Involuntary Commitment of People with Mental Retardation: Ensuring All of Georgia's Citizens Receive Adequate Procedural Due Process

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Involuntary Commitment of People with Mental Retardation: Ensuring All of Georgia’s Citizens Receive Adequate Procedural Due Process

I. INTRODUCTION

In the state of Georgia there are approximately three thousand citizens who are confined to segregated living institutions because of their disabilities.\(^1\) Many of these individuals are placed in institutions involuntarily through legal proceedings.\(^2\) Some of these individuals have mental retardation, a condition that occurs during a person’s development and results in below normal intellectual functioning.\(^3\) Many disability advocates argue that segregation and institutionaliza-

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3. Id. at 1113.
tion of people with mental retardation is not needed, although all do not agree. Despite strong advocacy for the rights of people with disabilities, many continue to be institutionalized, often because their families can find no other path of treatment for their loved ones.

This Comment focuses on the procedures used in Georgia to continue the habilitation of people with mental retardation. In order to commit someone initially, Georgia’s statute requires an adversarial hearing with ample procedural protections. However, once the initial order for habilitation is signed, the level of procedural protections for Georgia’s citizens drops dramatically. This Comment first analyzes the procedures currently in place in Georgia. Next, it analyzes what procedural due process might require in order for a state to continue its habilitation of a person with mental retardation. Because there has been no United States Supreme Court decision on point, this Comment focuses on past procedural due process decisions to outline the possible requirements. It also analyzes the procedures that other states utilize for continued habilitation, as the Supreme Court currently considers what procedures are used by states when determining how much procedure is due.

After analyzing what procedural due process requires, this Comment discusses how those constitutional rights can be waived, including what constitutes adequate notice of rights. After outlining the relevant law, this Comment analyzes Georgia’s procedures to determine (1) whether they comply with the proposed requirements of procedural due process and (2) whether the statute provides adequate notice so that failure to exercise those rights results in waiver. Finally, this Comment suggests possible amendments to Georgia’s procedures so that committed persons receive all of the protections they are entitled to under the law and so that no person is needlessly confined.

5. See generally Weidert, supra note 2, at 1114.
6. Id.
7. The terms “continued habilitation” and “involuntary commitment” are used interchangeably throughout this Comment.
9. See id.
II. LEGAL BACKGROUND

A. Historical Backdrop

People with mental retardation have faced a history of segregation and isolation. Many have been confined in state-run institutions, including mental hospitals and insane asylums. Until recently, many of these facilities had deplorable conditions. They provided no treatment for people and merely served as a place to warehouse people with disabilities. People were admitted with very little oversight and were then left in these facilities until their deaths. This lack of treatment is evident from Alabama’s notorious Bryce State Hospital in Tuscaloosa, which in 1970 had one physician for every 350 patients, one nurse for every 250 patients, and one psychiatrist for every 1700 patients. Living conditions were horrific. There were wards full of elderly people whose families had dumped them. Patients were often restrained, such as one patient who was straight-jacketed for nine years to prevent thumb-sucking. Patients who died were buried in unmarked graves behind the institution. There was no fire safety equipment, as the fire department’s hoses could not attach to the fire hydrants in the institution. Conditions like these in institutions throughout the United States sparked lawsuits and legislation that led to increased rights for institutionalized people.

For example, in Youngberg v. Romeo, a man with mental retardation who was involuntarily committed to a Pennsylvania institution alleged that he had a Fourteenth Amendment right to safe conditions, freedom from bodily restraints, and training. The Supreme Court held that people with disabilities who are involuntarily committed have these three basic rights as guaranteed by the Fourteenth Amendment. But, the Court limited the right to training or habilitation by requiring only training that relates to freedom from bodily restraints. The
Court concluded that because the respondent only sought training related to safety, the case "[did] not present the difficult question whether a mentally retarded person, involuntarily committed to a state institution, has some general constitutional right to training per se."\(^{20}\) Despite the limitation of the Court's holding, *Youngberg* was a crucial case because it alerted states to the possibility that there was a minimal constitutional level of care required for people with disabilities.

Congress's first attempt to address the problem of discrimination against people with disabilities was the passage of Section 504 of the Rehabilitation Act of 1973.\(^{21}\) The Act required that no program or activity that received federal funds discriminate on the basis of disability.\(^{22}\) But, Section 504 only covers entities that receive federal funds, and the problem of discrimination was much broader, so in 1990 Congress passed the Americans with Disabilities Act ("ADA").\(^{23}\) The ADA bars employers, public entities, and public accommodations, such as restaurants and hotels, from discriminating against people because of their disabilities.\(^{24}\)

Congress's second finding in the ADA is that "historically, society has tended to isolate and segregate individuals with disabilities, and . . . such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."\(^{25}\) One of the most common forms of isolation and segregation is the institutionalization of people with disabilities. By enacting the ADA, Congress made it a violation of federal law to isolate and segregate people simply because they have disabilities. States must find other ways of treating people that allow them to live outside of institutions.

This interpretation of the ADA was cemented with the Supreme Court's decision in *Olmstead v. L.C.*\(^{26}\) In *Olmstead* the Court reasoned that institutionalization "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and "severely diminishes the everyday life activities of individuals."\(^{27}\) *Olmstead* does not signify the end of institutionalization, but it does require states to become serious about finding community placements for people who qualify and want to live outside of an

\(^{20}\) Id.


\(^{22}\) 29 U.S.C. § 794(a).


\(^{24}\) 42 U.S.C. §§ 12111(2), 12112(a).


\(^{27}\) Id. at 600-01.
As the Court explained, the ADA only requires that states make reasonable modifications to their procedures. In *Olmstead* the Court reasoned that if a state could demonstrate that "it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the state's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met."  

Many states, including Georgia, attempt to comply with the ADA's requirements by maintaining an *Olmstead* list and moving people into community settings at a reasonable pace. However, many people with disabilities and disability rights advocates complain that Georgia is not doing all it can to find community based arrangements for people with disabilities. In Georgia, state-run facilities for people with mental retardation are known as Intermediate Care Facilities/Mental Retardation, or IFC/MRs. Every year advocacy groups investigate complaints of abuse and neglect in Georgia's ICF/MRs. Many critics argue that abuse and neglect occur because people with disabilities are cut off from society. Because they are hidden, there may be a lack of oversight, which allows inhumane conditions to go undetected. Thus, advocacy groups, such as The Georgia Advocacy Office, Georgia Legal Services Program, and the Legal Aid Society, file lawsuits on behalf of individuals in Georgia who are qualified for community placement. However, resources for these groups are limited, and litigation is expensive. Thus, most people are forced to simply wait.

**B. Procedures for Court Ordered Habilitation of People with Mental Retardation in Georgia**

If a parent, guardian, or someone standing in *locus parentis* is unable to find adequate services for someone with mental retardation, they can petition the court to order that person to receive services from Georgia's Department of Human Resources. The court reviews the petition, and if it finds probable cause, issues an order that the person be examined. Notice of that order is sent to the person and to two court-appointed representatives. The person is then examined by an

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28. *See id.* at 607.
29. *Id.* at 603.
30. *Id.* at 605-06.
32. O.C.G.A. § 37-4-40(a) (Supp. 2006).
33. *Id.* § 37-4-40(b).
34. *Id.*
evaluation team, and if the majority of that team believes the client is in need of specialized treatment, they file an individualized treatment plan with the court. The court holds a hearing on the petition, giving notice to the petitioner, the person, and his representatives or guardians.

After a “full and fair hearing,” if the court finds that the person has mental retardation and needs to receive services from a facility, the court may order habilitation, not to exceed six months. The full and fair hearing includes the right to counsel and to have counsel appointed by the court if necessary. At the end of the six months, if the person in charge of the client’s habilitation believes that the client needs further in-facility treatment, he or she must seek to continue habilitation under Official Code of Georgia Annotated (“O.C.G.A.”) section 37-4-42.

The process for continuing habilitation requires that the regional state hospital administrator seek an order authorizing continued habilitation. The administrator must file a notice with the Committee for Continued Habilitation Review (the “Committee”) of his intention to seek continued habilitation of up to one year. The Committee is made up of no less than five people, and its duty is to review and evaluate the updated individualized program plans sent to them by the hospital administrator and make recommendations back to the administrators.

Within ten days of receiving notice of the hospital administrator’s intention to seek continued habilitation, the Committee must meet to consider the application. Before the meeting to consider the application, the client and his representatives are informed of “the purpose of such meeting, the time and place of such meeting, their right to be present at such meeting, and their right to present any alternative individualized program plan secured at their expense.” The law does not specify when this notice must be sent. If the client is not able to attend, one member of the Committee is ordered to “make all reasonable efforts to interview the client and report to the committee.” The Committee reviews an updated individualized plan and then makes its

35. Id. § 37-4-40(b)-(d).
36. Id. § 37-4-40(d).
37. Id. § 37-4-40(e), (f).
38. Id. § 37-4-40(d)(2).
39. Id. § 37-4-40(f); O.C.G.A. § 37-4-42 (Supp. 2006).
40. Id. § 37-4-42(a).
41. Id. § 37-4-42(c).
42. Id. § 37-4-42(b).
43. Id. § 37-4-42(d).
44. Id.
45. Id.
recommendation to the administrator. The report must specify whether the person has mental retardation and whether continued habilitation is the least restrictive alternative available for treatment.

After considering the Committee's report, the hospital administrator must serve the Department of Human Resources and the client with a petition for continued habilitation, along with the updated individualized program plan and the Committee report. The petition must contain:

[A] plain and simple statement that the client or his representatives may file a request for a hearing with a hearing examiner . . . within 15 days after service of the petition, that the client has a right to counsel at the hearing, that the client or his representatives may apply immediately to the court to have counsel appointed if the client cannot afford counsel, and that the court will appoint counsel for the client unless the client indicates in writing that he will have retained counsel by the time set for hearing or does not desire to be represented by counsel.

If a hearing is not requested, the hearing examiner conducts an independent review of the paperwork and can order continued habilitation of up to one year.

If a hearing is requested within fifteen days, the hearing examiner must order a hearing and send notice to the facility, the client, his representatives, and his attorney. The hearing must be full and fair, except that the client may not be required to attend.

When these procedures were originally enacted in 1978, the hearing examiner was required to hold a "full and fair hearing" every time a hospital administrator sought continued habilitation. This meant that at least once a year, a hearing was held before a neutral party with full procedural due process protections, including the right to counsel. This procedure remained largely the same until a 1985 amendment removed the requirement for a "full and fair hearing" unless it was requested within fifteen days after service of the petition.

46. Id.
47. Id.
48. Id. § 37-4-42(f).
49. Id.
50. Id. § 37-4-42(g).
51. Id. § 37-4-42(h).
52. Id. The client's counsel may move to allow the client not to attend if the client is incapable of waiving the right to attend. Id.
54. Id.
As the Georgia law for court-ordered treatment currently stands, once someone is ordered into a treatment facility, it is possible he may never have an opportunity to be heard again. First, the Committee may meet without the client or any of his representatives, although it is required to give the client and his representatives notice it plans to meet. If the client cannot attend, the Committee is merely admonished to make “reasonable efforts” to meet with the client. However, the law does not create any penalties for failure to meet with the client, nor does it explain what constitutes “reasonable efforts.”

Second, once the Committee has made its recommendation, it must send that recommendation to the client, along with notice of the client’s right to request a hearing. The only person required to receive notice of a right to a hearing is the client, that is, the person receiving treatment in the facility. It is worth noting that the client has already been determined to have mental retardation. If no hearing is requested, a hearing examiner reviews all of the paperwork and then can order continued habilitation of the client for up to one year. The law places no burden on the hearing examiner to meet the client. Thus, after the initial habilitation hearing, a person may be ordered to a facility year after year through a shuffling of papers.

C. Procedural Due Process

The Fourteenth Amendment of the Constitution provides that no state shall “deprive any person of life, liberty, or property without due process of law.” The clause “due process of law” has been interpreted by the courts to protect two distinct rights—(1) the right to have a fair procedure before a deprivation occurs and (2) the right to be free from state interference with certain fundamental rights. The former is known as procedural due process; the latter is known as substantive due process. Procedural due process focuses on the procedures used by the state before it deprives someone of his or her life, liberty, or property. In order for the right of procedural due process to attach, there are two preliminary requirements: (1) the right being deprived must be

56. O.C.G.A. § 37-4-42(a).
57. Id.
58. See id.
59. Id. § 37-4-42(f).
60. See id.
61. Id. § 37-4-42(g).
62. If a child is placed in a facility before they reach age seventeen, it is possible the child will never have the opportunity to have the initial hearing. O.C.G.A. § 37-4-42(i).
established by the U.S. Constitution or state statute and (2) the person or entity which seeks to deprive the right must be acting under color of state law.64

Involuntary commitment infringes upon the constitutional right to liberty.65 Even if the initial commitment comports with the requirements of the Fourteenth Amendment, confinement may become unconstitutional if the reasons for the confinement are not present later. In O'Connor v. Donaldson,66 Donaldson, a man who was civilly committed by his father, sued the hospital administrator after he was confined against his will for fifteen years. Donaldson challenged his continued confinement as unconstitutional because he was neither mentally ill nor dangerous, and the mental hospital did not provide him any treatment. The issue before the Court was whether there was a constitutional basis for continuing to confine a patient who was not mentally ill or dangerous.67 The Court reasoned that even if the original commitment was based on a constitutionally adequate basis, the confinement could not continue after that basis no longer existed.68 At the trial level, the jury found that Donaldson was not dangerous and could easily live and work outside of the institution.69 Thus, the court held that “a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.”70

Donaldson confirms that where there is a constitutionally valid reason for institutionalizing someone, that reason must continue to exist throughout the institutionalization. The right to liberty does not disappear even though there is a valid civil commitment. If the reason for the initial institutionalization no longer exists, the state is depriving the individual of their constitutional right to liberty. Where there is a constitutional right at stake, the state cannot deprive an individual of it without due process of law. Donaldson does not address the question of what process is required by the Constitution to ensure that continued commitment is constitutional.

1. Three-factor Test for Procedural Due Process. Once a right has been established, the Supreme Court uses a three-factor test, first

65. Id.
67. Id. at 564-65.
68. Id. at 574-75.
69. Id. at 573.
70. Id. at 576.
established in Mathews v. Eldridge,\textsuperscript{71} to analyze whether a state's procedure for depriving a person of that right provides adequate procedural due process. The first factor is "the degree of potential deprivation that may be created."\textsuperscript{72} With respect to degree, the Court has noted the difference between permanent and temporary deprivations.\textsuperscript{73} The deprivation of liberty and social stigmatization that occurs in involuntary commitment is considered very severe.\textsuperscript{74}

The second factor is the "fairness and reliability of the existing . . . procedures, and the probable value, if any, of additional procedural safeguards."\textsuperscript{75} Here, the Court focuses on "the nature of the relevant inquiry."\textsuperscript{76} In other words, the Court considers what decisions and conclusions must be reached through the procedures and whether the current procedures are adequate to reach those conclusions.\textsuperscript{77} More due process is required when issues such as witness credibility are relevant than when the issue to be decided is merely medical.\textsuperscript{78}

The third factor is "the public interest . . . [including] the administrative burden and other societal costs" of other procedures.\textsuperscript{79} Although increased cost to the state is not a determining factor, the Court weighs the increased cost of procedures against the "increased assurance that the action is just."\textsuperscript{80} Presumably the state could always increase its procedures to assure more fairness, but the amount of increase in procedure is checked by cost factors. Thus, if increased procedure would be very expensive but not increase fairness and accuracy, then the procedures are not is not required by the Fourteenth Amendment.

2. Supreme Court Procedural Due Process Decisions in the Context of Institutionalization. The Supreme Court has never clearly articulated what procedures a state must use to continue the habilitation of someone in order to comply with procedural due process. But the Court has considered issues similar to the institutionalization of people with mental retardation and certain trends emerge.

\textsuperscript{71} 424 U.S. 319 (1976).
\textsuperscript{72} Id. at 341.
\textsuperscript{73} See id. at 340.
\textsuperscript{74} Humphrey v. Cady, 405 U.S. 504, 512 (1972).
\textsuperscript{75} Mathews, 424 U.S. at 343.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} See id. at 343-44.
\textsuperscript{79} Id. at 347.
\textsuperscript{80} Id. at 348.
In *Parham v. J.R.*, a class of children challenged Georgia's procedures for admitting children to institutions. In Georgia, a parent could admit their child to a hospital for temporary observation, and then each hospital followed its own procedures to determine whether continued hospitalization was warranted. Generally, children were admitted and then their conditions were reviewed periodically through informal meetings between doctors and providers. The district court found these procedures to be unconstitutional because children had a liberty interest in not being institutionalized, and due process required "notice to be heard before an impartial tribunal." In reversing the district court, the Supreme Court held that no formal hearing was required before commitment, but that a neutral fact finder must determine whether the requirements for institutionalization were met. The Court reasoned that the relationship between parents and children was unique and that parents generally acted in the best interest of their children. The Court further reasoned that "the questions are essentially medical in character," and therefore, judicial involvement was not necessary. The Court did not require a formal hearing before commitment, but the Court did note the need for periodic review, without giving any specific requirements for that review. With respect to continuing commitment, the Court held that "it is necessary that the child's continuing need for commitment be reviewed periodically by a similarly independent procedure." However, the issue of whether Georgia's periodic reviews met the constitutional standard of due process was not before the Court, and it lacked the necessary findings of fact to make that judgment. The Court directed the district court to make this determination on remand; there is no record of a subsequent decision.

In Justice Brennan's opinion, which was dissenting in part and concurring in part, the minority disagreed with the majority's decision, arguing that it failed to enunciate the requirements of procedural due

82. *Id.* at 591.
83. *Id.* at 592-95.
84. *Id.* at 597 (quoting J.L. v. Parham, 412 F. Supp. 112, 137 (1976)).
85. *Id.* at 606.
86. *Id.* at 602-03.
87. *Id.* at 609.
88. *Id.* at 607.
89. *Id.*
90. *Id.* at 617.
91. *Id.*
process after the children were initially committed. The minority argued that "the right to at least one postadmission hearing can and should be affirmed now." The Court reasoned that the factors outlined by the Court in Mathews showed that "[t]he risk of erroneous commitment is simply too great unless there is some form of adversary review."

The Court also considered a similar challenge to Pennsylvania's laws for the commitment of children in Secretary of Public Welfare v. Institutionalized Juveniles. In Juveniles institutionalized children challenged the voluntary admission procedures of their state. With respect to children with mental retardation, admission was only permitted after a referral by a physician and a mental examination. Additionally, the director of the institution was required to perform an independent evaluation of the children. The Court held that these procedures comported with the requirements of due process, as thorough background investigations were taken and an independent evaluation was conducted. As in J.R., the Court did not decide whether the state's postadmission procedures comported with due process requirements.

The minority again disagreed with the majority's approach and would have condemned Pennsylvania's postadmissions procedures as failing to comply with procedural due process. The postadmissions procedures required that the children be informed of their right to a hearing and given the telephone number of an attorney. However, the procedures placed the burden of contacting counsel and initiating the hearing on the institutionalized child. The minority concluded that this procedure did not meet the requirements of due process because "[i]f . . . constitutional rights . . . are to be guaranteed in substance as well as in form and if the commands of the Fourteenth Amendment are to be satisfied, then waiver of those constitutional rights cannot be inferred from mere silence or inaction on the part of the institutionalized

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92. Id. at 625-26 (Brennan, J., dissenting in part and concurring in part).
93. Id.
94. Id. at 639.
96. Id. at 643.
97. Id. at 648.
98. Id. at 649-50.
99. Id. at 650 n.9.
100. Id. at 651 (Brennan, J., concurring in part and dissenting in part).
101. Id.
102. Id.
child.\textsuperscript{103} The minority noted that "[m]any of the institutionalized children are unable to read, write, comprehend the formal explanation of their rights, or use the telephone. Few, as a consequence, will be able to take the initiative necessary for them to secure the advice and assistance of a trained representative."\textsuperscript{104}

Another Supreme Court case that provides insight into the requirements of procedural due process is \textit{Vitek v. Jones}.\textsuperscript{105} The issue in \textit{Vitek} was whether prisoners were entitled to procedural protections, such as notice of an adversarial hearing, before being transferred involuntarily to a state mental hospital.\textsuperscript{106} The Court held that there was a liberty interest in not being placed in a mental institution needlessly, despite the fact prisoners had already lost their right to be free from confinement.\textsuperscript{107} The only procedure required before the state transferred an inmate was a certification from a physician that the inmate suffered from a mental disease or defect and needed hospital treatment.\textsuperscript{108} The Court held that procedural due process required much more: notice, a hearing, an opportunity to present witnesses and to cross-examine, an independent decisionmaker, written findings of fact, and legal counsel.\textsuperscript{109} The Court particularly stressed the right to legal counsel because "[a] prisoner thought to be suffering from a mental disease or defect . . . is more likely to be unable to understand or exercise his rights."\textsuperscript{110} The state was required to provide counsel to indigent prisoners if it sought to place them in a hospital.\textsuperscript{111}

These cases demonstrate several important points. First, with respect to the institutionalization of children, both the majority and the minority of the Supreme Court agreed that procedural due process required some periodic review. However, the Court could not and did not agree on the specific contours of that review. The minority opinions in \textit{Parham} and \textit{Juveniles} stressed the danger of placing the burden of receiving review on the institutionalized child. But, these cases both involved juveniles, and the commitment of adults requires more procedural due process, as discussed below. In the \textit{Vitek} case, the Court stressed the importance of counsel so that inmates being committed would not waive their constitutional rights. The case also illustrates the importance of the

\begin{itemize}
\item \textsuperscript{103} Id. at 651-52.
\item \textsuperscript{104} Id. at 651 (citation omitted).
\item \textsuperscript{105} 445 U.S. 480 (1980).
\item \textsuperscript{106} Id. at 483.
\item \textsuperscript{107} Id. at 487-88.
\item \textsuperscript{108} Id. at 489.
\item \textsuperscript{109} Id. at 494-95.
\item \textsuperscript{110} Id. at 496-97.
\item \textsuperscript{111} Id. at 497.
\end{itemize}
right to be free from unwarranted institutionalization—it is a right that survives even incarceration and must be protected through procedural due process.

3. Georgia Courts' Procedural Due Process Decisions in the Context of Institutionalization. A district court in Georgia has recognized the right of involuntarily institutionalized persons to hold an adversarial procedure to challenge their confinement, and the court differentiated between the rights of children and adults. In Heichelbech v. Evans, an incapacitated adult challenged the state's requirement that his guardian consent before either discharging him or conducting a hearing to determine if he met the criteria to be an involuntary patient. The state's position was that only the guardian had the right to exercise due process on behalf of the incapacitated ward. The court held that the state had deprived the plaintiff of his due process rights by not initiating a hearing after his request to be released. The court reached its conclusion by distinguishing Parham. The court reasoned that the relationship between a "parent and his minor child is very different from the relationship between a guardian and his adult ward." The plaintiff "had a constitutionally protected interest in being free from involuntary confinement, and due process requires that he be afforded an adversary proceeding to challenge his confinement." Therefore, the court in Heichelbech held that even people who have been declared incompetent have the right to an adversarial hearing to challenge their confinement in an institution.

Prior to the 1985 amendments to the continuing habilitation statute, all clients were given a yearly hearing to determine whether they still met the requirements for admission. The Georgia Supreme Court indicated in dicta that those "full and fair hearings" comported with procedural due process. In Clark v. State, a man found not guilty by reason of insanity challenged Georgia's procedures for

114. Id. at 711.
115. Id. at 713.
116. Id. at 714.
117. Id.
118. Id.
119. See id. at 715.
120. See 1979 Ga. Laws 734.
122. 245 Ga. 629, 266 S.E.2d 466 (1980).
admitting him to a mental hospital. After a jury found the defendant not guilty by reason of insanity, the court had to determine whether the acquittee met the requirements for civil commitment. The court could defer its decision for thirty days, after which it was not required to hold a hearing. The court determined that the acquittee had a right to a hearing, but that the right could be waived by the failure of the acquittee or their representative to file an application for release.

The court compared this to the right of an individual with a developmental disability to waive a commitment hearing. Clark indicates there is a right to a hearing, but so long as the individual receives notice of the right to a hearing, the individual's procedural rights are protected. The court interprets the individual's failure to request a hearing as a waiver of their constitutional right to a hearing. Waiver of constitutional rights is discussed in Part II.D. of this Comment.

4. Practices of Other States. In addition to the three-factor analysis, courts also look to the history of the processes other states provide to determine how much process is due. This historical and comparative approach was used by the Supreme Court in *Burnham v. Superior Court of California*. In *Burnham* the Court analyzed whether the practice of "tagging" a person with service of process in a state comported with the due process requirements of the Fourteenth Amendment. The establishment of personal jurisdiction by tagging is based on the theory that a state has personal jurisdiction over any person appearing within its borders. Thus, if a person can be served with notice of the suit while in the borders of the state then the state has valid jurisdiction over them. A man who was tagged with service in California challenged the state's personal jurisdiction over him based on the Supreme Court's reasoning that a state could only exercise personal jurisdiction if it satisfies the Due Process Clause and does not violate "'traditional notions of fair play and substantial justice.'" To determine whether tagging comported with the requirements of fair play

123. Id. at 631, 266 S.E.2d at 469.
124. Id. at 641, 266 S.E.2d at 474-75.
125. Id.
126. Id.
127. Id.
128. Id. at 475.
130. See id. at 608. "Tagging" is when notice of a suit is served on a person who is physically present in the state. See id. at 607-08.
131. Id. at 608-09 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).
and substantial justice, the Court noted that tagging was a very old method of establishing personal jurisdiction.\textsuperscript{132} The Court reasoned that the practice was used in all of the states and by the federal government, and the Court upheld the practice.\textsuperscript{133} Thus, when determining what due process requires, the Supreme Court considers the practices of the states and the federal government.\textsuperscript{134} Therefore, an analysis of the processes used in other states for continuing commitment or habilitation of people with mental retardation is useful for outlining the requirements of the due process clause.

Some states do not have judicial proceedings for the admission of people with mental retardation; however, states such as Arizona\textsuperscript{135} and Massachusetts\textsuperscript{136} commit people with mental illnesses. Disregarding those states, there are two major categories of procedures for continuing habilitation or involuntary commitment in states: (1) a statutory right to a hearing that must be requested and (2) automatic hearings to determine continuing need for commitment.

Georgia is in the first category, but the practices of these states vary widely. Some states, such as Mississippi, are similar to Georgia in that the only person given notice of their right to a hearing is the person who was previously committed.\textsuperscript{137}

The second category consists of states that hold automatic hearings, such as Ohio,\textsuperscript{138} California,\textsuperscript{139} and Louisiana.\textsuperscript{140} The amount of time that passes between the initial commitment and a subsequent judicial hearing varies greatly.\textsuperscript{141} Connecticut takes a unique approach: the client is informed yearly of their right to request a hearing, but if a hearing has not been requested in five years, one is held automatically.\textsuperscript{142}

Various conclusions can be drawn from looking at how other states deal with continuing commitment of people with mental retardation.

\textsuperscript{132} \textit{Id.} at 611-14.
\textsuperscript{133} \textit{Id.} at 615, 628. Not all states still used the process, as some had held that it was unconstitutional under the Supreme Court's rationale, but the majority did not count those states. \textit{Id.} at 615.
\textsuperscript{134} \textit{Id.} at 615-16.
\textsuperscript{135} ARIZ. REV. STAT. ANN. § 36-560F (2003).
\textsuperscript{136} Dybwad & Herr, \textit{supra} note 4, at 760.
\textsuperscript{137} MISS. CODE ANN. § 41-21-99 (2005).
\textsuperscript{139} CAL. WELF. & INST. CODE § 6500 (West 1998).
\textsuperscript{140} LA. REV. STAT. ANN. § 28:454.7.A (Supp. 2006).
\textsuperscript{141} Compare OHIO REV. CODE ANN. § 5123.761(H)(4) (two years) \textit{and} CAL. WELF. \& INST. CODE § 6500 (one year).
\textsuperscript{142} CONN. GEN. STAT. § 17(a)-276(d) (2006).
First, many states do not involuntarily commit people with mental retardation (although they may commit people with mental illnesses), which indicates there may be a trend to stop the practice entirely. Second, Georgia's procedures are not among the worst of states, but they are not among the best—those that provide automatic judicial review. If the Supreme Court were to analyze what procedures are required to meet the traditional notions of fairness, it would likely note that there is no consensus among the states. And if a trend were to be gleaned from the data, the trend would be a movement away from using involuntary commitment and towards automatic judicial review when involuntary commitment is used.

Minnesota is a useful example of one of the states that provide automatic judicial review, because its automatic review was established by the Minnesota Supreme Court after a procedural due process challenge. In *In re Harhut*, the Minnesota Supreme Court analyzed its commitment procedures for people with mental retardation. Under Minnesota's procedures, people with mental retardation were committed for an indefinite period of time, and there was no statutorily required review; however, there was review for people with chemical dependency or mental illness. The petitioner in the case, a blind man with mild mental retardation, presented an equal protection argument. He argued there was no rational basis for the state to differentiate between people with mental illness and people with mental retardation. The state argued that there were sufficient safeguards in place because patients had the statutory right to petition for judicial review and that patients had court-appointed attorneys. The court rejected the petitioner's equal protection argument but nearly held that the statute violated procedural due process because "[i]ndeterminate commitment does raise a serious due process issue since the patient's basic personal liberty is affected." The statute was only held constitutional because of the state's explanation of the process. The court was satisfied with the procedure because all patients had counsel, and the court had faith in the attorney's "responsibility as a vigorous advocate for the client's rights."

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143. 385 N.W.2d 305 (Minn. 1986).
144. Id. at 306.
145. Id. at 309 (citing MINN. STAT. ANN. § 253B.12 (2003)).
146. Id. at 306, 310.
147. Id. at 310.
148. Id. at 311.
149. Id. at 312.
150. Id.
But, the court did insist on additional procedural safeguards being added. First, the court required that all periodic medical reviews be sent to the court that committed the person, as well as to the person's counsel. The court made clear the importance of having counsel and directed the committing court to automatically appoint new counsel if the previous counsel could no longer serve. Second, the court required a judicial review of every indefinitely committed person at least once every three years. The court explained that this three year review was in addition to the patient's right to request a hearing. The exact nature of the hearing would depend upon the person:

In many such reviews, the severity of mental retardation may be so manifest that the court will find it unnecessary to go into great detail or take adversary testimony. In other cases, where the degree of retardation is not as great and substantial progress has occurred, full adversary proceedings similar to that for initial commitment . . . may be in order.

The purpose of the hearing would be not only to determine whether the person met the requirements of commitment, but also whether institutionalization was the least restrictive alternative treatment available.

Other lower courts that have considered the issue have also concluded that procedural due process requires periodic judicial review of involuntarily committed people with mental retardation, though for varying reasons. In Doe v. Austin, the Sixth Circuit Court of Appeals upheld a district court's determination that Kentucky's involuntary commitment procedures violated due process and equal protection. At the time, Kentucky considered commitments that were initiated by a parent or guardian to be voluntary, despite the fact there was no regard for the "the actual wishes of the committed person." The circuit court affirmed the decision of the district court that "the commitment of mentally retarded adults by the Commonwealth

151. Id.
152. Id.
153. Id.
154. Id.
155. Id.
156. Id. at 312-13.
157. 848 F.2d 1386 (6th Cir. 1988).
158. Id. at 1396.
159. Id. at 1392.
upon application by a parent or guardian is to be considered involuntary."

However, the circuit court did not agree with the district court that procedural due process required judicial hearings before Kentucky involuntarily committed an adult with mental retardation.\textsuperscript{161} While the court agreed that there must be some process with a neutral factfinder, "due process does not require that the neutral trier of fact be legally trained or a judicial or administrative officer."\textsuperscript{162} Instead, the court relied on the Supreme Court's reasoning from \textit{Vitek}, holding that minimum procedures should include notice, a hearing, an opportunity to present testimony, an independent decisionmaker, written findings of fact, and independent legal assistance.\textsuperscript{163} Following the same reasoning, the court affirmed that due process required some postcommitment periodic review but did not require that the review be judicial.\textsuperscript{164} Because preadmission and periodic judicial review were provided to mentally ill individuals, the court determined there was no legitimate interest that justified denying people with mental retardation the periodic review provided to people with mental illness.\textsuperscript{165} Thus, the court concluded that judicial review for people with mental retardation was not required by the Due Process Clause of the Fourteenth Amendment, but it was required by the Equal Protection Clause.\textsuperscript{166}

This opinion was partially reversed by the Supreme Court's decision in \textit{Heller v. Doe}.\textsuperscript{167} In \textit{Heller} a class of involuntarily committed people with mental retardation asserted an equal protection challenge against the differences between Kentucky's commitment schemes for people with mental retardation compared to people with mental illness. There were two differences in the commitment schemes. First, the burden of proof for mental retardation was clear and convincing evidence, while for mental illness it was beyond a reasonable doubt. Second, guardians and immediate family members could participate as parties in the commitment proceedings of people with mental retardation, but not in the proceedings of people with mental illness.\textsuperscript{168} The Court analyzed these differences using a rational-basis test, meaning there must be "a rational relationship between the disparity of treatment and some legitimate

\begin{itemize}
  \item \textsuperscript{160} \textit{Id.}
  \item \textsuperscript{161} \textit{Id.} at 1392-93.
  \item \textsuperscript{162} \textit{Id.} at 1393.
  \item \textsuperscript{163} \textit{Id.} at 1393-94.
  \item \textsuperscript{164} \textit{Id.} at 1394, 1396.
  \item \textsuperscript{165} \textit{Id.} at 1396.
  \item \textsuperscript{166} \textit{Id.}
  \item \textsuperscript{167} 509 U.S. 312 (1993).
  \item \textsuperscript{168} \textit{Id.} at 314-15.
\end{itemize}
governmental purpose."\textsuperscript{169} The Court held that there was a rational basis for the distinction between people with mental retardation and mental illnesses.\textsuperscript{170} First, mental retardation is easier to diagnose than mental illness, and thus, the risk of an incorrect decision is reduced.\textsuperscript{171} Second, the Court concluded that the parents and guardians of people with mental retardation would have valuable insights that should be considered in the commitment process.\textsuperscript{172} Therefore, the differences in the procedures used for people with mental retardation and mental illnesses do not violate the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{173} Additionally, the Court held that the party status of parents and guardians did not violate the procedural Due Process Clause of the Fourteenth Amendment, either.\textsuperscript{174} The Court reasoned that the accuracy of the proceedings would likely be increased by parental or guardian involvement, and the parties did not allege that their participation could decrease the accuracy.\textsuperscript{175}

Another state supreme court that considered the issue determined that procedural due process required periodic judicial reviews for involuntarily committed people. In \textit{Fasulo v. Arafeh},\textsuperscript{176} two women petitioned for writs of habeas corpus, arguing that Connecticut's commitment procedure violated due process.\textsuperscript{177} At the time, once a patient was committed, they could be released through three possible procedures: (1) the patient could petition for release; (2) the supervisor of their institution could discharge them; or (3) the patient could seek habeas corpus relief.\textsuperscript{178} In order to evaluate these procedures, the court noted that it was necessary to "take account of the controlled and often isolated environment of the mental hospital."\textsuperscript{179} The court found the first procedure—the patient petitioning for release—lacking for two important reasons.\textsuperscript{180} First, only the state has the authority to confine someone when it proves they meet the qualifications of commitment,
thus the burden of proof must remain on the state.\textsuperscript{181} Second, placing the burden on the committed person ignores the practical considerations of living in an isolated and segregated environment.\textsuperscript{182} The court even doubted whether informing the person of their right to a hearing was sufficient, stating:

[I]t ignores the practical difficulties of requiring a mental patient to overcome the effects of his confinement, his closed environment, his possible incompetence and the debilitating effects of drugs or other treatment on his ability to make a decision which may amount to the waiver of his constitutional right to a review of his status.\textsuperscript{183}

The court held that the second method of release—initiated by the manager of the institution—was lacking because it was too discretionary and could not guarantee accuracy and fairness.\textsuperscript{184} And finally, the court also found habeas corpus lacking because it placed the legal burden on the patient.\textsuperscript{185} Thus, procedural due process requires periodic state-initiated judicial reviews with full procedural protection where the burden of proof rests on the state.\textsuperscript{186}

In \textit{Wyatt v. King},\textsuperscript{187} Alabama's lack of postcommitment procedure was held to violate the Due Process Clause.\textsuperscript{188} \textit{Wyatt} involved a class action against the Department of Mental Health and Mental Retardation challenging the constitutionality of Alabama's commitment scheme.\textsuperscript{189} At the time, Alabama had 1800 residents in its mental hospitals, and ninety percent of them were there through involuntary commitment.\textsuperscript{190} After concluding there was a right to be free from involuntary commitment if the reason for initial commitment no longer existed, the court then considered how much process was required to "minimize the risk of erroneous decisions."\textsuperscript{191} The court noted that many other courts that had considered the issue decided that some periodic review was required.\textsuperscript{192} The court distinguished an Eleventh Circuit decision that held that people committed after being found not guilty by reason of

\begin{thebibliography}{99}
\bibitem{181} \textit{id.}
\bibitem{182} \textit{id.}
\bibitem{183} \textit{id.}
\bibitem{184} \textit{id.}
\bibitem{185} \textit{id.} at 558.
\bibitem{186} \textit{id.}
\bibitem{188} \textit{id.} at 1517.
\bibitem{189} \textit{id.} at 1509.
\bibitem{190} \textit{id.} at 1511.
\bibitem{191} \textit{id.} at 1513 (quoting \textit{Greenholtz v. Inmates of Neb.}, 442 U.S. 1, 13 (1979)).
\bibitem{192} \textit{id.} at 1514-15.
\end{thebibliography}
insanity were not entitled to periodic proceedings. The liberty interest at stake for someone who has committed a crime is much less than for someone who has been involuntarily committed. In the end, the court relied not only on the legal precedents of other courts to consider the issue, but also on the real-life experience of one of the plaintiffs in the case:

[The] case of patient "L.M."—who has been involuntarily civilly confined for over 20 years—by itself provides a compelling reason of why review which is judicial in nature and reasonably periodic is minimally necessary... The least the state owed her over these many years was a periodic formal hearing, with all the trappings of an initial commitment proceeding, to assure to a reasonably high degree of certainty that her continued confinement was to her and society's benefit.

The court concluded that the due process balance falls in favor of periodic judicial review. Every court that has considered the issue has determined that the Constitution requires some form of postcommitment periodic review. However, not all agree that the review is required by the procedural Due Process Clause, and not all agree that the review must be judicial. Some are satisfied with an independent review procedure, even if it is not judicial in nature. Many courts emphasize the importance of the right to counsel, particularly when the committed person might waive his or her constitutional right to a hearing.

D. Waiver of a Constitutional Right

Assuming arguendo that procedural due process requires that institutionalized persons be given the right to a hearing, what constitutes a waiver of that right? Under Georgia's procedure, the institutionalized client is informed in writing of his right to a hearing. Does the client's failure to request the hearing constitute a viable waiver of that right?

The first issue is whether the notice given to people meets the requirements of due process. In Mullane v. Central Hanover Bank & Trust, the Court set the standard for sufficient notice under the

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193. Id. at 1515 (citing Williams v. Wallis, 734 F.2d 1434 (11th Cir. 1984)).
194. Id.
195. Id. at 1516.
196. Id.
197. O.C.G.A. § 37-4-42(f) (Supp. 2006).
Fourteenth Amendment. The Court stated: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The Court reasoned that "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." The notice must be such that it is reasonably calculated to inform the person of their right to a hearing.

The Supreme Court has addressed the waiver of the right to procedural due process in the realm of a property deprivation. In *Fuentes v. Shevin*, the Court held that property purchased under a conditional sales contract could not be seized through replevin without first providing procedural due process. In that case, the contract provided that in the event payments were missed, the property would be "take[n] back." The Court reasoned that "a waiver of constitutional rights in any context must, at the very least, be clear." In the context of other constitutional rights, such as the right to counsel for a criminal defendant, the Court requires that the right be waived "knowingly and intelligently." There can be no waiver from a silent record. Arguably, the right to a hearing falls somewhere in between these two levels of protection. First, the waiver must be "clear." Second, because there is a liberty interest at stake, it may be the state's burden to prove that the person waived their right to a hearing knowingly and intelligently.

If the failure to request a hearing is to act as a waiver of the constitutional right to the hearing, then the waiver must be made voluntarily, intelligently, and knowingly. In *Lynch v. Baxley*, the court held that Alabama's procedures for involuntary admission to mental institutions violated procedural due process. The court held

199. Id. at 314.
200. Id.
201. Id. at 315.
202. Id.
204. Id. at 96-97.
205. Id. at 94.
206. Id. at 95.
210. Id. at 397.
that a precommitment hearing was required and that only a “knowing and intelligent waiver of constitutional safeguards” was acceptable.\textsuperscript{211} If the person is incapable of giving consent to the waiver of constitutional rights, then “after appropriate inquiry and finding of facts, the court may approve such waiver for good cause shown.”\textsuperscript{212}

In one interesting case, a court held that the notice given to people with disabilities violated the Americans with Disabilities Act (the “ADA”). In \textit{Armstrong v. Davis},\textsuperscript{213} the Ninth Circuit Court of Appeals considered whether the California penal system’s notification of rights was sufficient for people with disabilities.\textsuperscript{214} While the court did not decide the case on constitutional grounds, it did rule that the procedures violated the ADA.\textsuperscript{215} The court held that the procedures violated the ADA by denying people with disabilities the benefits of state services.\textsuperscript{216} The court reasoned, “At the notification stage, disabled prisoners and parolees routinely waive their rights to hearings, frequently because they cannot comprehend the information provided to them.”\textsuperscript{217} The penal department made little or no effort to communicate notification in a way that people with disabilities would understand. For example, notice of rights was not provided in Braille for people who are blind.\textsuperscript{218} The court confirmed the lower court’s injunction requiring that the penal system improve its methods of communications with people with disabilities so that they may receive actual notice of their right to a hearing.\textsuperscript{219}

The required amount of notice is thus bound by the Due Process Clause as well as the ADA. Once sufficient notice is given, the state must show that the person’s failure to exercise their right was a knowing and voluntary waiver of that right. Thus, notice and waiver are linked. If the notice does not sufficiently inform the person of their right to a hearing, their failure to request one cannot constitute a waiver of that right.

\textsuperscript{211} Id. at 396.
\textsuperscript{212} Id.
\textsuperscript{213} 275 F.3d 849 (9th Cir. 2001).
\textsuperscript{214} Id. at 856-58.
\textsuperscript{215} Id. at 879.
\textsuperscript{216} Id. at 865.
\textsuperscript{217} Id. at 863.
\textsuperscript{218} Id. at 862-63.
\textsuperscript{219} Id. at 863.
III. Analysis

While the Supreme Court has yet to definitively rule on the issue of what procedures a state must use to continue the involuntary commitment of someone with mental retardation, some guidelines are clear. First, a person's right to personal freedom continues to exist even after they have been involuntarily committed. Because people still have a substantive right, the state must utilize some procedure in order to continue to deprive them of that right.

There are two major indicators of what due process requires: first, the three-factor balancing test of Mathews v. Eldridge, and second, what procedures states currently use to determine what constitutes "fair play," as described in Burnham. In this arena, the results of the three-factor test come down to a basic balancing of two competing interests—the interest of the individual to be free from unnecessary confinement and the interest of the state to avoid expensive and unnecessary procedures. In comparison to other states, Georgia's procedures are similar to the majority of states, although it is somewhere in the middle of the range of procedures, which range from one extreme of no statutory review system of any kind to the other extreme of full adversarial hearings held yearly.

A. What Procedures are Required for Continued Habilitation to Comport with the Due Process Clause

The first factor to be analyzed is "the degree of potential deprivation that may be created." In commitment cases, the potential deprivation is continued deprivation of personal liberty. Personal liberty is one of the most closely protected rights in the Constitution. As such, states can deprive people of it only when there is substantial procedural protection.

The second factor is the "fairness and reliability of the existing ... procedures, and the probable value, if any, of additional procedural safeguards." Here, the Court focuses on "the nature of the relevant inquiry." There are two major considerations a court must determine when deciding whether to order someone to receive continued habilitation: (1) whether the client has mental retardation and (2)

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222. Mathews, 424 U.S. at 341.
223. Id. at 343.
224. Id.
whether they are in need of treatment in an institutionalized setting. The first question is mainly a medical determination, and it is not likely to change with the passage of time. Thus, it is unlikely a judicial hearing is required to make this determination. However, the second determination, whether the person needs in-facility treatment, is one that could best be decided through an adversarial hearing. The court also needs to decide if there is a less restrictive environment for the person to receive treatment. For example, different experts and evaluators may disagree on the ability of the person to live independently. Additionally, family and community members may be able to provide to the person support that lessens their need for institutionalization. Thus, the second determination is one in which the courts would benefit from a full hearing.

To fully evaluate the second factor one must compare the fairness and reliability of the current procedure—notice to the client of their right to a hearing—to a hearing that is held automatically. On the one hand, the current procedures might be fair and reliable for clients who are able to read and understand their rights and are able to request a hearing. One might argue that those clients are the ones who are least in need of institutionalization. But understanding the implications of the right to have a hearing is a complex idea, and even those who may not fully understand or know how to exercise that right may be capable of living outside of an institution. The current procedure is unfair to those clients that do not understand their rights but nonetheless could live outside of the institution. It is also questionable how reliable the current procedure is because it places the burden of exercising important rights on the client. Many courts that have considered their state's process have voiced concern with placing the burden of exercising a constitutional right solely on the institutionalized person because to do so ignores the realities of their situation.

The third factor is “the public interest . . . includ[ing] the administrative burden and other societal costs” of having automatic hearings. This factor is difficult to analyze as there is a lack of data regarding how many people are involuntarily institutionalized in Georgia. There are at least 3000 Georgians living in congregate (more than seven-person) segregated living facilities. Even if only half of them are institutionalized against their will, there will still be an increased cost to automatically hold adversarial hearings yearly. The cost of these hearings may be prohibitive. One strong indication that the cost may be prohibitive

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225. See id. at 343-44.
226. Id. at 347.
is that in 1985, Georgia's legislature amended the continuing habilitation statute to remove automatic hearings.\textsuperscript{228} It is possible that these hearings were becoming expensive and burdensome on the state; so the legislature decided to remove them.

Accordingly, after analyzing the factors from Mathews, Georgia's current procedures fall short of what due process requires. Because the right to liberty is so fundamental and the fairness and reliability of the current procedure is lacking, increased procedures are needed. But, the cost of holding automatic hearings may be burdensome on the state's resources and outweigh the added benefit of additional due process protection. Thus, to balance the important concerns of adequate due process and wise allocation of the state's precious resources, this Comment suggests various compromises, mainly modeled after Minnesota's procedures.

\textbf{B. Problems with Georgia's Current Procedures and Potential Changes}

There are several problems with Georgia's current procedures. First, and most importantly, the only person who is given notice of the right to a hearing is the person who is institutionalized.\textsuperscript{229} That person has already been judged by a court to have mental retardation and to be in need of treatment. It is far from certain that clients have the ability to understand the implications of their right to a hearing and to have an attorney. The statute requires that the notice be given in writing and in clear and simple language.\textsuperscript{230} However, this means that a person who cannot read or is blind will receive no notice whatsoever. The statute does not address what the state must do if the person is incapable of understanding or reading his or her notice.

Georgia's notice of right to a hearing falls short of constitutional standards. The failure to petition for the hearing could only function as a waiver of the constitutional right to a hearing if that waiver was made knowingly and intelligently. If the person is incapable of giving informed consent to waive his or her right to a hearing, the court could grant the waiver only after an inquiry, findings of facts, and for good cause. \textit{Lynch} indicates that the failure to petition for a hearing might not be enough to waive the right to a hearing if the person does not do so knowingly.\textsuperscript{231}

\begin{itemize}
  \item \textsuperscript{228} See 1985 Ga. Laws 926.
  \item \textsuperscript{229} O.C.G.A. § 37-4-42(f) (Supp. 2006).
  \item \textsuperscript{230} \textit{Id}.
  \item \textsuperscript{231} \textit{Lynch} v. \textit{Baxley}, 386 F. Supp. 378, 396 (M.D. Ala. 1974).
\end{itemize}
Because notice is only given to the client, who has a developmental
disability, it can be soundly argued that this is not "reasonably
calculated" to give notice. Georgia's procedure is accurately described as
a mere gesture of due process and not an attempt to communicate with
the person their right to a hearing. The only provisions in the statute
are that the notice must be "plain and simple." These requirements
are not enough to ensure that people with disabilities understand their
rights.

Similar to Armstrong, the state has failed to "address the needs of
[people in institutions] who have problems understanding complex
information or communicating through the spoken or written word; thus, the state has violated the ADA. By not making reasonable
accommodations to provide notice in a way that people with mental
retardation can understand, the state is depriving them of their benefit
of a hearing.

The second major problem with Georgia's statute is that if a hearing
is never requested, one will never take place. After the initial commit-
ment hearing, there is no guarantee that there will ever again be
judicial review of the commitment. While some might argue that this is
justified by the intractability of mental retardation, there are more
issues to be resolved than just whether the person has mental retarda-
tion. In order to commit someone, the court must also find that the
person needs to receive services from a facility. Thus, the question
to be answered is not just whether the person has mental retardation,
but whether they are still in need of treatment from a facility. People
with mental retardation have the ability to learn, and many can develop
the life skills to live outside of an institutionalized setting.

An additional benefit of automatic hearings is that hearings are
another method to ensure Georgia is complying with the requirements
of Olmstead. At the hearings, the court should analyze whether the
person qualifies for community placement and desires it. If so, the court
can use the opportunity provided by the hearing to question the state
regarding why the person has not been moved to the community. This
will ensure that many more institutionalized Georgians have the
opportunity to push the state for a community placement, not just the
lucky few who have lawsuits filed on their behalf by an advocacy group.

If a person with mental retardation is to live successfully outside of an
institution, it usually takes the support of family members, friends, the
community, or advocates. Those members of the community should also

232. O.C.G.A. § 37-4-42(f).
233. Armstrong v. Davis, 275 F.3d 847, 862 (9th Cir. 2001).
234. See O.C.G.A. § 37-4-41(e) (Supp. 2006).
receive notice of the right to a hearing. There are organizations in Georgia devoted solely to pairing up citizen advocates with people with disabilities, and these citizen advocates should receive these notices. These advocates can take it upon themselves to investigate possible alternatives, such as lost or forgotten family members, group homes, and alternative ways to receive treatment in noninstitutionalized settings.

Not only should family members and citizen advocates be given notice of the right to a hearing, every institutionalized person should have an attorney. If they do not have an attorney, the committing court should appoint one. That attorney should be served with the notice as well. It is the duty of all attorneys to vigorously advocate for the interest of their client. It is axiomatic that it is in the best interest of every person to live in the least segregated and least restrictive environment possible. Thus, in order to fulfill their professional obligations, attorneys would likely meet with their clients, do background research, and try to relieve their clients of their commitment orders. To effectively advocate, the attorney should investigate whether the family can take the person back into their home and analyze what supports might be needed to make that happen. Additionally, attorneys have specialized knowledge of the legal field and, thus, will be more effective advocates for their clients in a hearing.

Next, the notice that Georgia gives should be designed to actually give the person notice of the person's rights. If the person cannot read, the notice should be given orally. If the person is deaf, the notice should be given in sign language or whatever mode of communication the person understands. And finally, in the case where the person is not capable of understanding his or her rights, it is crucial that attorneys and other citizen advocates acting in the best interest of the person receive notice.

Finally, a hearing should be held after some number of years if there has not been a hearing held after the initial assessment. Regardless of whether the client or any of the client's representatives ever requests a hearing, one should be held, perhaps every three or five years. At that hearing, the person should be present, along with the person's attorney and any other representative. The court should ensure the presence of as many people who are interested in the well-being of the person as possible. As the Minnesota Supreme Court described in In re Harhut, the exact contours of the hearing would depend on the nature of the person's disability.235 If it is clear that the person has mental retardation, and there are no alternatives available besides institutionalization, there will not be a need for adversarial witnesses. However, in a case

235. See In re Harhut, 385 N.W.2d 305 (Minn. 1986).
where the person has mild mental retardation or where people come forward who are willing to assist in the care of the person, an adversarial hearing should be held.

The suggested mandatory three or five year hearing ensures that no person slips through the bureaucratic cracks. What is crucial about this hearing is that it gives the person who will be subject to the continuing habilitation order an opportunity to be heard by the court before that order is issued. The person will have the opportunity to explain to the court what the person’s life is like, what treatment the person is receiving, and whether the person wishes to leave the institution. Even if the person cannot communicate, the court will at least have the opportunity to see the person, thereby ensuring that the person is not being abused or neglected. The hearing also ensures that attorneys are advocating for their clients, as it is unlikely attorneys would appear before the court without having prepared. It also provides an opportunity for advocates and family members to develop momentum behind deinstitutionalizing the person. For example, family members can have the opportunity to explain to the court what services they might need to enable them to bring the person home. When presented with a full picture of options available, the court may have other alternatives to continued institutionalization.

IV. CONCLUSION

For the Author, these additional procedural safeguards are a means to an end—the end of institutionalization of people with disabilities. That goal is endorsed not only by disability rights advocates, but also by the Supreme Court. To force someone to live a segregated life simply because they have a disability violates the Americans with Disabilities Act. By requiring more than a shuffle of paperwork to continue the institutionalization of a person with disabilities, momentum will shift away from institutionalization and towards real homes. Procedures prevent people from being forgotten and ignored. Their appearance before a court reduces the likelihood that people will suffer abuse and neglect.

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