Turner*, 66 Cal. App. 3d 391, 136 Cal. Rptr. 64, rehearing granted pending resolution of *In Re Conservatorship of Roulet*, Civ. No. 38400 (Div. 2, Cal. Ct. App. Feb. 8, 1977), motion to vacate rehearing denied, Civ. No. 38400 (Div. 2, Cal. Ct. App. Sept. 19, 1977).

123. However, the statutes specifically authorize that a first petition may be filed without the necessity of waiting an initial six-month period from the date of the court order establishing the conservatorship status.

124. CAL. WELF. & INST. CODE § 5364 (West Supp. 1977).

125. *Id.* § 5358.3.

A Proposed Solution

In its dictum, one court of appeal attempted to explain the delegation of placement authority to the conservator by asserting that the finding of grave disability in itself justifies civil commitment.

As an additional safeguard against early placement, however, the [LPS] Act gives the court the authority to delay actual placement in favor of alternative treatment available to the conservator. This corresponds to the procedure in the usual criminal case where the jury determines guilt which justifies incarceration but it remains discretionary with the judge to commit the person, grant probation or impose another penalty. The conservator's decision to place in a particular medical facility compares to the Adult Authority's decision to confine a person committed to it in a particular custodial facility or on parole¹²⁶

The analysis is dubious. Section 12 of the California Penal Code states: "The several sections of this Code which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the Court authorized to pass sentence, to determine and impose the punishment prescribed."¹²⁷ LPS imposes no similar duty on courts to confine gravely disabled conservatees and grants no authority to do so.¹²⁸ In fact, LPS declares: "Mentally disordered persons . . . may no longer be judicially committed."¹²⁹ The courts, lacking the authority to directly commit a gravely disabled person, may not overcome this deficiency indirectly by appointing a conservator and anointing him with authority to do so.¹³⁰

A simplistic way out of the quagmire created by inconsistent legislative provisions is for the courts to construe the LPS conservatorship law as an involuntary civil commitment statute. The committing court could then delegate to the conservator its power to place the

126. *In re Conservatorship of Johnson*, 66 Cal. App. 3d 87, 94-95, 135 Cal. Rptr. 740, 744, *hearing granted*, No. 77-43 (Cal. Sup. Ct. Mar. 14, 1977).

127. CAL. PENAL CODE § 12 (West 1970).

128. LPS declares that its legislative intent is "[t]o end the inappropriate, indefinite, and involuntary commitment of mentally disordered persons." CAL. WELF. & INST. CODE § 5001(a) (West 1972).

129. *Id.* § 5002 (West 1972). LPS explicitly articulates those categories of mentally disordered people who may be judicially committed. Individuals under LPS conservatorship are not included in the listing. *Id.* § 5008.1 (West Supp. 1977).

130. *See In re Michael E.*, 15 Cal. 3d 183, 191 n.11, 538 P.2d 231, 236 n.11, 123 Cal. Rptr. 103, 108 n.11 (1975) (the court expressed a similar thought in ruling that a juvenile court order could not authorize a probation officer who has custody of a minor to commit his ward as a "voluntary" patient in a state hospital).

conservatee and to require him to accept treatment during the life of the conservatorship. The legislature could amend LPS to achieve the same results. To the extent that this solution forces treatment on competent conservatees it would be subject to constitutional attack.¹³¹ However, even if these challenges could be overcome, the solution is undesirable from a policy perspective.

LPS was designed to create both a truly voluntary mental health treatment system for the nondangerous person without resulting stigma or loss of liberty and an involuntary civil commitment system with complete due process protection for the dangerous person.¹³² Neither the existing system of involuntary civil commitment of the nondangerous, gravely disabled conservatee without due process protections nor the statutory modifications suggested above conceivably furthers either societal objective. Under LPS, confinement of the dangerous is limited to ninety-day periods upon a court finding of past dangerous behavior and imminent danger to others.¹³³ Confinement of the nondangerous for one year periods upon a finding of grave disability is absurd.

Individuals found gravely disabled cannot be legislatively homogenized. Some are competent to make treatment decisions. Others are not. Some competent conservatees may be willing to accept treatment voluntarily. Others may not. The conservator's placement power, if it is to exist at all, should be construed judicially or revised legislatively to account for these differences. LPS conservators should be authorized: (1) to place in treatment facilities as voluntary patients only those conservatees who choose to be placed there and who are competent to make the decision and (2) to initiate involuntary civil commitment proceedings for other conservatees when necessary in appropriate cases.¹³⁴ Unless the conservatee is judicially determined to be an imminently dangerous person, involuntary treatment of a gravely disabled person should be limited to the seventeen-day maximum prescribed by LPS—that is, the seventy-two-hour evaluation period plus the fourteen-day intensive treatment period.

131. See text accompanying notes 88-97 & 105 *supra*.

132. SUBCOMM. ON MENTAL HEALTH SERVICES, ASSEMBLY INTERIM COMM. ON WAYS AND MEANS, CAL. LEGIS., THE DILEMMA OF MENTAL COMMITMENTS IN CALIFORNIA—A BACKGROUND DOCUMENT 19-20 (1966). See text accompanying note 6 *supra* for the full quotation expressing these legislative objectives.

133. CAL. WELF. & INST. CODE § 5300 (West 1972).

134. For example, *id.* § 5150 (West Supp. 1977) could be amended to authorize the LPS conservator to initiate a 72-hour treatment and evaluation hold without having to obtain a court order for such evaluation pursuant to *id.* § 5200 (West 1972).

LPS CONSERVATORSHIP LAW IN OPERATION:
THE SAN DIEGO EXPERIENCE

The Consequences of Conservatorship

In the spring of 1975, students in a seminar in law and mental disorder observed the LPS conservatorship proceedings in the San Diego County Superior Court.¹³⁵ The students examined the court files of each case in order to correlate the cases heard with the medical history of each potential conservatee. In this way, a more complete and objective picture of the individual was obtained. Although the data gathered focused primarily on the performance of San Diego attorneys in representing proposed conservatees, the data and anecdotal observations also provide valuable insights into the conservatorship process.

The judgment that a person is gravely disabled and that a conservator must be appointed is an extremely significant decision for the conservatee. Even before a conservatorship is ordered, the mere availability of the conservatorship option may result in substantial intrusion and interference in his life. By statute, the treating physician who believes that a person in his care is gravely disabled may recommend conservatorship only if the person "is unwilling to accept, or incapable of accepting, treatment voluntarily."¹³⁶ The definite impression of many data gatherers is that the conservatorship device is used to avoid the necessity of obtaining consent to treatment from recalcitrant patients. One can only speculate on the number of people who are coerced into accepting "voluntary" treatment by a threat to initiate the conservatorship process if the individual is unwilling to accept treatment.

A temporary conservator, appointed by the ex parte order of the court prior to the conservatorship hearing,¹³⁷ is statutorily required to

determine what arrangements are necessary to provide the person with food, shelter, and care pending the determination of conservatorship. He shall give preference to arrangements which allow the person

135. The study was conducted from February 19, 1975, through April 2, 1975. However, proceedings conducted on March 10, 1975, were not observed by the students or included in the presentation of data. On that date four hearings were scheduled; in three, conservators were appointed; the fourth was continued.

I would like to extend a special note of appreciation and recognition to Mr. Alan Brubaker for his assistance in developing the data-gathering questionnaire and directing the study.

136. CAL. WELF. & INST. CODE § 5352 (West Supp. 1977).

137. *Id.* § 5352.1.

to return to his home, family or friends. *If necessary*, the temporary conservator may require the person to be detained in a facility providing intensive treatment¹³⁸

When the law students examined the court files in the spring of 1975, they discovered a practice that appears contrary to the statutory mandate. In the study group of forty-five individuals under temporary conservatorship, only four were allowed to remain at home. Twenty-four were detained at the county-administered mental hospital (CMH), and the remaining seventeen were placed in nursing homes, board and care homes, or similar institutions.

Another questionable practice concerns the process of selecting conservators. A statute provides that the selection of a conservator shall be subject to the following list of priorities: (1) the nominee of the proposed conservatee; (2) the spouse of the proposed conservatee; (3) an adult child of the proposed conservatee; (4) a parent of the proposed conservatee; (5) a brother or sister of the proposed conservatee; (6) any qualified person or corporation.¹³⁹ However, the statute also provides that the appointment of a conservator is not subject to these priorities if "the officer providing conservatorship investigation recommends otherwise to the superior court."¹⁴⁰ The conservatorship investigator is required by a different statute to "designate the most suitable person . . . to serve as conservator."¹⁴¹

At best the statutory scheme is equivocal. The preferable interpretation would require that the conservatorship investigator adhere to the list of priorities as establishing the legislature's belief about who is probably the most suitable person to serve as conservator in the typical case. The investigator should deviate from the prescribed order of priorities only if evidence justifying such deviation is presented in an individual case.

In San Diego County, the Office of Counselor in Mental Health is designated as the conservatorship investigator. Almost invariably, the conservator recommended by the Counselor, and the conservator appointed by the court, is an institutional conservator—either the Counselor in Mental Health itself or the Department of Public Welfare.¹⁴² In only one case studied was a relative—the conservatee's brother—appointed conservator. Data released by CMH confirms the nonuse of noninstitutional conservators.¹⁴³ During the period of July

138. *Id.* § 5353 (emphasis added).

139. *Id.* § 5350(b), *incorporating by reference the list of priorities in CAL. PROB. CODE* § 1753 (West Supp. 1977).

140. CAL. WELF. & INST. CODE § 5350(b) (West Supp. 1977).

141. *Id.* § 5355.

142. A statute specifically authorizes the same public officer to function as both conservatorship investigator and conservator. *Id.*

143. Data released by W.W. Stadel, M.D., Director of Medical Institutions of San Diego County, in a conference with the author on June 16, 1975.

1, 1974, through April 1, 1975, conservatorships were established for 461 people.¹⁴⁴ The Department of Public Welfare was appointed conservator in 287 cases, the Counselor in Mental Health in 171, and relatives or friends in only three. The Supervising Counselor in Mental Health is unwilling to recommend spouses or relatives as conservators because he believes that they may be a part of the conservatee's problem and that they may lack both the knowledge of appropriate treatment facilities and the ability to effectuate a conservatee's placement in these facilities.¹⁴⁵

Although relatives often contribute to a conservatee's mental problem, it is doubtful that this situation always exists. Surely the appointment of a relative as conservator is appropriate in a significant number of cases. The Counselor in Mental Health's office could, if it wishes, provide necessary assistance regarding placement opportunities to relatives serving as conservators.

The appointment of institutional conservators provides maximum administrative convenience. However, whether the current system provides maximum protection and supervision of conservatees is questionable. A report on LPS conservatorships in Santa Clara County revealed that a majority of conservatees had no personal contact with their conservators, and in fact they did not even know their names.¹⁴⁶ To prevent instances of neglect, the courts in some counties require conservators to meet with their conservatees at least once a week. The Supervising Counselor in Mental Health stated that the imposition of such a requirement on his limited staff in San Diego would create an impossible burden.¹⁴⁷

The conservatorship investigator is obligated by statute to "recommend for or against the imposition of each of the following disabilities on the proposed conservatee: (a) The privilege of possessing a license to operate a motor vehicle. . . . (b) The right to enter into contracts."¹⁴⁸ In all the cases studied, the Counselor in Mental Health

144. During the nine month period, there were 531 applications for LPS conservatorships; of these 70 were denied or still pending at the end of the nine-month period.

145. Statement of H.N. Welborn, Supervising Counselor in Mental Health, in a conference with the author on June 17, 1975.

146. Community of Communities, *An Inquiry into the Operating Procedures, Personal and Social Effects of the Lanterman-Petris-Short Act in Santa Clara County California* (Aug. 1975) (unpublished report on file with the author).

147. Statement of H.N. Welborn, Supervising Counselor in Mental Health, in a conference with the author on June 19, 1975.

148. CAL. WELF. & INST. CODE § 5357 (West Supp. 1977).

recommended imposing these disabilities on conservatees, and his recommendations were always accepted by the court.¹⁴⁹

The conservator may place his conservatee in a mental treatment facility only if the court order establishing the conservatorship specifically grants him the authority to do so.¹⁵⁰ In every case studied, the court granted the conservator this placement power. Almost invariably, the power is exercised.¹⁵¹

Because CMH provides only acute psychiatric inpatient services, the average patient stay in this facility is 7.5 days.¹⁵² Thereafter, patients are discharged to nursing homes or board and care homes. A CMH aftercare team circuit-rides to these facilities, interviewing once every two weeks each patient who has been discharged from CMH.¹⁵³

The primary responsibility of the Aftercare Team is to supervise the patient's medication. The preferred medication is Prolixine [*sic*], an injectible which maintains effective blood levels for two weeks or longer. The description of a typical day of activity by the Aftercare Team to a large board and care home consists of interviews with residents for an average of five minutes each by one of the Team's two psychiatrists, a brief entry made in the patient's folder, and the administration of medication by the nurse.¹⁵⁴

David Owens, M.D., the senior psychiatrist on the CMH aftercare team, estimated that eighty to ninety percent of conservatees placed in aftercare settings received an injection of prolixin every two weeks. He also stated that he sometimes prescribes six to eight times the maximum dosage recommended in the *Physicians' Desk Reference*.¹⁵⁵ To the extent that prolixin or other medication is used as a

149. Subsequent to the completion of the law students' investigation, § 5357 was expanded to require the conservatorship investigator to recommend for or against the imposition of the following disabilities:

(c) The right to refuse or consent to treatment related specifically to the conservatee's being gravely disabled. . . . (d) The right to refuse or consent to other medical treatment unrelated to remedying or preventing the recurrence of the conservatee's being gravely disabled which is necessary for the treatment of an existing or continuing medical condition.

1976 Cal. Stats., ch. 905, § 1, *adding* CAL. WELF. & INST. CODE § 5357(c) & (d) (West Supp. 1977).

150. CAL. WELF. & INST. CODE § 5358 (West Supp. 1977).

151. K. WING, *THE LAW AND THE PUBLIC'S HEALTH* 40 (1976).

152. CALIFORNIA SENATE RULES COMM. & BOARD OF SUPERVISORS OF SAN DIEGO COUNTY, *REPORT OF A JOINT VENTURE: A COMPREHENSIVE REVIEW OF TAX-SUPPORTED HEALTH SERVICES IN SAN DIEGO COUNTY* 57 (Mar. 15, 1975).

153. *Id.* at 61.

154. *Id.* at 62.

155. Statement of David Owens, M.D. to San Diego Mental Health Association Task Force on Conservatorships, Feb. 17, 1975.

The foreword to the PHYSICIANS' DESK REFERENCE states:

The function of the Publisher is the compilation, organization, and distribution of this information. Each product description has been prepared by the manufacturer, and edited and approved by the manufac-

means of control¹⁵⁶ rather than of therapy, the practice infringes on the patient's constitutional rights.¹⁵⁷

The processing of conservatees as a homogeneous group and the activities of the CMH aftercare team can hardly be construed as fulfilling the LPS promise of individualized treatment for the gravely disabled.¹⁵⁸ Traditionally, nursing homes have been organized to treat people convalescing from medical illnesses or to provide aid to those—primarily the elderly—who require help in bathing, dressing, eating, or in using the toilet. Usually nursing home patients are either confined to their beds or their activity patterns are limited. Placing ambulatory mental patients—often young adults—in such a setting may be inappropriate. The mentally ill may be subjected to massive medication to control their activity and sometimes threatening behavior.¹⁵⁹

The problem of young adult conservatees is important, for San Diego LPS conservatorships are not used exclusively, or even primarily, as a protective device for the elderly. In the sixty-three cases studied, twenty individuals (31.7% of the cases) subjected to the conservatorship hearing were under age twenty-six, and thirty-six (57.1% of the cases) were under age thirty-six. Only fifteen (23.8% of the cases) were over age sixty. An independent study of

turer's medical department, medical director, and/or medical consultant.

Products described in PHYSICIANS' DESK REFERENCE which have official package circulars must be in full compliance with Food & Drug Administration regulations pertaining to promotional labeling for prescription drugs. These regulations require that for PDR, "indications, effects, dosages, routes, methods, and frequency and duration of administration, and any relevant warnings, hazards, contraindications, side effects, and precautions" must be the "same in language and emphasis" as the approved labeling for the product. FDA regards the words "same in language and emphasis" as requiring verbatim use of the approved labeling providing such information.

Foreword to PHYSICIANS' DESK REFERENCE (13th ed. 1976).

156. Prolixin has been described as "having an effect equivalent to a 'functional lobotomy.'" S. RUBIN, *THE LAW OF CRIMINAL CORRECTION* 601 n.135 (1973).

157. See *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974); *Knecht v. Gilman*, 488 F.2d 1136 (8th Cir. 1973). See generally Bomstein, *The Forcible Administration of Drugs to Prisoners and Mental Patients*, 9 CLEARINGHOUSE REV. 379 (1975).

158. CAL. WELF. & INST. CODE § 5001 (West 1972):

The provisions of this part shall be construed to promote the legislative intent as follows

(e) To provide individualized treatment, supervision, and placement services by a conservatorship program for gravely disabled persons

159. A. STONE, *supra* note 27, at 93, citing Reich & Siegel, *The Chronically Mentally Ill: Shuffle to Oblivian*, 3 PSYCH. ANNALS 35 (1973).

conservatorships established in fiscal year 1974-1975 confirmed the law students' finding that a majority of San Diego's conservatees are young people.¹⁶⁰

Although treatment practices in the community are of questionable adequacy,¹⁶¹ the basic living conditions in community facilities are undeniably inadequate. In theory, companion legislation to LPS was designed "to create financial incentives under which a local county would want to keep its citizens out of large State institutions while providing alternative outpatient care."¹⁶² However, the attempt to move the locus of mental health treatment to the community encountered major financial difficulties. Only a small portion of the savings realized from the reduction of state hospital patient populations was allocated to local treatment programs.¹⁶³ Additionally, state hospitals did not coordinate with local services to provide continuity of care for institutionalized patients prior to their release.¹⁶⁴ As a result, chronic patients released from state hospitals overwhelmed existing services.¹⁶⁵ Dr. Alan Stone, citing a study on

160. Students pursuing a masters of social work degree collected data on a 10% random sample of 105 cases selected from the 951 conservatorship files in San Diego County during fiscal year 1974-1975. The social work students concluded: "The majority of the conservatees were young, caucasian, unmarried, and with diagnoses of schizophrenia." B. Elliot, J. McKinley, F. Ruddick, M. Thole, S. Woodworth, *Conservatorship in San Diego County, 1974-1975: An Exploratory Descriptive Study of Conservatees and Placement Process* (May 1976) (unpublished masters thesis submitted to School of Social Work, San Diego State University).

161. Serious gaps in service remain. . . . Until these gaps are filled, the county will continue to see high recidivism rates in its inpatient wards (nearly 50% in 1974) and will be subject to criticism that it is creating 'back wards' in the community by over-medicating patients and providing minimal rehabilitative services.

CALIFORNIA SENATE RULES COMM. & BOARD OF SUPERVISORS OF SAN DIEGO COUNTY, REPORT OF A JOINT VENTURE: A COMPREHENSIVE REVIEW OF TAX-SUPPORTED HEALTH SERVICES IN SAN DIEGO COUNTY 69 (Mar. 15, 1975).

162. A. STONE, *supra* note 27, at 60.

163. Statement of California State Senator Nicholas C. Petris, News and Notes Section, 25 HOSPITAL & COMMUNITY PSYCH. 423 (1974). Senator Petris, one of the co-sponsors of LPS, criticized

the state's administration for subverting the intent of the legislation in order to cut state government costs. He warned backers of similar legislation in other states to "make certain that you have local care, that you're not just dumping people into the streets, and that you don't have an executive branch that is going to adopt that kind of policy."

Id. But cf. Chase, *Where Have All the Patients Gone?*, HUMAN BEHAVIOR 14, 20 (Oct. 1973), quoting a report by the California Department of Finance:

Since its [LPS's] implementation on July 1, 1969, the state's appropriation for this program has increased from \$53.5 million to \$103.8 million for fiscal year 1971-72—a 94 percent increase in only three years.

Costs are proliferating due to the autonomy of the local programs and the lack of central control for the Department [of Mental Hygiene].

164. ENKI RESEARCH INSTITUTE, A STUDY OF CALIFORNIA'S NEW MENTAL HEALTH LAW (1969-1971) 117 (1972).

165. Senator Petris claims that 300 or more patients were returned to many

the California experience, concluded that community mental health facilities deteriorated as they confronted increasing numbers of severely disturbed people whom they could not assimilate.¹⁶⁶ A California legislative committee charged that the state discourages operators of private board and care facilities from attempting to create a truly therapeutic environment by reimbursing those operators on only a "bare bones basis."¹⁶⁷

Although California has been a leader in establishing progressive mental health policies, other states are now adopting them. Consequently, California's problems in implementing its policies are no longer unique. The report of the United States Senate Subcommittee on Long-Term Care attests to a nationwide trend of reducing state mental hospital populations. During a five-year period, the average daily census of these institutions declined forty-four percent, from 427,799 patients in 1969 to 237,692 at the end of 1974.¹⁶⁸ This policy of deinstitutionalization has resulted in placing patients "in for-profit nursing homes or boarding homes which are generally ill-equipped to meet their needs."¹⁶⁹

The situation is a national disgrace. The wholesale dumping of the mentally ill into local facilities that are unprepared to meet their needs may mean that the patients are in a worse situation than they were in the state mental hospitals from which they came.¹⁷⁰ In a particularly telling indictment, the Subcommittee states: "The inevitable conclusion is that, at best, the quality of life in boarding homes is marginal; at worst, it is a cruel and intolerable exploitation

counties with only four or five days' notice and with no coordination with local mental health agencies. Statement of California State Senator Nicholas C. Petris, News and Notes Section, 25 HOSPITAL & COMMUNITY PSYCH. 423 (1974).

166. A. STONE, *supra* note 27, at 93-94. Dr. Stone cited a document by Council for Community Action Planning, Inc., *To the Lowest Bidder* (Mimeographed Materials 1971).

167. SENATE SELECT COMM. ON PROPOSED PHASEOUT OF STATE HOSPITAL SERVICES, CAL. LEGIS., FINAL REPORT 17 (1974). Other reports criticizing the quality of local treatment include: CALIFORNIA PUBLIC INTEREST RESEARCH GROUP (CALPIRG), WOULD YOU CALL THIS HOME? 19, 76, 87 (1975) (reporting on nursing homes in San Diego County); ENKI RESEARCH INSTITUTE, A STUDY OF CALIFORNIA'S NEW MENTAL HEALTH LAW (1969-1971) 54-62 (1972) (reporting on Sacramento County); Chase, *Where Have All the Patients Gone?*, HUMAN BEHAVIOR 14, 19 (Oct. 1973) (reporting on board and care facilities).

168. SUBCOMM. ON LONG-TERM CARE OF THE SENATE SPECIAL COMM. ON AGING, 94TH CONG., 1ST SESS., NURSING HOME CARE IN THE UNITED STATES: FAILURE IN PUBLIC POLICY, Supporting Paper No. 7, *The Role of Nursing Homes in Caring for Discharged Mental Patients (and the Birth of a For-Profit Boarding Home Industry)* 718 (Comm. Print 1976).

169. *Id.* at 752.

170. *Id.* at 717.

of helpless human beings, ranking with prisons and concentration camps as a prime example of man's inhumanity to man."¹⁷¹

San Diego's facilities are not immune from criticism. The California Public Interest Research Group conducted a five-month investigation of San Diego county nursing homes and found that "the level of care, attention and dignity received by patients in most homes remains below an acceptable level. In addition, a few homes continue to deliver very poor care and, at present, the system shows no signs of bringing these facilities up to par."¹⁷²

Measuring the Grave Disability of Counsel for the Gravely Disabled

Given the significance of the conservatorship adjudication, the competence of attorneys representing proposed conservatees is a critical issue. The law students who examined conservatorship proceedings in San Diego concluded that these lawyers were inactive and ineffective in representing their clients' interests. The lawyers did not consider themselves advocates in an adversary process in which conservatorship was to be avoided. For example, of the sixty-three court hearings observed during the study period, thirty-six lasted three minutes or less, and only nine hearings lasted nine minutes or longer.¹⁷³ Ironically, the conservatorship hearings were of a shorter average duration than the 4.7 minute average of pre-LPS commitment hearings.¹⁷⁴ The criticism leveled at the commitment hearings is equally applicable to the LPS conservatorship hearings:

One can only wonder what the court experience meant to more than 13,000 Californians committed last year. If the purposes of the system are so confusing to the judges, doctors and lawyers who practice in it, the citizens who come before the court for three or four minutes must be completely bewildered. Many must believe that they are being incarcerated for terrible deeds.¹⁷⁵

171. *Id.* at 753. The Subcommittee reported the following common characteristics of boarding homes:

First, they are owned privately by for-profit operators (few are non-profit or government-owned facilities). Second, they offer little in the way of services or recreation or therapy. Third, the food they offer is generally inadequate in quantity and quality and they often present significant fire safety hazards. Fourth, they are not required to meet any Federal or (with few exceptions) State standards. Fifth, unlike nursing homes which have few and untrained personnel, boarding homes often have no personnel whatsoever.

Id.

172. CALIFORNIA PUBLIC INTEREST RESEARCH GROUP (CALPIRG), *WOULD YOU CALL THIS HOME?* 87 (1975).

173. The length of hearings is reflected in the following table:

<i>Duration in Minutes:</i>	1	2	3	4	5	6	7	8	longer
<i>Number of Cases:</i>	8	19	9	4	6	4	2	2	9

174. SUBCOMM. ON MENTAL HEALTH SERVICES, ASSEMBLY INTERIM COMM. ON WAYS AND MEANS, CAL. LEGIS., *THE DILEMMA OF MENTAL COMMITMENTS IN CALIFORNIA—A BACKGROUND DOCUMENT* 43 (1966).

175. *Id.* at 49.

In fifty-nine of the sixty-three cases, counsel representing proposed conservatees stipulated to the qualifications of the reporting psychiatrist. In fifty-seven of the sixty-three cases, counsel stipulated to the admission of the psychiatric report. In forty-two cases, the proposed conservatee's lawyer asked no questions of the reporting psychiatrist. In most of the remaining twenty-one cases, the lawyer asked only one question.

In only one case did the proposed conservatee's counsel request either the assistance of a psychiatrist or the examination of the proposed conservatee by another psychiatrist. In none of the cases did counsel for the proposed conservatee offer testimony of an independent psychiatrist. In fifty-six cases, no questions were asked of the proposed conservatee. In fifty-eight cases, lawyers neither proposed alternatives to conservatorship nor even suggested that others explore these possibilities.

The conservatee's counsel proposed the appointment of a particular individual as conservator in only five instances. In two cases, counsel requested that conservatorship, if established, last less than the one-year statutory maximum. Only once did a lawyer urge that the proposed conservatee be permitted to retain his driver's license. In no case did the lawyer resist the imposition of contractual disability on his client. Most significantly, in only two cases did the attorney oppose the court's granting the placement power to the conservator. In sum, the court hearing in the typical conservatorship case is a mere formality, rubber-stamping the decisions made earlier by psychiatrists and the conservatorship investigator.

The absence of active counsel at many conservatorship hearings would be acceptable if the lawyer representing the proposed conservatee adequately prepared his case by interviewing his client, his client's relatives, acquaintances, and treating personnel, by observing the psychiatric examinations of his client performed prior to the hearing, by discussing with the Mental Health Counselor the latter's evaluation of the potential conservatee, by investigating alternatives to the appointment of a conservator, and by analyzing the appropriateness of disabilities that may be imposed on the conservatee and powers that may be granted to the conservator if a conservatorship is established.¹⁷⁶ However, observations of the law student researchers

176. A. STONE, *supra* note 27, at 59:

Surely some of the recommended attorneys' functions are social service roles which far transcend what has traditionally been viewed as the attorney's function. But if the attorney does not fill some of these needs,

and others lead to the conclusion that a lack of investigation and preparation prior to the hearing, rather than a reasoned decision not to contest conservatorship made after full preparation of the case, accounts for counsel's inadequate performance at trial. Some lawyers have stated that for \$75—the amount generally allotted by the court to appointed counsel in a conservatorship case¹⁷⁷—they will make one visit to the client in the facility where he is detained, ensure that the papers in the case are in order, and make an appearance at the conservatorship hearing. Many attorneys do even less. Several were observed meeting their clients for the first time at the hearing itself. Court psychiatrists reported that appointed counsel are almost never present at the psychiatric evaluation of their client that is performed a few days prior to the hearing, although the lawyers are permitted to attend. The psychiatrists also stated that most attorneys do not examine the psychiatric report prior to the hearing, despite the fact that the report is almost always entered into evidence upon stipulation and is often the most significant evidence in the case supporting the appointment of a conservator. Some attorneys have expressed the concern that if they “make waves” at the hearing, they will jeopardize their chances for future appointments.

Although some courts require that attorneys undergo special training in order to be eligible for the court's appointment list, the mental health court imposes no such requirements. Any attorney admitted to the bar is eligible to be appointed. On more than one occasion the author observed an inexperienced attorney “learning” what was expected of him merely by attending conservatorship hearings.

Once a conservator has been appointed, the conservatee's counsel usually considers that his job is completed. Lawyers rarely believe that their responsibility to their clients continues during the one-year life of the conservatorship.

The “Choice of Role” Issue: Reality or Rationalization

Professor Fred Cohen described the lawyer representing a proposed patient in a typical civil commitment hearing as “a stranger in

it is unlikely that anyone else will; and without aid of counsel, commitment can easily become a summary or self-fulfilling process.

Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 *TEX. L. REV.* 424, 455 (1966):

In the performance of these prehearing tasks the lawyer becomes a mediator between the socio-medical model and the legal model. He can and should perform the functions lawyers often perform in this mediational role: Interpret specialized information to the client and other participants; advocate and negotiate on behalf of the client; clarify, anticipate, and communicate effects of alternative courses of action; and design and clarify policy. If the attorney fails to perform these functions, in all likelihood they will not be performed by anyone.

177. In 1975, San Diego County paid \$57,975 to lawyers representing proposed

a strange land without benefit of guidebook, map, or dictionary."¹⁷⁸ This characterization is also appropriate for the proposed conservatee's counsel. He too lacks tradition, experience, training, and guidance in the handling of conservatorship cases.¹⁷⁹ The attorney who represents a mentally disturbed client may rely upon one of two role models. The best-interest model holds that the lawyer should determine his client's best interests and pursue those interests in all judicial and nonjudicial proceedings involving his client. The traditional adversarial model holds that the client should make the ultimate decisions in all matters and that the lawyer should advocate the position expressly favored by his client. The existence of these seemingly opposite role models, and the justifications supporting each model,¹⁸⁰ are a major source of a lawyer's uncertainty.

Regardless of which model the lawyer ultimately chooses in representing a mentally disturbed client, he should *begin* the case by assuming the adversarial role. An attorney is more comfortable with this role, for it is the one he is accustomed to using when representing nonmentally disturbed clients. In addition, it is a role that encourages him to thoroughly investigate the case, questioning as only a lawyer can, the assertions, statements, and opinions of all parties and

conservatees in 742 hearings. These attorneys were paid at a base rate of \$75 per case, up from \$50 per case in 1974. Extra payment was allotted when continuances were granted or when attorneys could convince the judge that extra work or extra expenses warranted such payment. Typically an attorney was assigned to two cases at the time his name rotated up for appointment, a process which occurred approximately every six months.

178. Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424, 424 (1966). See also STONE, *supra* note 27, at 233-34; Note, *The Role of Counsel in the Civil Commitment Process: A Theoretical Framework*, 84 YALE L.J. 1540, 1542 n.12 (1975) (citing authorities).

179. Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424, 441 (1966). See also, R. ALLEN, E. FERSTER, & H. WEIHOFEN, MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY 241-42 (1968), for a discussion of deficiencies in the representation of proposed wards in incompetency determinations.

180. *Justifications for the best-interest model:*

1. Even though a mentally disordered client may outwardly resist help, his words might not express his "true" desires because his mental condition affects his judgment. The lawyer's independent judgment must be asserted because the mentally disordered client lacks the capacity to make a rational judgment as to what is his own best interests.

2. Most proceedings involving the mentally disordered client, whether they be civil commitment or conservatorship, are intended to benefit the client. Physicians are acting benevolently to help the client achieve what he would want if only he knew his own best interests.

3. A lawyer who honestly believes that his client needs and would benefit from commitment or conservatorship is doing a disservice to his client if he

witnesses in the proceeding. And finally, in most cases the consequences of establishing a conservatorship are not sufficiently desirable that a client's best interests are served by an attorney who is something other than an adversary opposed to the adjudication of grave disability.¹⁸¹

However, the *real* ethical issue is not: Should I adopt the best-interest model or should I adopt the adversarial model? It is rather: Am I willing to adequately prepare in order to understand and safeguard the interests of my client? Without that adequate preparation no lawyer can competently represent his client.¹⁸²

The problem of inadequate representation of proposed conservatees is more complicated than attorneys' concern over role-model confusion or claims of insufficient compensation in conservatorship cases.¹⁸³ The infusion of additional funds into the current system

advocates a position contrary to his client's own welfare. For example, a lawyer who attempts to defeat a commitment petition for a client with suicidal tendencies or who is too old to care for himself is offering the client not "freedom" but death.

Justifications for the adversarial model:

1. Mental disorder and incompetence are not synonymous. Many persons who suffer a mental disability may nevertheless be entirely competent to make rational decisions concerning their affairs, including the decision of whether to accept or reject treatment for their mental condition.

2. A mentally disordered client's choice to resist treatment is not necessarily a "wrong" choice.

- a. Some mental conditions are not treatable.
- b. There is little hard data supporting the efficacy of psychiatric treatment.
- c. Due to deficiencies in staffing and budget, not all patients get treatment appropriate to their condition.
- d. Institutionalization can reinforce and exacerbate the mental disorder.

3. Even a client's "wrong" choice is not necessarily an irrational choice and should not be subject to interference.

4. The lawyer's role is that of an advocate; the decision as to commitment or conservatorship should be left with the factfinder.

181. Recently, a number of authorities have urged adoption of the adversarial model in civil commitment proceedings. *See, e.g.,* Andalman & Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic, and a Proposal*, 45 MISS. L.J. 43, 44-49 (1974); Blinick, *Mental Disability, Legal Ethics, and Professional Responsibility*, 33 ALB. L. REV. 92, 115, 119 (1968); Litwack, *The Role of Counsel in Civil Commitment Proceedings: Emerging Problems*, 62 CALIF. L. REV. 816, 827-31 (1974); *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1288-91 (1974); Note, *The Role of Counsel in the Civil Commitment Process: A Theoretical Framework*, 84 YALE L.J. 1540, 1548-63 (1975).

182. "A lawyer should represent a client competently." ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 6 (1971). A lawyer is subject to disciplinary action for failing to "handle a legal matter without preparation adequate in the circumstances." *Id.*, DR 6-101. "The Disciplinary Rules . . . are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." *Id.*, Preliminary Statement.

183. "[A]n attorney's duty runs to his client, not the attorney's pocket." *Phillips v. Seely*, 43 Cal. App. 3d 104, 117, 117 Cal. Rptr. 863, 872 (1974).

would not ensure that lawyers have either the necessary knowledge of the system or the willingness to devote adequate resources to these cases. The problem is both educational and motivational. At a minimum, attorneys should receive training in the conservatorship process and be tested on their basic competence in the area. No attorney should be eligible for court appointment without a demonstration of ability.¹⁸⁴ At the hearing, the judge should actively question whether the proposed conservatee's attorney has adequately prepared and presented his case.

Systematic changes should also be considered. Rather than using large numbers of private practitioners who handle conservatorship cases only sporadically, consideration should be given to creating a full-time conservatee attorney service. Experience with the public defender model¹⁸⁵ suggests that a small group of attorneys who only represent proposed conservatees and who have adequate psychiatric and social work services to assist them will develop expertise in the preparation and presentation of their cases and will pursue those cases with appropriate dedication.¹⁸⁶

CONCLUSION

If a foolish consistency is the hobgoblin of little minds, then what is a foolish inconsistency? In the case of LPS conservatorships, the answer is: dangerous.

Lawyers who represent proposed conservatees have a tremendous opportunity to question and challenge the way in which society treats and mistreats these unfortunates and to begin to reform the system. A lawyer who undertakes the representation of these or any mentally disturbed client has the responsibility to make the most of that opportunity. He owes that obligation not only to society or to the legal profession, or even to his client; he also owes that obligation to *himself* as a human being who cares about the troubled people around him.

184. Merely because a county has not established a public defender's office, all members of the bar do not have a right to be appointed to represent indigents at public expense. *Id.* at 115, 117 Cal. Rptr. at 871.

185. See Comment, *Analysis and Comparison of the Assigned Counsel and Public Defender Systems*, 49 N.C.L. REV. 705 (1971).

186. For a more detailed discussion of this model of client representation in civil commitment proceedings, see Andalman & Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic, and a Proposal*, 45 Miss. L.J. 43, 75-91 (1974); Litwack, *The Role of Counsel in Civil Commitment Proceedings: Emerging Problems*, 62 CALIF. L. REV. 816, 819-39 (1974).

