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THERE ARE CRACKS IN THE CIVIL COMMITMENT PROCESS: A PRACTITIONER'S RECOMMENDATIONS TO PATCH THE SYSTEM

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INTRODUCTION

When a dangerously mentally ill person is in need of in-patient psychiatric hospitalization, the apparatus for involuntary civil commitment goes into motion. As a result, a mentally ill person can be confined against his or her will, to remain in the hospital indefinitely. The mentally ill person's freedom depends on the outcome of a single hearing. The civil commitment process raises a number of legal questions: What are the constitutional protections against self-incrimination and the right to remain silent? Who presides over the hearing? Do the rules of evidence apply, specifically hearsay? Is the burden of proof standard by the preponderance of evidence, clear and convincing, or beyond a reasonable doubt? Should the mentally ill person have the right to an independent evaluation of his or her psychiatric condition to contest the view of the hospital psychiatrist? Is the adversarial hearing process best suited to address the need for in-patient hospitalization? Should legal guardians and those designated as power of attorney be given the authority to voluntarily admit a patient into a psychiatric hospital?

This Article will explore the current involuntary civil commitment process for confining a mentally ill and dangerous person in a psychiatric hospital. A criminal defendant is often guaranteed greater protections than a mentally ill person facing involuntary civil

commitment. As a person's freedom is at stake, the serious nature of confinement warrants a critical review of how we address the need for psychiatric treatment of our dangerously mentally ill.

Part I will examine the government's power to confine a mentally ill person and the minimum due process safeguards for involuntary admission. Part II will explore the applicability of the constitutional right to remain silent in civil commitment proceedings. Part III will discuss the authority of mental health professionals to testify at the civil commitment hearings and consider issues of privileged communication. Parts IV and V will look at issues pertaining to the rules of evidence, ranging from the burden of proof to hearsay evidence as heard by the hearing judge. Parts VI and VII will analyze respectively the right to an independent psychiatric evaluation and alternative procedures to resolve the determination of the need for hospitalization. Part VIII will address the rights of others to consent to voluntary hospitalization of a mentally ill person, including guardians, persons with power of attorney, and parents of minor persons. Part IX will make recommendations for improving the involuntary civil confinement process.

This Article provides an analysis of the current system and practical, concrete suggestions for improving the involuntary civil confinement process through the eyes of the attorney representing the mentally ill client facing involuntary psychiatric hospitalization.

I. THE GOVERNMENT'S POWER TO CONFINE, MINIMAL DUE PROCESS PROTECTIONS, AND THE REMAINING VOID OF DUE PROCESS PROTECTIONS

This section outlines a historical perspective of the civil commitment process, including the source of the government's power to confine mentally ill persons, the minimum due process safeguards for the procedure, and the voids that still exist in those safeguards.

A. The Government's Power to Apprehend and Confine a Person with a Mental Illness

Half a century ago, it was recognized that the current treatment of persons with mental illness was inhumane and that change was imperative. State and federal courts, acknowledging that civil commitment was a significant curtailment of liberty interests,[1]

1. Addington v. Texas, 441 U.S. 418 (1979); Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); *In re* Gault, 387 U.S. 1 (1967); Sprecht v. Patterson, 386 U.S. 605 (1967).

established procedural limitations to the previously unchallenged practice of committing mentally ill persons for treatment purposes under *parens patriae* powers.[2] Following landmark Supreme Court decisions,[3] most states adopted a stricter criterion for civil commitment requiring, at a minimum, a showing of "dangerousness."[4]

According to the United States Supreme Court, the State has a legitimate interest under its *parens patriae* power in providing care to the mentally ill who are unable to care for themselves.[5] In addition, the Court recognizes the state has the authority under its police power to protect the community from the dangerously mentally ill.[6] The interplay of these two opposing governmental roles presents conflict when the rights of the involuntarily confined are at stake.

Unfortunately, several decades later attitudes have changed and the pendulum has swung in the opposite direction, lowering the threshold.[7] State legislatures, with the broad support of the medical community,[8] have moved to expand the definition of "dangerousness" back to the dark ages prior to the 1960s. Only eight states still define dangerousness solely as a "danger to self or others."[9] Forty-two states provide criteria broader than dangerousness that often include either a "grave disability"[10] or a "need for treatment"[11] provision.

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2. R. Michael Bagby & Leslie Atkinson, *The Effects of Legislative Reform on Civil Commitment Admission Rates: A Central Analysis,* 6 BEHAV. SCI. & L. 4545–46 (1988).

3. *Addington*, 441 U.S. 418 (1979); O'Connor v. Donaldson, 422 U.S. 563 (1975); Jackson v. Indiana, 406 U.S. 715 (1972).

4. Robert A Brooks, *Psychiatrists' Opinions About Involuntary Civil Commitment: Results of a National Survey*, 35 J. AM. ACAD. PSYCHIATRY & L. 219 (2007).

5. *Addington*, 441 U.S. at 426.

6. *Id.*

7. Donald H. Stone, *Confine is Fine: Have The Non-Dangerous Mentally Ill Lost Their Right to Liberty? An Empirical Study to Unravel the Psychiatrist's Crystal Ball*, 20 VA. J. SOC. POL'Y & L., 323, 325 (2012).

8. Brooks, *supra* note 4.

9. *Improved Treatment Standards*, TREATMENT ADVOCACY CTR., http://www.treatmentadvocacycenter.org/solutions/improved-treatment-standards.

10. *Id.* (stating that grave disability is an additional criterion that allows for commitment where a mentally ill person is unable to care for their basic needs).

11. *Id.* (stating that need for treatment provisions are based on either the person's inability to provide for needed psychiatric care, inability to make an informed medical decision, or need for intervention to prevent further psychiatric or emotional deterioration).

The regressive trend in civil commitment laws requires scrutiny. In most cases, criminal defendants, whom the government has authority to confine via the police power, are afforded greater protections than mentally ill persons facing involuntary civil commitment.

B. Minimal Due Process Protections Afforded by the Supreme Court

The United States Supreme Court articulated in *O'Connor v. Donaldson* that the purpose of involuntary hospitalization is treatment and not mere custodial care or punishment if the patient is not a danger to himself or others.[12] The Court declared that a state cannot constitutionally confine a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.[13] The Court specifically held:

> A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the 'mentally ill' can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.[14]

Thus, the confinement of a non-dangerous person based upon mental illness alone is not constitutionally sufficient.[15]

In the landmark case *Addington v. Texas*, the Supreme Court recognized that civil commitment "constitutes a significant deprivation of liberty"[16] and that mentally ill individuals facing involuntary civil commitment can lead to adverse social consequences.[17] The Court noted the very significant impact an involuntary commitment to a mental hospital would have on the individual by stating:

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12. O'Connor v. Donaldson, 422 U.S. 563, 570 (1975). The Court requires that minimally adequate treatment should be provided.

13. *Id.* at 576.

14. *Id.* at 575.

15. *Id.* The *O'Connor* Court further noted the "important" nature of its holding as one "concerning every man's constitutional right to liberty." *Id.* at 573.

16. Addington v. Texas, 441 U.S. 418, 425 (1979) (citing Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); *In re* Gault, 387 U.S. 1 (1967); Specht v. Patterson, 386 U.S. 605 (1967)).

17. *Id.* at 425–26.

> [I]t is indisputable that involuntary commitment to a mental hospital . . . can engender adverse social consequences to the individual. Whether we label this phenomena "stigma" or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual.[18]

The Court appreciated the individual's interest in the outcome of a civil commitment proceeding is of the weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.[19] The Court held that the proper burden of proof at the civil commitment hearing was a clear and convincing evidence standard of proof,[20] although as will be discussed later, several states laws have applied the more stringent beyond a reasonable doubt standard.[21]

Another significant cornerstone of due process protections for persons facing civil commitment is limiting the length of the stay in the hospital. In *Jackson v. Indiana*,[22] the Court announced its prohibition on indefinite confinement, holding that it violates the Fourteenth Amendment's guarantee of due process.[23] In so holding, the Court imposed a rule of reasonableness, requiring that without a finding of dangerousness, one committed through the civil commitment process could only be held for a reasonable period of time.[24]

C. The Void of Due Process Safeguards in the Civil Commitment Process: *Lessard v. Schmidt*

Lessard v. Schmidt, a landmark mental health decision by a lower federal court, highlighted several due process implications in the context of civil commitments.[25] The United States District Court for the Eastern District of Wisconsin acknowledged that in civil commitment proceedings, the same fundamental liberties are at stake

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18. *Id.*
19. *Id.* at 1810.
20. *Id.* at 1812.
21. *See infra* Part V.
22. Jackson v. Indiana, 406 U.S. 715 (1972)
23. *Id.* at 731.
24. *Id.* at 1855.
25. Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974). The Court addressed other issues including timely notice of petition, notice of right to jury trial, length of detention prior to a hearing, right to counsel, hearsay evidence, as well as the privilege against self-incrimination.

as in criminal cases.[26] The failure to provide due process safeguards against unjustified deprivation of liberty in the context of involuntary civil commitments was of grave concern to the court.[27] The abhorrence to the relaxation of criminal due process standards in the involuntary civil commitment arena is especially important. The court was skeptical of lengthy hospitalization that may greatly increase symptoms of mental illness and make adjustment to society more difficult.[28] It also recognized the enormous and devastating effect on the individual's civil rights, as well as the stigma that accompanies any hospitalization.[29] Furthermore, the court had great concerns for the secondary impacts of civil commitment on the committed individual, ranging from the loss of basic civil rights to the loss of future opportunities.[30]

The *Lessard* court also recognized other significant due process rights, ranging from notice of the commencement of proceedings to the opportunity to be heard at the hearing.[31] Although the *Lessard* decision did not articulate the precise nature of the hearing, it did explain that a mentally ill person is entitled to a preliminary hearing within forty-eight hours of first being detained[32] and a full hearing within ten to fourteen days after their initial detainment.[33]

Involuntary civil commitment hearings require a determination that a mentally ill person is a danger to his or her self or others.[34] The *Lessard* court recognized the difficulty in predicting future conduct and viewed confinement based on such predictions with suspicion.[35] In recognition of this challenge, the Court determined that the state must prove beyond a reasonable doubt all facts necessary to show the individual is mentally ill and dangerous.[36] Civil commitment laws vary among the states with respect to the burden of proof standard, which ranges from clear and convincing evidence to the beyond a

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26. *Id.* at 1084.
27. *Id.*
28. *Id.* at 1087.
29. *Id.* at 1089. The Court noted the job market is better for ex-felons than ex-patients. *Id.*
30. *Id.* at 1090.
31. *Id.*
32. *Id.* at 1091.
33. *Id.* at 1092.
34. *See, e.g.*, N.Y. Ment. Hyg. Law § 9.37(a).
35. *Lessard*, 349 F. Supp. . at 1093.
36. *Id.* at 1095.

reasonable doubt standard.[37] In addition, the court announced the right to counsel for persons facing involuntary civil commitment.[38]

Lessard's declaration of due process protections recognizes the serious implications faced by a person subjected to involuntary civil commitment. As a result, the civil commitment process became remarkably similar to a criminal proceeding through considering the potential loss of liberty as well as the negative impact on one's reputation (i.e., "stigma"). The Fifth Amendment's privilege against self-incrimination[39] afforded in criminal cases[40] was also considered in *Lessard* in terms of its application to civil commitment proceedings.[41] *Lessard* acknowledged that the availability of the privilege does not turn upon the type of proceeding but rather upon the nature of the patient's statement or admission to hospital or police personnel and the exposure that it invites.[42] The privilege may be claimed in civil or administrative proceedings if the content of the statement may be inculpatory.[43] The threat of deprivation of liberty, clearly evident in civil commitment proceedings, was recognized by the court.[44] *Lessard*'s conclusion was to extend the privilege against self-incrimination whenever a person is committed on the basis of his or her statements to a psychiatrist in the absence of a showing that the statements were made with "knowledge" that the individual was not obligated to speak.[45]

There are other instances where the privilege against self-incrimination may come into play, from the initial detention, which often involves the police, to the continued confinement or observation stages[46] in which the mentally ill individual will have frequent conversations with a psychiatrist who may testify at the

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37. *See* MONT. CODE ANN. § 53-21-126 (beyond a reasonable doubt); DEL. CODE ANN. tit. 16, § 5011 (clear and convincing evidence); Tex. Health & Safety Code Ann. § 574.034 (clear and convincing evidence); *In re* Turner, 439 N.E.2d 201 (Ind. 1982) (clear and convincing evidence); Massachusetts v. Nassar, 406 N.E.2d 1286 (1980) (beyond a reasonable doubt).

38. *Lessard*, 349 F. Supp. at 1097.

39. U.S. CONST. AMEND. V.

40. *In re Gault*, 387 U.S. 1 (1967).

41. *Lessard,* 349 F. Supp. at 1100.

42. *Id.*

43. *Id.*

44. *Id.* at 1101. Such is deprivation of liberty if the person is held against his will.

45. *Id.* at 1101. The psychiatrists should inform the patient that he is going to be examined with regard to his mental condition and such statements he makes may be the basis for commitment and that he does not have to speak to the psychiatrist.

46. *See, e.g.*, CODE OF MD. REGULATIONS [hereinafter COMAR] § 10.21.01.07. Initial confinement is an observation status.

pending civil commitment hearing. At the hearing itself, there may be opportunities for the mentally ill person to make statements.[47] At all of these vital stages, the right to the privilege against self-incrimination comes into play. The statements made by an individual at various stages in the civil commitment process—to police at the earliest stages, to psychiatrists and other hospital personnel upon confinement prior to the civil commitment hearing, and, finally, at the hearing itself—all cast into doubt the actual protection against self-incrimination.

The *Lessard* court also considered a challenge to the constitutionality of the civil commitment statute based on the use of hearsay evidence at the commitment hearing.[48] The court appreciated the standard exclusionary rules forbidding the admission of evidence in criminal cases and saw no sound policy reasons for admitting evidence in involuntary civil commitment hearings.[49] This strict adherence to the rules of evidence is applicable to proceedings in which an individual's liberty is in jeopardy.[50] The *Lessard* holding with respect to self-incrimination, as well as hearsay, will be explained further in analyzing current state civil commitment laws.

The *Lessard* decision was ultimately overturned on other grounds and never amounted to binding precedent. However, the court's recognition of serious problems regarding the involuntary civil commitment process in the United States is of extreme importance. Forty-three years after the *Lessard* opinion, most of the same serious problems exist.

The Supreme Court, in *Vitek v. Jones,* recognized the significant loss of liberty involved in an involuntary civil commitment.[51] Other courts have attempted to elevate the rights of the involuntarily committed to that of a criminal defendant. For example, in *Terrace v. Northville*, the Court of Appeals for the Sixth Circuit announced that involuntarily committed psychiatric patients have greater rights under the Fourteenth Amendment than criminals under the Eighth Amendment and, therefore, a person involuntarily committed should be entitled to more considerate treatment in conditions of

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47. *See, e.g.*, S.D. CODIFIED LAWS § 27A-12-3.19 (2014).

48. *Lessard,* 349 F. Supp. at 1102.

49. *Id.* at 1103.

50. *Id.* The *Lessard* Court quotes Justice Brandeis saying, "[e]xperience should teach us to be most on our guard to protect liberty when the government's purposes are beneficial . . . the greatest danger to liberty is insidious encroachment by men of zeal, well-meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928).

51. Vitek v. Jones, 445 U.S. 480, 491-92 (1980).

confinement than criminals whose conditions of confinement are intended as punishment.[52]

Several courts have discussed the rights of the involuntarily committed person, equating those rights to that of the criminal defendant.[53] However, the extent to which the privilege against self-incrimination is applicable is far from clear. Courts should continue to consider the similarities between these two groups and extend the due process protection even further for the mentally ill person facing involuntary hospitalization.

II. THE CONSTITUTIONAL RIGHT TO REMAIN SILENT: DOES IT APPLY TO CIVIL COMMITMENT PROCEEDINGS?

When a mentally ill person is exhibiting dangerous behavior in the community, police are authorized to detain and transport the individual to a hospital for an examination.[54] At the hospital, physicians will conduct an examination to determine if the person poses a danger to him or her self or others as a result of a mental illness and, if so, would require in-patient psychiatric hospitalization.[55] Once hospitalized in the psychiatric facility, the mentally ill person will begin receiving mental health treatment for several days prior to a civil commitment hearing.[56] During the period of time after first being detained, transported, and examined and the treatment commencing, as many as ten or eleven days may pass.[57] This is all time during which the mentally ill individual has the potential to make statements to the police, family members, and/or mental health professionals who may repeat such statements at the civil commitment hearing. These statements may then be used as a basis for confinement.

What are the rights of the mentally ill person to prevent such self-incriminating statements from being used against him or her to prove

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52. Terrance v. Northville Regional Psychiatric Hosp., 286 F.3d 28, 34 (6th Cir. 2002). This is based on the notion that criminals are confined for punishment under the state's police power, whereas the involuntarily committed are confined for *treatment* under the state's *parens patriae* role.

53. *See* Humphrey v. Cady, 405 U.S. 504 (1972); Sprecht v. Patterson, 386 U.S. 605 (1967); Baxtrom v. Herold, 383 U.S. 107 (1966); *In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973).

54. *See, e.g.*, MD. CODE ANN., HEALTH GEN., § 10-622(d), § 10-624.

55. *See, e.g.*, *id.* § 10-616.

56. *See, e.g.*, *id.* § 10-625.

57. *See, e.g.*, *id.* § 10-632(b). The hearing shall be conducted within ten days of initial confinement; in addition, an evaluee may have been detained in an emergency evaluation for up to thirty hours. *See id.* § 10-624(b)(4).

the presence of dangerous behavior? Should the Fifth Amendment privilege against compelled self-incrimination, applicable to criminal proceedings,[58] be extended to involuntary civil commitment hearings? The deprivation of liberty that is present in the criminal context surely extends to person involuntarily confined against their will in a psychiatric hospital.

A. *Miranda* and the Civil Commitment Process

In the context of a custodial police interrogation, *Miranda v. Arizona* and its progeny provide that any statement made in such a context is prohibited from being used against the speaker unless police provided Miranda warnings.[59] In *Miranda*, the Supreme Court evaluated the admissibility of statements obtained from a defendant while in police custody or otherwise deprived of his freedom of action in a significant way.[60] When a mentally ill person is acting in a dangerous way that leads police to believe he or she is in need of psychiatric hospitalization, the person is then taken into police custody, transported against his or her will for a psychiatric evaluation, and is not free to leave.[61] During this period of detention, a mentally ill person may make statements that form the basis of future police testimony that the person poses a danger to one's self or others. Such statements may be incriminating by including admission of criminal wrongdoing.

The *Miranda* Court spoke of the police practice of incommunicado interrogation, which is at odds with one of the United States' most cherished principles: that the individual may not be compelled to incriminate himself.[62] Similarly, in the civil commitment setting, the mentally ill individual is often subject to intimidation and confinement, which, as in *Miranda*, is used to subjugate the individual to the will of his examiner.[63] In this context, the examination would

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58. U.S. CONST. AMEND. V; *see also* Miranda v. Arizona, 384 U.S. 436 (1966).

59. *Miranda*, 384 U.S. at 479. When an individual is taken into custody or deprived of his freedom, *Miranda* mandates that the individual be warned that he has the right to remain silent and anything said can be used against him in court, and that he has the right to be questioned in the presence of an attorney and if he cannot afford an attorney, one will be appointed to him prior to any questioning. *Id.*

60. *Id.* at 445. The Court gave particular note to the fact that the defendant, while in custody, was cut off from the outside world. The nature of this incommunicado environment was the Court's basis for its ultimate finding that custody situations are inherently coercive.

61. *See, e.g.*, MD. CODE ANN., HEALTH GEN., § 10-624.

62. *Miranda*, 384 U.S. at 457.

63. *See id.*

include police, emergency room personnel, and hospital mental health workers. Individuals confined to inpatient psychiatric hospitals face greater deprivation of freedom than those who are incarcerated, as arrestees have diminished liberties but persons civilly committed are outside of the penal authority.

The Court held that the Fifth Amendment privilege extends outside of criminal court proceedings and recognized that it protects persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.[64] As *Miranda* declares, when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is then subjected to questioning, the privilege against compelled self-incrimination is jeopardized.[65] The mentally ill person detained by police and confined in a psychiatric facility too should be extended the *Miranda* protections, including being warned prior to questioning that he has a right to remain silent and anything he says can be used against him in an involuntary civil commitment hearing. The Supreme Court has declared that "[t]he loss of liberty produced by involuntary commitment is more than a loss of freedom from confinement."[66]

The privilege against self-incrimination was expanded in *In re Gault*, where the Supreme Court examined the due process rights of juveniles charged with delinquency.[67] The Court recognized that although the juvenile proceedings were not criminal, the results were the same and determinations of delinquency could lead to commitment in a state institution, which is a deprivation of liberty.[68] Incarceration against one's will has occurred, and whether called criminal or civil, deprivation of liberty has occurred.[69] So, in the civil commitment context, the deprivation of one's freedom has occurred, calling for the Fifth Amendment privilege against self-incrimination to apply. Justice Douglas, in his concurring opinion in *McNeil v. Patuxent Institution Director*, asserted that the Fifth Amendment's privilege against self-incrimination was applicable to commitment proceedings even though they are normally labeled *civil*

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64. *Id.* at 466.
65. *Id.* at 478.
66. Vitek v. Jones, 445 U.S. 480, 492 (1980).
67. 387 U.S. 1 (1967).
68. *Id.* at 49; *see also* French v. Blackburn, 428 F. Supp. 1351 (M.D.N.C 1977).
69. *In re Gault*, 387 U.S. at 50; *see also In re* Helvenston, 658 S.W.2d 99 (Tenn. Ct. App. 1985).

proceedings.[70] When the state asserts that a mentally ill person poses a danger to self or others, the state should be required to prove the need for psychiatric confinement through ways other than the mentally ill person's compelled statements. Observations by other witnesses should form the basis of the state's case for confinement.

B. State Laws on the Right to Remain Silent in the Civil Commitment Setting

Several state legislatures have extended the privilege against compelled self-incrimination beyond the criminal context and into the civil commitment process.[71] For example, in a Pennsylvania hearing on a petition for court-ordered involuntary treatment, a patient shall not be called as a witness without his consent.[72] Alabama civil commitment laws also prohibit a patient from being compelled to testify against his or her self.[73] Other states providing for the right to remain silent in the civil commitment hearing include Alaska, Arkansas, Delaware, Florida, Hawaii, Mississippi, Missouri, Montana, Ohio, South Dakota, Washington, West Virginia, Wisconsin, and Wyoming.[74] These states that provide for the privilege against self-incrimination and the right to remain silent recognize the significant infringement on one's liberty interest caused by involuntary civil commitment.

In contrast, several courts addressing the privilege against self-incrimination and its applicability in the civil commitment context

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70. McNeil v. Patuxent Institution Director, 407 U.S. 254 (1972); *see also* Tyars v. Finner, 518 F. Supp. 502 (C.D. Cal. 1981); Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Haw. 1976); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972).

71. *See* ALA. CODE § 22-52-9; ALASKA STAT. § 47.30.735; ARK. CODE ANN. § 20-47-211; DEL. CODE ANN. tit.16, § 5006; FLA. STAT. ANN. §394.467; HAW. REV. STAT. § 334-60.5; MISS. CODE ANN. § 41-21-73; MO. ANN. STAT. § 632.335; MONT. CODE ANN. § 53-21-115; N.J. STAT. ANN. § 30: 4-27.33; OHIO REV. CODE ANN. § 5122.15; 50 PA. CONS. STAT. ANN. § 7304; S.D. CODIFIED LAWS § 27A-12-3.19; WASH. REV. CODE ANN. § 71.05.360; W. VA. CODE ANN. § 27-5-4; WIS. STAT. ANN. § 51.20; WYO. STAT. ANN. § 25-10-109.

72. 50 PA. CONS. STAT. ANN. § 7304.

73. ALA. CODE § 22-52-9.

74. *See* ALASKA STAT. § 47.30.735; ARK. CODE ANN. § 20-47-211; DEL. CODE ANN. tit.16, § 5006; FLA. STAT. ANN. §394.467; HAW. REV. STAT. § 334-60.5; MISS. CODE ANN. § 41-21-73; MO. ANN. STAT. § 632.335; MONT. CODE ANN. § 53-21-115; N.J. STAT. ANN. § 30: 4-27.33; OHIO REV. CODE ANN. § 5122.15; S.D. CODIFIED LAWS § 27A-12-3.19; WASH. REV. CODE ANN. § 71.05.360; W. VA. CODE ANN. § 27-5-4; WIS. STAT. ANN. § 51.20; WYO. STAT. ANN. § 25-10-109. For state statutes addressing the privilege against self-incrimination, see Appendix A.

have held that the privilege does not apply.[75] Occasionally, the state seeking confinement of a person to a psychiatric hospital will attempt to call the person subject to the involuntary commitment as an adverse witness to prove the need for involuntary hospitalization. The California Court of Appeals held that it was permissible for the hearing court to compel a person facing civil commitment to testify at the commitment hearing, on the basis that the privilege was not extended from the criminal context to the civil commitment context.[76] In Illinois, however, the Appellate Court of Illinois held that the involuntary commitment proceedings do not encompass the right against self-incrimination, permitting one who is subject to such matters to be called as an adverse witness.[77] Moreover, the Supreme Court of Indiana rejected the civil commitment patient's right to remain silent, holding that the privilege against self-incrimination has no applicability in civil commitment proceedings.[78] *Kiritsis* acknowledged the resulting deprivation of liberty but recognized that the legitimate objectives of the statute and interests of the state would be wholly frustrated were individuals permitted to claim the privilege in civil commitment proceedings.[79] Some courts even attempt to explain the authority to call the mentally ill person to testify and be questioned by the judge as analogous to the admissibility of physical evidence as opposed to testimonial evidence at a criminal trial.[80]

The Court of Appeals of Oregon in *Oregon v. Matthews*, although not finding that due process requires a mentally ill person in a civil commitment proceeding be afforded the right to remain silent if his testimony may be used as a basis for confinement, held that one may

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75. Conservatorship of Bones, 189 Cal. App. 3d 1010 (1987); People v. Taylor, 618 P.2d 1127 (Colo. 1980); Matter of Nolan, 384 N.E.2d 134 (Ill. App. Ct. 1978); State *ex rel.* Kiritsis v. Marion Prob. Ct., 381 N.E.2d 1245 (Ind. 1978); Matter of Baker, 324 N.W.2d 91(Mich. Ct. App. 1982); *In re* Field, 412 A.2d 1032 (N.H. 1980); French v. Blackbum, 428 F. Supp. 1351 (M.D.N.C. 1977); Matter of D.J.L., 964 P.2d 983 (Okla. Civ. App. 1998); Matter of Mathews, 613 P.2d 88 (Or. Ct. App. 1980); *In re* Helvenston, 658 S.W.2d 99 (Tenn. Ct. App. 1983); State v. McCarty, 892 A.2d 250 (Vt. 2006).

76. Conservatorship of Bones, 189 Cal. App. 3d 1010 (1987). The state and federal constitutions, according to the Court, do not grant the patient a right not to testify. *See also* People v. Taylor, 618 P.2d 1127 (Colo. 1980).

77. Matter of Nolan, 384 N.E.2d 134 (Ill. App. Ct. 1978).

78. State *ex rel.* Kiritsis v. Marion Prob. Ct., 381 N.E.2d 1245 (Ind. 1978); *see also* French v. Blackbum, 428 F. Supp. 1351 (M.D.N.C. 1977) (rejecting a claim of the protection of the Fifth Amendment in involuntary civil commitment proceedings).

79. State *ex rel.* Kiritsis, 381 N.E.2d at 1247–48.

80. *See* Matter of Baker, 324 N.W.2d 91 (Mich. Ct. App. 1982); Matter of Matthews, 613 P.2d 88 (Or. Ct. App. 1980) (noting that due process does not require the patient be afforded the right to remain silent).

assert his Fifth Amendment privilege whenever his testimony might implicate him in a criminal matter.[81] *Matthews* cited Justice Douglas' concurrence to the Supreme Court case *McNeil v. Patuxent Institution Director*,[82] in which Justice Douglas concluded that the privilege did apply to any statements that might serve as a basis for commitment because there is harm and self-incrimination whenever there is a deprivation of liberty and there is such deprivation if the person is held against his will. A commitment is improper where it is based on statements made to a psychiatrist that lack evidence that such statements were made voluntarily after the individual was given notice that his statements might contribute to his commitment and that he is not obligated to speak.[83]

The *Matthews* Court rationale for not extending the privilege was its conclusion that the best way to ascertain an individual's condition at the civil commitment hearing is to question him and observe his demeanor, making it extremely difficult to commit persons in need of help if they refuse to talk.[84] However, courts would not make such an assertion in a criminal prosecution, making the claim that the defendant's own statements are necessary to incarcerate him. Evidence and testimony forming the basis of civil commitment should rely on observations of others and the acts of the mentally ill — not from that person's statements.

There are instances in which the judge presiding over the commitment hearing directly questions the mentally ill person to decide whether to confine the person to an inpatient psychiatric hospital. In challenging the trial judge calling him to the stand, the respondent facing commitment in *Matter of Baker* unsuccessfully asserted that there was a violation of due process and the Fifth Amendment.[85]

The protection of the right against self-incrimination by statute in some states is in stark contrast to states that refuse to recognize the right against self-incrimination in the civil commitment context by judicial decision.[86] Other state legislatures should draft legislation to incorporate the right to remain silent and the privilege against self-

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81. Oregon v. Matthews, 613 P.2d 88, 90 (Or. App. 1980). However, such is the case in all civil contexts. The privilege applies wherever there is future prosecution or a threat or risk of future prosecution, and the statement reveals inculpatory information.

82. McNeil v. Patuxent Institution Director, 407 U.S. 254 (1972).

83. *Id.*

84. *Id.* at 91.

85. Matter of Baker, 324 N.W.2d 91 (Mich. Ct. App. 1982).

86. *See* Appendix A.

incrimination in civil commitment proceedings. The loss of liberty caused by the impact of a civil commitment decision requires states to act to extend the right against self-incrimination and the right to remain silent to the civil commitment context.

In addition, the mentally ill person is often compelled to submit to a psychiatric evaluation, and the information so obtained is used against him in the civil commitment hearing. [87] In New Hampshire, the state Supreme Court held that the Fifth Amendment privilege against self-incrimination does not protect against giving evidence relating to civil commitment.[88] The Court took a narrow view of the Fifth Amendment privilege and reasoned that the privilege only applies where the evidence elicited would result in a future criminal prosecution.[89] The authority permitting mental health professionals to testify at civil commitment hearings also permits the mental health professional to base such testimony in large part on statements and conversation elicited from the person now subject to an involuntary civil commitment.

III. THE AUTHORITY OF A MENTAL HEALTH PROFESSIONAL TO TESTIFY AT A CIVIL COMMITMENT HEARING: CAN THE PATIENT PREVENT THE INTRODUCTION OF STATEMENTS MADE DURING THE COURSE OF THE PSYCHIATRIC EVALUATION?

As part of a state's civil commitment process, the person subjected to involuntary confinement in a psychiatric hospital will be examined by a psychiatrist, psychologist, or physician to determine the need for forced confinement.[90] Usually, the process starts in an emergency room setting, where the police[91] or the person's family members bring him for an emergency evaluation. At that time, an examination is conducted to determine if the mentally ill person is in need of hospitalization.[92] This exam begins the process in which there are conversations between the patient and physicians, which form the basis for the evidence presented at an involuntary civil commitment hearing.[93] Once admitted to the inpatient hospital, the patient is

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87. *See, e.g.*, MD. CODE ANN., HEALTH GEN. § 10-619.

88. *In re* Field, 412 A.2d 1032 (N.H. 1980).

89. *See id.*

90. *See, e.g.*, 50 PA. CONS. STAT. ANN. § 7302 (providing that a physician of the facility shall examine the patient and determine the need for treatment); *see also* MO. ANN. STAT. § 632.335.

91. *See, e.g.*, OHIO REV. CODE ANN. § 5122.15.

92. *Id.*

93. *See, e.g.*, MD. CODE ANN., HEALTH GEN. § 10-632(e).

examined by a hospital psychiatrist to determine the need for hospitalization.[94] The patient then awaits a civil commitment hearing that takes place in two to ten days.[95] During this time, the patient will undergo daily examinations and interviews with the treating psychiatrist who will present testimony at the civil commitment hearing seeking continued hospitalization. The mentally ill person will have daily contact with mental health professionals who will be offering the patient treatment for his or her mental illness but who will also be providing testimony at the upcoming civil commitment hearing. On the one hand, the psychiatrist and patient will be establishing a trusting and therapeutic relationship, but on the other hand, lingering in the background is the psychiatrist's need to develop evidence to prove the patient is a danger to self or others and in need of hospitalization.

Can the patient prevent the psychiatrist from sharing the communication obtained during the psychiatrist-patient relationship? What privilege might apply to exclude certain testimony that is the subject of the civil commitment hearing?

The Supreme Court first recognized the psychotherapist-patient privilege under Federal Rule of Evidence 501 in *Jaffee v. Redmond*.[96] In *Jaffee* the Court held that confidential communications between psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Federal Rule of Evidence 501.[97] The Court left the specific contours of the privilege up to the lower courts.[98] The general approach is that the privilege is inapplicable to civil commitment proceedings.[99]

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94. *See, e.g.,* MD. CODE ANN., HEALTH GEN. § 10-619.

95. See MISS. CODE ANN. § 41-21-83 (fourteen days); ALASKA STAT. § 47.30.715 (seventy-two hours); ARK. CODE ANN. § 20-47-211 (three days).

96. 518 U.S. 1, 15 (1996).

97. *Id.*; Fed. R. Evid. 501.

98. *In re* Miller, 585 N.E.2d 396, 404 (Ohio 1992) (the psychiatrist testifying at the hearing was the patient's treating physician).

99. *See* Walden Behavioral Care v. K.I., 2014 Mass. App. Div. 1 (2013) (holding that no warning is required as precondition to admissibility of patient-psychotherapist communications at civil commitment hearings, and testimonial privilege for patient-psychotherapist communications does not apply to civil commitment proceedings); *In re* Sandra H., 846 A.2d 513 (N.H. 2004) (holding there was rational basis for treating civil committees and criminal committees differently, thus a statute making waiver of physician-patient privilege automatic for civil committees, and not for criminal committees, did not violate mental health patient's equal protection rights); Matter of T.C.F., 400 N.W.2d 544, 549–550 (Iowa 1987) (holding state statutory privilege inapplicable to involuntary hospitalization proceedings on basis that the statute's terms made it inapplicable to any civil action in which the condition of the person is element of claim or defense); People v. District Court, County of Adams, State of

Some jurisdictions render the privilege inapplicable by statute.[100] In Illinois, a person subjected to an involuntary commitment proceeding must first be notified that statements made to the evaluating practitioner may be used in the commitment hearing; failure to give this warning results in the inadmissibility of the testimony.[101] Other states hold that the privilege is indeed applicable in the context of civil commitments, but it is limited to certain circumstances and does not apply where the testimony is based on information obtained in the course of the commitment evaluations.[102] Ohio is illustrative of this approach.[103]

When a physician testified at a commitment hearing and the subject of the testimony was based on his ten-year relationship with the patient, the Supreme Court of Ohio held that the testimonial privilege was applicable.[104] The Court specifically held that Ohio's statutory physician-patient privilege makes no exception for civil commitment proceedings and that such privilege applies "in the appropriate commitment situation[.]"[105]

Colo., 797 P.2d 1259 (1990) (holding privilege inapplicable where information is obtained in course of evaluating individual who is involuntarily committed); Matter of R., 641 P.2d 704 (Wash. 1982) (holding the physician-patient privilege did not apply in involuntary commitment proceedings where issue was whether further treatment was needed, and where patients had not been told that their psychiatrists were communicating with them solely for treatment purposes); SHIRLEY J. MCAULIFFE, 1 ARIZ. PRAC., LAW OF EVIDENCE § 501:7 (4th ed. 2014) (citing ARIZ. REV. STAT. ANN. §§ 36-3701–36-3717 (2014)). (In Arizona, "the privilege does not apply to evaluation and treatment records sought in a proceeding for the civil commitment of a person pursuant to the Sexually Violent Persons Act. A.R.S. §§ 36-3701 to 36-3717.").

100. California's evidence code contains a provision rending the privilege inapplicable in the context of civil commitments. 29B CAL. EVID. CODE § 1004. In involuntary civil commitment proceedings instituted in Texas, the physician-patient privilege is waived if the state seeks court-ordered treatment or probable cause for involuntary commitment to a mental health institution. TEX. R. EVID. 509(e)(6). However, the privilege applies in certain circumstances. *See* Salas v. State, 592 S.W.2d 653 (Tex. Civ. App. 1979) (holding statute providing physician-patient communications are confidential applies to mental health commitments).

101. Matter of Collins, 429 N.E.2d 531 (Ill. 1981) (holding in involuntary commitment, an examining physician must first personally inform patient of his rights, in absence of which he will not be permitted to testify as to patient's admissions at any subsequent court hearing).

102. *See, e.g.*, People v. District Court, County of Adams, State of Colo., 797 P.2d 1259 (1990).

103. *See In re* Miller, 585 N.E.2d 396, 404 (Ohio 1992).

104. *Id.*

105. *Id.* at 404–05 (noting that a different result may arise if the testimony of the physician was limited to facts learned in the course of evaluating the patient for the present commitment only).

In reaching its holding, the Ohio court noted that the privilege is inapplicable to civil commitment proceedings in many states.[106] The court also noted that the best practice is to have an independent physician examine the patient in conjunction with a civil commitment proceeding.[107] However, in a different case, where the patient did not consult the testifying physician for treatment but instead was "forced to undergo examination and treatment as part of the judicial hospitalization procedures[,]" the privilege is not applicable.[108]

As a reasonable compromise of competing interests, from the patient's right of privacy and confidence in the psychotherapist-patient relationship to the state's obligation to provide treatment for the dangerously mentally ill, the psychiatrist should provide documentation that the patient was advised that any statements made to the psychiatrist during the course of the evaluation or treatment may be used against the person at the civil commitment hearing. Additionally, the patient should be provided with a written statement advising him or her that statements made to the hospital psychiatrist can be repeated at the civil commitment hearing. In the alternative, the psychiatrist should be required to provide written documentation in the medical record that such a disclosure was provided to the patient at the start of their relationship. Without such a finding, the treating psychiatrist should be required to limit testimony of the patient's behavior based exclusively on what was reasonably observed by the psychiatrist and not what was told to him by the patient in confidence.

IV. THE APPLICABILITY OF EVIDENCE RULES AND THE USE OF HEARSAY AT THE COMMITMENT HEARING

It is often said that the rules of evidence at a civil commitment hearing are loosely applied.[109] The most controversial evidentiary issue in administrative adjudications involves the treatment of hearsay.[110] Often testimony presented at the civil commitment hearing relies on declarations of family members, employers,

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106. *Id.* at 404 ("Responding to these and other considerations, a number of states expressly render the privilege inapplicable in civil commitment proceedings. *See, e.g.*, 29B CAL. EVID. CODE § 1004 (1996). Other states reach the same result by providing that the privilege does not apply when a person's mental condition is at issue.").

107. *Id.* at 405.

108. *In re* Winstead, 425 N.E.2d 943, 945 (Ohio 1980).

109. For a table of authority illustrating various states' approaches to the applicability of evidentiary rules to civil commitment hearings, see Appendix B.

110. *See* ARNOLD ROCHVARG, MARYLAND ADMINISTRATIVE LAW (MICPEL 2d. ed. 2007).

neighbors, mental health professionals, police, and other interested individuals who interacted with the mentally ill person prior to the hospital confinement. The state often follows its state's Administrative Procedure Act (APA) in addressing contested cases, including evidentiary issues.[111] The Maryland APA provides that "evidence may not be excluded solely on the basis that it is hearsay."[112] At the civil commitment hearing, the hospital relies heavily on hearsay in presenting evidence on the patient's recent behavior and need for current hospitalization. The decision to commit a patient to a psychiatric hospital must be supported by substantial evidence and must comport with due process. In order to satisfy the substantial evidence test, there must be sufficiently probative and reliable evidence. The "hearsay evidence must demonstrate sufficient reliability and probative value to satisfy the requirement of procedural due process."[113] The significant nature of the matter in dispute, the freedom of the mentally ill person, should raise concerns regarding the reliance on hearsay as the sole basis for the decision to retain the person in a psychiatric hospital.

There are twenty-nine states that have addressed the issue of the applicability of evidentiary rules at the civil commitment hearing.[114] Of those states, nineteen appear to require that the rules of evidence apply during the commitment hearing,[115] six apply the rules of evidence on an explicitly informal basis,[116] and four states have express statutory provisions that provide that the hearing officer is not bound by the rules of evidence.[117] Two states, New Jersey[118] and

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111. *See, e.g.*, MD. CODE ANN. STATE GOV'T § 10-213.

112. *See, e.g.*, *id.*

113. Travers v. Baltimore Police Dep't, 693 A.2d 378 (Mt. Ct. Spec. App. 1997).

114. *See* Appendix B for a table of state law on applicability of the rules of evidence to involuntary commitment hearings.

115. ALA. CODE 1975 § 22-52-9; CONN. GEN. STAT. ANN. § 17A-498; IDAHO CODE § 66-329; KY. REV. STAT. § 202A.076; LA. REV. STAT. ANN. § 28:55; ME. REV. STAT. ANN. TIT. 34-B, § 3864; MISS. CODE ANN. § 41-21-73; MO. ANN. STAT. § 632.335; MONT. CODE ANN. § 53-21-115; NEB. REV. STAT. § 71-955; N.J. STAT. ANN. § 30: 4-27.33; *In re* R.D., 739 A.2d 548 (Pa. Super. 1999); R.I. GEN. LAWS § 40.1-5-8; TEX. HEALTH & SAFETY CODE ANN §574.031; UTAH CODE ANN. § 62A –15– 631; 18 VERMONT STAT. ANN. § 7615; WASH. REV. CODE ANN. § 71.05.310; W. VA. CODE, § 27-5-4; WIS. STAT. ANN. § 51.20.

116. ALASKA STAT. § 47.30.735; IDAHO CODE § 66-329; MO. ANN. STAT. § 632.335; S.C. CODE ANN. § 44-17-570.

117. CAL. WELF. & INST. CODE § 5256.4; IOWA CODE § 229.12 3; KAN. STAT. ANN. § 59-2959; MINN. STAT. ANN. § 253B.07; *In re* Zollicoffer, 598 S.E.2d 696 (N.C. App. 2004).

118. N.J. STAT. ANN. § 30: 4-27.33.

Kentucky,[119] are notable for their express statutory requirements that the same rules of evidence that are applicable in criminal cases apply at the civil commitment hearing.

As part of the psychiatrist's testimony at the civil commitment hearing, information such as the police interaction at the initial incident that led to the present hospitalization, the examination at the emergency room where the patient was initially transported for evaluation, as well as conversations with family members becomes central to the psychiatrist's testimony.[120] The patient who is subject to involuntary hospitalization is denied the opportunity to cross-examine the key individuals, whether the police, emergency room staff, or family members, when the testifying psychiatrist offers statements from said individuals as part of his testimony at the hearing. The right to confront witnesses as provided in the Sixth Amendment of the United States Constitution[121] is denied in the civil commitment arena. In the case of *In re Irwin,* the Court found that the confrontation clause is not applicable in civil commitment proceedings.[122] Due to the serious liberty interests impacted in the civil commitment hearings, it is recommended that the rules of evidence are more strictly followed at civil commitment hearings and that the Confrontation Clause apply. The rampant hearsay offered at civil commitment hearings should be drastically reduced, requiring an overwhelming showing of reliability before such hearsay testimony is considered.

In consideration of the significant deprivation of freedom as well as the stigma associated with an involuntary civil commitment, it is recommended that other states follow the New Jersey and Kentucky approach to the treatment of hearsay and the rules of evidence generally. The confinement against one's will is more akin to the criminal consequences of punishment than to pure treatment, necessitating greater adherence to due process, specifically with the applicability of the rules of evidence. Where other due process protections are severally limited or even completely lacking, at the very least the decision to deprive a person of his freedom should be based on reliable evidence that possesses adequate guarantees of trustworthiness and accuracy.

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119. KY. REV. STAT. § 202A.076.
120. *See In re* Zollicoffer, 598 S.E.2d 696 (N.C. App. 2004).
121. U.S. CONST., AMEND. VI.
122. *In re* Irwin, 529 N.W.2d 366, 377 (Minn. Ct. App. 1995).

V. THE BURDEN OF PROOF STANDARD EMPLOYED IN THE CIVIL COMMITMENT HEARING

In *Addington v. Texas*, the Supreme Court announced the minimum burden of proof in civil commitment hearings as the clear and convincing standard.[123] The Court recognized the adverse social consequences to an individual from an involuntary commitment to a mental hospital in setting a minimum standard above the preponderance of the evidence standard.[124] The Court further held that the precise burden to be used must be equal to or greater than the clear and convincing standard but is a matter of state law.[125] Following the *Addington* decision, several states selected the criminal standard of proof, the beyond a reasonable doubt standard, for civil commitments.[126]

Kentucky requires proof beyond a reasonable doubt for the hospitalization of the mentally ill.[127] In Hawaii, the criteria for whether the person subject to involuntary hospitalization has a mental illness likewise must be proved beyond a reasonable doubt.[128] A third state, Montana, requires proof beyond a reasonable doubt with respect to any physical facts of evidence and clear and convincing evidence as to all other matters.[129] Additionally, like Kentucky, Montana requires the existence of the person's mental disorder to be proved to a reasonable medical certainty.[130]

In addition to these state legislatures enacting the higher standard of proof, at least one state has done the same by judicial measures.[131] In Massachusetts, the court in *Commonwealth v. Nassar* mandated that a mentally ill person shall not be involuntarily committed unless the person's release would create a substantial risk of harm to other persons and that such substantial risk must be proved beyond a reasonable doubt.[132]

The loss of liberty and serious stigma attached to the involuntary civil commitment of a person with mental illness should necessitate

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123. Addington v. Texas, 441 U.S. 418 (1979).

124. *See id.*

125. *Id.* at 443.

126. KY. REV. STAT. § 202A.076(2); MONT. CODE ANN. § 53-21-126; HAW. REV. STAT. § 334-60.3; CAL. WELF. & INST. CODE § 5256.6.

127. KY. REV. STAT. § 202A.076(2).

128. HAW. REV. STAT. § 334-60.3.

129. MONT. CODE ANN. § 53-21-126.

130. *Id.*

131. Com. v. Nassar 406 N.E.2d 1286 (1980).

132. *Id.*

the requirement that all criteria for retention in a psychiatric hospital be proved beyond a reasonable doubt. State legislatures are encouraged to adopt this higher standard as proof, as required in the criminal context.[133]

VI. THE RIGHT TO AN INDEPENDENT PSYCHIATRIC EVALUATION

In a typical civil commitment hearing, testimony regarding the mentally ill person's need for inpatient psychiatric hospitalization is usually provided by the hospital psychiatrist.[134] The testifying psychiatrist is in a unique position, having a current understanding of the person's psychiatric condition and behavior based on being the expert charged with treating the patient.

What is more, courts are extremely deferential to the expertise of the treating psychiatrist, especially on the prediction that the person poses a danger to oneself or others. Occasionally a family member may testify at the civil commitment hearing, describing recent behavior on the part of the mentally ill person that justified the request for hospitalization, although the family member frequently testifies on behalf of the hospital.

The patient's case in chief is usually the testimony of the patient himself. Understanding that the judge may often discredit the testimony of the patient as lacking insight into his illness or view the patient as in denial over his illness, it is likely that judges often receive a distorted picture of the patient's condition. In order to level the playing field and offer an objective perspective on the important issues of whether there is a less restrictive alternative to inpatient hospitalization and whether there is a risk of danger to self or others if the person is released, several states have provided for the right to an independent psychiatric evaluation.[135]

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133. For a table of current state laws regarding the burden of proof applicable to an involuntary civil commitment hearing, see Appendix C.

134. *See e.g.,* MD. CODE ANN., HEALTH GEN. § 10-619.

135. ARIZ. REV. STAT. § 36-538; N.D. CENT. CODE. ANN. § 25-03.1-02; ALASKA STAT. § 47.30.745; MICH. COMP. LAWS ANN. § 330.1463; MASS. GEN. LAW. ANN. 123 § 5; COLO. REV. STAT. § 27-65-127; N.M. STAT. ANN. § 43-1-11; DEL. CODE ANN. tit. 16, § 5007; FLA. STAT. ANN. §394.467; R.I. GEN. LAWS § 40.1-5-8; 405 ILL. COMP. STAT. § 5/3-804; LA. REV. STAT. ANN. § 28:54; ME. REV. STAT. ANN. Tit. 34-B, § 3864; MINN. STAT. ANN. § 253B.07; MONT. CODE ANN. § 53-21-118; NEB. REV. STAT. § 71-908; OHIO REV. CODE ANN. § 5122.15; ORE. REV. STAT. § 426.110; S.C. CODE ANN. § 44-17-530; S.D. CODIFIED LAWS § 27A-12-3.14; 18 Vermont Stat. Ann. §§ 7113, 7114; WASH. REV. CODE ANN. § 71.05.360; W. VA. CODE § 27-5-4; WIS. STAT. ANN. § 51.20.

In Florida and Texas the court may order an independent evaluation if the evaluation will assist the fact finder.[136] Illinois and Michigan also provide for the right to an independent clinical evaluation at public expense for indigent individuals.[137] Several states permit the selection of the independent evaluator to be a person of the mentally ill person's own choice.[138]

The opportunity to receive an independent evaluation to counter the testimony of the hospital's treating psychiatrist is imperative. The independent evaluator's ability to attend and testify at the civil commitment hearing is a significant benefit to the patient, resulting in the presentation of alternatives to inpatient hospitalization, in addition to a different perspective of the mentally ill person's dangerousness.[139] The civil commitment hearing, thus, begins to conform to the standards of due process when the judge hears opinion testimony from two psychiatrists who offer their perspective on the need, or not, for inpatient psychiatric hospitalization.

It is strongly recommended that all states provide the right to an independent psychiatric evaluation. These evaluations should be free of charge for indigent persons, and the evaluator should be able to testify at the civil commitment hearing. It is also encouraged that the independent psychiatrist be permitted to observe the mentally ill person in the hospital setting for a reasonable period of time to be in the best position to respond to the opinion of the hospital psychiatrist, whose testimony at the hearing is generally to advocate for in-patient hospitalization.

VII. ALTERNATIVES TO THE ADVERSARIAL CIVIL COMMITMENT HEARING

The current approach to addressing the involuntary civil commitment of a mentally ill person is through an adversarial hearing before a judge. The mentally ill person is represented by counsel, and the state has its representative at the hearing.[140] The trier of fact will hear testimony and evidence and make a determination on whether or not to confine the mentally ill person in a psychiatric hospital.

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136. FLA. STAT. ANN. § 394.467(6)(a)(2); TEX. HEALTH & SAFETY CODE ANN. § 574.010.

137. 405 ILL. COMP. STAT. § 5/3-804; MICH. COMP. LAWS ANN. § 330.1463.

138. *See, e.g.*, MONT. CODE ANN. § 53-21-118.

139. For a complete state by state listing of the right to independent evaluations, see Appendix D.

140. *See, e.g.*, FLA. STAT. ANN. § 394.467(3).

Alternatives to the adversarial model are hard to find. Mediation, however, is rarely utilized. Is it the unequal bargaining position between the hospital and the patient that necessitates an adversarial proceeding over mediation? Or is there a belief that there is not a workable compromise available? Either you are confined in a hospital setting for an indefinite period of time or you are not. Should we take a closer look at alternatives to the current civil commitment hearing that may result in better outcomes for people with mental illness?

Mediation involves a neutral third party assisting conflicted parties, the patient and the hospital, by expanding communication between said parties. Often, there is a conflict over the length of stay in the hospital, whereby a patient may feel more comfortable with a fixed end day while the hospital may prefer an open-ended discharge day. Mediation may be able to facilitate discussion on the length of the hospital stay, which might also include day passes to leave the hospital temporarily.[141]

Another source of conflict may involve the specific psychotropic medication being prescribed. The mediation may offer a better setting to reach consensus on the specific medication, explaining the purpose, benefits, and side effects, as well as possible alternatives. Rather than leaving the specific medication regiment in the hands of the treating psychiatrist, the mediator may be able to propose certain medication approaches that lead a patient to accept his or her treatment options voluntarily, rather than being coerced into accepting them.[142]

Furthermore, mediation may be capable of offering alternatives to the involuntary hospitalization option, such as discharge to a less restrictive setting or a postponement or delay to more fully explore alternatives. The hospital psychiatrist may be more inclined to accept discharge to a less restrictive setting if the mediation can encourage dialogue surrounding an out-patient plan, including housing and treatment. "Mediation may provide an opportunity for people with

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141. *See* Robert Rubinson, *Client Counseling, Mediation and Alternative Narratives of Dispute Resolution*, 10 CLINICAL L. REV. 833, 837 (2004) (discussing benefits of mediation).

142. For example, the patient may prefer a specific medication among medications of the same class due to side-effects. At mediation, the exact medications, or choices of medications, may be stipulated.

mental illness to fashion the appropriate treatment for their needs without undergoing involuntary confinement."[143]

It is encouraged that, prior to the involuntary civil commitment hearing being conducted, an offer should be made to explore mediation as an alternative to addressing the treatment needs of a mentally ill person.

VIII. OTHER THAN THE MENTALLY ILL PERSON, WHO SHOULD BE PERMITTED TO CONSENT TO IN-PATIENT TREATMENT?: GUARDIAN, POWER OF ATTORNEY OR PARENT

Should a legal guardian be permitted to voluntarily admit a mentally ill person to a psychiatric hospital?[144] What about a person with a power of attorney voluntarily admitting a person under her care? Should a person be permitted to draft an advance directive relating to mental health services for himself?

Most states provide for the admission of an individual to a psychiatric hospital through the voluntary admission process.[145] Maryland, for example, requires the patient to meet five criteria: (1) the individual has a mental disorder; (2) the mental disorder is susceptible to care or treatment; (3) the individual understands the nature of the request for admission; (4) the individual is able to give continuous consent to retention in the facility; and (5) the individual is able to ask for release.[146]

In the context of a third party seeking voluntary admission of a mentally ill person, the third party is not bound by these statutory considerations, which serve as important safeguards for the mentally ill person. When a substitute decision maker, such as a guardian or person with a power of attorney or durable power of attorney through a living will, makes the decision to seek voluntary admission of the mentally ill person on whose behalf they act, the voluntary admission process is compromised. Moreover, while there may be benefits of voluntary admission over involuntary admission, such as less stigma

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143. Henry Chen, *Current Development 2005-2006: The Mediation Approach: Representing Clients with Mental Illness in Civil Commitment* 19 GEO. J. LEGAL ETHICS 599, 612 (2006).

144. For a table of authority regarding a guardian's ability to make mental health care decisions for his or her ward, see Appendix E.

145. *See, e.g.*, MINN. STAT. ANN. § 253B.04.

146. MD. COD ANN., HEALTH GEN. § 10-609(c).

and more cooperation between the patient and the hospital, there is a clear lack of judicial or attorney oversight.[147]

The requirement that the individual involved in the voluntary admission must understand the nature of the request for admission or be able to give continuous assent to retention by the facility is often ignored when a hospital accepts the request by a third-party decision maker.

There are some states that recognize guardians who are authorized to make decisions for the health care of an individual when the individual is incapable of making an informed decision.[148] However, in Maryland, the Health Care Decision Act expressly forbids a surrogate from authorizing treatment for a mental disorder.[149]

The Uniform Guardianship and Protective Proceedings Act, followed by thirty states,[150] prohibits guardians from committing an individual to a mental health facility except in accordance with the state's procedure for involuntary civil commitment.[151] Persons with a power of attorney, who are authorized to make hospital and personal decisions, might also be authorized by the power of attorney to make the choice to voluntarily admit the individual under their care. [152] When the person with the power of attorney seeks out a voluntary admission of the mentally ill individual to a psychiatric hospital, but such admission is opposed by the mentally ill individual, the state

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147. *See* Donald Stone, *The Benefits of Voluntary Inpatient Psychiatric Hospitalization: Myth or Reality?*, 9 BOS. U. PUB. INT. L.J. 25 (1999).

148. MD. CODE ANN., HEALTH GEN. §-605(a)(2) surrogates priority are guardians if appointed spouse or domestic partner, adult child, parent, sibling of the patient or friend or other relative.

149. MD. CODE ANN., HEALTH GEN. §-605(d).

150. ALASKA STAT. § 13.26.150; ARIZ. REV. STAT. § 14-5312.01; ARK. CODE ANN. § 28-65-303; CAL. PROB. CODE § 2356; COLO. REV. STAT. ANN. § 15-14-316; CONN. GEN. STAT. ANN. § 45A- 656; DEL. CODE ANN. TIT. 12, § 3922; D.C. CODE ANN. § 21-2047.01; FLA. STAT. ANN. § 744.3215; HAW. REV. STAT. § 560:5-316; 755 ILL. COMP. STAT. § 5/11A-17; KAN. STAT. ANN. § 59-3075; LA. CODE CIV. PROC. ANN. ART. 4566; MD. CODE ANN., EST. & TRUSTS § 708; MASS. GEN. LAWS ANN. CH. 190B, § 5-309; MINN. STAT. ANN. § 524.5-315; MO. ANN. STAT. § 475.120; MONT. CODE ANN. § 72-5-322; N.H. REV. STAT. ANN. § 464-A:25; N.J. STAT. ANN. § 3B:12-56; N.Y. MENTAL HYGIENE LAW § 81.22; N.D. CENT. CODE ANN. § 30.1-28-12 (5-312); OKLA. STAT. ANN. TIT. 30, § 3-119; OR. REV. STAT. § 125.320; 20 PA. CONS. STAT. ANN. § 5521; TEX. EST. CODE § 1151.053; VT. STAT. ANN. TIT. 14, § 3074; WASH. REV. CODE ANN. § 11.92.043; WIS. STAT. ANN. § 54.25; WYO. STAT. ANN. § 3-2-202. *See also* Hawaii, Minnesota, and New Jersey.

151. Karna Sandler, *A Guardian's Health Care Decision-Making Authority: Statutory Restrictions*, 35 BIFOCAL 106, 107 (2014).

152. *See* ME. REV. STAT. ANN. Tit. 18-A, § 5-312 (providing that guardian "may place the ward in any hospital or other institution for care in the same manner as otherwise provided by law.").

should utilize its involuntary civil commitment process rather than the voluntary admission process. States should be prohibited from allowing a person with power of attorney from seeking voluntary admission of a mentally ill person under his or her care when opposed by the mentally ill person, as this admission is clearly not voluntary.

Another mechanism for circumventing the involuntary admission process is through the use of advance directives. In Maryland, the Health Care Decision Act permits an individual to create an advance directive[153] for mental health services.[154] The advance directive takes effect upon a finding by two physicians that the person is incapable of making an informed decision about treatment.[155] When the individual has expressed disagreement with the action of seeking voluntary admission to a psychiatric hospital, the hospital should proceed through the state's involuntary admission process.[156]

When the mentally ill individual has expressed no opinion as to the voluntary admission to a psychiatric hospital requested by a person designated with authority under the directive, hospitals are often in a dilemma as far as the validity of their authority to proceed with a voluntary hospital admission. In *Cohen v. Bolduc*, the Supreme Court of Massachusetts declared that absent an express limitation, an agent is authorized to endorse a voluntary admission on behalf of an individual in situations where he does not object to treatment.[157] The court authorized the power to voluntarily admit the mentally ill person to a mental health facility.[158] The Court reasoned that permitting a guardian to consent to admission ensured respect for the patient's autonomy insofar as it honors the patient's previous decision. However, the Court failed to recognize the potential that a patient could change his or her mind and no longer wishes to authorize inpatient hospitalization.[159] Moreover, authorizing

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153. ADVANCE DIRECTIVE, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "advance directive" as "[a] document that takes effect upon one's incompetency and designates a surrogate decision-maker for healthcare matters").

154. MD. CODE ANN., HEALTH GEN. § 5-602.1 (2015). Such directives may provide for various specifications, including the designation of an agent to make mental health services decisions, the identification of a mental health facility to provide services, preferred medications, and notification to third parties. *Id.*

155. *Id.*

156. MD. CODE ANN., HEALTH GEN. § 5-611(e)(2); *see also* 91 Md. Op. Att'y Gen. 3 (2006) (advocating to prohibit an application for voluntary admission if the patient "has expressed disagreement with the action").

157. Cohen v. Bolduc, 760 N.E.2d 714 (Mass. 2002). For a comprehensive education of state guardianship laws, see Appendix E.

158. *Id.* at 719.

159. *Id.* at 722.

substitute decision makers to consent to such admissions bypasses due process to ensure that the patient is truly incompetent to make the decision for his or her self. Several states have prohibited the use of advance directives for voluntary admission.[160]

With the variation of state approaches regarding the authority of an advance directive with respect to voluntary psychiatric hospital admission, there is a need for a more thoughtful, unified approach. In situations where the mentally ill person has expressed opposition to a voluntary admission, the state should be required to proceed through the involuntary admission process. When the person subject to the voluntary admission has expressed no opinion, the designated agent should be permitted to proceed with the voluntary hospitalization subject to specific mandatory requirements. First, an attorney should be appointed to represent the interests of the mentally ill person. The hospital should evaluate its ability to provide inpatient treatment. Second, a judge should review the case to determine if the mentally ill person is in favor of or opposed to the voluntary admission, determine if the person would benefit from hospitalization, and limit the inpatient admission to thirty days. If an extension beyond thirty days is sought, a second judicial review should be required, with the patient again represented by counsel.

With the increase in advance directives that include mental health services decisions, states should require a judicial review and scrutiny of the voluntary admission processes. In those states that permit advance directives to include inpatient mental health hospitalization, the requirement of judicial review will ensure the interests of the mentally ill person are protected but will still permit voluntary hospitalization when necessary and appropriate.

IX. RECOMMENDATIONS TO REPAIR THE BROKEN INVOLUNTARY CIVIL COMMITMENT PROCESS

Recognizing the liberty interests at stake in civil commitment decisions, it is crucial that our state commitment laws reflect the paramount imperative that the due process rights of mentally ill persons are protected. For individuals with mental illness who pose a danger to themselves or others and are in need of treatment, the

160. Alabama (ALA. CODE 1975 § 26-1-2); California (CAL. PROBATE CODE § 4682); Florida (FLA. STAT. ANN. § 765.113); Georgia (GA. CODE ANN. § 31-32-7); Minnesota (MINN. STAT. ANN. § 253B.03); Nevada (N.R.S. 162A.700); New Hampshire (N.H. REV. STAT. § 137-J:5); Texas (V.T.C.A., CIVIL PRACTICE & REMEDIES CODE § 137.001); Wisconsin (WIS. STAT. ANN. § 155.01) and Wyoming (WYO. STAT. ANN. § 35-22-302).

challenge is to furnish the necessary care while protecting their constitutional right to be treated in a humane setting with the due process protections we afford those who are confined against their will.

The following are recommendations to guide state legislatures in developing and implementing an enlightened, comprehensive, and fair involuntary civil commitment statute for the mentally ill citizens facing involuntary confinement.

1. Provide that all persons facing civil commitment are entitled to the right to remain silent.

2. Extend the applicability of the *Miranda* warning rights to police involved in the civil commitment patient

3. Provide that all persons facing civil commitment are entitled to the right against self-incrimination insofar as they may refuse to testify at the hearing.

4. Provide that mentally ill persons are entitled to the privilege of confidentiality between psychiatrist and patient, extending such privilege to civil commitment hearings.

5. Require the burden of proof in involuntary civil commitment hearings to be the beyond a reasonable doubt standard.

6. Require the formal rules of evidence to apply to the civil commitment hearings, including the rule against hearsay.

7. Provide all persons facing involuntary civil commitment hearings a right to an independent psychiatric evaluation and at state expense if indigent.

8. Offer the option of mediation as an alternative dispute resolution to the contested involuntary commitment hearing.

9. Require a judge to review all voluntary admissions to an inpatient psychiatric hospital, including those sought by the patient, guardian, or health care agent.

The involuntary civil commitment process is under great scrutiny today, with some seeking greater protection while others are seeking a relaxation of rights afforded in the adversarial system. With significant media coverage of persons with mental illness involved in recent tragedies, from the Virginia Tech massacre[161] to the Aurora, Colorado, movie theater shootings,[162] there is a call for loosening the procedures for committing a dangerously mentally ill person to a

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161. *See Virginia Tech Shooting Fast Facts,* CNN (Apr. 13, 2015, 12:03 PM), http://www.cnn.com /2013/10/31/us/virginia-tech-shootings-fast-facts/.

162. *See Aurora Shooting,* HUFFINGTON POST http://www.huffingtonpost.com/news/aurora-shooting/ (last visited Sept. 28, 2015).

psychiatric hospital. Clearly, there is a need for greater outpatient mental health treatment options, as well as suitable housing arrangements for persons with mental illness. However, to reduce the protections for the mentally ill person facing involuntary civil commitment, or to make the process more convenient for the state, is both short-sighted and counterproductive. Moreover, it is a violation of a person's liberty. We, as a society, should provide greater protections to the mentally ill, ensuring that involuntary inpatient hospitalization is truly a last resort when all less restrictive forms of intervention are either inappropriate or unavailable.

APPENDIX A: RIGHTS TO REMAIN SILENT, AGAINST COMPELLED TESTIMONY, OR AGAINST SELF-INCRIMINATION	
Alabama	ALA. CODE § 22-52-9 (2016): Right not to be compelled to testify against self.
Alaska	ALASKA STAT. § 47.30.735(b)(8) (2016): Right to remain silent.
Arkansas	ARK. CODE ANN. § 20-47-211 (2016): Right to remain silent.
California	*Conservatorship of Bones*, 234 Cal. Rptr. 724 (Ct. App. 1987): At post-certification treatment hearing (for extended commitment) county attorney moved to call appellant-patient as a witness and the trial court granted the motion. The trial court issued orders remanding Appellant to hospital. Appellant appealed, arguing *inter alia* it was an error to compel him to testify. In analogizing the present case to a line of precedent cases where a criminal defendant's privilege not to testify was *not* extended to parties in non-criminal proceedings, the California Court of Appeals held that the trial court did not err in ordering Appellant to testify at his post-certification treatment hearing.
Colorado	*People v. Taylor*, 618 P.2d 1127 (Colo. 1980): On appeal of a dismissal of hearing to confirm certification of respondent for short-term treatment, the Colorado Supreme Court distinguished civil commitment process from criminal proceedings, holding "due process does not require that the Fifth Amendment privilege against self-incrimination be extended to Colorado's civil commitment proceedings to bar the respondent from being called upon to testify or to justify her absence from court during the certification proceedings." *Id.* at 1138–39.
Delaware	DEL. CODE ANN. tit.16, § 5006 (2016): Privilege against self-incrimination is applicable to all proceedings under this chapter.
Florida	FLA. STAT. ANN. § 394.467 (West 2016): Patient may refuse to testify at the hearing.
Hawaii	HAW. REV. STAT. ANN. § 334-60.5 (West 2016): Nothing in this section shall limit persons' privilege against self-incrimination.
Illinois	*In re Nolan*, 384 N.E.2d 134 (Ill. App. Ct. 1978): Nolan

	appealed adjudication that he was in need of mental treatment, arguing that it was constitutionally impermissible for the state to call him as an adverse witness. The Appellate Court of Illinois held that "involuntary commitment proceedings do not encompass the right against self-incrimination . . . thus one who is subject to such matters may be called as an adverse witness" and, furthermore, that so calling him as a witness does not violate guarantees to effective assistance of counsel. *Id.* at 135–36. The holding was based on the rationale that accepting Nolan's arguments "would obscure the differentiation between a criminal trial and an involuntary civil commitment." *Id.* at 136.
Indiana	*State ex rel. Kiritsis v. Marion Probate Court*, 381 N.E.2d 1245 (Ind. 1978): Patient petitioned to Supreme Court of Indiana for a writ of mandate and prohibition asking for the Court to order the Probate Court to recognize patient's right to remain silent. The Indiana Supreme Court held that the privilege against self-incrimination has no applicability in civil commitment proceedings on that rationale that "the fact that a proceeding may result in the deprivation of liberty does not automatically invoke the protection of the Fifth Amendment" and "the legitimate objectives of the statute and the interests of the State would be wholly frustrated were individuals permitted to claim the privilege in civil commitment proceedings." *Id.* at 1247–48.
Massachusetts	*Commonwealth. v. Barboza*, 438 N.E.2d 1064 (Mass 1982): Miranda warnings were not required; Fifth Amendment was not violated by use of respondent's statement to his psychiatrist.
Michigan	*In re Baker*, 324 N.W.2d 91 (Mich. Ct. App. 1982): Over counsel's objections, appellant was called to the stand and questioned by the judge pertaining to issues relating to commitment of appellant. Appellant was subsequently committed. The Court of Appeals held that trial court did not violate appellant's Fifth Amendment rights forcing him to testify against himself. The Court based its holding on the rationale that "the receipt of testimony from the respondent in a commitment hearing can be analogized to the admissibility of physical evidence, as opposed to testimonial evidence, at a criminal trial" and "[n]o witness

	has the privilege to refuse to reveal to a trier of fact pertinent physical or mental characteristics where they are relevant to issues under consideration." *Id.* at 94.
Mississippi	MISS. CODE ANN. § 41-21-73 (2016): Privilege against self-incrimination.
Missouri	MO. ANN. STAT. § 632.335 (West 2016): Right to remain silent.
Montana	MONT. CODE ANN. § 53-21-115 (West 2016): Any person who is involuntarily detained or against whom petition is filed has the right to remain silent.
New Hampshire	*In re Field*, 412 A.2d 1032 (N.H. 1980): Patient argued that his Fifth Amendment privilege against self-incrimination would be violated if he was compelled to submit to a psychiatric evaluation and the information so obtained was used against him. The New Hampshire Supreme Court held that the Fifth Amendment privilege against self-incrimination does not protect against giving evidence relating to civil commitments. As long as those proceedings do not seek to elicit evidence that may result in any criminal prosecution, there is no privilege.
New Jersey	N.J. STAT. ANN. § 30:4-27.33a (West 2016): The rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to a defendant at a criminal trial, other than the right to a trial by jury and the right not to be tried while incompetent, shall apply.
New York	*Ughetto v. Acrish*, 494 N.Y.S.2d 943 (1985), *affirmed as modified* 518 N.Y.S.2d 398 (1987), *appeal dismissed* 518 N.E.2d 8 (1987), *reconsideration denied* 521 N.E.2d 438 (1988): Patient's privilege against self-incrimination did not apply to prevent hospital from using patient's statements made in course of prehearing psychiatric interview and medical conclusions drawn therefrom to support application for involuntary civil commitment.
North Carolina	*French v. Blackbum*, 428 F. Supp. 1351 (M.D.N.C. 1977): Plaintiff challenged state involuntary commitment procedures on the basis that they violate the Fifth Amendment because, *inter alia*, they fail require that the respondent be advised of his right against self-incrimination. A three-judge federal district court panel held that the privilege against self-incrimination does not apply to involuntary commitment proceedings on the basis that "to apply the privilege to the type of proceedings here

	challenged would be to destroy the valid purposes which they serve as it would make them unworkable and ineffective."
Ohio	OHIO REV. CODE ANN. § 5122.15 (West 2016): The respondent has the right, but shall not be compelled, to testify, and shall be so advised by the court.
Oklahoma	*In re D.J.L.*, 964 P.2d 983 (Okla. Civ. App. 1998): Patient appealed order of involuntary civil commitment arguing, inter alia, the trial court improperly overruled his objections to being called as a witness. Oklahoma Court of Civil Appeals affirmed the order, holding "that there is no constitutional right against self-incrimination in an involuntary commitment proceeding and that Oklahoma law allows the State to call the person alleged to be requiring treatment in support of its case." *Id.* at 984.
Oregon	*In re Matthews*, 613 P.2d 88 (Or. Ct. App. 1980): Patient appealed Circuit Court order of commitment. Court of Appeals held that due process did not require that he be afforded right to remain silent if his testimony might be used as a basis for commitment.
Pennsylvania	50 PA. STAT. AND CONS. STAT. ANN. § 7304(e) (West 2016): A hearing on a petition for court-ordered involuntary treatment shall be conducted such that a patient shall not be called as a witness without his consent.
South Dakota	S.D. CODIFIED LAWS § 27A-12-3.19 (2016): The person may appear personally at any hearing and testify on his own behalf, but the person may not be compelled to do so.
Tennessee	*In re Helvenston*, 658 S.W.2d 99 (Tenn. Ct. App. 1983): Patient appealed the commitment order, asserting violations of her federal constitutional rights. The Tennessee Court of Appeals held that "proceedings under the judicial hospitalization statute, Tenn. Code Ann. § 33–604, are civil in nature and are not criminal for Fifth Amendment purposes."
Vermont	*State v. McCarty*, 892 A.2d 250 (Vt. 2006): Defendant was charged with truancy for failing to send her child to school and was subsequently arrested after an FTA with added charges of resisting arrest. The trial court ordered a psychiatric evaluation over defendant's objections to determine her competency to stand trial. Following a series of more FTAs, charges/arrests, and court-ordered evaluations, the defendant was deemed incompetent,

	insane, and was eventually ordered to involuntary treatment based on testimony of an examining physician. The defendant appealed the order, claiming that her statements to the examining physician could not be used against her in support of an involuntary commitment order. The Supreme Court of Vermont held that once the defendant was deemed incompetent, she was no longer at risk for punishment and therefore her privilege against self-incrimination was not implicated. *Id.* at 254. However, the court noted that if such statements later surfaced in a proceeding that could expose the speaker to potential punishment, speaker could invoke her privilege to exclude statements. *Id.*
Washington	WASH. REV. CODE ANN. § 71.05.360(8) (West 2016): At the probable cause hearing the detained person shall have the right to remain silent.
West Virginia	W. VA. CODE ANN. § 27-5-4(h)(4) (West 2016): The individual may not be compelled to be a witness against himself or herself.
Wisconsin	WIS. STAT. ANN. § 51.20 (West 2016): Right to remain silent.
Wyoming	WYO. STAT. ANN. § 25-10-109 (2016): At the time of emergency detention the person shall be informed orally and in writing of his right to contact his family and an attorney, of his right to appointed counsel if he is indigent, of his right to remain silent and that his statements may be used as a basis for involuntary hospitalization.

APPENDIX B: APPLICABILITY OF EVIDENCE RULES AND USE OF HEARSAY AT COMMITMENT HEARING	
Alabama	ALA. CODE § 22-52-9(5) (2016): The rules of evidence applicable in other judicial proceedings in this state shall be followed in involuntary commitment proceedings.
Alaska	ALASKA STAT. § 47.30.735(b)(4) (2016): At the hearing . . . the respondent has the right to have the rules of evidence and civil procedure applied so as to provide for the informal but efficient presentation of evidence.
California	CAL. WELF. & INST. CODE § 5256.4 (West 2016): (b)The hearing shall be conducted in an impartial and informal manner in order to encourage free and open discussion by participants. The person conducting the hearing shall not be bound by rules of procedure or evidence applicable in judicial proceedings . . . (d) All evidence which is relevant to establishing that the person certified is or is not as a result of mental disorder or impairment by chronic alcoholism, a danger to others, or to himself or herself, or gravely disabled, shall be admitted at the hearing and considered by the hearing officer. (e) Although resistance to involuntary commitment may be a product of a mental disorder, this resistance shall not, in itself, imply the presence of a mental disorder or constitute evidence that a person meets the criteria of being dangerous to self or others, or gravely disabled.
Connecticut	CONN. GEN. STAT. ANN. § 17a-498(h) (West 2016): The rules of evidence applicable to civil matters in the Superior Court shall apply to hearings under this section.
Idaho	IDAHO CODE § 66-329(10) (2016): The hearing shall be conducted in as informal a manner as may be consistent with orderly procedure. The court shall receive all relevant and material evidence consistent with the rules of evidence.
Iowa	IOWA CODE ANN. § 229.12 3.a. (West 2016): The respondent's welfare shall be paramount and the hearing shall be conducted in as informal a manner as may be consistent with orderly procedure, but consistent therewith the issue shall be tried as a civil matter. Such discovery as is permitted under the Iowa rules of civil procedure shall be available to the respondent. The court shall receive all relevant and material evidence which may be offered and need not be bound by the rules of evidence.

Kansas	KAN. STAT. ANN. § 59-2959(c) (West 2016): The court shall receive all relevant and material evidence which may be offered. The rules governing evidentiary and procedural matters shall be applied to hearings under this section in a manner so as to facilitate informal, efficient presentation of all relevant, probative evidence and resolution of issues with due regard to the interests of all parties.
Kentucky	KY. REV. STAT. § 202A.076(2) (West 2016): The manner of proceeding and rules of evidence shall be the same as those in any criminal proceeding including the burden of proof beyond a reasonable doubt.
Louisiana	LA. STAT. ANN. § 28:55(D) (2016): . . . court shall conduct the hearing in as formal a manner as is possible under the circumstances and shall admit evidence according to the usual rules of evidence.
Maine	ME. REV. STAT. ANN. tit. 34-B, § 3864(c) (2016): The court shall receive all relevant and material evidence that may be offered in accordance with accepted rules of evidence and accepted judicial dispositions.
Michigan	MICH. COMP. LAWS ANN. § 330.1459(2) (West 2016): The court shall receive all relevant, competent, and material evidence which may be offered. The rules of evidence in civil actions are applicable, except to the extent that specific exceptions have been provided for in this chapter or elsewhere by statute or court rule.
Minnesota	MINN. STAT. ANN. § 253B.07 (West 2016): Subd. 7. Preliminary hearing. . . . (b) court may admit reliable hearsay evidence, including written reports, for the purpose of the preliminary hearing.
Mississippi	MISS. CODE ANN. § 41-21-73(3) (2016): The rules of evidence applicable in other judicial proceedings in this state shall be followed.
Missouri	MO. ANN. STAT. § 632.335(2) (West 2016): The hearing shall be conducted in as informal a manner as may be consistent with orderly procedure and in a physical setting not likely to have a harmful effect on the respondent. Due consideration shall be given by the court to holding a hearing at the mental health facility. The respondent shall have the following rights in addition to those specified elsewhere: . . . (7) To be proceeded against according to the rules of evidence applicable to civil judicial proceedings; MO. ANN. STAT. § 632.425 (West 2016). Physician-patient,

	psychologist-patient privileges waived in detention proceedings. The physician-patient privilege recognized by section 491.060 and the psychologist-patient privilege recognized by section 337.055 shall be deemed waived in detention proceedings under this chapter. The fact that such privileges have been waived pursuant to this section does not by itself waive the privileges in any other proceeding, civil or criminal. The waiver of the privileges shall extend only to that evidence which is directly material and relevant to detention proceedings.
Montana	MONT. CODE ANN. § 53-21-115 (West 2016): . . . any person who is involuntarily detained or against whom a petition is filed pursuant to this part has the following rights: . . . (7) . . . the right in any hearing to be proceeded against according to the rules of evidence applicable to civil matters generally.
Nebraska	NEB. REV. STAT. ANN. § 71-955 (West 2016): The rules of evidence applicable in civil proceedings shall apply at all hearings held under the Nebraska Mental Health Commitment Act. In no event shall evidence be considered which is inadmissible in criminal proceedings.
New Jersey	N.J. STAT. ANN. § 30: 4-27.33a (West 2016): The rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to a defendant at a criminal trial, other than the right to a trial by jury and the right not to be tried while incompetent, shall apply.
North Carolina	*In re Zollicoffer*, 598 S.E.2d 696 (N.C. Ct. App. 2004): Hearing before magistrate upon involuntary commitment petition of patient was "miscellaneous proceeding" under rule exempting certain proceedings from rules of evidence, and thus, rules of evidence did not apply
Ohio	OHIO REV. CODE ANN. § 5122.15(A)(9) (West 2016): The court shall receive only reliable, competent, and material evidence.
Oregon	OR. REV. STAT. ANN. § 426.095 (West 2016): The provisions of §§ 40.230 [psychotherapist-patient privilege], 40.235 [physician-patient privilege], 40.240 [nurse-patient privilege] and 40.250 [regulated social worker-client privilege] shall not apply to and the court may consider as evidence any of the following . . . (B) Upon objection by any party to the action, the court shall exclude any part of the investigation report that may be excluded under the

	Oregon Evidence Code on grounds other than those set forth in ORS 40.230, 40.235, 40.240 or 40.250. . . . (C) Neither the investigation report nor any part thereof shall be introduced into evidence under this paragraph unless the investigator is present during the proceeding to be cross-examined or unless the presence of the investigator is waived by the person alleged to have a mental illness or counsel for the person.
Pennsylvania	Hearsay inadmissible for extended commitment hearing, *In re Hutchinson*, 421 A.2d 261 (Pa. 1980), but admissible at commitment hearings for less than 20 days. *In re R.D.*, 739 A.2d 548 (Pa. 1999) ("The legislature, for whatever reason, has determined that commitments for less than twenty days do not require the same formalities as are necessary in commitments for longer periods of time. Further, appellant's right to confront and cross-examine witnesses necessarily implies that hearsay evidence is inadmissible. 50 P.S. s 7304(e)(3).").
Rhode Island	40.1 R.I. GEN. LAWS § 5-8(i)(1)(2016): All evidence shall be presented according to the usual rules of evidence that apply in civil, non-jury cases.
South Carolina	S.C. CODE ANN. § 44-17-570 (2016): Hearing shall be conducted in as informal a manner as may be consistent with orderly procedure and in a physical setting not likely to have a harmful effect on the mental health of the person. The court shall in receiving evidence follow the rules of evidence applicable to the probate courts of this State.
Texas	TEX. HEALTH & SAFETY CODE ANN. § 574.031(e) (West 2016): The Texas Rules of Evidence apply to the hearing unless the rules are inconsistent with this subtitle.
Utah	UTAH CODE ANN. § 62A –15– 631(9)(e) (West 2016): The court shall consider all relevant historical and material information that is offered, subject to the rules of evidence, including reliable hearsay under Rule 1102, Utah Rules of Evidence.
Vermont	VT. STAT. ANN. tit. 18 § 7615(c) (2016): The hearing shall be conducted according to the Vermont Rules of Evidence, and to an extent not inconsistent with this part, the Vermont Rules of Civil Procedure shall be applicable.
Washington	WASH. REV. CODE ANN. § 71.05.310 (West 2016): The person shall be present at such proceeding, which shall in all respects accord with the constitutional guarantees of due

	process of law and the rules of evidence pursuant to RCW 71.05.360 (8) and (9). WASH. REV. CODE ANN. § 71.05.360(9) (West 2016): Privileges between patients and physicians, psychologists, or psychiatric advanced registered nurse practitioners are deemed waived in proceedings under this chapter relating to the administration of antipsychotic medications. As to other proceedings under this chapter, the privileges shall be waived when a court of competent jurisdiction in its discretion determines that such waiver is necessary to protect either the detained person or the public.
West Virginia	W. VA. CODE § 27-5-4(j) (West 2016): Conduct of hearing; receipt of evidence; no evidentiary privilege; record of hearing . . . (2): The circuit court or mental hygiene commissioner shall receive all relevant and material evidence which may be offered. (3) The circuit court or mental hygiene commissioner is bound by the rules of evidence promulgated by the Supreme Court of Appeals except that statements made to physicians or psychologists by the individual may be admitted into evidence by the physician's or psychologist's testimony, notwithstanding failure to inform the individual that this statement may be used against him or her. A psychologist or physician testifying shall bring all records pertaining to the individual to the hearing. The medical evidence obtained pursuant to an examination under this section, or section two or three of this article, is not privileged information for purposes of a hearing pursuant to this section.
Wisconsin	WIS. STAT. ANN. § 51.20(10)(c) (West 2016): Except as otherwise provided in this chapter, the rules of evidence in civil actions and s. 801.01(2) apply to any judicial proceeding or hearing under this chapter

APPENDIX C: BURDEN OF PROOF	
Alabama	ALA. CODE § 22-52-10.4(a) (2016): clear and convincing
Alaska	ALASKA STAT. § 47.30.735(c) (2016): clear and convincing
Arizona	ARIZ. REV. STAT. ANN. § 36-540(a) (2016): clear and convincing
Arkansas	ARK. CODE ANN. § 20-47-214(b)(2) (2016): clear and convincing
California	CAL. WELF. & INST. CODE § 5256.6 (West 2016): probable cause; *see also Dep't of Corr. v. Office of Admin. Hearings*, 61 Cal. Rptr. 2d 903 (Ct. App. 1997) (finding that although proceedings to establish involuntary conservatorship for person who is gravely disabled under Lanterman-Petris-Short Act (LPS) are essentially civil in nature, grave disability must be proved beyond reasonable doubt to unanimous jury because of risk to freedom and stigma attached to involuntary conservatorship)
Colorado	COLO. REV. STAT. § 27-65-111(1) (2016): clear and convincing
Connecticut	CONN. GEN. STAT. § 17a-498(c) (West 2016): clear and convincing
Delaware	DEL. CODE ANN. tit. 16, § 5011(a) (2016): clear and convincing
Florida	FLA. STAT. ANN. § 394.467(1) (West 2016): clear and convincing
Georgia	*Pitts v. State*, 261 S.E.2d 435 (Ga. Ct. App. 1979) (finding due process requires clear and convincing standard)
Hawaii	HAW. REV. STAT. ANN. § 334-60.3(West 2016): clear & convincing for dangerousness & in need of care & no less restrictive alternatives but mental illness must be proved beyond reasonable doubt
Idaho	IDAHO CODE § 66-329(11) (2016): clear and convincing
Indiana	*In re Turner*, 439 N.E.2d 201 (Ind. Ct. App. 1982): clear and convincing
Iowa	IOWA CODE ANN. § 229.12(3)(c) (West 2016): clear and convincing
Kansas	KAN. STAT. ANN. § 59-2969(f) (West 2016): clear and convincing
Kentucky	KY. REV. STAT. ANN. § 202A.076(2) (West 2016): manner of proceeding and rules of evidence shall be the same as those in any criminal proceeding including burden of proof

	beyond a reasonable doubt.
Louisiana	LA. STAT. ANN. § 28:55(e)(1) (2016): clear & convincing
Maine	ME. REV. STAT. ANN. tit. 34-B § 3864(6)(A) (2016): clear & convincing
Massachusetts	*Commonwealth v. Nassar*, 406 N.E.2d 1286 (Mass. 1980): beyond a reasonable doubt
Michigan	MICH. COMP. LAWS ANN. § 330.1465 (West 2016): clear and convincing
Minnesota	MINN. STAT. ANN. § 253B.09(1) (West 2016): clear and convincing
Mississippi	MISS. CODE ANN. § 41-21-73(4) (2016): clear and convincing
Missouri	MO. ANN. STAT. § 632.350 (West 2016): clear and convincing
Montana	MONT. CODE ANN. § 53-21-126(2) (West 2016): proof beyond a reasonable doubt with respect to any physical facts or evidence & clear & convincing evidence as to all other matters; respondent's mental disorder must be proved to a reasonable medical certainty.
Nebraska	NEB. REV. STAT. ANN. § 71-925(1) (West 2016): clear and convincing
Nevada	NEV. REV. STAT. ANN. § 433A.310(1) (West 2016): clear and convincing
New Hampshire	*In re B.T.*, 891 A.2d 1193 (N.H. 2006): clear and convincing
New Jersey	N.J. STAT. ANN. § 30: 4-27.15 (West 2016); *see also In re Commitment of J.R.*, 916 A.2d 463 (N.J. Super. Ct. App. Div. 2007): clear and convincing
New Mexico	N.M. STAT. ANN. § 43-1-11(C) (West 2016): clear and convincing
New York	*N.Y.C. Health & Hosps. Corp. v. Brian H.*, 857 N.Y.S.2d 530 (App. Div. 2008): clear and convincing
North Carolina	N.C. GEN. STAT. § 122C-268(j) (2016): clear and convincing evidence
North Dakota	*In re B.D.K.*, 742 N.W.2d 41 (N.D. 2007): clear and convincing
Ohio	OHIO REV. CODE ANN. § 5122.15(C) (West 2016): clear and convincing
Oklahoma	OKLA. STAT. tit. 43A, § 5-415(C) (2016): clear and convincing
Oregon	OR. REV. STAT. ANN. § 426.130 (West 2016): clear and convincing

Pennsylvania	50 PA. STAT. AND CONS. STAT. ANN. § 7304(f) (West 2016): clear and convincing
Rhode Island	40.1 R.I. GEN. LAWS § 5-8(J) (2016): clear and convincing
South Carolina	S.C. CODE ANN. § 44-17-580 (2016): clear and convincing
Texas	TEX. HEALTH & SAFETY CODE ANN. § 574.034(a) (West 2016): clear and convincing
Utah	UTAH CODE ANN. § 62A –15– 631(10) (West 2016): clear and convincing
Vermont	VT. STAT. ANN. tit. 18, § 7616 (2016): clear and convincing
Virginia	VA CODE ANN. § 37.2-817 (2016): clear and convincing
Washington	WASH. REV. CODE ANN § 71.05.310 (West 2016): clear, cogent, and convincing evidence
West Virginia	W. VA. CODE, § 27-5-4(2) (West 2016): clear, cogent and convincing proof.
Wisconsin	WIS. STAT. ANN. § 51.20(4)(e) (West 2016): clear and convincing
Wyoming	WYO. STAT. ANN. § 25-10-110(j) (2016): clear and convincing

APPENDIX D: RIGHT TO INDEPENDENT EVALUATION	
Alaska	ALASKA STAT. § 47.30.745(e) (2016) Upon request by an indigent respondent, the court shall appoint an independent licensed physician or other mental health professional to examine the respondent and testify on the respondent's behalf. The court shall consider an indigent respondent's request for a specific physician or mental health professional.
Arizona	ARIZ. REV. STAT. ANN. § 36-538 (2016): If unable to afford, court shall appoint an independent evaluator acceptable to patient from a list of practitioners
Colorado	COLO. REV. STAT. § 27-65-127(4)(b) (2016) The court, upon request of an indigent respondent or his attorney, shall appoint, at the court's expense, one or more professional persons of the respondent's selection to assist the respondent in the preparation of his case.
Delaware	DEL. CODE ANN. tit. 16, § 5007(3) (2016) [right] to be examined by an independent psychiatrist or other qualified medical expert and to have such psychiatrist or other expert testify as a witness on the individual's behalf, such witness to be court appointed if the involuntary patient cannot afford to retain such witness.
Florida	FLA. STAT. § 394.467(6)(a)(2) (West 2016): if cannot afford, will be provided
Illinois	405 ILL. COMP. STAT. ANN. 5/3-804 (West 2016): if cannot afford one, court will arrange
Louisiana	LA. STAT. ANN. § 28:54(c)(2) (2016): Mental Health Advocacy Service will pay if patient cannot afford
Maine	ME. REV. STAT. ANN. tit. 34-B, § 3864 1 (2016). (D) [shall be notified of] (2) The patient's right to select or to have the patient's attorney select an independent examiner"
Maryland	*Dorsey v. Solomon*, 435 F. Supp. 725 (D. Md. 1977): There is no constitutional right to an independent psychiatric examination at state expense in criminal proceedings; a fortiori, similar principles should control in civil commitment hearings involving an insanity acquittee.
Massachusetts	MASS. GEN. LAWS ch. 123 § 5 (2016): right to present independent testimony; court may provide if indigent
Michigan	MICH. COMP. LAWS ANN. § 330.1463 (West 2016): (1) If requested before the first scheduled hearing or at the first

	scheduled hearing before the first witness has been sworn on an application or petition, the subject of a petition . . . has the right at his or her own expense, or if indigent, at public expense , to secure an independent clinical evaluation by a physician, psychiatrist, or licensed psychologist of his or her choice relevant to whether he or she requires treatment, whether he or she should be hospitalized or receive treatment other than hospitalization, and whether he or she is of legal capacity.
Minnesota	MINN. STAT. ANN. § 253B.07 9 (West 2016): 3. Examiners. Prior to the hearing, the court shall inform the proposed patient of the right to an independent second examination. At the proposed patient's request, the court shall appoint a second examiner of the patient's choosing to be paid for by the county at a rate of compensation fixed by the court.
Montana	MONT. CODE ANN. § 53-21-118 (West 2016): (1) The respondent, the respondent's attorney, or the friend of respondent appointed by the court may secure a professional person of the individual's own choice to examine the respondent and to testify at the hearing before the court or jury as to the results of the professional person's examination. (2) If the person wishing to secure the testimony of a professional person is unable to do so because of financial reasons and if the respondent joins in the request for the examination, the court shall appoint a professional person other than the professional person requesting the commitment to perform the examination. Whenever possible, the court shall allow the respondent a reasonable choice of an available professional person qualified to perform the requested examination who will be compensated from the public funds of the county where the respondent resides.
Nebraska	NEB. REV. STAT. ANN. § 71-908 (West 2016): provided if indigent (limited to one evaluation)
New Jersey	*In re Gannon*, 301 A.2d 493 (N.J. Super. Ct. 1973): In proceeding for commitment to psychiatric hospital, due process includes right to independent psychiatric examination, paid for by the county, but patient does not get to choose the examiner, who is selected by the Court.
New Mexico	N.M. STAT. ANN. § 43-1-11(B) (West 2016): At the hearing, the client shall be represented by counsel and shall have the right to present evidence on the client's behalf, including

	testimony by an independent mental health professional of the client's own choosing
North Dakota	N.D. CENT. CODE § 25-03.1-02 (2016): provided for indigent patients
Ohio	OHIO REV. CODE ANN. § 5122.15 (West 2016): Right to paid independent examiner if indigent
Oregon	OR. REV. STAT. ANN. § 426.110(1) (West 2016): The judge shall appoint one qualified examiner. If requested, the judge shall appoint one additional qualified examiner. A request for an additional examiner under this subsection must be made in writing and must be made by the person alleged to have a mental illness or the attorney for the person.
Pennsylvania	*Dixon v. Attorney Gen. of Pa.*, 325 F. Supp. 966, 974 (M.D. Pa. 1971) ("The Secretary of Public Welfare, the Commissioner of Mental Health, and the Attorney General and their representatives and successors will assure that any new involuntary proceedings for members of the present class of plaintiffs will be in accordance with the following principles: . . . 2) The subject thereof shall be entitled to independent expert examination and assistance in preparation for the hearing, through court appointment where the subject cannot afford to retain these services. Communications between the subject and the expert described herein shall be privileged.")
Rhode Island	40.1 R.I. GEN. LAWS § 5-8 (2016): expert of choice and if cannot afford one, court may, upon application, allow a reasonable fee for one
South Carolina	S.C. CODE ANN. § 44-17-530 (2016): must be given opportunity to request additional exam by independent examiner. If indigent, exam must be conducted at public expense.
South Dakota	S.D. CODIFIED LAWS § 27A-12-3.14 (2016): notice of hearing shall include . . . (3) Notice of the person's right to seek an opinion of an independent psychiatrist at the person's own expense or at the expense of the person's county of residence if the person is indigent.
Texas	TEX. HEALTH & SAFETY CODE ANN. § 574.010 (West 2016): court may order independent evaluation chosen by patient if it determines evaluation will assist the fact finder
Vermont	VT. STAT. ANN. tit. 18, § 7113 (2016): Whenever a court orders an independent examination by a mental health

	professional or a qualified developmental disabilities professional pursuant to this title or 13 V.S.A. § 4822, the cost of the examination shall be paid by the Department of Disabilities, Aging, and Independent Living or of Health. The mental health professional or qualified developmental disabilities professional may be selected by the court but the Commissioner of Disabilities, Aging, and Independent Living or of Mental Health may adopt a reasonable fee schedule for examination, reports, and testimony. VT. STAT. ANN. tit. 18, § 7614 (2016): As soon as practicable after notice of the commencement of proceedings is given, the court on its own motion or upon the motion of the proposed patient or his or her attorney or the state of Vermont shall authorize examination of the proposed patient by a psychiatrist other than the physician making the original certification. The examination and subsequent report or reports shall be paid for by the state of Vermont. The physician shall report his or her finding to the party requesting the report or to the court if it requested the examination.
Washington	WASH. REV. CODE ANN. § 71.05.360 (West 2016): (12) independent expert will be public cost if patient cannot afford
West Virginia	W. VA. CODE ANN. § 27-5-4 (West 2016): (h)(3) right to independent expert, paid if patient indigent
Wisconsin	WIS. STAT. ANN. § 51.20(9)(a) (West 2016): 3. If requested by the subject individual, the individual's attorney, or any other interested party with court permission, the individual has a right at his or her own expense or, if indigent and with approval of the court hearing the petition, at the reasonable expense of the individual's county of legal residence, to secure an additional medical or psychological examination and to offer the evaluator's personal testimony as evidence at the hearing.

APPENDIX E: GUARDIAN MENTAL HEALTH CARE DECISION STATUTES	
Alabama	ALA. CODE § 26-2A-108 (2016): No express statutory language limiting or allowing mental health admissions; says that guardians appointed under this statute have the same powers, duties, and responsibilities as guardians for minors. Guardians for minors may consent to medical or other professional care or treatment of the ward.
Alaska	ALASKA STAT. § 13.26.316(e) (2016): A guardian may not: (1) place the ward in a facility or institution for the mentally ill other than through a formal commitment proceeding under AS47.30 in which the ward has a separate guardian ad litem
Arizona	ARIZ. REV. STAT. ANN. § 14-5312.01 (2016): (B) On clear and convincing evidence that the ward is incapacitated as a result of a mental disorder . . . and is likely to be in need of inpatient mental health care and treatment . . . court may authorize a guardian appointed pursuant to this title to give consent for the ward to receive inpatient mental health care. (C) The court shall limit the guardian's authority to what is reasonably necessary to obtain the care required for the ward in the least restrictive treatment alternative. (D) Within 48 hours after placement of the ward . . . the guardian shall give notice of this action to the ward's attorney . . . If requested by the attorney, the court shall hold a hearing on the appropriateness of the placement within 3 days after receiving that request
Arkansas	ARK. CODE ANN. § 28-65-303(a)(1) (2016): The Guardian must petition the court to get permission to commit the ward to a state hospital.
California	CAL. PROB. CODE § 2356(a) (West 2016): No ward or conservatee may be placed in a mental health treatment facility under this division against the will of the ward or conservatee. [Requires compliance with the mental health commitment statute.]
Colorado	COLO. REV. STAT. ANN. § 15-14-316 (2016): (4) A guardian may not initiate the commitment of a ward to a mental health care institution or facility except in accordance with the state's procedure for involuntary civil commitment.

Connecticut	CONN. GEN. STAT. ANN. § 45a-656(d) (West 2016): Conservator of the person shall not have the power or authority to cause the respondent to be committed to any institution for the treatment of the mentally ill except under the provisions of [mental health commitment laws].
Delaware	DEL. CODE ANN. tit. 12, § 3922 (2016): (b) the guardian of the person has the following powers and duties: (1) . . . the guardian may not waive any right of the disabled person respecting involuntary commitment to any facility for the treatment of mental illness or deficiency.
District of Columbia	D.C. CODE ANN. § 21-2047.01 (2016): A guardian shall not have the power: . . . (4) To consent to the involuntary or voluntary civil commitment of an incapacitated individual who is alleged to be mentally ill and dangerous under any provision or proceeding occurring under [D.C. statute].
Florida	FLA. STAT. ANN. § 744.3215 (West 2016): (3) Rights that may be removed from a person by an order determining incapacity and which may be delegated to the guardian include the right . . . (f) To consent to medical and mental health treatment. . . . (4) Without first obtaining specific authority from the court, as described in § 744.3725, a guardian may not: (a) Commit the ward to a facility, institution, or licensed service provider without formal placement proceeding, pursuant to chapter 393, chapter 394, or chapter 397.
Georgia	GA. CODE ANN. § 29-4-23 (2016): (a) Unless inconsistent with the terms of any court order relating to the guardianship, a guardian may: . . . (2) Subject to chs. 9, 20, and 36 of Title 31 and any other pertinent law, give any consents or approvals that may be necessary for medical or other professional care, counsel, treatment, or service for the ward.
Hawaii	HAW. REV. STAT. ANN. § 560:5-316(d) (West 2016): A guardian shall not initiate the commitment of a ward to a mental health-care institution except in accordance with the State's procedure for involuntary civil commitment.
Idaho	IDAHO CODE ANN. § 15-5-312 (2016): (1) the guardian has the following powers and duties: . . . (c) A guardian may give any consents or approvals that may be

	necessary to enable the ward to receive medical or other professional care, counsel, treatment or service. . . . (e) Any individual who lacks capacity to make informed decisions about treatment upon application of the individual's guardian; provided that admission to an inpatient facility shall require a recommendation for admission by a designated examiner . . .
Illinois	755 ILL. COMP. STAT. ANN. 5/11a-17 (West 2016): (a) . . . A guardian of the person may not admit a ward to a mental health facility except at the ward's request as provided in Article IV of the Mental Health and Developmental Disabilities Code and unless the ward has the capacity to consent to such admission as provided in Article IV of the Mental Health and Developmental Disabilities Code.
Indiana	IND. CODE. ANN. § 29-3-8-2 (West 2016): (b) The guardian (other than a temporary guardian) of an incapacitated person has all of the powers to perform the guardian's responsibilities, including the powers with respect to the incapacitated person and the incapacitated person's property regardless of where the property is located, that are granted to the guardian of a minor enumerated in subsection (a)(1) through (a)(9). (including (a)(4), which provides: "The power to consent to medical or other professional care and treatment for the minor's health and welfare.")
Iowa	IOWA CODE ANN. § 633.635 (West 2016): (1) Based upon the evidence produced at the hearing, court may grant a guardian the following powers and duties which may be exercised without prior court approval: . . . (e) Ensuring the ward receives professional care, counseling, treatment, or services as needed. If necessitated by the physical or mental disability of the ward, the provision of professional care, counseling, treatment, or services limited to the provision of routine physical and dental examinations and procedures under anesthesia is included, if the anesthesia is provided within the scope of the health care practitioner's scope of practice
Kansas	KAN. STAT. ANN. § 59-3075 (West 2016): (e) A guardian shall not have the power . . . (9) to place the ward in a treatment facility as defined in K.S.A. 59-3077, and amendments thereto, except if authorized by the court as

	provided or therein [the referenced statute defines treatment facility as, among other things, any psychiatric or mental facility].
Kentucky	KY. REV. STAT. ANN. § 387.660 (West 2016): Guardian of a disabled person shall have the following powers and duties, except as modified by order of the court: (1) To give any necessary consent or approval to enable the ward to receive medical or other professional care, counsel, treatment or service.
Louisiana	LA. CODE CIV. PROC. ANN. art. 4566 (2016): H. Neither a curator nor a court shall admit or commit an interdict to a mental health treatment facility except in accordance with the provisions of R.S. 28:50 through 64. [mental health commitment statutes]
Maine	ME. REV. STAT. ANN. tit. 18-A, § 5-312 (2016): (a) . . . a guardian has the following powers and duties, except as modified by order of the court: (1) To the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, he is entitled to custody of the person of his ward and may establish the ward's place of abode within or without this State, *and may place the ward in any hospital or other institution for care in the same manner as otherwise provided by law* (emphasis added)
Maryland	MD. CODE. ANN., EST. & TRUSTS, § 13-708(b)(2) (West 2016): The right to custody of the disabled person and to establish his place of abode within and without the State, provided there is court authorization for any change in the classification of abode, except that no one may be committed to a mental facility without an involuntary commitment proceeding as provided by law
Massachusetts	MASS. GEN. LAW. ANN. ch. 190B § 5-309(f)(2016): No guardian shall be given the authority under this chapter to admit or commit an incapacitated person to a mental health facility or a mental retardation facility
Michigan	MICH. COMP. LAWS ANN. § 700.5314 (West 2016): the guardian has all of the following powers and duties, to the extent granted by court order: . . . (c) The power to give the consent or approval that is necessary to enable the ward to receive medical or other professional care, counsel, treatment, or service.

Minnesota	MINN. STAT. ANN. § 524.5-315(c) (West 2016): guardian may not initiate the commitment of ward to an institution except in accordance with § 524.5-313.
Mississippi	MISS. CODE ANN. § 41-41-213 (2016): No express language limiting or allowing mental health admissions
Missouri	MO. STAT. ANN. § 475.120(5) (West 2016): No guardian of the person shall have authority to seek admission of the guardian's ward to a mental health or mental retardation facility for more than thirty days for any purpose without court order except as otherwise provided by law. MO. STAT. ANN. § 475.121(1) (West 2016): Pursuant to an application alleging that the admission of the ward to a particular mental health or mental retardation facility is appropriate and in the best interest of the ward, the court may authorize . . . to admit the ward. Such application shall be accompanied by a physician's statement setting forth the factual basis for the need for continued admission including a statement of the ward's current diagnosis, plan of care, treatment or habilitation and the probable duration of the admission.
Montana	MONT. CODE ANN. § 72-5-321 (West 2016): (2) [A] full guardian has the following powers and duties, except as limited by order of the court: . . . (c) A full guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment, or service.
Nevada	NEV. REV. STAT. ANN. § 159.079 (West 2016): 1. . . . a guardian of the person . . . shall perform the duties necessary for the proper care, maintenance, education and support of the ward, including, without limitation, the following: . . . (c) Authorizing medical, surgical, dental, psychiatric, psychological, hygienic or other remedial care & treatment for the ward.
New Hampshire	N.H. REV. STAT. ANN. § 464-A:25 (2016): (I)(a) [T]he guardian shall be entitled to custody of the ward and may establish the ward's place of abode within or without this state. Admission to a state institution shall be in accordance with the following: . . . (2) . . . without prior approval . . . upon written certification by a physician licensed in the state of New Hampshire, or, in the case of placement in New Hampshire hospital, by a

	psychiatrist licensed in the state of New Hampshire, . . . that the placement is in the ward's best interest and is the least restrictive placement available. Within 36 hours, excluding days when the court is closed, of such an admission of a ward to a state institution, the guardian shall submit [notice and rationale for the admission], together with a copy of the certificate by the physician or psychiatrist.
New Jersey	N.J. STAT. ANN. § 3B:12-56 (West 2016): (d) . . . if the ward objects to the initiation of voluntary admission for psychiatric treatment or to the continuation of that voluntary admission, the State's procedures for involuntary commitment pursuant to P.L.1987, c. 116 shall apply. If the ward objects to any other decision of the guardian of the ward pursuant to this section, this objection shall be brought to the attention of the [Court], which may, in its discretion, appoint an attorney or guardian ad litem for the ward, hold a hearing or enter such orders as may be appropriate in circumstances.
New Mexico	N.M. STAT. ANN. § 24-7A-6 (West 2016): C. Subject to the provisions of A and B of this section, a health-care decision made by a guardian for the protected person is effective without judicial approval, if the appointing court has expressly authorized the guardian to make health-care decisions for the protected person, in accordance with provisions of § 45-5-312 NMSA 1978, after notice to the protected person and any agent.
New York	N.Y. MENTAL HYG. LAW § 81.22 (McKinney 2016): (b) No guardian may: 1. consent to voluntary formal or informal admission of incapacitated person to a mental hygiene facility under article 9 or 15 of this chapter
North Carolina	N.C. GEN. STAT. § 35A-1241 (2016): (a)(2) The guardian of the person may give any consent or approval that may be necessary to enable the ward to receive medical, legal, psychological, or other professional care, counsel, treatment, or service
North Dakota	N.D. CENT. CODE. § 30.1-28-12 (5-312) (2016): 2. No guardian may voluntarily admit a ward to a mental health facility or state institution for a period of more than forty-five days without a mental health commitment proceeding or other court order . . . . Notwithstanding

	the other provisions of this subsection, the guardian may readmit a ward to a mental health facility or a state institution within sixty days of discharge from that institution, if the original admission to the facility or institution had been authorized by the court.
Ohio	OHIO REV. CODE ANN. § 2111.13 (West 2016): (C) A guardian of the person may authorize or approve the provision to the ward of medical, health, or other professional care, counsel, treatment, or services unless the ward or an interested party files objections with the probate court, or the court, by rule or order, provides otherwise.
Oklahoma	OKLA. STAT. ANN. tit. 30, § 3-119 (2016): 5. No guardian shall have the power to consent on behalf of the ward to placement of the ward in a facility or institution to which a person without a guardian would have to be committed pursuant to the laws of this state absent formal commitment proceedings in which the ward has independent counsel.
Oregon	OR. REV. STAT. ANN. § 125.320 (West 2016): (3) Before a guardian may place an adult protected person in a mental health treatment facility, a nursing home or other residential facility, guardian must file a statement with the court . . . guardian may thereafter place adult protected person in a mental health treatment facility, a nursing home or other residential facility without further court order. If an objection is made . . . court shall schedule hearing on objection as soon as practicable.
Pennsylvania	20 PA. STAT. AND CONS. STAT. ANN. § 5521 (West 2016): (f) The court may not grant to a guardian powers controlled by other statute, including, but not limited to, power: (1) To admit incapacitated person to an inpatient psychiatric facility or State center for the mentally retarded.
Rhode Island	33 R.I. GEN. LAWS ANN. § 15-29 (2016): No express language limiting or allowing mental health admissions
South Carolina	S.C. CODE ANN. § 62-5-312 (2016): (3) A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment, or service.
South Dakota	S.D. CODIFIED LAWS § 29A-5-40 (2016): A guardian of a protected person shall make decisions regarding the

	protected person's support, care, health, habilitation, therapeutic treatment, and, if not inconsistent with an order of commitment or custody, shall determine the protected person's residence.
Tennessee	TENN. CODE ANN. § 34-6-204 (2016): No express language limiting or allowing mental health admissions
Texas	TEX. EST. CODE ANN. § 1151.051 (West 2016): (c) A guardian of the person has: . . . (4) the power to consent to medical, psychiatric, and surgical treatment other than the inpatient psychiatric commitment of the ward TEX. EST. CODE ANN. § 1151.053 (West 2016): (a) . . . a guardian may not voluntarily admit a ward to a public or private inpatient psychiatric facility operated by the Department of State Health . . . If care and treatment in a psychiatric or residential facility is necessary, the ward or the ward's guardian may: (1) apply for services under Section 593.027 or 593.028, Health and Safety Code; (2) apply to a court to commit the person under Subtitle C or D, Title 7, Health and Safety Code, or Chapter 462, Health and Safety Code; or (3) transport the ward to an inpatient mental health facility for a preliminary examination in accordance with Subchapters A and C, Chapter 573, Health and Safety Code. . . . (c) A guardian of a person may voluntarily admit an incapacitated person to a residential care facility for emergency care or respite care under Section 593.027 or 593.028, Health and Safety Code
Utah	UTAH CODE ANN. § 75-5-312 (West 2016): (b) A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment, or service.
Vermont	VT. STAT. ANN., tit. 14, § 3074 (2016): Nothing in this chapter shall give the guardian of a ward authority to: . . . (1) place that person in a state school or hospital except pursuant to [mental commitment procedures]; (2) consent to an involuntary treatment or medication petition pursuant to chapter 181 of Title 18.
Virginia	VA. CODE ANN. § 64.2-2019 (2016): No express language limiting or allowing mental health admissions
Washington	WASH. REV. CODE ANN. § 11.92.043 (West 2016): (4) No guardian, limited guardian, or standby guardian may involuntarily commit for mental health treatment,

	observation, or evaluation an alleged incapacitated person who is unable or unwilling to give informed consent to such commitment unless the procedures for involuntary commitment . . . are followed
West Virginia	W. VA. CODE ANN. § 44A-3-1 (West 2016): (a) The guardian of a protected person owes a fiduciary duty to the protected person and is responsible for obtaining provision for and making decisions with respect to the protected person's support, care, health, habilitation, education, therapeutic treatment, social interactions with friends and family, and, if not inconsistent with an order of commitment or custody, to determine the protected person's residence.
Wisconsin	WIS. STAT. ANN. § 54.25 (West 2016): (2)(d) Guardian authority to exercise certain powers . . . n. The power to apply for protective placement under s. 55.075 or for commitment under s. 51.20 [involuntary commitment statute] or 51.45(13) for the ward; *see also State ex rel. Watts v. Combined Cmty. Servs. Bd.*, 362 N.W.2d 104 (Wis. 1985) (holding that a guardian does not have the statutory authority to consent to mental hospitalization of his ward who is not protectively placed and who has not consented to such hospitalization absent compliance with requirements of mental health commitment statute (§ 51.15 and this section)).
Wyoming	WYO. STAT. ANN. § 3-2-202 (2016): (a) Upon order of the court, after notice and hearing and appointment of a guardian ad litem, the guardian may: (i) Commit the ward to a mental health hospital or other mental health facility