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NOTE

HEARINGS PRIOR TO REVOCATION OF MENTAL CONVALESCENT STATUS: A COMMENT ON THE CONSTITUTIONAL IMPERATIVES

I. INTRODUCTION

Today, between 600,000 and 650,000 persons are hospitalized because of mental illness,[1] and approximately 500,000 new patients are admitted annually.[2] It has been projected that one out of every twelve Americans will require treatment in a mental institution,[3] and that a very large majority of these hospitalized patients will be treated in public facilities.[4] To the extent of providing treatment for the mentally ill, the problem is one of medical technology and public finance,[5] issues essentially unrelated to law. The involuntary commitment of the mentally ill into mental health treatment institutions, however, raises questions of prime concern to the legal order.[6]

The state's substantive justification for involuntary commitment can be reduced to two basic concepts.[7] First, the state may exercise its police power to protect society.[8] Second, the state may use its authority as *parens patriae*[9] to protect an individual unable

1. R. ROCK, M. JACOBSON, & R. JANOPAUL, HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL 1 (1968) [hereinafter cited as HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL].
2. *Id.*
3. Langdale, *Civil Commitment of the Mentally Ill in Nebraska,* 48 NEB. L. REV. 255 (1968).
4. HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL, *supra* note 1, at 2.
5. *Id.* at 4.
6. *Id.* at 5.
7. Comment, *An Analysis of Admission and Release Procedures at the Yankton State Hospital,* 14 S.D.L. REV. 266, 267 (1968).
8. *Id.*
9. *Parens patriae* is defined as follows:

   In the United States, the state, as a sovereign-referring to the sovereign power of guardianship over persons under disability. BLACK'S LAW DICTIONARY 1269 (4th ed. 1968).

to protect himself.[10] The police power responds to the needs of the community; *parens patriae*, on the other hand, is primarily concerned with protecting the individual.[11]

For the purpose of this note, it is assumed that the foregoing concepts constitute a valid basis of authority for confinement of the mentally ill. It is also assumed that society has a sufficient interest in the individual to protect him from himself or others from him. It is conceded that such interest under the proper criteria and circumstances justifies involuntary commitment.[12]

This note is concerned with the framework of laws that control the involuntary commitment and conditional release of the mentally ill on convalescent status in North Dakota. More specifically, it focuses on the lack of procedural protections afforded the mentally ill in North Dakota when conditional discharge is revoked.

In light of the two assumptions enumerated above, the scope of the inquiry is narrowed to the questionable constitutionality of Section 25-03-16 of the North Dakota Century Code,[13] which provides that the superintendent of the state hospital shall have the authority to grant a patient release on convalescent status, and then revoke this discharge without notice, explanation, or procedural safeguards of any kind.[14]

It is contended that the absence of procedural protections dur-

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10. Comment, *An Analysis of Admission and Release Procedures at the Yankton State Hospital*, 14 S.D.L. REV. 266, 267 (1968).

11. HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL, *supra* note 1 ,at 7.

12. The justifications for involuntary civil commitment have not gone uncontested, and the problem has been recognized as the most serious deprivation of individual liberty that a society may impose. Livermore, Malmquist, and Melhl, *On the Justification for Civil Commitment*, 117 U. PA. L. REV. 75 (1968).

Thomas S. Szasz, M.D., has described involuntary commital as a form of imprisonment, and has stated: 'The practice of 'sane' men incarcerating their insane fellowmen in mental hospitals can be compared to that of white men enslaving black men. In short, I consider commitment a crime against humanity." T. Szasz, *Science and Public Policy: The Crime of Involuntary Mental Hospitalization*, MEDICAL OPINION AND REVIEW 25 (1968).

13. N.D. CENT. CODE § 25-03-16 (1960) provides:

> 1. The superintendent of the state hospital may release a patient on convalescent status when he believes that such release is in the best interests of the patient. Release on convalescent status shall include provisions for continuing responsibility to and supervision by the hospital, and may include a plan of treatment on an out-patient or nonhospital patient basis. Prior to the end of a year on convalescent status, and not less frequently than annually thereafter, the superintendent of the state hospital shall reexamine the facts relating to the hospitalization of the patient on convalescent status and, if he determines in view of the condition of the patient that hospitalization is no longer necessary, he shall discharge the patient and make a report thereof to the state mental health and retardation division and the mental health board of the county of residence.
>
> 2. Prior to such discharge, the superintendent of the state hospital may at any time order the rehospitalization of the convalescent patient. Such an order, if not voluntarily complied with, shall, upon the endorsement by a judge of the county court in which the patient is a resident or present, authorize any health or police officer to take the patient into custody and transport him to the state hospital. The costs of returning such patient to the state hospital shall be paid by either the patient, his relatives legally responsible for his support, or by the county, as the judge may direct.

14. *Id.*

ing this revocation process violates the patient's right to due process of law. Since North Dakota provides that a person whose parole has been revoked shall have access to a "full hearing,"[15] it is also contended that the distinction thus created between parolees and patients on convalescent status discharge, in relation to the guarantees of due process, is a violation of the patient's right to equal protection of the law.

II. CONDITIONAL DISCHARGE

Conditional discharge on mental convalescent status is a situation in which the improved patient is allowed to leave the hospital,[16] although his continued release depends on his compliance with certain conditions.[17] The patient's failure to adjust to his new environment or to comply with any of the conditions attached to his release may result in his being returned to the hospital.[18] Conditional discharge may provide a period of transition for the improved patient,[19] or serve as a device for providing care for patients not requiring hospital facilities.[20]

One authority has described the procedure of conditional release as:

> [A] means of finishing off the rehabilitative processes begun under medical supervision in the hospital. From the point of . . . re-establishment of the individual in society, it is the only logical means of safely bridging over the gap between hospital care and self-directed life in the community. From the point of view of the hospital management, it does serve to reduce population and thus it diminishes the public expense for the maintenance of the insane. . . [M]any patients can be discharged under supervision and

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15. N.D. CENT. CODE § 12-59-15 (1971 Supp.) provides:

> Any person shall be deemed to be in the custody and under the control of the board while on parole, and shall be subject, at any time until the expiration of the term for which he was sentenced, to be taken into actual custody and returned to the penitentiary. The board shall enforce the rules and regulations made by it for the paroling of persons committed to the penitentiary. When it shall appear to the board after a *full hearing* (emphasis added) that a person out on parole has violated any of such rules or regulations, it may order that such person be taken into actual custody and recommitted to and confined in the penitentiary as provided in his sentence. The board shall enter any such order in the record of the proceedings. A copy of the order certified by the clerk of the board may be delivered to any sheriff or other peace officer of the state for service and return, and it shall be the duty of any such officer to receive the same, to apprehend and immediately to return any person named in the order and to deliver him to the warden of the penitentiary. The warden shall receive and re-imprison such person in accordance with the terms of his original sentence.

16. S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 134 (1971) [hereinafter cited as THE MENTALLY DISABLED AND THE LAW.]
17. *Id.*
18. *Id.*
19. *Id.* at 135.
20. *Id.*

become self-supporting under these conditions when it would be unsafe to discharge them absolutely from hospital supervision.[21]

Although he lives outside the institution, a conditionally released patient is considered to be in the constructive custody of the hospital and under the original commitment papers;[22] further legal proceedings are not needed to return the patient to the hospital.[23] From the patient's point of view, the problem is obvious: he may suddenly find himself removed from his home, family, friends, and employment, and returned to the state hospital without notice or explanation.

Since a conditionally released patient may be returned to the state hospital at any time, he is under a constant threat of loss of liberty. The question for discussion, therefore, is whether a termination of this conditional liberty without an evidentiary hearing prior to termination denies the patient procedural due process in violation of the due process clause of the fourteenth amendment.

III. DUE PROCESS

Perhaps the most frequent basis for denying procedural due process in situations involving revocation of conditional liberty has been the notion that conditional liberty is a privilege,[24] the result of an act of grace,[25] and thus a person cannot complain when his conditional liberty is revoked without the benefit of procedural safeguards.[26]

In 1935, the United States Supreme Court in *Escoe v. Zerbst*,[27] reasoned that since probation was instituted for federal prisoners by the Federal Probation Act, it was not a "right," but a "privilege" granted by Congress.[28] The Court, therefore, found that Congress could dispense with notice or hearing as part of the procedure of probation.[29]

The United States Supreme Court no longer relies solely on the legislative characterization of a governmental benefit as a "right" or "privilege" to determine whether this benefit is constitutionally

21. THE MENTALLY DISABLED AND THE LAW, *supra* note 17, at 134, *quoting* Haines, *Lessons from the Principles Governing the Parole Procedures in Hospitals for the Insane*, PROCEEDINGS OF THE NATIONAL CONFERENCE OF SOCIAL WORK 159, 160 (1920).

22. THE MENTALLY DISABLED AND THE LAW, *supra* note 17, at 134.

23. *Id.*

24. Comment, *Parole Revocation Hearings—Pro Justicia or Pro Camera Stellata*, 10 SANTA CLARA LAW. 319, 331-32 (1969-70).

25. *Id.* at 332.

26. *Id.*

27. Esco v. Zerbst, 295 U.S. 490 (1935).

28. *Id.* at 492.

29. *Id.* at 492-93.

required.[30]

> '[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by government action.'[31]

Procedural protections depend on the extent to which an individual will be condemned to suffer "grievous loss,"[32] and on whether the individual's interests in avoiding that loss outweighs the governmental interest in summary adjudication.[33] The question is not merely the weight of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty" or "property" language of the fourteenth amendment.[34]

A recent case dealing with the issue of termination of conditional liberty is *Morrissey v. Brewer,*[35] in which the United States Supreme Court held that a parolee's liberty involves significant values within the protection of the due process clause, and termination of that liberty requires an informal hearing to assure that the finding of a parole violation is based on verified facts to support the revocation.

The Court first examined the nature of the parolee's interest in continued liberty, and found that his liberty enables him to do many things that persons who have never been convicted of a crime

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30. Graham v. Richardson, 403 U.S. 365, 374 (1971); Shapiro v. Thompson, 394 U.S. 618, 627 (1969); Hahn v. Burke, 430 F.2d 100 (7th Cir. 1970). In *Hahn,* a case involving probation, the court was mindful that probation was a privilege and not a right, but stated that procedural due process no longer turns on the distinction between right and privilege. *Id.* at 103.

The court weighed the extent to which the petitioner would be condemned to suffer "grievous loss" against the governmental interest, and found the loss of freedom to outweigh the added burden of a limited hearing. *Id.* at 104.

The court reasoned that when the state created probation it impliedly agreed to continue petitioner's probation as long as the conditions were satisfied. To allow the state to revoke probation without a hearing to determine if the conditions had been violated would be inconsistent with the due process guarantees of the fourteenth amendment. *Id.*

31. Goldberg v. Kelly, 397 U.S. 254, 263 (1970), *quoting* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

32. Goldberg v .Kelly, 397 U.S. 254, 263 (1970), *quoting* Joint Anti-Facist Refuge Comm. v. McGrath, 314 U.S. 123, 168 (1951).

33. Goldberg v. Kelly, 397 U.S. 254, 263 (1970). In *Goldberg,* the Court held that termination of public assistance without affording the recipient an opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process. The decision was reached by a two step process in which the Court determined that the recipient would be condemned to suffer grievous loss by the termination and that the recipient's interest in avoiding that loss outweighed the governmental interest in summary adjudication. *Id.* at 262.

The loss was found to be 'grievous" since termination of welfare benefits would deprive the recipient of the very means by which to live. *Id.* at 264.

Thus, it was held that the interest of the recipient in uninterrupted receipt of public assistance clearly outweighed the state's interest in preventing any increase in its fiscal and administrative burdens. *Id.* at 266.

34. Fuentes v. Shevin, 407 U.S. 67, 84 (1972).

35. Morrissey v. Brewer, 408 U.S. 471 (1972).

may do.[36] The Court noted that subject to the conditions of parole, the parolee can hold a job, and can enjoy a normal relationship with his family and friends.[37]

From this examination of the characteristic features of the parolee's liberty, the Court concluded:

> We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a right or a privilege. By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.[38]

While the Court was mindful that the state has an interest in being able to return the parolee to imprisonment without the burden of a criminal trial,[39] nevertheless, it ruled that the state may not revoke parole without providing minimal procedural safeguards.[40] Nor was the Court persuaded by the argument that revocation is a discretionary matter on the part of the parole board and will become an intolerable administrative burden if a hearing is required.[41] The Court stated that a simple hearing will not interfere with the administrative exercise of discretion.[42] The Court noted that society has an interest in treating the parolee with basic fairness, since fair treatment in parole revocation will improve the chance of rehabilitation.[43]

The Court recognized two stages in the process of parole revocation: first, when the parolee is arrested, and second, when parole is formally revoked.[44] With regard to the first stage, the Court stated:

> Given these factors, due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged violation or arrest, and as promptly as convenient after arrest while information is fresh and sources are available. . . Such an inquiry should be seen as in the nature of a preliminary hearing to determine whether there is probable cause or reasonable ground to be-

36. *Id.* at 482.
37. *Id.*
38. *Id.*
39. *Id.* at 483.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id* at 484.
44. *Id.*

> lieve that the arrested parolee has committed acts that would constitute a violation of parole conditions.[45]

With regard to the second stage, the Court concluded that aside from the "preliminary hearing," due process requires a "final hearing,"[46] the purpose of which is to evaluate the relevant facts and to determine if these facts support a conclusion that revocation of parole status is warranted.[47]

Thus, it is clear that a person on parole is entitled to certain procedural protection afforded by the due process clause of the fourteenth amendment. His liberty is closely related to unqualified liberty, a revocation of that liberty inflicts a "grievous loss" on the parolee, and a two stage hearing procedure is necessary to ensure fairness in the revocation process.[48] Without the benefit of a hearing, there is no assurance that the findings of the parole board will be based on verified facts. These facts should, in all fairness, be substantiated before the parolee can be deprived of his liberty.

Mental convalescent status discharge, like parole, involves conditional release from institutional confinement,[49] and like the parolee, the patient on mental convalescent status discharge is allowed to return to his home, family, friends, and employment.[50] It can be argued that revocation of mental convalescent status discharge is similar to revocation of parole status in that both result in a "grievous loss" to the individual affected. From the reasoning of the Court in *Morrissey*, it follows that the mental patient on conditional release is entitled to the procedural protections of due process.

Since the private interest affected by the governmental action when mental convalescent status discharge is revoked is similar to the private interest affected when parole is revoked, the procedural protections granted the parolee should also be granted the patient on mental convalescent discharge. Therefore, to meet the requirements set forth in *Morrissey*, due process requires a preliminary field hearing to determine if probable cause exists to believe that the patient did violate the conditions under which he was conditionally released,[51] and a final hearing at the state hospital to determine if the violations are substantial enough to warrant revocation of convalescent status discharge.[52]

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45. *Id.*
46. *Id.* at 487.
47. *Id.* at 488.
48. *Id.*
49. THE MENTALLY DISABLED AND THE LAW, *supra* note 17, at 134.
50. *Id.*
51. Morrissey v. Brewer, 408 U.S. 471, 485 (1972).
52. *Id.* at 488.

From the above discussion, it is clear that the North Dakota statute that gives the superintendent of the state hospital unrestricted power to revoke convalescent status[53] does not meet the requirements set forth in *Morrissey*. Therefore, it is contended that the statute is in violation of the due process clause of the fourteenth amendment.

IV. EQUAL PROTECTION

Although the equal protection clause has been interpreted as a limitation on legislative classifications, this does not mean that a state cannot create any classification.[54] The equal protection clause does not prevent the legislature from recognizing "degrees of evil,"[55] nor does it preclude the legislature from conforming its restrictions to those classes of cases where the need is thought to be the greatest.[56] The United States Supreme Court has held that things different in fact need not be treated the same in law,[57] but persons similarily situated must be treated alike.[58]

The Supreme Court has developed a two-tiered test in cases involving equal protection. In most instances, classifications are upheld unless they are without a rational basis.[59] In other cases, however, where the classification is grounded on "suspect" criteria,[60] or where the classification impinges on certain "fundamental rights,"[61] strict judicial scrutiny is required, and the classification will stand only if justified by a compelling governmental interest.[62]

The Supreme Court has not classified conditional liberty as a fundamental right, nor is there any case law to support the contention that classifying mental patients on the basis of their convalescent status is a suspect criteria. Therefore, for the purpose of this note, it is assumed that the rational basis test is the standard of review to apply.

The Supreme Court's definition of what constitutes the necessary rational relationship between a classification and a legitimate governmental interest has been interpreted as having become more strict in recent years.[63] In *McGowan v. Maryland*,[64] for example, the Supreme Court held that a classification is to be sustained un-

53. N.D. CENT. CODE § 25-03-16 (1960).
54. Bain Peanut Butter Co. v. Pinson, 282 U.S. 499, 501 (1930).
55. Trux v. Raich, 239 U.S. 33, 43 (1915).
56. Miller v. Wilson, 236 U.S. 373, 384 (1914).
57. Tign v. Texas, 310 U.S. 141, 147 (1939).
58. Skinner v. Oklahoma, 316 U.S. 535, 540 (1941).
59. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425 (1961).
60. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971).
61. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 19 (1956).
62. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
63. Green v. Waterford Board of Education, 473 F.2d 629, 633 (2nd Cir. 1973).
64. McGowan v. Maryland, 366 U.S. 420, 425 (1961).

less "wholly irrelevant" to some permissible state purpose.[65] However, in a much more recent Supreme Court decision, *Reed v. Reed*,[66] the Court stated:

> A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of legislation. . . .[67]

Reed provides evidence that the Court is prepared to be more discerning when using the traditional rational basis standard in cases involving questions of equal protection.[68] In *Reed*, the Court struck down a section of the Idaho probate code which gave mandatory preference to men over women when competing for the right to administer a decedent's estate.[69] Chief Justice Burger, writing for a unanimous Court, never reached the question of whether sex was a suspect classification. Rather, he declared that no rational relationship existed between the Staate's methods and its objectives.[70] Although the Court's future direction on questions of equal protection is uncertain, the intensified rationality test employed by the Court in *Reed*[71] warrants close attention, and should be kept in mind during the following equal protection discussion.

Although the parolee is deemed worthy of protection under the due process clause, he is not afforded the safeguards inherent in the criminal process. In *Hyser v. Reed*,[72] the court concluded that parole revocation was neither a criminal prosecution nor an adversary proceeding.[73] The court reasoned that the nature of parole is rehabilitative, and as such, due process does not require cross-examination of the board's sources.[74] The court stated that parole could not be revoked arbitrarily, [75]but to hold that complusory process is constitutionally required would imply that revocation hearings are comparable to criminal prosecutions rather than administrative processes.[76]

Much the same rational was applied in *Alverez v. Turner*,[77] where the court concluded that parole revokees are not entitled to the specifics of due process,[78] but are entitled to due process as that mandate reflects the right to all persons to be treated fairly

65. *Id.*
66. Reed v. Reed, 404 U.S. 71, 76 (1971).
67. *Id.*
68. Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 33 (1972).
69. Reed v. Reed, 404 U.S. 71 (1971).
70. *Id.* at 76-77 (1971).
71. *See also*, Eisenstadt v. Baird, 405 U.S. 438 (1972).
72. Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963).
73. *Id.* at 238.
74. *Id.*
75. *Id.* at 242.
76. *Id.* at 240.

in complusory processes.[79] The court reasoned that the board's familiarity with the prisoner's case history distinguishes it from the courtroom setting, and is the reason why traditional rules of evidence, including discovery, have no application to these proceedings.[80]

And in *Morrissey v. Brewer*,[81] the Court stated:

> Revocation of parole is not part of a criminal prosecution, and thus, the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. Parole arises after the end of the criminal prosecution, including imposition of sentence. Supervision is not directly by the court but by an administrative agency, which is sometimes an arm of the court, and sometimes of an executive. Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observation of special parole restrictions.[82]

The purpose of parole is to help prisoners reenter society, without being confined for the full duration of their sentence.[83] Parole alleviates the cost to society of keeping an individual in prison, and is an important part of the rehabilitative aim of the correctional philosophy.[84]

Patients on convalescent status discharge are in a class similar to parolees. The purpose of convalescent status discharge is to provide the patient with the opportunity of making an orderly re-adjustment from an institutional to a non-institutional environment.[85] Conditional discharge of mental patients, like parole, pursues the goals of rehabilitation, surveillance, and economy.[86] Conditions are attached to the grant. Furthermore, the community serves as the correctional milieu, and the patient is under the supervision of someone who has access to coercive authority.

One argument that the state will undoubtedly present to justify retaining the distinction between the parolee and the mental convalescent with regard to the right to a set of hearings before revocation of conditional liberty, is that the parolee was originally incarcerated under criminal sanctions, and that this reason is a ra-

77. Alverez v. Turner, 422 F.2d 214 (10th Cir. 1970).
78. *Id.* at 220.
79. *Id.*
80. *Id.* at 218.
81. Morrissey v. Brewer, 408 U.S. 471 (1972).
82. *Id.* at 480.
83. *Id.* at 477.
84. *Id.*
85. THE MENTALLY DISABLED AND THE LAW, *supra* note 17, at 134-135.
86. *Id.*
87. *Id.*

tional basis for denying patients on mental convalescent status the same procedural safeguards as the parolee.

In *Baxtrom v. Herold,*[88] however, the Supreme Court held that a New York statutory procedure, whereby a prisoner civilly committed to a mental institution at the expiration of his sentence without the jury review available to all other civilly committed persons, was a denial of equal protection of the laws.[89] The basis for the decision was that prior incarceration is an insufficient and irrational basis for discriminating between otherwise similarily situated individuals who face loss of liberty.[90]

A second, and perhaps stronger argument that the state could make derives its basis from the treatment aspects of mental health commitments. An individual will be committed to the North Dakota State Hospital if the mental health board finds that the proposed patient:

> a. Is mentally ill, an alcoholic or a drug addict, and because of his illness is likely to injure himself or others if allowed to remain at liberty; or
>
> b. Is in need of custody, care, or treatment in a mental hospital and, because of his illness, lacks sufficient insight or capacity to make responsible decisions with respect to his hospitalization.[91]

Should an individual be committed, release on convalescent status is appropriate when the patient has progressed to the point where he can be treated outside the institution.[92] Even though the patient may not be receiving any prescribed medication during the conditional release, his readjustment from an institution to a non-institutional environment may be considered a part of the treatment program.[93]

The conditional release provides the hospital with a means by which it can expedite the return of the patient for treatment should the conditions which justified the original hospitalization reappear. Thus, the state may raise the argument that a hearing before revocation of mental convalescent status discharge will cause unnecessary delay; delay that could result in the patient not receiving the necessary care and treatment.

This is a valid argument, but not one that serves as a rational basis for denying patients the right to a hearing before revocation

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88. Baxstrom v. Herold, 383 U.S. 107 (1966).
89. *Id.* at 110.
90. *Id.* at 111-112.
91. N.D. CENT. CODE § 25-03-11 (1971 Supp.)
92. THE MENTALLY DISABLED AND THE LAW, *supra* note 17, at 134-135.
93. *Id.*

of conditional discharge. In emergency situations, the preliminary field hearing that is necessary to meet the requirements of due process can be waived,[94] and the patient returned to the state hospital for treatment. Once the necessary treatment has been administered, the final hearing should be held to determine if the facts warrant revocation of the mental convalescent discharge. The emergency situation should be the exception rather than the rule, however, and in the majority of cases, the preliminary hearing should be convened before the patient is transported to the state hospital.

In light of the emphasis on rehabilitation, and on the use of the community rather than the institution as the means for achieving that goal, there is no legitimate ground for continuing to distinguish between these types of conditional releases, where the only difference is that the parolee has been in prison, and the patient on convalescent status leave has been in a mental hospital. Both are in a class with whom society has taken risks by extending restricted liberty in an effort to rehabilitate them. Should the experiment in rehabilitation fail, both will be returned to institutional confinement, confinement that inflicts a "grievous loss" on each. Therefore, both are of one and the same class, and by applying the stricter rational basis standard set forth in *Reed*, it can be argued that the state has no rational basis for distinguishing between the two. Hence, the denial to patients on convalescent status discharge of the enumerated procedural safeguards afforded parolees in arguably a violation of the equal protection of the laws.

In addition to the assertion that Section 25-03-16 of the North Dakota Century Code is a violation of due process, it is contended that this statute which gives complete control over revocation of convalescent status to the superintendent of the state hospital is a violation of the equal protection clause of the fourteenth amendment.

V. THE HEARINGS

Based on the requirements set forth in *Morrissey*, the preliminary hearing should be presided over by someone other than the individual who alleges that convalescent status discharge conditions have been violated. The hearing officer should be someone in the community who can make an independent decision as to whether probable cause exists to believe that the patient did violate the conditions under which he was discharged.

94. The authority to waive the preliminary hearing should be delegated to someone in the community who is qualified to make a determination of need for immediate treatment. A physician would be the most likely person to make such a decision. It should be pointed out, however, that to ensure a truly objective diagnosis, the doctor should not be associated in any way with the mental institution to which the patient is returning.

With respect to the preliminary hearing, the patient should be given notice that the hearing will take place, the purpose of the hearing, and an opportunity to question those who have given adverse information on which revocation is to be based.[95] From the information gathered at the hearing, the hearing officer should determine whether probable cause exists to return the patient to the state hospital until the final hearing.[96]

The minimum requirements for the final hearing should include (a) written notice of the claimed violations; (b) disclosure to the patient of evidence against him; (c) opportunity to be heard in person and to present witnesses and evidence; (d) the right to confront and cross-examine adverse witnesses; (e) a hearing body made up of individuals qualified to make a determination of need for re-hospitalization; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revocation of the convalescent status discharge.[97]

VI. CONCLUSION

In *Morrissey v. Brewer*,[98] the United States Supreme Court extended many aspects of due process to parole revocation procedures. This note has examined the reasoning of *Morrissey* and the similarities between parole and mental convalescent status discharge. From this examination, it is apparent that the analogy drawn between parole revocation and mental convalescent status discharge revocation is a legitimate one, and that the specifics of due process granted the parolee should also be afforded the patient on convalescent leave.

In North Dakota, the patient on mental convalescent status discharge is subject to the caprice of the superintendent of the state hospital who may, for any reason, order the immediate return of the patient to the hospital.[99] Before court action ultimately resolves the issue, it is recommended that the North Dakota statute be amended to provide due process for those persons who have been released from mental health institutions on convalescent status.

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95. Morrissey v. Brewer, 408 U.S. 471, 487 (1972).
96. *Id.*
97. *Id.* at 489.
98. Morrissey v. Brewer, 408 U.S. 471 (1972).
99. N.D. CENT. CODE § 25-03-16 (1960).