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NOTE

TAKING LIBERTIES: ANALYSIS OF
IN RE MENTAL HEALTH OF K.G.F.

Elaine M. Dahl*

I. INTRODUCTION

In In re Mental Health of K.G.F., 1 the Montana Supreme Court laudably espoused individual rights in involuntary civil commitment proceedings, but the court's occasionally strained analyses and failure to address case facts indicate K.G.F. may say the right things at the wrong time. Involuntary civil commitment 2 is the process by which the state obtains a court order requiring a mentally ill person to stay at a facility or to follow a particular treatment program. 3 Commitment raises

* J.D. Candidate, The University of Montana, 2003. She thanks all those who read the article and provided valuable comments, including Professor Jeffrey Renz, Pete Mickelson, Julie Johnson, and Brady Peterson.


2. In this case note, the terms "involuntary civil commitment," "civil commitment," and "involuntary commitment" are interchangeable. This note addresses only commitment based on mental illness, not other types of civil commitment (e.g., juvenile commitment). Additionally, this note does not address treatment of sex offenders, which may involve different procedural considerations.

3. MONT. CODE ANN., Title 53, Chapter 21, Part 1 governs involuntary civil commitment based on mental illness. K.G.F., ¶ 26. Although K.G.F. was issued in 2001, the court examined statutes in effect prior to the 2001 legislative session, so the year of
complex issues, primarily because the state's authority to commit stems both from its police powers and from the doctrine of *parens patriae*. Recent scholarship has explored various aspects of civil commitment, specifically examining the role of counsel, the therapeutic value of commitment proceedings, and the "sanist" and "pretextualist" undercurrents in mental health law. While the *K.G.F.* court acknowledged several tensions inherent in civil commitment proceedings, its constitutional analyses and abstract holdings may have enhanced, rather than resolved, those tensions.

The *K.G.F.* court only partially addressed the narrowly defined issue of whether the respondent received effective assistance of counsel. Rejecting the *Strickland* standard for effective assistance of counsel, the court based its analysis on *K.G.F.*'s right to due process and then identified dignity and medical-decision personal autonomy as the fundamental rights at risk. The court adopted guidelines set by the National Center for State Courts and added them to existing statutory requirements, raising standards considerably for public defenders and other attorneys who represent patient-respondents at commitment hearings. Finally, the case was remanded for a fact-finding hearing because the record was insufficient. In 93 paragraphs, the *K.G.F.* court did not actually answer the question presented, but raised several new questions about mental health law and constitutional interpretation. The court's failure to address defense counsel's performance directly was an anticlimactic resolution after a complicated and perhaps unnecessary constitutional analysis.

This note begins with an overview of the schools of thought surrounding involuntary commitment and the role of counsel,
followed by a summary of the case facts, an overview of the holdings and dissent, a step-by-step analysis of the opinion, and its implications.

II. MENTAL HEALTH LAW CONCEPTS AND ISSUES

Because mental health law involves terms and concepts not familiar to all lawyers, this section is designed to familiarize the reader with issues relevant to K.G.F. Specifically, this section analyzes the source of a state's authority to commit an individual, the role of defense counsel in commitment proceedings, therapeutic jurisprudence, and sanism and pretextuality.

A. Police Power and Parens Patriae

Civil commitment straddles the "no man's land" between civil and criminal law. The state derives its power to commit mentally ill people from both the parens patriae doctrine and the state's police powers.10 The term parens patriae, derived from the Latin "parent of his or her country," provides that the state is the protector of those who cannot care for themselves.11 Police power, reserved for the states by the 10th Amendment of the U.S. Constitution, is the power "to make all laws necessary and proper to preserve the public security, order, health, morality, and justice."12 Although these justifications differ substantially, most case law and statutory schemes treat all involuntary commitment proceedings the same.13

Perhaps because of its resemblance to other legal proceedings, civil commitment clearly exemplifies an overlap of police powers and parens patriae. Like criminal proceedings that stem from the state's police powers, civil commitment

11. BLACK'S LAW DICTIONARY 1137 (7th ed. 1999).
12. Id. at 1178.
13. ROBERT F. SCHOPP, COMPETENCE, CONDEMNATION, AND COMMITMENT: AN INTEGRATED THEORY OF MENTAL HEALTH LAW 5 (2001) ("Neither the statutes nor the courts explain why the same parameters of commitment and conceptions of legal mental illness should apply to both types of commitment."). See also Note, The Role of Counsel in the Civil Commitment Process: A Theoretical Framework, 84 Yale L.J. 1540, 1549 (1975). Although this is an unsigned note, Steven J. Goode has been identified as the author. Bibliography of Therapeutic Jurisprudence, 10 N.Y.L. SCH. J. HUM RTS 915 (1993); Virginia Aldigé Hiday, The Attorney's Role in Involuntary Civil Commitment, 60 N.C. L. REV. 1027,1028, n.7 (1982).
proceedings begin in the county attorney's office, provide for appointed public defenders, and may result in a loss of liberty.\textsuperscript{14} Police officers also play a role in some civil commitments.\textsuperscript{15} Moreover, a civil commitment respondent may actually have committed a criminal act.\textsuperscript{16} Likewise, the similarities between incompetence hearings and civil commitment proceedings may justify the state's exertion of its \textit{parens patriae} powers. Although civil commitment does not require a finding of incompetence,\textsuperscript{17} the inability to care for oneself is a criterion considered in commitment proceedings and in declarations of incompetence. Civil commitment may be defined as a hybrid of criminal and civil "caretaking" proceedings.

\textbf{B. The Role of Counsel}

Largely because of the dual nature of civil commitment, the role of counsel in involuntary commitments has long been the

\textsuperscript{14} Paul S. Appelbaum has suggested that commitments based on the state's police powers often involve "an inherently paternalistic element," because treatment is sometimes needed to help a patient regain her liberty. PAUL S. APPELBAUM, ALMOST A REVOLUTION: MENTAL HEALTH LAW AND THE LIMITS OF CHANGE 148 (Oxford U. Press 1994). For an argument that the state should not have the power of involuntary commitment at all, see Morse, \textit{supra} note 10.

\textsuperscript{15} Some law enforcement officials receive special training about handling mentally ill people. See, e.g., www.omh.state.ny.us/omhweb/Police/police.htm (providing information about Police-Mental Health Coordination Project of New York).

\textsuperscript{16} For Montana civil commitment cases involving the law enforcement system and criminal acts, see, e.g., \textit{In re} Shennum, 210 Mont. 442, 684 P.2d 1073 (1984) (police intervened when respondent brought a semiautomatic pistol to a city council meeting and expressed disdain for women voting and holding office, but only questioned him and did not subject him to evaluation until the next day); \textit{In re} J.B., 217 Mont. 504, 705 P.2d 598 (1985) (respondent was driving in circles in an open field and talked of demons and religion when police stopped him); \textit{In re} Mental Health of D.R.S., 221 Mont. 245, 718 P.2d 335 (1986) (respondent was unfit to stand trial for charges he robbed a store and buried a tied-up clerk under a woodpile, but after 2 years his alleged crimes were relevant in commitment proceedings); \textit{In re} D.D., 277 Mont. 164, 920 P.2d 973 (1996) (police officer took respondent to hospital for evaluation because had placed herbal weight loss brochures in his oven and disabled his smoke alarm, and during the evaluation respondent revealed his fears of an unknown couple and an unidentified gang leader whom respondent believed intended to rape him and his habit of watching for these people).

\textsuperscript{17} Incompetence is not a requirement for involuntary medication either. \textit{In re} Mental Health of S.C., 2000 MT 370, ¶ 10, 303 Mont. 444, ¶ 10, 15 P.3d 381, ¶ 10. Scholars have debated whether incompetence should be a prerequisite finding for civil commitment. See generally SCHOPP, \textit{supra} note 13 (advocating the invocation of \textit{parens patriae} commitment only after a finding of incompetence); Michael L. Perlin, On "Sanism," 46 SMU L. REV. 373, 394 (1992) (incompetence should not be presumed). It is interesting to note a person must be deemed incompetent to stand trial in order to be "kicked" from the criminal to the civil commitment system. See generally SCHOPP.
subject of debate.\textsuperscript{18} Patient-respondents generally have a right to counsel at all stages of commitment proceedings,\textsuperscript{19} but the responsibilities of counsel are not clearly defined.\textsuperscript{20} Scholars have frequently decried the lack of guidance for counsel in involuntary commitment proceedings, noting that cases, statutes, and codes of professional responsibility provide little or no assistance.\textsuperscript{21}

The main disagreement centers on whether counsel should play an "adversarial" or a non-adversarial, "best interests" role.\textsuperscript{22} Under the "adversarial" model, the lawyer ascertains the wishes of the respondent and advocates for them, even if the lawyer believes the respondent's decision is incorrect.\textsuperscript{23} In the "best interests" role, counsel ascertains a patient's best interest and advocates for it, balancing liberty interests with other concerns for the patient's welfare.\textsuperscript{24} Of course, some scholars do not identify with either the "best interests" or the "adversarial" camp. At least one scholar has suggested an alternative "mediational role,"\textsuperscript{25} while another has argued the distinction

\textsuperscript{18} Yale Note, \textit{supra} note 13, at 1542-43.

\textsuperscript{19} In some jurisdictions, the right to counsel may be waived. \textit{See}, e.g., Matter of S.Y., 469 N.W.2d 836, 840 (Wis. 1991) (constitutional right to self-representation extends to respondents because they are "suitors"); Matter of Nelson, 1993 WL 52172 (Minn. App. 1993) (unpub.).

\textsuperscript{20} \textit{See} \textit{MONT. CODE ANN.} \S 53-21-115(5) (specifying only the right to be represented by counsel).


\textsuperscript{22} \textit{See} Abisch, \textit{supra} note 21, at 121. If the respondent is silent about the issue of commitment, most adversarial role proponents would advise the attorney to assume the respondent does not want to be committed. Perlin & Sadoff, \textit{supra} note 21, at 173.

\textsuperscript{23} Perlin & Sadoff, \textit{supra} note 21, at 168. Cook, \textit{supra} note 21, at 180.

\textsuperscript{24} Cook, \textit{supra} note 21, at 179-80; Appelbaum, \textit{supra} note 14, at 214 (arguing a patient's interest in civil liberties should not outweigh his interest in treatment). \textit{See also} Donald H.J. Hermann, \textit{Barriers to Providing Effective Treatment: A Critique of Revisions in Procedural, Substantive, and Dispositional Criteria in Involuntary Civil Commitment Law}, 39 VAND. L. REV. 83, 85-86 (1986) (applauding the expansion of procedural rights but characterizing as "inappropriate barriers" both limited commitment criteria and least restrictive alternate disposition requirements).

\textsuperscript{25} Abisch, \textit{supra} note 21, at 122. For an argument that commitment should consist of mediation with only limited lawyer involvement, see Joel Haycock et al., \textit{Mediating the Gap: Thinking About Alternatives to the Current Practice of Civil Commitment}, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 265, 282-89 (1994).
between "adversarial" and "best interests" is altogether false. 26 Defining the defense attorney's role in civil commitment is difficult because statutes and case law isolate civil commitment as unique, but the process strongly resembles other legal proceedings.

C. Therapeutic Jurisprudence

Mental health law gave rise to an academic movement called therapeutic jurisprudence. David B. Wexler and Bruce J. Winick, the originators of the term, defined it as "the extent to which substantive rules, legal procedures, and the roles of lawyers and judges produce therapeutic or antitherapeutic consequences." 27 More recently, Winick defined it as "an interdisciplinary field of legal scholarship and approach to law reform that focuses attention upon law's impact on the mental health and psychological functioning of those it affects." 28

Winick and Wexler suggested a limited application of therapeutic jurisprudence when they originally advocated the idea:

We are sensitive to the potential criticism of therapeutic jurisprudence that has often been made of law and economics scholarship. By suggesting the need to identify the therapeutic and antitherapeutic consequences of legal rules and practices, we do not necessarily suggest that such rules and practices be recast to accomplish therapeutic ends or to avoid antitherapeutic results. Whether they should is, of course, a normative question that calls for a weighing of other potentially relevant normative values as well, such as patient autonomy, constitutional rights, and community safety. 29

26. Cook, supra note 21, at 188 (arguing "active" lawyers should be the standard because "[t]he problems that authorities usually connect to the 'best interest' or 'adversary' lawyers are just plain bad lawyering").


29. Wexler & Winick, supra note 27, at 983. Some are not pleased with the expansion of therapeutic jurisprudence concepts to other arenas. See Morris B. Hoffman, Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous, 29 FORDHAM URB. L. J. 2063, 2069-70 (2002) (noting therapeutic jurisprudence-based programs yield unsatisfactory or immeasurable results and arguing specialty courts grounded in therapeutic
Answering the call to examine legal proceedings from a therapeutic jurisprudence perspective, mental health professionals and legal scholars have studied the effects of involuntary commitment proceedings on patient-respondents. Several scholars have argued patient-respondents benefit therapeutically when the commitment procedure is adversarial. However, this position has not gone without criticism.

In the absence of clear-cut evidence of therapeutic effects, the relative merits of counsel’s potential roles remains uncertain. A “best interests” lawyer could defer to a mental health professional’s judgment about the impact of an adversarial proceeding on a respondent and ignore the respondent’s voice in determining therapeutic value. However, an “adversarial” lawyer might be too occupied with protecting a respondent’s civil liberties to recognize the effects of hearing-related stress on the respondent’s mental health. In other words, therapeutic jurisprudence is an ideal that provides support for and criticism of both types of lawyering. Therapeutic jurisprudence considerations may motivate lawyers following either model to investigate more thoroughly and listen more attentively.

D. Sanism and Pretextuality

Michael L. Perlin, a prolific writer in the field of mental illness law, has focused on two themes: sanism and jurisprudence result in “de facto decriminalization” of crimes).


32. Sydeman, supra note 30, at 217 (questioning long-term effects on treatment and suggesting respondent cynicism, asocial feelings, and mental capacity may dampen therapeutic effects). See also Abisch, supra note 21, at 124-28 (noting adversarial approach can result in increased undercommitments, higher stress levels for respondents, contributes to increased tension between attorneys and clinicians, may encourage respondents to view treatment teams “as adversaries to be defeated,” and may create a false “appearance of fairness” to society as a whole).

33. See Cook, supra note 21, for position that “active” lawyers in both roles do the same things in preparing for a hearing. Therapeutic jurisprudence may also motivate courts to consider the impact of their rulings on future respondents.

34. Perlin recently published a book that draws from some of his law review articles and provides insight into his perspectives on mental illness law. MICHAEL L.
pretextuality. Sanism is defined as prejudice against the mentally ill, particularly as reflected in the legal system.\textsuperscript{35} Tracing the historical view of mental illness as “linked to sin, evil, God’s punishment, crime, and demons,”\textsuperscript{36} Perlin noted the tendency of society to classify the mentally ill as “the Other” because of people’s fear that “all of us could become mentally ill.”\textsuperscript{37} Among other “sanist myths,” Perlin listed the presumptions that mentally ill people are incompetent and that mentally ill people who refuse medication need institutionalization.\textsuperscript{38}

Perlin defines pretextuality as follows:

*Pretextuality* means that courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (frequently meretricious) decision making, specifically where witnesses, especially expert witnesses, show a “high propensity to purposely distort their testimony in order to achieve desired ends.” This pretextuality is poisonous; it infects all participants in the judicial system, breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blâsé judging, and, at times, perjurious and/or corrupt testifying.\textsuperscript{39}

Pretextuality relates to the role of counsel in that “best interests” lawyers may defer to treatment professionals’ opinions, whereas “adversarial” attorneys test the accuracy and credibility of a professional’s statements in the same manner as they would any expert.

Minimizing prejudices and helping respondents may appear to be self-apparent concepts, but the existence of scholarship in these areas indicates that courts have not always considered them. The *K.G.F.* opinion demonstrates the Montana Supreme Court’s awareness of these concepts, as well as its struggle to define the role of counsel in light of the dual nature of the state’s authority in civil commitment.

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\textsc{Perlin, The Hidden Prejudice: Mental Disability on Trial} (Am. Psychol. Ass’n 2000). Perlin also authored an oft-cited three volume set in which he has praised *K.G.F.* as “the most comprehensive and thoughtful post-Strickland case.” \textsc{Michael L. Perlin, Mental Disability Law: Civil and Criminal} (2d Ed. LEXIS L. Pub. 1998 & Supp. 2001) (1989). This is not surprising, since the *K.G.F.* court cited Perlin’s works.


36. \textit{Id.} at 388.


38. \textit{Id.} at 394-95.

39. \textsc{Hidden Prejudice}, supra note 34, at xix.
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III. CASE FACTS

K.G.F. is a woman diagnosed with mixed rapid cycling bipolar disorder. Bipolar disorder, once commonly known as manic-depression, consists of alternating periods of euphoria and depression. Mixed rapid cycling indicates that a patient’s moods alternate quickly, and she can experience mania and depression at the same time. K.G.F. underwent treatment with a psychiatric professional near her hometown outside Bozeman, and she managed her condition with medication. In October of 1999, K.G.F. became suicidal, sought mental health treatment, and was voluntarily admitted to St. Peter’s Community Hospital in Helena on October 21, 1999.

Concerned with the medications prescribed for her at St. Peter’s, K.G.F. questioned her treatment and ultimately refused to take prescribed medication. On October 25, she expressed her desire to leave St. Peter’s against medical advice, but she never signed a written request. St. Peter’s employee Nancy McVean asked a deputy county attorney to petition for K.G.F.’s involuntary commitment because K.G.F.’s treatment team

40. In light of anonymity provisions in Montana’s involuntary commitment statutes and the convention of identifying respondents by their initials, K.G.F.’s anonymity will remain protected in this note. See MONT. CODE ANN. § 53-21-103 (2001).

41. K.G.F., ¶ 5; Resp’t Br. 2.


43. Interview with Anita Roessman, Montana Advocacy Program (February 1, 2002); K.G.F., ¶ 5.

44. K.G.F., ¶ 6.

45. Id. ¶ 4; Appellant Br. 1; Resp’t Br. 3.

46. K.G.F., ¶ 7; Tr. Dist. Ct. at 5:6-8; 9:6-10. Lithium is the only drug approved by the FDA for bipolar disorder, but it has side effects and is not effective for some patients, including mixed rapid-cyclers. Heather S. Hopkins & Alan J. Gelenberg, Treating Bipolar Disorder: Toward the Third Millennium, 18 Psych. Times, Issue 2 (Feb. 2001) at www.mhsource.com/pt/p010283.html. The medications prescribed for K.G.F. were Topamax (topiramate) and Risperdal, which are anticonvulsants found to be somewhat effective in bipolar disorder treatment. One side effect of Topamax is weight loss, so it is sometimes prescribed for patients concerned with weight. Id. Additionally, researchers have recently discovered a causal connection between Topamax and the eye conditions glaucoma and myopia. Important Drug Warning, letter from Ortho-McNeil Pharm., Inc., at www.fda.gov/medwatch/SAFETY/2001/topamax.htm.

47. K.G.F., ¶ 7; Reply Br. 4; Resp. Br. 3. Appellant argued that because MONT. CODE ANN. § 53-21-111(1)(b)(i) provided a request for release from voluntary admission “must be in writing,” K.G.F. remained voluntarily committed when the involuntary commitment petition was filed and even during the hearing. Reply Br. 4.

48. K.G.F., ¶ 8. McVean identified her occupation as “case coordinator” and affirmed she was a recognized professional person. Tr. Dist. Ct. at 3:1-7.
believed she presented a threat to herself.\textsuperscript{49}

On October 26, K.G.F. had a preliminary hearing in which the court explained her rights and appointed counsel.\textsuperscript{50} On October 27, the involuntary commitment hearing occurred.\textsuperscript{51}

At the commitment hearing, McVean testified for the State, and Nancy Adams testified on K.G.F.'s behalf.\textsuperscript{52} McVean recommended K.G.F. go to New Visions, a community treatment center, only until she stabilized and then seek aftercare services in Bozeman.\textsuperscript{53} Noting that K.G.F. "already knows the Support Center [St. Peter's]," Adams recommended that K.G.F. stay voluntarily at St. Peter's before returning to Bozeman.\textsuperscript{54} However, Adams did not know what community based treatment was available in Bozeman, primarily because "the mental health district ha[d] been broken up."\textsuperscript{55} K.G.F.'s counsel cross-examined McVean and directly examined Adams about their proposals.\textsuperscript{56}

After Adams testified, K.G.F.'s counsel requested that K.G.F. be allowed to testify.\textsuperscript{57} The following dialogue ensued:

The court: Is there any possibility of continuing this? Finish it off later?

Mr. Menahan [for the State]: That would be fine. We can come back this afternoon. The state doesn't anticipate calling any more witnesses.

The court: Never mind. I will just skip my meeting. Go ahead. Please be sworn. Come up here and be sworn. I just can't make plans.\textsuperscript{58}

Defense counsel asked K.G.F. what support was available to her and then rested.

The district court then asked defense counsel what the

\textsuperscript{49} Tr. Dist. Ct. at 4:20-24.

\textsuperscript{50} K.G.F., \textit{\textsuperscript{49}} 9.

\textsuperscript{51} Id.

\textsuperscript{52} Tr. Dist. Ct. at 2-16; K.G.F., \textit{\textsuperscript{49}} 10-12. \textsc{montana code ann.} \textsection 53-21-118 provides respondents with the right to examination by a professional person of their own choosing.

\textsuperscript{53} K.G.F., \textit{\textsuperscript{52}} 11; Tr. Dist. Ct. at 6:14-18. McVean testified that K.G.F. "is very, very bright. She can present like—that things are okay and she can make it through." Tr. Dist. Ct. 5:11-13. The treatment team debated what to recommend for K.G.F. because one doctor believed K.G.F. "might be able to present herself and be released too soon." Tr. Dist. Ct. at 6:23-24.

\textsuperscript{54} K.G.F., \textit{\textsuperscript{53}} 12; Tr. Dist. Ct. at 16:1-2.

\textsuperscript{55} Tr. Dist. Ct. at 12:22-13:5.

\textsuperscript{56} Id. at 2-16.

\textsuperscript{57} Id. at 16:15-16.

\textsuperscript{58} Id. at 16:17-24.
Defense counsel indicated K.G.F. wished to remain voluntarily at St. Peter’s until she could arrange for treatment in Bozeman. When the court asked defense counsel if K.G.F. had already signed a second voluntary commitment application, he answered, “I understand she is willing to do so.”

The district court’s deliberation consisted of the following exchange:

The court: Has she reapplied for voluntary commitment? Because I can’t order her to sign a voluntary commitment. The only thing I can do—what you are requesting is dismiss this. She needs treatment. There is no question that this woman needs treatment. And she needs community treatment. But I can’t order her to St. Peter’s Hospital.

K.G.F.: If I volunteer to go—

The court: I know.

K.G.F.: I offered to sign to continue my stay voluntarily when I was there for the—I would sign voluntarily again.

Mr. Menahan [for the State]: I don’t think that you can order her to go back to a level of care that is for acute care when she doesn’t need that and then follow through on a treatment plan that hasn’t been established.

The court: The finding that I make is that you need treatment in the community. You have a mental disorder that requires treatment. The least restrictive, most appropriate alternative for you is treatment in the community. The treatment that is available for you in this community is Golden Triangle, the mental health services that they provide out of there. And there is nothing else that I can send you to at this point because I can’t—I can’t dismiss the petition. And I can’t order you to voluntarily commit yourself to St. Peter’s Hospital. And I am not willing to dismiss the petition because that means that you are not going to have any community health services available to you. So I guess what I have to do is grant the state’s petition. I don’t think I have any other alternative. And that commitment should be for a period of up to 90 days. Okay?

K.G.F. appealed the district court’s order, claiming she had received ineffective assistance of counsel. Specifically, she argued counsel failed to: (1) object to hearsay offered by the State’s professional person, (2) prepare adequately for

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59. *Id.* at 18:10-11.
60. *Id.* at 18:12-19.
63. Appellant Br. at 8-10; Reply Br. at 12-16.
hearing, 64 (3) ascertain K.G.F. was still voluntarily admitted, as she had not provided a written request for release, 65 (4) request additional time to prepare for the hearing, 66 (5) present sufficient evidence, 67 (6) question the professional persons and K.G.F. adequately, 68 (7) attempt to have K.G.F.'s husband appointed as a "friend of the respondent" until three weeks after the hearing, 69 and (8) request a separate posttrial disposition hearing, despite insufficient knowledge of available alternatives in her hometown. 70

Initially, K.G.F. argued that the standards governing Sixth Amendment right to effective assistance of counsel, as outlined in *Strickland v. Washington*, 71 provided the basis of her argument. 72 After both the Montana Advocacy Program (MAP) writing as amicus curiae for respondent and the State argued a due process standard was more appropriate, 73 K.G.F. argued alternatively that counsel was ineffective under a due process analysis. 74 MAP recommended a standard for effective assistance of counsel, which appeared in a set of guidelines established by the National Center for State Courts (hereinafter "Guidelines"). 75

IV. HOLDINGS OF K.G.F. AND DISSENT: AN OVERVIEW

A brief overview of the K.G.F. court's holdings demonstrates the complexities of the issues presented. The court first set the standard of review as plenary. 76 Rejecting the *Strickland* standard, 77 the court based the right to counsel in involuntary

64. Appellant Br. at 12-13, 15.
65. Id. at 12-13; Reply Br. at 3-5.
66. Reply Br. at 7-8.
67. Id. at 8-12.
68. Appellant Br. at 11-14.
69. Reply Br. at 5-7.
70. Reply Br. at 16-18.
72. Resp't Br. at 7; Amicus Br., entire. The Montana Advocacy Program filed the Amicus Brief, which was signed by the ACLU. K.G.F. n. 2. An ACLU attorney not only signed the brief, but contributed to its preparation as well. Interview, Beth Brenneman, ACLU Attorney, Missoula, Montana (Jan. 24, 2002).
74. Appellant Br. at 1; K.G.F., ¶ 23.
75. Id. ¶¶ 33-40.
commitment proceedings on Montana's constitutional due process, dignity, and privacy provisions. Then, it found statutory references to dignity, privacy, and bodily integrity invoked corresponding constitutional rights. Noting the stigma historically and currently associated with mental illness, the court criticized governmental paternalism for its "stereotypical labels" of the mentally ill and then recognized the purpose of involuntary commitment is "to help, not punish" respondents. Before delineating new standards for counsel, the court stressed the importance of "formally and fairly" balancing the rights of the state under parens patriae and police powers with an individual's statutory and constitutional rights.

Defining counsel's role as adversarial, the court cited counsel's statutory duties to meet with the respondent and explain the proceedings, to review all available records, discuss options and ascertain the respondent's wishes, request necessary additional time before a hearing or trial, facilitate examination of the respondent by a professional person of the respondent's choosing, and to assist the respondent in waiving the right to remain silent. By adopting selected Guidelines, the court expanded those statutory duties to include meeting competency standards, discussing the consequences of pursuing various options, seeking interviews with all persons with knowledge of the surrounding circumstances, and scheduling the initial interview sufficiently before any scheduled hearings.

78. Id. ¶¶ 41-50 (citing MONT. CONST. art. II, § 17 (due process); MONT. CONST. art. II, § 4 (dignity); MONT. CONST. art. II, § 10 (privacy)).
79. Id. ¶¶ 44-48.
80. Id. ¶¶ 51-55, 59-60.
81. Id. ¶¶ 59-60.
82. K.G.F., ¶ 63.
83. Id. ¶ 65.
84. Id. ¶¶ 66, 84-89.
85. Id. ¶¶ 67, 77 (citing MONT. CODE ANN. § 53-21-121(3)).
86. Id. ¶ 74 (citing MONT. CODE ANN. §§ 53-21-115; -165).
87. Id. ¶¶ 75, 79 (citing MONT. CODE ANN. § 53-21-127(2)).
88. K.G.F., ¶¶ 75, 79 (citing MONT. CODE ANN. § 53-21-122(2), (3)).
89. Id. ¶ 80.
90. Id. ¶ 83.
91. Id. ¶ 71 (citing Guidelines, Part E1 at 464).
92. Id. ¶ 75 (citing Guidelines, Part E2 at 465).
93. K.G.F., ¶ 76 (citing Guidelines, Part E5(c) at 474).
94. Id. ¶ 78 (citing Guidelines, Part E5, at 473).
After setting these standards, the court issued its conclusion in four paragraphs. First, the court reiterated its holding that a respondent has the right to effective assistance of counsel. Second, the court qualified its delineation of counsel’s duties by stating the list was not exhaustive. Due process provided the basis for respondent’s rights, and the fundamental liberty interests at stake were dignity and integrity. An ineffective counsel claim requires a “substantial showing of evidence” in order to stand. The court then noted the responsibility of the courts as well as of counsel to ensure respondents’ rights. Finally, the case was remanded for a hearing because the record lacked any evidence of a pre-hearing investigation.

In his dissenting opinion, Justice Trieweiler raised significant concerns about the majority opinion. He believed K.G.F. may burden public defenders to do the impossible and burden courts to enforce effective assistance of counsel in every case. Specifically, he worried that K.G.F. could be interpreted to mandate a post-commitment hearing to determine effectiveness of counsel after every commitment. Additionally, he found it inconsistent to afford commitment respondents special rights to remain silent and to counsel when criminal defendants face similar deprivation of liberty. Most disturbing to Trieweiler was the lack of evidence in the record to support K.G.F.’s appeal.

V. ANALYSIS OF K.G.F.

This section analyzes issues raised by K.G.F. First, despite the court’s failure to address the case facts directly, the court’s decision may have rested in part on those facts. Second, rejecting Strickland standards was consistent with this court’s prior case law differentiating civil commitment from criminal proceedings. Third, the court’s treatment of parens patriae and

95. Id. ¶¶ 90-93.
96. Id. ¶ 90.
97. Id. ¶ 91.
98. Id.
100. Id. ¶ 92.
101. Id. ¶ 93.
102. Id. ¶¶ 107, 110 (Trieweiler, J., dissenting).
103. Id. ¶ 110 (Trieweiler, J., dissenting).
104. Id. ¶ 98 (Trieweiler, J. dissenting).
stigma was paradoxical. Fourth, the court's constitutional analysis was convoluted and perhaps unnecessary. Fifth, the opinion left several practical questions unanswered when the court adopted new standards without indicating how those standards applied to K.G.F.'s counsel. Finally, remanding the case raises several procedural questions for future civil commitments.

A. K.G.F.'s Case Facts

The court neither addressed the facts presented regarding counsel's representation nor limited its opinion in any manner, but its decision may have depended to some degree on the nearly ideal scenario presented. K.G.F. was intelligent, articulate, knowledgeable about her illness, familiar with the mental health system, and non-threatening to other people. She had voluntarily sought treatment for her suicidal tendencies. Bipolar disorder, her mental illness, is perceived by many as more understandable and less threatening than disorders like schizophrenia. K.G.F. understood her need for treatment and contested only the regimen prescribed. Her age and gender may also have been factors.

Whether or not K.G.F.'s counsel acted properly, the commitment was probably unjustified. However, it is uncertain why K.G.F. based her appeal solely on ineffective assistance of counsel claims, rather than arguing the district court had not chosen the "least restrictive alternative." The order to keep K.G.F. in Helena was almost certainly error, but the responsibility for this error lies, at least in part, with the district court.

B. Rejecting Strickland: Maintaining the Wall Between Civil and Criminal Law

The K.G.F. court's recognition of a right to effective assistance of counsel and rejection of Strickland standards was

106. In all likelihood, she would easily survive an incompetence proceeding.

107. Cf. In re Mental Health of E.M., 265 Mont. 211, 215, 875 P.2d 355, 357 (1994) (Hunt, J., dissenting) (noting respondent was a 57-year old widow in his determination that she performed no "overt acts" when she threatened to kill her neighbor and herself because she believed the neighbor had cut holes in her long johns, smeared feces on her toilet, and interfered with her radio and TV reception).

108. MONT. CODE ANN. § 53-21-127(5).

proper and consistent with prior case law. A respondent has “the right to be represented by counsel” under Mont. Code Ann. § 53-21-115(5). Following case law in other jurisdictions, the court first established that Montana’s statutory right to counsel implicitly guaranteed a right to effective assistance of counsel. The court then discussed the standard by which counsel’s effectiveness should be judged.

The court correctly chose due process over Sixth Amendment Strickland standards as appropriate for evaluating counsel’s performance in civil commitment. In Strickland v. Washington, a defendant convicted of three murders and sentenced to death for each count unsuccessfully claimed his counsel was ineffective. The United States Supreme Court set forth a two-pronged test to determine whether counsel was unconstitutionally ineffective: (1) Did counsel act within the range of competence demanded of attorneys in criminal cases? and (2) Did counsel’s performance prejudice the defense so that the defendant was denied a fair trial?

Other jurisdictions had previously considered whether Strickland standards were appropriate to evaluate counsel’s performance in involuntary commitments. The K.G.F. court noted cases from other jurisdictions in which effectiveness of counsel was subjected to Strickland analysis. An Illinois court applied the Strickland standard in In re Carmody. In In re Hutchinson, a Pennsylvania court found respondent’s counsel was ineffective and could have no reasonable basis for failing to object to hearsay testimony offered by the Commonwealth’s expert. Other cases analyzing effectiveness of counsel in involuntary commitment cases were not cited in K.G.F. Indiana courts have applied the Strickland standard and rejected respondents’ ineffective assistance of counsel claims because

111. Id. ¶¶ 32-50.
115. 421 A.2d 261 (Pa. Super. 1980), cited in K.G.F., ¶ 30. Although Hutchinson did not mention Strickland by name, the test seeking any “reasonable basis” indicates the court employed Strickland.
116. Id. at 266.
they could not demonstrate prejudice to their defenses.\textsuperscript{117} An Arizona court did not specify the constitutional basis for a respondent's right to counsel, but appears to have ordered a \textit{Strickland} analysis on remand.\textsuperscript{118} Cases from Florida, Texas, and Wisconsin have grounded the right to assistance of counsel in due process.\textsuperscript{119}

When jurisdictions split on a particular issue, a state can look to its own case law for its position on similar issues. Montana has frequently noted the differences between the rights of criminal defendants and the rights of civil commitment respondents. In \textit{Kerr v. Wilcox},\textsuperscript{120} involuntary commitment statutes did not apply to an appointed lawyer's representation of a criminal defendant ultimately deemed mentally ill.\textsuperscript{121} A criminal statute\textsuperscript{122} providing that an expert must examine a defendant before testifying about his mental condition did not apply in a civil commitment hearing in \textit{In re Mental Health of G.S.}\textsuperscript{123} Similarly, in \textit{In re Mental Health of L.C.B.}, the exclusionary rule did not apply in an involuntary commitment hearing.\textsuperscript{124} However, the \textit{K.G.F.} court did not cite these precedents in its determination of an appropriate standard.

According to the \textit{K.G.F.} court, applying the \textit{Strickland} standard to involuntary commitment proceedings was inappropriate for four reasons. First, the Sixth Amendment of the U.S. Constitution and Article II, Section 24, of the Montana Constitution expressly applied to "criminal prosecutions"
alone. 125 Second, "[The Strickland standard] simply does not go far enough to protect the liberty interests of individuals such as K.G.F., who may or may not have broken any law, but who, upon the expiration of a 90-day commitment, must indefinitely bear the badge of inferiority of a once "involuntarily committed" person with a proven mental disorder." 126 Third, as noted by "legal commentary," the Strickland presumption of trial strategy and deference to counsel's judgment is inappropriate when the hearing procedure generally does not encourage high standards of care for lawyers. 127 Finally, requiring a respondent to show prejudice, as the Strickland standard would do, runs counter to Montana's case law mandating strict adherence to civil commitment statutes. 128 Although the K.G.F. court failed to cite Montana precedent that would support its rejection of Strickland, its ultimate conclusion was sound. Because Montana has generally based its involuntary commitment jurisprudence in statutes and maintained a "wall" between the laws governing civil and criminal proceedings, 129 embracing statutory due process provisions and rejecting Strickland was consistent with precedent.

C. Stigma and Parens Patriae Stereotypes

In its discussion of stereotypes associated with stigma and parens patriae, the K.G.F. court displayed the conflict between ideals and reality. The court criticized paternalist and sanist viewpoints, but also based its holdings at least in part on these views. While the court indicated mental illness should hold no stigma, it reinforced that stigma in its holding that commitment is a fate to be avoided. Additionally, the K.G.F. court expressed a "love-hate" relationship with the parens patriae aspect of involuntary commitment. 130 These discussions demonstrated

126. Id. ¶ 33. See discussion of sanism and pretextuality, infra.
127. Id. ¶ 34-35 (citing Michael L. Perlin, Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases, 16 Law & Hum. Behav. 39, 53-54 (1992)). Whether two pages of a single law review article suffices as justification is perhaps subject to debate.
129. The Montana Supreme Court has apparently confused criminal and civil commitment proceedings at least once, describing evidence of a respondent's statements in a civil commitment proceeding as "not incriminating." In re Shennum, 210 Mont. 442, 454, 684 P.2d 1073, 1080 (1984).
130. Although the court acknowledged the state's police power to initiate involuntary commitment proceedings, K.G.F., ¶ 58, only parens patriae powers were
the inherent conflict that sometimes exists between an individual's rights and the state's interest in serving certain people's needs.

The court acknowledged several stereotypes associated with mental illness, commitment proceedings, and parens patriae. Finding it "necessary to recognize and dispel certain stereotypes that serve only to frustrate the legal process," the court disapproved of phrases defining the state's role as "father of the country" and "general guardian of all...idiots and lunatics." Quoting a California case, the court noted that, "[i]n the ideal society, the mentally ill would be the subjects of understanding and compassion rather than ignorance and aversion...[b]ut that enlightened view, unfortunately, does not yet prevail." Then the court shifted from idealism to society's stereotypes, again quoting the California case: "It is implausible that a person labeled by the state as so totally ill could go about, after his release, seeking employment, applying to schools, or meeting old acquaintances with his reputation fully intact." The K.G.F. court acknowledged the stigma associated with mental illness, but did not explain how its decision would counteract society's sanist views. In fact, the court actually perpetuated this stigma by describing a respondent as one "who, upon the expiration of a 90-day commitment, must indefinitely bear the badge of inferiority of a once 'involuntarily committed' person." Apparently, the court does not share society's sanist views, but believes them pervasive enough to warrant legal protection from the mental health system. Characterizing discussed in detail. Id. ¶¶ 51-65.

131. Id. ¶ 51.
132. Id. ¶¶ 59-60 (rejecting language from In re Sonsteng, 175 Mont. 307, 314, 573 P.2d 1149, 1153). It is not clear whether the court considered "father of the country" and "general guardian" to be "stereotypical labels," or if the only objectionable labels were "idiots and lunatics." If "father" and "guardian" are unconstitutional labels, then the entire parens patriae doctrine and any civil commitments attained under its authority are arguably unconstitutional.

133. K.G.F., ¶ 54 (quoting Conservatorship of Roulet, 590 P.2d 1, 6 (Cal. 1979)). Scholars centered on the distinction between incompetence and subjection to involuntary commitment may note that the issue in Roulet was whether a conservator established a person's "grave disability" in order to maintain her control over the person's estate. Moreover, it does not appear K.G.F. was as "totally ill" as the subject of Roulet.

134. Id. ¶ 53 (quoting Roulet, 590 P.2d at 7).

commitment proceedings as adversarial and raising standards for counsel may send the message that commitment is a fate to be avoided at all costs. While the court’s recognition of the stigma associated with commitment was necessary, its silence about the implications of its own ruling on that stigma is frustrating.

Even more frustrating was the court’s apparent desire to invoke the *parens patriae* doctrine without acknowledging that to do so would be paternalistic. The court cautioned that “we must...be cautious and critical of signs of paternalism legitimized by the *parens patriae* doctrine....” However, the court also acknowledged therapeutic jurisprudence considerations and even implied Montanans have a fundamental right to understanding and compassion. Despite the negative stereotypes associated with *parens patriae* justifications, the court defined the purpose of civil commitment as “to help, not punish” the respondent. According to the court, public policy dictates that the “therapeutic influence” of the hearing should be maintained, especially since some people are deterred from seeking professional help because they fear the possibility of involuntary commitment. Citing a recent law review article, the court noted that the “ideals” of “understanding and compassion” are expressed in the dignity clause of the Montana Constitution.

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137. Any teenager might make a similar argument: “I want you to be my parents, not tell me what to do!”
138. *K.C.F.*, ¶ 62, (citing MONT. CODE ANN. § 53-21-101, which provides the purpose of the statutes is in part to “secure...the care and treatment suited to the needs of the person” and “ensure due process of law”). No mention of the state’s police power appears in this statement of purpose. However, a court is required by § 53-21-126(1) to consider whether the respondent has caused injury to others or poses an imminent threat, as well as the respondent’s ability to care for herself. The omission of police power justifications from the statement of purpose is unclear.
139. *Id.* ¶ 63.
140. *Id.* (citing National Institute for Mental Health, U.S. Dept. of Health and Human Svc., *Mental Health: A Report of the Surgeon General* (1999)). Incidentally, the State Bar of Montana requires bar applicants to disclose any diagnosis or treatment of mental illness, along with criminal convictions and debt, to ascertain whether an applicant is “fit” to practice. 2003 State Bar of Montana Application, Questions 9-10. *See also* Section 2(c), Rules of Procedure of the Commission on Character and Fitness of the Supreme Court of Montana (defining “fitness”). The State Bar apparently assumes the risk that some people may be deterred from seeking treatment by this requirement, remaining undiagnosed and untreated.
receive understanding and compassion from the state. Such a conclusion should strengthen the state’s *parens patriae* powers of commitment, since commitment arguably “protects” an individual’s fundamental rights to compassion and understanding.

The court’s assertion that *parens patriae* powers threaten privacy rights to personal autonomy in medical decisions may indicate a hierarchy in which privacy rights outweigh the dignity right to understanding and compassion. If the state can only help respondents without infringing on their autonomy, the civil commitment process could never be “involuntary,” and the statutory scheme should be abolished entirely. However, in light of the ultimate holding, this was apparently not the court’s intended meaning.

The stereotypes surrounding mental illness and *parens patriae* certainly should have influenced the court’s decision, but the court’s treatment of these stereotypes leaves uncertainties. First, the procedural safeguards instituted in *K.G.F.* may send a message that treatment is always to be avoided, in part because mentally ill people are ostracized. Second, safeguarding individuals from society’s stereotypes by raising standards for defense counsel may be as inherently paternalistic as a “best interests” model. Finally, the court’s criticism of paternalistic *parens patriae* authority, combined with its embrace of therapeutic jurisprudence goals, leaves the state of *parens patriae* justifications in flux.

**D. Constitutional Due Process Analysis: The “Turnings”**

The court twice employed a remarkable method of constitutional and statutory interpretation by which it found statutes “in turn” provided for constitutional rights. First, the court found statutory rights to due process and to counsel “[i]n turn...garner protection under both the federal and the Montana constitutions.”142 Second, the court found statutes providing for an admitted patient’s dignity, privacy, and personal integrity “in turn...invoke fundamental rights under our state constitution.”143 This “turning” runs counter to traditional doctrine that provides courts should decide constitutional issues only after exhausting all procedural,
factual, and statutory grounds for an opinion.\textsuperscript{144}

The first "turning" is troublesome because the reasoning behind it is not apparent. As noted above, a vague statutory statement of "right to counsel" does not define counsel's roles or obligations. No party to \textit{K.G.F.} asserted the involuntary commitment statutes were facially unconstitutional, so three alternative lines of reasoning are possible. First, \textit{K.G.F.} arguably contested the statute as applied to her, insofar as the mere appointment of a public defender did not meet the constitutional requirements of due process. Second (and more likely), the court ensured the statutory right to counsel was consistent with the constitutional right to due process by reaching beyond the statute to the constitution. Third, the court could have hinged its "turning" on statutory language providing that statutory procedural rights exist "[i]n addition to any other rights that may be guaranteed by the constitution."\textsuperscript{145} In any event, the court probably should have clarified its decision apply constitutional analysis with something more than "turning."

More troubling than the first "turning" was the second, which led to the invocation of fundamental rights to privacy and dignity. Although the cited statutes are published near the statutes applicable to hearings, the statutes clearly apply to the treatment phase, not the hearing phase.\textsuperscript{146} Beginning from this tenuous starting place, the court took the following path: (1) treatment statutes, (2) constitutional right to dignity, (3) \textit{Armstrong v. State}, (4) statutes applicable to hearings but lacking the word "dignity", (5) \textit{Armstrong} again, (6) constitutional right to privacy, (7) statutes applicable to hearings that do not mention "privacy" but support the concept of "medical-decision personal autonomy."\textsuperscript{147} The court concluded this long and winding road by stating, "That these fundamental constitutional rights are at issue during all phases of the involuntary commitment process...is self evident."\textsuperscript{148} The

\begin{itemize}
  \item \textsuperscript{144} See, e.g., \textit{In re Mental Health of S.J.}, 231 Mont. 353, 355, 753 P.2d 319 (1988) ("Because we are reversing on statutory grounds, we decline to address appellants' constitutional claims."). See also \textit{Illinois v. Carmody}, 653 N.E.2d 977, 983 (Ill. App. 1995).
  \item \textsuperscript{145} \textit{MONT. CODE ANN.} § 53-21-115.
  \item \textsuperscript{146} Obviously, \textit{K.G.F.} was a "patient" in that she was voluntarily admitted to a facility. \textit{MONT. CODE ANN.} § 53-21-102(13). If the holdings of \textit{K.G.F.} were limited to those respondents who already are patients, the application of these statutes would not present a problem. However, the \textit{K.G.F.} opinion does not so limit itself.
  \item \textsuperscript{147} \textit{K.G.F.}, ¶¶ 44-47.
  \item \textsuperscript{148} \textit{Id.} ¶ 48.
\end{itemize}
following is a closer examination of the court’s journey.

1. Fundamental Rights: Skimming Over Plain Liberty

The court did not need to discuss medical decision personal autonomy and dignity at all, because the fundamental right at issue under due process analysis easily could have been freedom from confinement or restraint. Instead of beginning with the applicable procedural rights statute,149 the court started with Montana Constitution, Article II, Section 17.150 After rejecting the Strickland standard, the court began its due process analysis by noting, “our legal system... has seemingly lost its way in vigilantly protecting the fundamental rights” of respondents.”151 The lack of time available to K.G.F.’s counsel for preparation of the case provided an example of this “loss.”152 The court then decreed that the “fundamental liberty interests” at issue in the due process clause were dignity and privacy, including the right to personal autonomy.153

While dignity and privacy certainly are liberty interests, the court ignored the most obvious liberty interest, i.e., freedom from confinement or restraint. This “plain liberty” is perhaps the most recognizable liberty interest, and involuntary commitment certainly threatens the right to “plain liberty” because it can result in confinement. In its prefatory comments about due process, the K.G.F. court cited several cases in which the interest at stake was freedom from bodily restraint.154 However, the court defined the relevant “fundamental liberty interests” as the right to privacy and the right to dignity.155 At no point did the court articulate its reasoning for choosing to

149. MONT. CODE ANN. § 53-21-115.
150. K.G.F., ¶ 41. Of course, the “turning” in ¶ 27 may explain this omission.
151. Id. ¶ 42. The court cited two Montana cases for the proposition that courts should ensure proper commitment procedures were followed, but these cases would presumably strengthen the “system” rather than weaken it. The court apparently took “judicial notice” of the legal system “losing” its way.”
152. K.G.F., ¶ 43 (noting counsel had four or five working hours to prepare).
153. Id. ¶¶ 44-49.
155. Id. ¶¶ 44-50. Without discussing dignity or personal autonomy, the court recently stated that a suspended commitment still implicated a respondent’s liberty interests when she was subjected to inpatient treatment, therapy, and prescribed medication. In re Mental Health of T.J.D., 2002 MT 24, ¶ 21, 308 Mont. 222, ¶ 21, 41 P.3d 323, ¶ 21 (harmless error doctrine did not apply because “her liberty was restricted” and “the stigma...remains”).

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base its decision on privacy and dignity, rather than on
confinement alone. 156

One explanation for the court’s decision to define liberty less literally might have been the court’s desire to address K.G.F.’s right to refuse treatment. K.G.F. was not a right to refuse treatment case, but K.G.F.’s refusal of medication probably led to her commitment proceedings. Therapeutic jurisprudence scholar Bruce J. Winick analyzed the grounding of right to refuse treatment in the “liberty” interests of bodily integrity, mental privacy, and individual autonomy. 157 Noting the United States Supreme Court’s failure to define the “significant liberty interest” at issue in cases of involuntary medication, 158 Winick explored the expanding concept of liberty in due process arguments. 159 However, because K.G.F. did not center on the right to refuse treatment and because the court did not define the liberty interests as such, this explanation is not entirely satisfactory.

Another reason for the K.G.F. court’s decision could have rested in statutory provisions for outpatient care, insofar as applying those provisions would result in little or no bodily restraint. 160 However, even if K.G.F. were only committed to a treatment program and not to a residential facility, her freedom of movement, or “plain liberty” would arguably be implicated. Moreover, as the court noted, Montana’s 2001 legislature struck the former statutory provision allowing commitment to

156. The court cited three cases in which due process protections were founded on liberty interests to remain free from confinement: In re Mental Health of L.C.B., 253 Mont. 1, 830 P.2d 1299 (1992); In re J.B., 217 Mont. 504, 705 P.2d 598 (1985); In re Morlock, 261 Mont. 499, 862 P.2d 415 (1993). K.G.F., ¶¶ 38, 42, 58, 62, 65.

157. BRUCE J. WINICK, THE RIGHT TO REFUSE MENTAL HEALTH TREATMENT 201-222 (Am. Psychol. Ass’n 1997). Winick’s discussion of bodily integrity includes non-constitutional and Fourth Amendment cases. Id. at 202-03. Winick also analyzed constitutional arguments based on freedom of expression (mental processes), cruel and unusual punishment, free exercise of religion, and equal protection. Id. at 131-85, 223-38, 243-48, 251-57. The Montana Supreme Court rejected constitutional claims in an involuntary medication case, when the respondent failed to frame her arguments under the relevant statutory scheme. In re Mental Health of S.C., 2000 MT 370, ¶ 10, 303 Mont. 444, ¶ 10, 15 P.3d 861, ¶ 10 (involuntary medication did not require finding of incompetence, and constitutional arguments failed because they were not couched in the statutory scheme).


159. Id. at 189-201 (tracing history of purely procedural due process through the Fourteenth Amendment and Slaughter-House era to substantive due process cases).

outpatient therapy. Therefore, the court's decision to consider privacy and dignity rather than "plain liberty" is puzzling.

2. Medical-Decision Personal Autonomy

The K.G.F. court based much of its "fundamental rights" holdings on Armstrong v. State. In Armstrong, health care providers who performed abortion services including counseling and referrals successfully asserted that the Montana Constitution's privacy clause "broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from government interference." A statute that prohibited physician's assistants from performing abortions was declared unconstitutional.

Citing Armstrong, the K.G.F. court declared patient-respondents have the right to "medical-decision personal autonomy," a right "at issue" during commitment proceedings. To say medical-decision personal autonomy is "at issue" during commitment proceedings is accurate, but the right to autonomy is hollow if statutes box it out. By its nature, an involuntary commitment proceeding denies a patient-respondent the right to decide individual medical issues "free from government interference" because the commitment itself is such a decision. Additionally, an involuntarily committed person usually does not choose his or her treatment team with which to form a "partnership."

To bolster its discussion, the court cited statutes providing

165. Id. ¶¶ 47-48 (citing Armstrong, ¶ 39). The discussion of medical-decision personal autonomy may prove ironic for some medical professionals. As the court noted, involuntary commitment statutes prohibit respondents from waiving the right to counsel. K.G.F., ¶ 26 (citing MONT. CODE ANN. § 53-21-119(1)). Medical professionals may view with cynicism a framework in which respondents have the constitutional right of autonomy to refuse medications but cannot refuse an attorney's representation.
166. See Robert F. Schopp, Competence, Condemnation, and Commitment: An Integrated Theory of Mental Health Law 19 (2001) (noting "apparent paradox" of patients committed pursuant to parens patriae justifications but still able to refuse treatment); Paul S. Appelbaum, Almost a Revolution: Mental Health Law and the Limits of Change 148-49 (Oxford U. Press 1994) (since society has chosen not to add incompetence as a prerequisite to involuntary commitment, competent people should be subject not only to involuntary commitment, but also to involuntary medication).
respondents the right to refuse or to take medications before a hearing and the right to choose a professional person to examine the respondent and testify at the hearing. These statutes are not relevant to medical-decision personal autonomy. The right to refuse or to take medications before a hearing certainly relates to bodily integrity, but the purpose of the statutory provision is to allow the respondent to appear at the hearing unimpaired, either by his condition or by drugs. A respondent's right to choose a professional person to examine him and testify at a hearing does not equate to a choice of medical care providers. The chosen professional person functions as an expert witness, not as a treatment provider.

If K.G.F. were involuntarily sedated before her hearing or her chosen professional person were not allowed to testify, the cited statutes would be relevant to her due process rights. However, these rights would not be rooted in the constitutional right to personal autonomy. Medical-decision personal autonomy is threatened at two main points in involuntary commitment: when the respondent is committed and when the respondent is involuntarily medicated. The commitment proceeding itself presumes the court, and not the respondent, will make the medical decision about commitment. Counsel was not asked to defend K.G.F.'s right to refuse medication while committed. In fact, St. Peter's professional person stated involuntary medication was not necessary, and K.G.F. had indicated she would take her medication. Future litigants may find K.G.F.'s discussion of "medical-decision personal autonomy" more confusing than helpful.

3. Dignity

The court's discussion of dignity was also unnecessary, but it was better reasoned. Armstrong also provided support for the K.G.F. court's discussion of dignity rights derived from Montana Constitution, Article II, Section 4. The court cited statutory provisions clearly relevant to the hearing proceeding itself. The concept of dignity is related to the statutory provision that respondents can dress in their own clothes at the hearing, rather

167. K.G.F., ¶ 47 (citing MONT. CODE ANN. §§ 53-21-115(9), (11), (12);53-21-124(3).
than in a patient’s garb. The K.G.F. court interpreted the location of the proceeding in a courtroom, rather than in a mental health facility, as a requirement that “enhances the dignity afforded to the individual.” Insofar as the respondent is not required to argue his case on the mental health professional’s “turf,” this is probably an accurate statement.

The court cited a law review article by Matthew O. Clifford and Thomas P. Huff that suggested various applications of the dignity clause at Article II, Section 4, of the Montana Constitution. The article begins with a discussion of Gryczan v. State, a case in which the Montana Supreme Court struck down a deviate sexual conduct statute because it violated the Montana Constitution’s right to privacy in Article II, Section 10.

In the course of this discussion, the authors stated the following:

Interestingly, [the] dignity clause, which was discussed in some detail in the briefs of the parties and amici in Gryczan, received no attention from the court in its opinion. We believe this is unfortunate, but entirely understandable. The Montana Constitution’s dignity clause is unusual, and its meaning, scope, and legal significance are not, at first glance, obvious or clear. If ever a law review article baited a court to rule in a particular manner, this article did so. The Montana Supreme Court may well have felt the urge to prove it understands the dignity clause and is not afraid to apply it. However, this urge is probably not sufficient reason to invoke the dignity clause unnecessarily.

As stated above, the right to liberty in its most literal sense was clearly a sufficient fundamental liberty interest subject to due process protections. Absent explicit explanation, the court’s decision to invoke Montana’s privacy and dignity clauses seems illogical.

171. MONT. CODE ANN. § 53-21-115(10).
173. If this statement was meant to imply that the dignity of the court would automatically translate into dignity for the respondent, the statement may be questionable. The court noted the 2001 legislature’s authorization of two-way electronic audio-video communications, but declined to address the new provision. K.G.F., ¶ 46 n.7 (discussing MONT. CODE ANN. § 53-21-122, as amended in 2001).
176. Clifford & Huff, supra note 175, at 302.
177. For an argument that dignity should be the basis for privacy and liberty interest claims, see Luis Anibal Aviles Pagan, Human Dignity, Privacy and Personality Rights in the Constitutional Jurisprudence of Germany, the United States and the
E. Analysis of the New Standards

The court created avoidable uncertainty by adopting new standards without applying them to K.G.F.'s counsel. As stated earlier, the court adopted portions of the National Center for State Courts' Guidelines for Involuntary Civil Commitment (hereinafter "Guidelines"). These Guidelines supplement statutes regarding counsel responsibilities in commitment hearings. In addition to governing statutory provisions, counsel in an involuntary commitment procedure must meet the following requirements.

1. Counsel must have specialized course training or supervised on-the-job training in the duties, skills, and ethics of representing civil commitment respondents.

2. Counsel “should be prepared to discuss the available options” and the “practical and legal consequences” of each option.

3. Before or after the initial client interview, counsel should also attempt to interview all persons with knowledge of the circumstances surrounding the commitment petition and be prepared to call those people as witnesses.

4. Counsel must meet with the respondent to explain the petition and proceedings and ascertain the client's wishes must be held privately and sufficiently before any scheduled hearing.

5. Counsel must “represent the perspective of the respondent and...serve as a vigorous advocate for the respondent's wishes,” “advocate the position that best safeguards and advances” the interest of uncommunicative clients, and “engage in all aspects of advocacy and vigorously argue” for the client in court.

Although these standards appear fairly clear-cut, the court's failure or refusal to apply these standards to K.G.F.'s counsel leaves several questions open. For example, what amount or type of training is required? Is counsel required to raise all available options as possibilities during the client interview, or will it suffice to prepare to discuss options if the client asks...
about them? If a client suggests the Prince of Sweden has "knowledge" of relevant facts, is counsel obligated to try to interview the Swedish ambassadors, or is the determination of "all persons with knowledge" within the attorney's discretion? If a public defender's office is overburdened, are the "sufficient" time requirements flexible? Must counsel document each decision made, the basis for the decision, and the time spent following particular courses of action?

Most important is the question of how counsel should respond to a time-crunched court. Montana has a small bar, and attorneys often appear before the same judge repeatedly. If a judge demonstrates hostility to requests for time or to counsel's attempts to meet K.G.F. standards, counsel must make a difficult choice. A public defender could see the same judge every day, and irritating the judge in one case could prove to have negative consequences in others. However, allowing a judge to rush a case could compromise an individual client's rights to a day in court and result in a finding of ineffective assistance. K.G.F. did not address this concern, except to say "we again emphasize that it is not only counsel for the patient-respondent, but also courts, that are charged with the duty of safeguarding the due process rights of individuals involved at every stage of the proceedings, and must therefore rigorously adhere to the standards expressed herein, as well as those mandated under Title 53, Chapter 21." Clearly, the practical effects of such a mandate are questionable.

The court avoided applying these standards to K.G.F.'s counsel by finding the record insufficient. Carefully avoiding any criticism of counsel's performance, the court instead engaged in a discussion of the system:

[W]e emphasize that what follows is not meant as a per se indictment of the individual counsel here or appointed counsel in these matters in general; nor is it a tacit censure of the individual professionals involved, who undoubtedly have sound therapeutic objectives in mind. Rather, our aim is on the failure of the system

185. The Montana chapter of the ACLU has filed suit alleging that public defenders' offices in seven counties have provided or will provide inadequate assistance and otherwise violate indigent defendants' constitutional rights, in part because the offices are overworked. White v. Martz, No. 2002-133 (Mont. 1st Jud. Ct. July 24, 2002) (denying defendants' motion to dismiss).

186. The District Court judge's conduct during K.G.F.'s hearing was not presented as an issue on appeal, but she clearly wanted the hearing to end on schedule. See supra text accompanying notes 57-58.

As noted earlier, K.G.F. outlined eight specific actions for the Montana Supreme Court to review. The court dismissed K.G.F.'s assertion of a missed hearsay objection, finding it "minuscule in comparison to the failure to fully investigate and comprehend a patient's circumstances prior to an involuntary civil commitment hearing or trial." However, K.G.F. also asserted lack of preparation, as evidenced by the record. The K.G.F. court failed to explain why K.G.F.'s citations to the record were insufficient and instead remanded for a "fact finding hearing."

In her appellant brief, K.G.F. pointed to the record in support of her allegations of ineffective assistance of counsel. First, she noted the "disjointed, perfunctory, and...harmful" cross-examination of Nancy McVean, which included an elucidation of testimony that K.G.F. was "capable of carrying out a suicide attempt...a sincere one." Counsel apparently did not know McVean could not testify as an expert on medications, and he did not secure the presence of Dr. Caldwell, who might have testified about FDA approval and side effects of medications. Next, K.G.F. noted counsel's failure to ask about the threat to K.G.F.'s health and his failure to learn K.G.F. had not requested her release in writing, which meant she was still voluntarily admitted at St. Peter's. Additionally, K.G.F. argued counsel's direct examination of Nancy Adams was "poorly planned and executed," because he should have ensured Adams would know of available treatment options and because he did not follow up on Adams' testimony that K.G.F. did not pose an imminent threat of harm to herself. K.G.F. also asserted that counsel should have called K.G.F.'s husband to testify, especially given Adams' testimony that he was K.G.F.'s "closest support." K.G.F. noted that counsel had asked her only question about treatment available to her in her own

188. Id. ¶ 49.
189. See supra text accompanying notes 63 through 70.
192. Appellant Br. at 10-11 (citing Tr. Dist. Ct. at 8-10).
193. Id. at 11-12 (citing Tr. Dist. Ct. at 9:11-14; 10:3-12)
194. Id. at 12-13 (citing Tr. Dist. Ct. at 7:16-17).
195. Id. at 13 (citing Tr. Dist. Ct. at 11:15-25; 12:10-11).
196. Id. at 13 (citing Tr. Dist. Ct. at 14:18-20).
community, despite her obvious personal knowledge of her illness, threats of self harm, and medications. Finally, K.G.F. cited counsel's lack of a closing argument as evidence of ineffective assistance.

The K.G.F. court certainly may have found the record insufficient to determine whether counsel properly acted, but at the very least, it should have acknowledged K.G.F.'s citations to the record and explained why they were insufficient. Strangely, the court actually noted counsel only had "at best four or five working hours—amidst his usual case load of criminal matters—to prepare," but still could not determine whether his assistance was effective. While the court may have wished to spare defense counsel's reputation, the remand seems superfluous in light of his documented time constraints. Surely, he could not have done all that was required by K.G.F. standards in four or five hours, and he did not request additional time. The K.G.F. court's bald assertion that the record was insufficient provides no guidance for determining either effective performances or sufficient records.

F. The Remand—Procedural Concerns

The finding of an insufficient record was not the only difficulty with the remand. In fact, K.G.F.'s remand may present the most challenging issues for future participants in Montana involuntary commitment proceedings. First, the court defied precedent by remanding without first reversing for an existing procedural defect. Second, the court indicated the individual rights defined in K.G.F. should be balanced against the state's interests in protecting society and individuals, but did not set forth criteria or a specific test for the district court to apply in its "balancing." Finally, the remand bears similarities to post-conviction relief, which may again blur the lines between criminal and commitment proceedings.

1. Precedent and Procedural Defects

Because precedent required an evidentiary hearing only after at least one procedural defect mandated reversal, K.G.F.'s remand may be inconsistent with precedent. The Montana Supreme Court "previously reversed civil commitment actions

197. Id. at 14 (citing Tr. Dist. Ct. at 17:10-25).
for violations of procedural defects and remanded to the district
court to conduct an evidentiary hearing to examine claims of
additional procedural defects” in In re Mental Health of S.J. 199
In S.J., the appellate court determined that the district
court had failed to document two respondents’ waivers of certain
rights and the facts supporting a finding of serious mental
illness, as required by title 53, chapter 21, sections 119 and 127
of the Montana Code, respectively. 200 The Montana Supreme
Court reversed on these grounds, because a contemporaneous
record was required by statutes. The patient-respondents also
alleged the district court failed to document service of notice, the
court’s advice of respondent’s rights, the appointment of a
person as friend of respondent, the certification of an expert as a
“professional person,” and the receipt of a written report by the
professional person. 201 Noting that contemporaneous
documentation of these items was not required by statute, the
court remanded for an evidentiary hearing because the court
was required to note in its order of commitment that the
patient-respondents had the benefit of all applicable and
statutory rights and “the record [was] bare.” 202

Clearly, K.G.F. is distinguishable from S.J. First, the
actions of counsel, not the court, are at issue. Second, the
appellate court found no violations to which “additional”
violations could attach. Third, K.G.F. was decided largely on a
constitutional basis. The inquiry in S.J. was whether the court
met its statutory obligations. Arguably, the S.J. court could
avoid further investigation by amending its order to read,
“Respondent has received the benefit of all applicable and
statutory rights.” In K.G.F., the court must examine all five of
K.G.F.’s claims, applying all applicable statutes, adopted
Guidelines, and constitutional considerations. Of course, no rule
provides that only easy issues can be determined in evidentiary
hearings, but appellate courts generally instruct lower courts
what specifically is at issue. The K.G.F. court listed several
factors to consider, but gave the lower court no guidance about
how to apply those factors to the present case. Additionally, the
court did not limit the focus of the inquiry. This provides the
makings for a strange and readily appealable evidentiary

200. 231 Mont. at 355-56, 753 P.2d at 320.
201. Mental Health of S.J., 231 Mont. at 355-56, 753 P.2d at 320.
202. Id.

https://scholarship.law.umt.edu/mlr/vol64/iss1/11
hearing.

2. The Undefined Balancing Test

Before setting forth the duties of counsel in involuntary commitment, the *K.G.F.* court gave the following instruction:

[I]t is imperative in applying the following standards to the matter at bar, and all subsequent cases, that the constitutional and legislated rights discussed herein are formally and fairly balanced with the State's ultimate power to protect both the individual and the public from actual or perceived harm.\textsuperscript{203}

However, the court listed no criteria and no specific test to use in this balancing process. If the test is "imperative," it would seem crucial to define how a court should measure the state's "ultimate power" against an individual's fundamental right. Some balancing tests measure the state's interest against an individual's interest, but the balance here involves state power, not interest. Besides, the state's interest in commitment proceedings is always protection of citizens, which would presumably be compelling under any type of scrutiny. Additionally, given the undue stigma of mental illness acknowledged by the court, how does public perception of the mentally ill as dangerous people figure into a balancing test? Clearly, this test needs refinement before a "formal" or fair balance can occur.

3. Analogy to Postconviction Relief

By creating a post-appellate hearing, the *K.G.F.* court may have created even more similarities between commitment and criminal law. In criminal law, postconviction hearings are common practice and are sanctioned by statute.\textsuperscript{204} Postconviction hearings allow a petitioner to assert the error of his conviction even after appeal, as long as the grounds for relief could not have been reasonably raised on direct appeal.\textsuperscript{205} As noted by mental health advocates,\textsuperscript{206} civil commitment statutes do not provide for "post commitment hearings" to ensure respondents were afforded due process rights. However, as

\textsuperscript{203} *K.G.F.*, ¶ 65.


\textsuperscript{205} MONT. CODE ANN. §§ 46-21-102; 46-21-105(2) (2001).

\textsuperscript{206} Telephone Interview with Anita Roessman, Montana Advocacy Program (Feb. 1, 2002).
Justice Trieweiler suggested in his dissent, *K.G.F.* may have created the right to a post appellate hearing.\(^{207}\)

Just two and a half months after publishing *K.G.F.*, the Montana Supreme Court decided a criminal postconviction case called *State v. Whitlow.*\(^{208}\) In *Whitlow*, a postconviction petitioner asserted his counsel was ineffective because he failed to follow up on certain responses from prospective jurors during *voir dire.*\(^{209}\) The District Court granted the State's motion to dismiss the petition because Whitlow could have raised this issue on direct appeal.\(^{210}\) Reversing the lower court, the Montana Supreme Court determined Whitlow's ineffectiveness claim was not "record based."\(^{211}\) The court distinguished an earlier case, *State v. Chastain,*\(^{212}\) a direct appeal in which defense counsel's failure to follow up on prospective jurors' statements was clearly ascertainable from the record. Unlike *Chastain*, Whitlow's trial counsel could have a "satisfactory explanation" for failing to follow up on jury *voir dire* questions, because he "could have known other facts about these prospective jurors."\(^{213}\) Because review of the trial record necessarily required giving "every indulgence" that defense counsel's acts were tactical, facts outside the trial record may be necessary to prove or disprove the strategy of counsel.\(^{214}\)

One reason the *K.G.F.* court rejected *Strickland* standards was that the presumption of sound trial strategy was inappropriate to involuntary commitment proceedings.\(^{215}\) Because this presumption does not exist in commitment proceedings, the *Whitlow* reasoning for allowing facts outside the record to prove "strategy" is not applicable. *K.G.F.* formulated eight arguments based on the record alone, but the court declined to address any of them. As the first court to

\(^{207}\) *K.G.F.*, ¶ 110 (Trieweiler, J., dissenting).

\(^{208}\) 2001 MT 208, 306 Mont. 339, 33 P.3d 877. It seems reasonable to infer that the court was aware of *Whitlow* at the time it deliberated *K.G.F.* Note that four of five justices deciding this case wrote separate opinions respectively advocating the modification, overruling, and affirmance of *State v. Chastain*, 285 Mont. 61, 947 P.2d 57 (1997). *Whitlow* ¶¶ 27-30 (Regnier, J., concurring and advocating modification); ¶¶31-43 (Nelson, J., concurring in part and dissenting in part, advocating overruling); ¶¶ 44-54 (Trieweiler and Cotter, J.J., concurring, advocating affirmance).

\(^{209}\) *Whitlow*, ¶ 8.

\(^{210}\) *Whitlow*, ¶¶ 8-9.

\(^{211}\) *Id.* ¶¶ 21-22.

\(^{212}\) 285 Mont. 61, 947 P.2d 57 (1997).

\(^{213}\) *Whitlow*, ¶ 21.

\(^{214}\) *Id.* ¶ 21.

\(^{215}\) *Id.* ¶¶ 34-35.
examine the record for signs of ineffective assistance, the Montana Supreme Court could have mentioned K.G.F.'s arguments and offered guidance to the lower court for what missing facts would indicate effectiveness or ineffectiveness.

It is not clear if all involuntary commitment appeals for ineffective assistance of counsel will be remanded. It may be that the K.G.F. remand is unique, occurring only because the new Guidelines were adopted. If Strickland applied, remanding K.G.F. for a hearing would be consistent with allowing a postconviction petition in Whitlow. In both cases, the court seems to imply that something beyond the record may surface to support or detract from an ineffective assistance claim. However, the judicial economy of such decisions is questionable, especially since the Strickland effectiveness presumption does not apply. In direct appeals, parties are generally not allowed to submit evidence outside the record. If consideration of evidence outside the record is necessary to determine the mere possibility of tactical strategy in ineffective assistance of counsel claims, the direct appeal process may be meaningless.

VI. POST-K.G.F. DEVELOPMENTS

Since K.G.F., the controversy over civil commitment and mental health law has resurfaced. Not surprisingly, lobbyists, legislators, and the press have been greatly concerned with the financial implications of K.G.F. and other proposed changes to the mental health system. Recent cuts in state funding to

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216. See, e.g., Vera Haffey, Mental Health Stalling, THE MONTANA STANDARD, Jan. 27, 2002, at A1 (discussing burden on public defenders, increase of costs at Warm Springs, and practical consequences of delaying care for those in need). Above Haffey's byline appeared the following language: "High court ruling creating bottleneck in involuntary commitment process."

217. Critics might view the K.G.F. court's omission of financial considerations as the proverbial "elephant in the room." Others have noted the general effects of financial constraints on Montana's mental health system. In a special session, the Montana legislature cut several programs, and the 2003 regular session will address further cuts. See http://www.discoveringmontana.com/budget/content/budget/2005_budget/OVERVIEW.pdf; http://www.discoveringmontana.com/budget/content/budget/2005_budget/OBPP%20B.pdf For a general overview of some effects of these cuts on Montana's mental health care system, see Montana Mental Health Ombudsman's Report (2002), at http://www.dphhs.state.mt.us/about_us/divisions/addictive_mental_disorders/services/annual_report_2002.pdf (noting lack of state funding resulted in elimination of some Montana drop-in centers and school programs). Some people suffering from mental illness testified before the Montana legislature about the effects of a budget "rollback" and proposed future cuts. Allison Farrell, Lawmakers Hear Pleas for Funding,
mental health programs may decrease voluntary treatment and trigger a corresponding increase in involuntary commitment. Steven J. Morse has argued that absent a financial commitment to adequate mental health care, involuntary commitment is largely ineffectual and should be abolished, or at least severely limited.\textsuperscript{218} While such a position may be extreme, it may have support in Montana.

One meeting about mental health services, facilitated by the Montana Consensus Council, displayed the diverse interests and opinions held by various Montanans who do not hold legislative offices.\textsuperscript{219} At this meeting, interested groups defined the lack of definition and organization in Montana mental health care as a major issue to consider in the future.\textsuperscript{220} To attain the best possible mental health system would require statutory changes, new money from the legislature, re-organizing existing resources.\textsuperscript{221} Interested parties warned that entities should avoid cost shifting and should pay extra attention to Montana’s Native American population.\textsuperscript{222}

One idea is to grant jurisdiction over involuntary commitments to the Department of Health and Human Services, an executive agency.\textsuperscript{223} Of course, this option would significantly reduce the role of the judiciary and legislature in involuntary commitment law. Another idea is to “[d]evelop ways
to reduce the due process requirements in the interest of mental health [to avoid] over-criminaliz[ing] the mental health system." 224 While this option is vague, more specific ideas include eliminating jury trials, devoting more resources to Montana State Hospital as an alternative to community based treatment, and reducing the number of hearings from 3 to 2. 225 Some wish to expand the already lengthy legislative history of the statutes by recodifying the entire act. Although some experts discourage blending the roles of "professional person" and therapist, some Montanans apparently wish to explore the idea of mandating a "continuing connection between the patient" and the petitioning professional is apparently set for exploration. 226 All of these notions are directly related to the K.G.F. opinion, and they demonstrate the controversies in mental health law.

VII. CONCLUSION

In the debate surrounding civil commitment, almost everyone involved in the debate is at least partly right. Only those who have experience with the mental health system can fully understand the practical implications of ethereal debates about liberty, autonomy, dignity, community, government, compassion, and understanding. Precisely because civil commitment raises issues about these core values of society, it will remain a controversial subject. If nothing else, the civil commitment process provides a framework of introspective discussion for legal practitioners, scholars, and the public.

The K.G.F. opinion probably served a therapeutic purpose for K.G.F., but the Montana bar may find it antitherapeutic. Attorneys appointed to represent respondents definitely should interview clients carefully, investigate circumstances, and protect respondents' interests. However, most attorneys probably knew that before K.G.F. Without an understanding of whether K.G.F.'s counsel acted appropriately or assistance in interpreting the new Guidelines, attorneys may have difficulty determining whether they have met the standards. More importantly, K.G.F. did not provide any guidance for the attorney with limited time, few resources, and harried judges. The court's analysis may provide some indication of the court's

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224. Rendezvous, supra note 219, at 3.
225. Id. at 3-4
226. Id. at 3.
willingness to implement sparsely litigated constitutional provisions, but only given the "right" facts and issues. 

*K.G.F.* is an ambitious opinion in that it addressed several difficult and controversial issues and attempted to resolve them. However, its faults lie in its ambition. The relatively narrow issue presented was effective assistance of counsel. In an attempt to distinguish civil commitment from criminal proceedings, interpret the Montana Constitution, and set new standards for counsel, the court ignored the facts. Instead, it indicted "the system" and attempted to affirm it in part and reverse it in part. "The system" was not a party to the case, nor were its faults directly at issue. Stopping short of addressing the issue before it, the *K.G.F.* court raised more questions about civil commitment than it answered.