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Prison Transfer to Mental Institutions - The Right to Equal Protection

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PRISON TRANSFER TO MENTAL INSTITUTIONS THE RIGHT TO EQUAL PROTECTION

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The history of prisons and penology contains many instances in which prison administrators have had mentally ill persons confined in their institutions. With that in mind, this article will first attempt to briefly discuss the need to provide proper mental health care for prison inmates who require care beyond the scope of that available within the prison confines. Secondly, it will point out some problems which have arisen in connection with the transfer of prisoners to mental institutions. Thirdly, an examination will be made of several statutory provisions for transferring prisoners to mental hospitals, some of the arguments challenging the constitutionality of in-prison transfer statutes, and the rationale of the courts in several landmark decisions. Finally, the North Dakota prison transfer statute[1] will be critically appraised in light of the constitutional arguments which can be made against it.

I. THE NEED FOR TRANSFERS

Historically the mentally ill have often been treated in a manner much akin to criminals. At times the treatment afforded them included such practices as scourging and burning, and often included chaining the mentally ill in dungeons with criminals.[2] As reforms were introduced into the method of caring for and treating the mentally ill, earlier abuses began to disappear. In the Nineteenth Century, asylums were built to house the insane. Although in many cases these early institutions fell far short of what would be desired goals today, they were an improvement over most previously existing facilities.

Today's mental health facilities provide extensive methods of

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1. N.D. CENT. CODE § 12-47-27 (1971).

treatment for mental illness. Modern treatment techniques include: (1) somatic therapy, including the use of drugs such as insulin, electroshock therapy, and brain surgery;[3] (2) psychotherapy, based on the formation of a relationship between the therapist and the patient and intended to effect a change in the patient; (3) behavior therapy, which entails the manipulation of the patient's environment in order to elicit specific responses, but may also include some shock therapy; and (4) milieu therapy, in which attempts are made to have the patient achieve identification with a group or community in order to have him attempt to conform to the norms of that group.[4] These forms of treatment can be quite beneficial provided a mentally ill person has access to them.

Many correctional institutions are faced with a lack of facilities with which to effectively treat prisoners who have acute mental health problems. For many prisoners the availability of psychiatric resources is dismally small.[5] This lack of facilities is a twofold problem: lack of physical equipment and lack of qualified personnel. Both of these shortages are related, each contributing to the severity of the other.

Financial resources limit the ability of correctional institutions to purchase and maintain expensive equipment for surgical, shock, or drug treatment. Unless maximum use is obtained from such equipment, the investment is wasteful. Such equipment would most likely receive much greater use in a mental hospital than it would in a prison. The correctional programs in some of the larger states deal with a great number of prisoners with mental health problems. New York, for example, has a large number of mentally ill prisoners and has attempted to confine them in facilities that are akin to both hospitals and prisons, but the soundness of this procedure has been questioned.[6] For small correctional systems, such as the one in North Dakota, resources with which to purchase equipment are limited, as is the need for such equipment in terms of the number of prisoners suffering from mental health problems.[7] Therefore, in states such as North Dakota, in order to conserve financial resources, the correctional system should provide treatment for men-

2. Morris, *The Confusement of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Correction of the State of New York*, 17 BUFFALO L. REV. 651 (1968).

3. *Id.* at 651 n. 4; MILLER, DAWSON, DIX & PARNAS, CRIMINAL JUSTICE ADMINISTRATION AND RELATED PROCESSES, 1419-1423 (1971).

4. MILLER, DAWSON, DIX & PARNAS, *supra* note 3.

5. Thurrell, Halleck, and Johnson, *Psychosis in Prison*, 56 J. CRIM. L. C. & P. S. 271 (1965).

6. Morris, *supra* note 2 at 652.

7. The North Dakota State Penitentiary had only 115 inmates at the time of this study. As of April 12, 1972, only one inmate was under treatment in the clinic. However, the Clinical Director reported that the number of prisoners under treatment may vary considerably.

tally ill prisoners through the use of the facilities of the state mental hospital.[8]

The second problem, lack of adequate personnel, supports the argument against the purchase of equipment for mental health clinics in prisons. In 1964 there were only 56 full time psychiatrists working in 230 correctional institutions in the United States. Eighteen of this number were employed in federal institutions. The remaining thirty-six worked in various states. The national average was four-fifths of a full time psychiatrist per state.[9] At the North Dakota Penitentiary a psychiatrist is presently available one-half of one day per week. This is the equivalent of one-tenth of a full time psychiatrist. Although additional services include a psychologist who comes in one day per week, one full time nurse, two full time social workers, and one part time social worker, the lack of personnel who are qualified to use special equipment supports an argument against purchasing expensive special equipment for the mental health facility at the North Dakota Penitentiary.

As to the cause of this second problem, it has been argued that many psychiatrists find the atmosphere in prisons depressing.[10] This argument is supported by one which contends that in prisons, psychiatrists are not often invited to participate in enlightened mental health treatment programs.[11] Assuming these arguments are valid, they provide reasons to explain the limited number of psychiatric personnel available who will work in the prison milieu, thus creating a need to transfer prisoners with acute mental health problems to facilities which can provide adequate psychiatric care for them.

Another factor contributing to the need for transfer of prisoners with acute mental illness to the environment of a mental hospital is the prison environment itself. "If one applies the generality that a man's psycho-social adjustment can be measured in terms of love and work, a prisoner is generally deficient in both counts."[12] In prison the individual is generally isolated from contacts with the opposite sex.[13] Relationships in prison are rarely characterized by fond mutuality or sharing of emotions.[14] Part of the punishment of prison is isolation from society. It seems to follow from this state-

8. The State Hospital at Jamestown, North Dakota, has a ward in which prisoners under sentence can be both treated and confined.

9. Morris, *"Criminality" and the Right to Treatment*, 36 U. CHI. L. REV. 784, 788 (1969).

10. Thurrell, Halleck & Johnson, *supra* note 5.

11. *Id.*

12. *Id.*

13. This is not the case in all jurisdictions. *See*, Hopper, *Conjugal Visitation: A Controversial Practice in Mississippi*, 3 CRIM. L. BULL. 289 (1967).

14. Thurrell, Halleck, & Johnson, *supra* note 5 at 272.

ment that an environment in which isolation is associated with punishment is not necessarily the most conducive to fostering a quick recovery for a mentally ill offender.

However, even assuming there is a genuine need to transfer mentally ill prisoners to facilities which can provide adequate care and treatment for them, care must be used in exercising the transfer process to remove a man from prison and place him in a mental hospital. In the past, instances have occurred in which a prison administrator abused the transfer process by placing in a mental institution an inmate who had decried the quality of the prison administration.[15]

Transferring a prisoner to a mental institution may affect him in several ways. Under some statutory schemes the prisoner suffers distinct disadvantages that he might not otherwise suffer if he were to remain a prisoner. For instance, transfer to a mental hospital may be for an indefinite period of time.[16] Also, confinement in a mental institution may effectively deny a prisoner the possibility of being paroled because he is removed from the environment where he can be observed, or because the parole board does not consider prisoners confined in mental hospitals for parole.[17] For example, the North Dakota Century Code provides for a hearing on applications for parole.[18] However, if the prisoner is confined at Jamestown he will be precluded from being available for either interviews with or hearings before the parole board. In some jurisdictions, when a prisoner is formally committed, or transferred to a mental institution without formal commitment proceedings, his sentence, if indeterminate at the time of sentencing, becomes the maximum sentence the statute will allow.[19] This last situation effectively lengthens the sentence of the mentally ill offender without review by the tribunal which sentenced him. Finally, the United States Court of Appeals for the Second Circuit has recognized the possibility that a prisoner who is in fact sane might be mistakenly transferred to a mental institution, and because of the environment, lose his sanity.[20]

While prisoners who are mentally ill may benefit from transfers to mental health institutions, it cannot be doubted that if such transfers are made indiscriminately, prisoners who do not require treatment may be irreparably harmed. Thus, it is imperative that

15. United States *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1075 (2d. Cir. 1969), *cert. denied,* 369 U.S. 847 (1969).
16. CAL. PENAL CODE § 2684 (West, 1970); IOWA CODE ANN. § 246.16 (1971).
17. PA. STAT. ANN. tit. 61, § 292 (1964) provides that the parole board shall consider for parole those inmates *confined in* the penitentiary.
18. N.D. CENT. CODE § 12-59-08 (1963).
19. PA. STAT. ANN. tit. 50 § 4412 (d) (1964).
20. United States *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1078 (2d Cir. 1969).

prisoners who are transferred to mental institutions be properly determined to be in need of such care by the use of procedural safeguards in the transfer process.

II. THE PRESENT STATE OF THE LAW IN NORTH DAKOTA

In North Dakota the warden of the state penitentiary at Bismarck is vested with authority under the North Dakota Century Code to have any prisoner he believes is mentally ill given a psychiatric evaluation.[21] This evaluation may be given either at the prison or at the state hospital at Jamestown. If the prisoner is found to be mentally ill, the warden may order him confined to Jamestown. The North Dakota prison transfer statute contains no provision for review of the propriety of the transfer nor does it provide for any procedural safeguards for prisoners involved in this process. The statute which grants authority for the transfer is silent as to the length of confinement at Jamestown, but the statute which provides for return to the penitentiary of prisoners who have recovered refers to the expiration of a prisoner's sentence:

> If the term of commitment sentence of such person has expired at the time of his recovery, the warden shall direct that he be released from further custody by the superintendent.[22]

In comparison, civil proceedings for involuntary commitment to the state hospital provide substantial safeguards for the person who is to be committed. First, an application must be made to the mental health board and must be accompanied by a certificate of a licensed physician stating that he has examined the individual and that such individual should be hospitalized.[23] The proposed patient has a right to receive notice of the proceedings.[24] The mental health board must appoint a medical examiner.[25] For commitment, a hearing must be conducted before the mental health board.[26] At this hearing the patient has the right to cross-examine witnesses and be represented by counsel.[27]

III. THE STATUS OF PRISON TRANSFER LAW IN OTHER JURISDICTIONS

The statutory process of transfer of a mentally ill prisoner may vary significantly from one jurisdiction to another. In some juris-

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21. N.D. CENT. CODE § 12-47-27 (1971).
22. N.D. CENT. CODE § 12-47-29 (1960).
23. N.D. CENT. CODE § 25-03-11(1) (1960).
24. N.D. CENT. CODE § 25-03-11(2) (1960).
25. N.D. CENT. CODE § 25-03-11(3) (1960).
26. N.D. CENT. CODE § 25-03-11(6) (1960).
27. *Id.*

dictions it is quite simple, appearing to be administrative in nature and requiring nothing more than a transfer of custody.[28] In other jurisdictions it is quite complex, often requiring a hearing by a court of record, complete with procedural safeguards.[29]

A. IOWA

In Iowa when the director of the Department of Corrections is informed that a prisoner is mentally ill, he may have the director of the Department of Social Services transfer the prisoner to the state security medical facility for examination, diagnosis, or treatment, as necessary.[30] Nothing in the statute provides for the right to a hearing or for judicial review of the transfer. By comparison, however, during civil involuntary commitment proceedings the person to be confined has the right to be examined by a physician,[31] to be represented by counsel, and to have counsel appointed if he cannot afford one,[32] to be present at an administrative hearing,[33] and to appeal from the administrative hearing to the district court for a jury trial.[34]

B. CALIFORNIA

California's Penal Code provides for transfer of mentally ill, mentally deficient, or insane prisoners to state mental health institutions, but provides no procedure to determine when a prisoner is actually mentally ill, deficient, or insane.[35] The statute merely provides for transfer to a state hospital "until in the opinion of the superintendent such person has been treated to such an extent that he will not benefit from further care and treatment in a state hospital."[36]

In contrast to the Penal Code, the California Welfare and Institutions Code provides a number of procedural safeguards for mentally retarded persons who are to be committed.[37] Initially, the petition for commitment should be filed in a court of record[38] which will then order two experts to conduct an examination of the person.[39]

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28. CAL. PENAL CODE § 2684 (West, 1970); IOWA CODE ANN. § 246.16 (1971); N.D. CENT. CODE § 12-47-27 (1971).
29. N.Y. CORRECTION LAW § 408 (McKinney, 1971); PA. STAT. ANN. tit. 50, § 4411 (1964).
30. IOWA STAT. ANN. § 246.16 (1971).
31. *Id.* § 229.6 (1969).
32. *Id.* § 229.5 (1969).
33. *Id.* § 229.4 (1969).
34. *Id.* § 229.17 (1969).
35. CAL. PENAL CODE § 2684 (West, 1970).
36. *Id.*
37. CAL. WELFARE & INSTITUTIONS CODE §§ 6500.1-6509 (West, 1972).
38. *Id.* § 6502 (West, 1972).
39. *Id.* § 6507 (West, 1972) requires examination by either a physician and a clinical psychologist, two physicians, or two psychologists.

The person who is to be confined must have a hearing,[40] and the court may subpoena witnesses to testify at that hearing.[41]

C. DISTRICT OF COLUMBIA

In the District of Columbia the prison transfer statute requires only the certification of a psychiatrist to the director of the Department of Corrections that the prisoner concerned is mentally ill.[42] This is little protection compared with the civil commitment procedure in the District which requires a hearing,[43] and provides for rights to: (1) examine witnesses and jurors;[44] (2) be represented by counsel;[45] (3) appeal from the hearing in order to obtain a trial by court or jury;[46] and (4) be examined periodically.[47] It can be seen that in the District of Columbia considerable disparity exists between the rights provided a prisoner and those provided to a person not under sentence.

In *Matthews v. Hardy*[48] the Circuit Court of Appeals for the District of Columbia held that before being transferred to a mental institution a prisoner is entitled to a judicial hearing and a jury trial, if requested. At this hearing the prisoner is to be provided the same procedural safeguards which a non-prisoner would enjoy.[49]

D. PENSNYLVANIA

In Pennsylvania, transfers from a correction facility to a mental institution can be effected by either of two methods: (1) transfer without court approval;[50] or (2) commitment proceedings in court.[51] It should be pointed out that the statutes are unclear as to any requirement for using one procedure or the other to transfer a prisoner.

(1) *Transfer Without Court Approval*

The Pennsylvania statute which allows transfers without court approval provides few procedural safeguards for an inmate. In order to be eligible for this type of transfer, an inmate of a penal or correctional institution must be "believed to be mentally disabled so that his commitment to a facility is necessary or desirable. . . ."

40. *Id.* § 6503 (West, 1972).
41. *Id.* § 6507 (West, 1972).
42. D.C. CODE ANN. § 24-302 (1967).
43. *Id.* § 21-542 (1967).
44. *Id.*
45. *Id.* § 21-543 (1967).
46. *Id.* § 21-544 (1967).
47. *Id.* § 21-546 (1967).
48. Matthews v. Hardy, 420 F.2d 607 (D.C. Cir. 1969).
49. *Id.* at 612.
50. PA. STAT. ANN. tit. 50 § 4412 (1969).
51. *Id.* § 4411 (1969).

Since the statute gives no other criteria for transfer and does not state who must find it necessary or desirable to transfer the inmate, it is patently unclear on its face. Under this statute the inmate must be examined, but again there is no provision as to who must examine him or what the qualifications of that individual must be. If, upon examination, the inmate is found to be in need of care, the Department of Public Welfare may "order the admission of a prisoner to a proper facility until sufficient improvement of his condition warrants his return to the custody of the Bureau of Correction."[53]

(2) *Prison Transfer Through Court Commitment*

The commitment procedure for prison transfers requires a petition to the court which imposed sentence. These proceedings are applicable to a person "undergoing sentence and detained in a penal or correctional institution . . . and believed to be mentally disabled so that his commitment to a facility is necessary. . . ."[54] The court then has the option to adopt one or more procedures in making a determination whether or not to commit the individual. The court may:

> (1) Appoint two or more physicians to examine the person in the detaining institution and make a report as to whether he is mentally disabled and whether his commitment is necessary.
>
> (2) Appoint a commission consisting of two physicians and an attorney which shall examine such person in the detaining institution and in addition, receive any other evidence from any source. . . .
>
> (3) Appoint an attorney to represent such person. . . .
>
> (4) Hold a hearing which may be public or private. . . .[55]

It is significant that the court is not bound to provide more than one of the procedures listed. It has the discretion to eliminate any requirements it considers unnecessary.

The procedures for civil commitment in Pennsylvania provide substantially more protection than is found in either of the two prison transfer statutes.[56] In Pennsylvania, civil commitment of a mentally disabled person[57] may be obtained either by: (1) application of a relative[58] or (2) by civil court commitment.[59]

Commitment by a relative requires a petition, accompanied by

52. *Id.* § 4412(a) (1969).
53. *Id.* § 4412(a)(2) (1969).
54. *Id.* § 4411(a) (1969).
55. *Id.* § 4411(b) (1969).
56. *Id.* §§ 4404, 4406 (1969).

certificates of examination from two physicians to be presented to the director of a mental health facility.[60] Mental retardation also provides grounds for commitment under authority of this statute.[61] The director of the mental health facility may receive the person to be committed "until discharge in accordance with the provisions of the act."[62] There is provision for an annual review of the patient's records by a committee appointed by the director,[63] however, this statute provides almost no procedural safeguards for the person who is being committed.

Civil court commitment provides much greater procedural protection than does commitment on application by a relative. In this procedure the petition for commitment must be presented to a court.[64] The court is required to conduct a hearing and notify interested parties of the hearing.[65] After the hearing, the court may have the person examined by two physicians or commit him to a mental institution for a period of examination.[66] If, after examination, the person is found to be in need of care, he may be committed to a mental institution.[67]

It seems doubtful that the alternate forms of procedure for confinement in mental institutions provided by the Pennsylvania statutes represent sound legislative policy. Civil commitment and prison transfer each have one process for confinement which provides substantial procedural safeguards for the person who is to be committed. However, each type of confinement process has one procedural form which might easily be abused by those who would arbitrarily exercise their authority. Since there are no clear standards which direct the use of commitment proceedings in court rather than transfer without court approval in the case of prisoners, or require civil court commitment rather than application by a relative for non-prisoners, any procedural safeguards found in transfer by commitment proceedings or civil court commitment may be easily avoided by the use of transfer without court approval or application by a relative.

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57. *Id.* § 4102 (1969). This term by statutory definition applies to a broad range of abnormal mental conditions.
58. *Id.* § 4404(a) (1969).
59. *Id.* § 4406 (1969).
60. *Id.* § 4404 (1969).
61. *Id.* § 4404(b) (1969). The requirements to commit a mentally retarded person under this statute include submitting the report of a psychologist concerning the individual to be committed.
62. *Id.* § 4404(c) (1969).
63. *Id.* § 4404(d) (1969).
64. *Id.* § 4406(a) (1969).
65. *Id.* § 4406(a)(3) (1969).
66. *Id.* § 4406(a)(4) (1969).
67. *Id.* § 4406(b) (1969).

E. NEW YORK

In New York numerous procedural safeguards protect prisoners from arbitrary transfer to mental institutions. In order to transfer an inmate, the warden of the correctional facility where the prisoner is confined must submit the initial application for commitment to a court of record, which will then order an examination by two physicians not connected with the correctional institution.[68] After the examination, an additional application for commitment must be made to the court.[69] Although a hearing at this point is not mandatory, if requested, a hearing must be provided to determine the issue of sanity.[70] The prisoner in question must receive notice of the hearing.[71] After the hearing the prisoner may request a jury trial if he desires one.[72] Finally, in any case the initial commitment from the court may not be for more than six months.[73]

The Mental Hygiene law in New York provides substantially the same procedural protection in civil commitment cases as the Correction law provides in prison transfer cases. Under the Mental Hygiene law the following rights are provided for a person who is under consideration for commitment to a mental institution: (1) he must be examined by two physicians;[74] (2) he must be notified of the proceedings;[75] (3) if requested, a hearing will be provided;[76] and (4) if requested, a trial *de novo* by jury will be provided.[77]

The New York statutes are excellent examples of legislative policy which reflects concern for the rights of those who might be confined in mental institutions, whether they are prison inmates or otherwise. However, the law of New York did not always reflect this concern for the rights of prisoners. Under earlier statutes[78] prisoners did not enjoy many procedural protections. However, in two landmark cases New York laws were held to violate the equal protection clause of the fourteenth amendment.[79]

In *Baxstrom v. Herold*[80] the United States Supreme Court held that the New York statutes did not provide equal protection for an inmate whose term of commitment under sentence expired while he was in a mental institution and whose custody was changed with-

68. N.Y. CORREC. LAW § 408(1) (McKinney, 1972).
69. *Id.* § 408(2) (McKinney, 1972).
70. *Id.* § 408(4) (McKinney, 1972).
71. *Id.*
72. *Id.* § 408(9) (McKinney, 1972).
73. *Id.* § 408(3),(4),(9) (McKinney, 1972).
74. N.Y. MENTAL HYGIENE LAW § 72(1) (McKinney, 1971).
75. *Id.* § 72(2) (McKinney, 1971).
76. *Id.* § 72(3) (McKinney, 1971).
77. *Id.* § 74 (McKinney, 1971).
78. Law of March 28, 1939, ch. 136 [1939] N.Y. Laws 167-68 (repealed 1965).
79. Baxstrom v. Herold, 383 U.S. 107 (1966); United States *ex rel.* Schuster v. Herold, 410 F.2d 1071 (2d Cir. 1969).

out any civil proceeding. In *United States ex rel. Schuster v. Herold*[81] the Court of Appeals for the Second Circuit extended the doctrine of *Baxstrom* to require procedural protection for a person whose term of commitment had not expired. The court in *Schuster* held that *substantially* the same procedural safeguards which govern civil commitment proceedings must be provided even when a prisoner is transferred to a mental institution before his sentence expires.[82]

IV. CONSTITUTIONAL QUESTIONS CONCERNING PRISON TRANSFERS

Constitutional arguments against prison transfer statutes have been based on claimed deprivations of both due process and equal protection. There is a strong line of precedent which has consistently rejected the due process argument against prison transfers.[83] Recently, however, the equal protection argument has proven successful as a challenge to prison transfer statutes.[84]

In making a determination of whether due process has been provided in a prison transfer the following factors would be relevant: (1) whether the prisoner was provided with a right to a hearing; (2) whether he was provided with notice of the proceedings; (3) whether he had a right to present and cross-examine witnesses; (4) whether he had a right to be represented by counsel, or to have counsel appointed if he could not afford one.

In North Dakota, many of the procedural safeguards listed above are already provided in civil commitment proceedings.[85] For this reason it seems that a successful challenge to a prison transfer statute could be based on a claimed violation of equal protection.

In determining whether or not a statute provides equal protection, the court must determine: (1) whether any distinction made by the statute has some relevance to the purpose of the classification created by the statute; (2) whether the classification created is reasonable.[86]

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80. Baxstrom v. Herold, 383 U.S. 107 (1966).
81. United States *ex rel.* Schuster v. Herold, 410 F.2d 1071 (2d Cir. 1969).
82. *Id.* at 1084.
83. Darey v. Sandritter, 355 F.2d 22 (9th Cir. 1965); Urban v. Settle, 298 F.2d 502 (8th Cir. 1962); Garcia v. Steele, 193 F.2d 276 (8th Cir. 1951); Jones v. Pescor, 169 F.2d 853 (8th Cir. 1948).
84. Matthews v. Hardy, 420 F.2d 607 (D.C. Cir. 1969); United States *ex rel.* Schuster v. Herold, 410 F.2d 1071 (2d Cir. 1969).
85. N.D. CENT. CODE § 25-03-11 (1960).
86. Walters v. City of St. Louis, 347 U.S. 231, 237 (1954). It should be noted that this is the traditional equal protection test by which courts have measured legislative enactments. This criterion was used in both *Baxstrom v. Herold*, 383 U.S. 107, and United States *ex rel.* Schuster v. Herold, 410 F.2d 1071 (2d Cir. 1969), *cert. denied*, 396

A. BAXSTROM v. HEROLD

The leading case in the area of equal protection for the criminally insane is *Baxstrom v. Herold*.[87] Here the United States Supreme Court ruled on a situation in which the petitioner had been transferred to Dannemora State Hospital (for the criminally insane) in accordance with New York law[88] while he was in prison, and had been retained there after the end of his sentence.

After Baxstrom's sentence had expired, the director of Dannemora sought to have him committed civilly. However, the commitment proceeding was carried out under the authority of the Department of Correction and pursuant to the Correction Law[89] rather than under the Department of Mental Hygiene and pursuant to the Mental Hygiene Law.[90] After Baxstrom's sentence had expired, administrative charge of him was transferred from the Department of Correction to the Department of Mental Hygiene, but he was retained in custody at Dannemora, an institution for mentally ill criminals and the dangerously insane.

Baxstrom sought release from Dannemora, alleging that if he had been committed in accordance with the requirements of the New York Mental Hygiene Law he would have been entitled to a trial *de novo* before a jury on the question of insanity.[91] The Correction Law provided no such procedure.[92] In appraising the commitment under the Correction Law the Court said:

> Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distintion for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all*. For purposes of granting judicial review before a jury of the question whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other commitments.[93]

U.S. 847 (1969) which are discussed at length in the text *infra*.

In recent years, the United States Supreme Court has developed a "new" equal protection which strictly scrutinizes certain types of legislation which touch on "fundamental interests" or employ "suspect classifications." For an excellent discussion of the changing doctrine of equal protection *see* Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

87. *Id.*

88. Law of April 2, 1929, ch. 243, § 384, [1929], N.Y. Laws 599-600 (repealed 1966) [now N.Y. CORREC. LAW § 385 (McKinney, 1968)].

89. *Id.*

90. N.Y. MENTAL HYGIENE LAW § 74 (McKinney, 1971).

91. *Id.*

92. Law of April 2, 1929, ch. 243, § 384, [1929], N.Y. Laws 599-600 (repealed 1966) [Now N.Y. CORREC. LAW § 385 (McKinney, 1968)].

93. Baxstrom v. Herold, 383 U.S. 107, 111 (1966).

The Court concluded that the classification in the New York statute was unreasonable and that Baxstrom had been denied equal protection of the law.[94]

B. UNITED STATES EX REL. SCHUSTER V. HEROLD

In *United States ex rel. Schuster v. Herold*[95] the Court of Appeals for the Second Circuit expanded the equal protection rationale of *Baxstrom v. Herold* and held that *substantially* the same procedural safeguards which govern civil commitment proceedings must be provided even when a prisoner is transferred to a mental institution *before* his sentence expires. In *Schuster* the petitioner had been transferred to Dannemora State Hospital pursuant to a statute which provided that a determination of insanity by the prison physician was sufficient cause for transfer of an inmate to Dannemora until he was legally discharged from that institution.[96] Schuster's case took on added significance because immediately before his transfer to Dannemora he had charged the administration at Clinton prison with corruption.[97]

The court of appeals considered it significant that Schuster's possibility of parole was effectively cut off while he was at Dannemora.[98] They also noted the possibility of greater restraint existing at Dannemora than had existed in the prison.[99] A factor which the court seemed to weigh heavily was the possibility that a sane man might wrongly be confined in a mental institution.[100]

> We are faced with the obvious but terrifying possibility that the transferred prisoner may not be mentally ill at all. Yet he will be confined with men who are not only mad, but dangerously so. . . . He will be exposed to physical, emotional, and general mental agony. Confined with those who are insame, told repeatedly that he too is insane, and indeed treated as insane, it does not take much for a man to question his own sanity and in the end succumb to some mental aberration.[101]

In holding that Schuster had been denied equal protection of the law, the court of appeals said:

> [T]he *procedures* to be followed in determining whether

94. *Id.* at 110.
95. United States *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1084 (2d Cir. 1969), *cert. denied,* 396 U.S. 847 (1969).
96. Law of March 28, 1939, ch. 136 [1939] N.Y. Laws 167-68 (repealed 1965).
97. United States *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1075 (2d Cir. 1969).
98. *Id.* at 1076.
99. *Id.* at 1078.
100. *Id.*
101. *Id.*

> one is committable must be unaffected by the irrelevant circumstance that one is or has recently been under sentence pursuant to a criminal conviction, although the fact that one had committed a crime may be relevant to the substantive conclusion that he is mentally ill.[102]

It should be noted that Schuster had been committed under authority of a law which provided fewer procedural safeguards[103] than those provided by the statute in effect at the time of the *Schuster* decision.[104] The court recognized this fact, but noted that protection for non-prisoners was still greater than that provided for prisoners. In its opinion the court stated that prisoners are entitled to substantially the same procedural safeguards as non-prisoners before they can be transferred to a mental institution.[105]

C. MATTHEWS V. HARDY

In *Matthews v. Hardy*[106] the Circuit Court of Appeals for the District of Columbia held that before being transferred to a mental institution a prisoner is entitled to a judicial hearing and a jury trial, if requested. At the hearing the prisoner is to be provided the same procedural protections which a non-prisoner would enjoy.[107]

It should be noted that in *Matthews* the court faced a fact situation which seemed less outrageous than the one faced by the *Schuster* court. At the time the case was heard Matthews was not in a mental institution. He had been transferred from St. Elizabeth's Hospital back to prison. Also, it had not been shown that Matthews had been denied parole. Nevertheless, in the majority opinion the court did make note of the fact that in some jurisdictions parole was not considered while a prisoner was confined in a mental institution.[108]

The statute in question[109] in *Matthews* provided few procedural safeguards for the prisoner who was to be transferred to a mental hospital. The *Matthews* court, in order to avoid declaring the statute unconstitutional, read into the statute the procedural safeguards provided in civil commitments in the District.[110]

In holding that prisoners are entitled to equal protection of the

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102. *Id.* at 1081.
103. Law of March 28, 1939, ch. 136 [1939] N.Y. Laws 167-68 (repealed 1965).
104. Law of March 16, 1964, ch. 105, § 3 [1964] N.Y. Laws (repealed 1966).
105. United States *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1084 (2d Cir. 1969).
106. Matthews v. Hardy, 420 F.2d 607 (D.C. Cir. 1969).
107. *Id.* at 612.
108. *Id.* at 611 n. 12.
109. D.C. CODE ANN. § 24-302 (1967).
110. Matthews v. Hardy, 420 F.2d 607, 612 (D.C. Cir. 1969). Here the court of appeals had authority to read the civil commitment procedure requirements into the District of Columbia statute. This would not be the case if the federal court were interpreting a state statute.

law, the court of appeals in *Matthews* gave three reasons why prison authorities should not have unlimited discretion to transfer a prisoner to a mental institution. First, incarceration in a mental institution is sufficiently different from incarceration in a prison to require procedural safeguards for those to be transferred. Second, the restrictions and routines in a mental hospital differ significantly from those of a prison. Third, transfer to a mental hospital might result in a prisoner being incarcerated longer than if he were to remain in prison.[111]

The reasoning in the *Schuster* and *Matthews* cases appears to be a logical extension of *Baxstrom v. Herold*. It can be argued that the doctrine of *Schuster* and *Matthews*, if applied to other jurisdictions, might bring about the demise of several state prison transfer statutes, including some reviewed earlier in this analysis.

V. EQUAL PROTECTION FOR NORTH DAKOTA INMATES

In comparing the North Dakota prison transfer statute with its counterpart in the District of Columbia,[112] it becomes apparent that the two statutes are quite similar in the procedures they require and the protections they offer inmates. The similarity between the two statutory schemes becomes even more apparent when the procedural safeguards provided by each are compared with the procedural rights afforded in civil commitment proceedings in the same jurisdiction. In view of the arguments made against the District of Columbia statute and the reasoning of the court of appeals in deciding that the statute did not provide equal protection in *Matthews v. Hardy*, it seems reasonable to conclude that the North Dakota prison transfer statute likewise fails to provide equal protection of law for prison inmates.

An argument against the reasonableness of the North Dakota statute might be based on the criteria used by the *Matthews* court to justify restricting the discretion of prison authorities to transfer inmates. Since the challenge here is not against transfers *per se*, but rather against the authority vested in the warden by the statute, it can be argued that the statute is unreasonable if the following facts are demonstrated: (1) incarceration in the mental hospital at Jamestown is by its nature substantially different from incarceration in the prison at Bismarck; (2) the restrictions and routine at Jamestown differ from those in the penitentiary; (3) transfer to Jamestown might result in a longer incarceration than would other-

111. *Id.* at 611.
112. D.C. CODE ANN. § 24-302 (1967).

wise be the case.[113]

Although the *Matthews* decision is not binding on either the North Dakota courts or the Court of Appeals for the Eighth Circuit, the reasoning of the *Matthews* case is quite persuasive and could provide the basis for a sound argument challenging the constitutionality of the North Dakota prison transfer statute.

VI. LEGISLATIVE ALTERNATIVES FOR NORTH DAKOTA

Assuming that sufficient facts can be shown to provide grounds for holding the North Dakota prison transfer statute unconstitutional as violative of the equal protection clause of the fourteenth amendment, the following are offered as alternative solutions available to the North Dakota Legislative Assembly.

A. INCORPORATION BY REFERENCE

If the civil commitment statute is incorporated into the prison transfer statute by reference, the equal protection problem should be permanently eliminated. As the legislature makes procedural changes to the civil commitment proceedings, these changes will automatically apply to prisoners, thus solving the equal protection problem and avoiding the drafting of two statutes.

On the other hand, incorporation by reference would bring in other aspects of the civil commitment law which might be inappropriate for prison transfers. Incorporation would also bring any inherent weaknesses in the civil commitment statute into the prison transfer area as well as incorporate any future weak points enacted into the civil commitment statute.

B. DRAFT A NEW STATUTE

The second alternative to incorporation is the drafting of a new statute. For several reasons this appears to be the better solution. A new statute, based substantially upon the civil commitment statute, could deal with specific problems that are peculiar to the situation found at the state penitentiary. Further, in drafting a new statute, there would be little or no difficulty encompassing all the procedural protections necessary to meet due process and equal protection requirements. Finally, a separate prison transfer statute would eliminate any possibility of unintended changes being effected by change in the civil commitment statute. A prison transfer statute could be updated as procedural changes are added to the

113. N.D. CENT. CODE § 12-59-08 (1971) provides for a hearing on applications for parole. If the prisoner is confined at Jamestown he will be precluded from being available for either interviews with or hearings before the parole board.

civil commitment law and still be tailored to handle the situation as presented in the prison milieu. Appendix I contains a proposed revision to North Dakota Century Code § 12-47-27.

VII. CONCLUSION

It seems fair to conclude that the issue of transfer to mental institutions for mentally ill prisoners is one to which the attention of the North Dakota Legislative Assembly should be directed. There is a plethora of material which reflects growing public concern for treatment of the mentally ill. It follows that this public concern should not distinguish between mentally ill persons who are or are not confined in penal institutions, a conclusion which has support in legal decisions.[114]

It has been shown that disparity exists between different jurisdictions as to the procedural protections offered to mentally ill inmates of penal institutions. The state of New York, after having its prison transfer statutes tested by the federal courts in two landmark cases,[115] has enacted a prison transfer statute which reflects a sound legislative attitude toward the issue of equal protection.[116] It seems apparent that other state legislatures will remedy such procedural deficiencies when faced with the problem, especially in light of the tendency of the federal courts to examine the *possible* effects of such procedural deficiencies.[117]

In view of the above facts, and keeping in mind that on its face the North Dakota prison transfer statute[118] fails to provide the same procedural safeguards for prisoners that non-prisoners enjoy, it is recommended that the North Dakota Legislative Assembly amend the prison transfer statute to ensure equal protection of the law for prisoners who are committed to mental institutions. The enactment of such a statute would not only preclude the raising of the constitutional issue of equal protection in future litigation, but would indicate a progressive legislative policy which reflects the growing concern of the people of North Dakota for more equitable and humane treatment of the mentally ill.

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114. Baxstrom v. Herold, 383 U.S. 107, 111 (1966).
115. Baxstrom v. Herold, 383 U.S. 107 (1966); United States *ex rel.* Schuster v. Herold, 410 F.2d 1071 (2d Cir. 1969).
116. N.Y. CORREC. LAW § 408 (McKinney, 1972).
117. Matthews v. Hardy, 420 F.2d 607, 611 n. 12 (D.C. Cir. 1969).
118. N.D. CENT. CODE § 12-47-27 (1971).

APPENDIX

PROPOSED REVISION TO N.D.C.C. § 12-47-27. TRANSFER OF PENITENTIARY INMATE TO STATE HOSPITAL.

1. Whenever the warden of the penitentiary believes that a person confined in the penitentiary has become mentally ill during his confinement he may require such person to be given a psychiatric evaluation by a licensed physician. If the examining physician is of the opinion that the person is mentally ill and should be hospitalized, the warden may commence proceedings to transfer the person to the state hospital by filing a written application with the county mental health board of the county in which the penitentiary is located. Any such application shall be accompanied by a certificate of the physician who performed the psychiatric evaluation stating that he has examined the individual and is of the opinion that he is mentally ill and should be hospitalized for treatment.

2. Upon receipt of such application, the county mental health board shall give notice of such application to the inmate concerned, to his spouse or parent, or nearest known other relative or friend, if such persons can be found.

3. As soon as practicable after notice of the commencement of the proceedings is given, the mental health board shall appoint at least one licensed physician as an examiner who may or may not be a member of the mental health board, but who shall not be the same person who conducted the initial psychiatric evaluation at the penitentiary, to examine the inmate concerned and report his findings as to the condition of the inmate concerned and the need for his care or treatment in a mental hospital.

4. The examination required in subsection 3 of this section shall be made at a hospital or other medical facility, or at the state penitentiary.

5. If the report of the designated examiner shows that the inmate concerned is not mentally ill, the mental health board may without taking any further action, terminate the proceedings and dismiss the application; otherwise, it shall forthwith fix a date for and give notice to the persons designated in subsection 2 of this section of a hearing before the county mental health board to be held within ten days from receipt of the report.

6. The inmate concerned, the warden of the penitentiary, and all other persons to whom notice is required to be given under subsection 2 of this section shall be afforded an opportunity to appear

at the hearing, to testify, and to present and cross-examine witnesses, and the mental health board may in its discretion receive the testimony of any other person. The inmate concerned shall not be required to be present unless he so desires and all persons not necessary for the conduct of the proceedings shall be excluded, except as the mental health board may admit persons having a legitimate interest in the proceedings. The hearing shall be conducted in as informal a manner as may be consistent with orderly procedure and in a physical setting not likely to have a harmful effect upon the health of the inmate concerned. The mental health board shall receive all relevant and material evidence which may be offered and shall not be bound by the rules of evidence. An opportunity to be represented by counsel shall be afforded to the inmate concerned, and if neither he nor others provide counsel, the mental health board, upon request of the inmate concerned, shall appoint counsel. If it is determined that the inmate concerned is unable to pay for such counsel, the attorney fees, upon approval by the mental health board, shall be paid by the State of North Dakota.

7. If upon completion of the hearing and consideration of the record the mental health board finds that the inmate concerned is in need of custody, care or treatment in a mental hospital it shall order his hospitalization at the state hospital, or if it finds otherwise it shall dismiss the proceedings. No person who is being treated by prayer in the practice of the religion of any well recognized church, sect, denomination, or organization, shall be transferred under the provisions of this section.

8. The mental health board shall designate the warden of the penitentiary to assure the carrying out of the order for hospitalization.

9. Every inmate admitted pursuant to the provisions of this section shall be examined by the staff of the hospital as soon as practicable after his admission.

10. If it is determined by the director of the state hospital that an inmate transferred under this section whose sentence has not expired is no longer in need of treatment, such individual shall be transferred back to the state penitentiary.

11. If the sentence of a person transferred under this section expires while such individual is confined to the state hospital and the director of the state hospital believes that such person is still in need of treatment, the director shall initiate proceedings under

section 25-03-11 to have such person committed to a mental health facility. If such proceeding is initiated within ten days of the expiration of the inmate's sentence, the director of the state hospital is authorized to detail such individual pending the result of such proceedings.