North Dakota Law Review

Volume 46 | Number 3 Article 5

1969

An Old Man's Problem

Dale Evavold

AN OLD MAN'S PROBLEM

A discussion of how a North Dakota resident may be placed in a mental institution and how the laws concerning civil commitment work presently together with some proposals for improvements.

Old man X, a former junk dealer in a small North Dakota town, is now a resident in a hospital near Jamestown. If it weren't for Halloween, he may still have been a small town merchant. It happened this way:

Every year around Halloween time, some of the young boys around town get into Mr. X's lot around two or three o'clock in the morning, and bang on the cars. This wakens Mr. X and because the boys generally keep on making noise for an hour or so, he rarely gets any more sleep that night. This year he decided to stop the noise as soon as it started.

To properly tell the story a little must be known about old man X. He has resided here almost since the town was founded and is so old that no one would be surprised to hear he had died. He neither sees nor hears as well as he used to but still has a very sharp and keen business mind. He gets more crochety as the years pass. The last few years he has hardly talked to anyone except buying customers and a few close acquaintances. For many years, he has told anyone who was looking at his cars to get off the property unless they wanted to purchase something, and the last year or so he has been chasing almost everyone he does not know.

It is apparent Mr. X is not the most popular man in town. He does not bother anyone off his premises, but neither does he help make the town a more friendly place in which to live.

This Halloween, Mr. X finally went too far. An old shotgun had been hanging in the office of Mr. X's building for so long that it was not expected to ever work again. This year, Mr. X removed the old shotgun from the wall before Halloween. He then got some ammunition to fit the gun and removed the shot replacing it with rock salt. Now when Halloween came, he was ready; he would just take a shot with the old scatter gun and scare off the intruders. Then maybe he could get some sleep this year and maybe they would not come back again the next.

Everything went as Mr. X expected. Late on Halloween night, the boys came. They started banging on the car roofs, and of

course Mr. X woke up. This time instead of yelling at the boys to "get lost," he quietly opened a window of his building and after finding out where the boys were, he let them have a blast from his old shotgun. The noise was so loud that the whole building shook, but the boys left on the run and did not return. Mr. X went back to bed and slept better than he had for a long time.

The next night, however, Mr. X did not sleep so well.

One of Mr. X's neighbors, Mr. Y, heard the boys banging on the cars the night before. Because of the noise, Mr. Y came to the window and saw the proceedings. He saw Mr. X take a shot at the boys and without attempting to find out more, called the sheriff and told him that he, Mr. Y, thought Mr. X should be committed to a mental hospital.

I. HOW PEOPLE CAN BE COMMITTED IN NORTH DAKOTA

The sheriff told Mr. Y that commitment probably would be best for Mr. X but that a statement from a doctor indicating that Mr. X was crazy was needed.[1] The next morning Mr. Y went to the doctor in town, told him what he proposed and asked him for a statement. The doctor agreed that Mr. X's conduct was outrageous and stated he would attempt to examine Mr. X to see if he was sick. Needless to say, Mr. X would not talk to the doctor when contacted. Mr. Y submitted his application to the County Judge for Mr. X's hospitalization,[2] and the doctor gave the judge a statement that in his opinion, Mr. X was mentally ill, but had refused to be examined.

The judge then had a notice served on Mr. X telling him to appear at the doctor's office for an examination that afternoon at one o'clock.[3] Mr. X, who respected the judge, not knowing what to do or why he had to go to the doctor, did go upon being so ordered. The doctor, who was the same person who had sent the note to the judge in the morning, talked to Mr. X for a few minutes and then excused him. The doctor then sent a note over to the judge saying that in his

1. Under North Dakota emergency procedure any police officer could have taken the old man into custody and applied to any member of the mental health board for permission to apply to a hospital for emergency admission. This procedure is available to "[a]ny health or police officer or licensed physician who has reason to believe that an individual is mentally ill, an alcoholic or a drug addict and because of his illness likely to injure himself or others. . .", N.D. CENT. CODE § 25-03-08 (1970). The procedure as reflected in the text corresponds to the non-emergency treatment of a person alleged to be mentally ill, an alcoholic or a drug addict, N.D. CENT. CODE § 25-03-11 (1970). The main difference, as reflected by the above code sections is in the treatment by the county mental health board in that, in the emergency procedure the board member need only find there is reason to believe the individual is ill, whereas in the non-emergency procedure the board is supposed to find the proposed patient is either ill or unable to make responsible decisions.

2. N.D. CENT. CODE § 25-03-11(1) (1970).

3. N.D. CENT. CODE § 25-03-11(3), (4) (1970).

opinion Mr. X appeared confused and hostile. The doctor gave his opinion that Mr. X was in need of some mental care.[4]

The judge called the members of the Mental Health Board[5] to a meeting at his chambers at four o'clock that afternoon. The judge then had notice served on Mr. X telling him that there was to be a meeting that afternoon at four o'clock concerning Mr. X's sanity and that he, Mr. X, could come if he wanted to. This notice was always given by the judge even though he was not required to do so.[6]

When four o'clock came everyone was assembled except Mr. X. He considered the last notice from the judge some form of nonsense and besides, he did not have any more time to waste that day. Mr. X felt that there could be no question about his sanity; of course he was sane. So, the Board discussed Mr. X's mental health without his presence.[7] By reading the petition and the doctor's report, the lawyer and the judge readily agreed with the doctor that Mr. X was certainly ill. The doctor described Mr. X's condition as some form of schizophrenia, though he was not certain what variety.

The Board agreed that Mr. X would have to be sent to the Jamestown Mental Hospital. An order was made out for the Public Health Officer to take Mr. X to Jamestown that evening.[8]

According to the North Dakota Century Code, Mr. X has been treated fairly and legally, and no rights of his have been interfered with in spite of the rapidity of the proceedings.[9] Thank goodness, Mr. X is a hypothetical character.

This is how the North Dakota civil commitment statute *can* operate.[10] It does not have to operate so speedily, but it can do so. Some have called the North Dakota Law very adequate if "intelligently applied."[11] There can be no argument with this, but it may not always be "intelligently applied."

Now let us look at what would happen to Mr. X in another jurisdiction with a different kind of Mental Health law.

II. COMPARISON WITH WASHINGTON, D. C.

In Washington, D. C., Mr. X would have been treated as follows:

4. N.D. CENT. CODE § 25-03-11(3) (1970). The examining doctor may be the same person as the doctor on the mental health board.
5. N.D. CENT. CODE § 25-02-11 (1970). "Each county in this state shall have a county mental board consisting of: 1. a county judge who shall be chairman of the board; 2. a licensed practicing physician; and 3. a licensed practicing attorney."
6. N.D. CENT. CODE § 25-03-11(6) (1970).
7. *Id.*
8. N.D. CENT. CODE § 25-03-11(7) (1970).
9. *See generally* N.D. CENT. CODE § 25-03-11 (1970).
10. N.D. CENT. CODE § 25-03-08, -11 (1970). It should be noted that the North Dakota civil commitment statute applies equally to alcoholics and drug addicts under both the emergency procedure and upon the order of the mental health board.
11. Interview with the Honorable Kirk Smith, Judge of the Grand Forks County Court of Increased Jurisdiction, in Grand Forks, North Dakota, October 28, 1969 [hereinafter referred to as Interview].

To begin with, Mr. Y could not have submitted a petition to the Mental Health Board. In Washington, D. C., a petition may be filed by a spouse, parent, legal guardian, physician, health officer, or by an officer authorized to make arrests.[12] This means that when Mr. Y called the authorities, he could do nothing except complain about Mr. X's conduct. The police then could file a petition with the Mental Health Commission. In the case of Mr. X, the police may have decided that Mr. X certainly must be some kind of a nut and therefore belongs in St. Elizabeth's Hospital[13] rather than a jail. They would then have to get a physician to examine Mr. X and submit a statement, or if Mr. X refuses to see a physician, a statement to this effect must be submitted.[14]

After the petition is filed with the Mental Health Commission, a copy of the petition must be sent to Mr. X.[15] The Commission shall promptly examine Mr. X and hold a hearing on the issue of his mental illness. The hearing, like North Dakota's, is an informal one in which all relevant evidence is to be heard.[16] One of the differences between Washington, D. C. and North Dakota is pointed out at this juncture, however. In the District of Columbia Mr. X *must* be represented by counsel, while in North Dakota he does not have to be.[17]

In Mr. X's case, counsel could point out to the Commission that Mr. X's act was at most an assault, but may not even be that because the boys were trespassers.[18] The city may have an ordinance against discharging firearms within the city limits.[19] Counsel could inform the Commission of the aggravation Mr. X has suffered over the years as a result of the Halloween night pranks, and that this had caused him to prepare a means to stop the juvenile's tricks. Presenting evidence of Mr. X's actions before Halloween night would tend to show that he was an elderly person who merely wanted to be left alone. The attorney can also bring in witnesses who know Mr. X to testify as to his mental health, if he so desired.[20] Without an attorney it is doubtful that these steps could be taken, especially when the proposed patient does not attend the hearing.

In Washington, D. C., the Commission holds a hearing on Mr. X's mental health, and if they determine that he is mentally ill

12. D.C. CODE ENCYCL. ANN. § 21-541(a) (1967).
13. St. Elizabeth's Hospital is the public Mental Health Hospital for the District of Columbia.
14. D.C. CODE ENCYCL. ANN. § 21-541(a) (1967).
15. D.C. CODE ENCYCL. ANN. § 21-541(b) (1967).
16. *Compare* N.D. CENT. CODE § 25-03-11(6) (1970) *with* D.C. CODE ENCYCL. ANN. § 21-541(b) (1967).
17. N.D. CENT. CODE § 25-03-11(6) (1970). D.C. CODE ENCYCL. ANN. § 21-543 (1967).
18. N.D. CENT. CODE § 12-26-01, -03 (1960). State v. Cruikshank, 13 N.D. 337, 100 N.W. 697 (1904).
19. Grand Forks City Code § 12-0502 (1969). The discharge of a firearm is unlawful except as a defense to an attack on the person or his property.
20. D.C. CODE ENCYCL. ANN. § 21-542(a) (1967). Also permitted in North Dakota, *see* N.D. CENT. CODE § 25-03-11(6) (1970).

and because of the illness is likely to injure himself or others, they will report this to the United States District Court for the District of Columbia.[21] If the Commission finds that Mr. X is not likely to harm himself or others, they shall immediately order Mr. X's release.[22] This is contrasted with North Dakota where the District Court never hears of the commitment process, and the Mental Health Board is the sole decision making body.[23]

If the Commission finds Mr. X is likely to injure someone, he will have a hearing before the District Court. At this time he may have a jury trial concerning his mental status, if he desires,[24] and he must have an attorney which is furnished by the government, if necessary.[25] Again, Mr. X must be found likely to injure himself or others before he may be committed to a mental hospital.[26] The government has the burden of showing this by a preponderance of the evidence, and may also have to show that Mr. X will receive treatment if committed.[27] However, the Federal Rules of Civil Procedure do not apply to mental health hearings in Federal Court in Washington, D. C.[28]

To summarize the different treatment offered Mr. X in commitment proceedings, Washington, D. C. demands that the proposed patient be represented by an attorney in all proceedings,[29] whereas North Dakota offers to provide an attorney for the patient, but does not make it mandatory.[30] In Washington, D. C. the proposed patient must be found to be likely to injure himself or others because of the illness;[31] not so in North Dakota.[32] In the District of Columbia the court may order hospitalization for an indeterminate period, or order other treatment which is believed to be in the best interests of the patient or the public.[33] In North Dakota the only authorized procedure is to order hospitalization[34] which apparently will be for an indefinite period, as the statutes state the patient shall be discharged when the ". . . conditions justifying hospitalization no longer exist. . . ."[35] Both North Dakota and Washington, D. C. have pro-

21. D.C. CODE ENCYCL. ANN. § 21-544 (1967).
22. *Id.*
23. N.D. CENT. CODE § 25-03-11 (1970).
24. D.C. CODE ENCYCL. ANN. § 21-545(a) (1967).
25. D.C. CODE ENCYCL. ANN. § 21-543 (1967).
26. Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968).
27. *In re* Alexander, 372 F.2d 925 (D.C. Cir. 1967).
28. FED. R. CIV. P. 81(a)(1).
29. D.C. CODE ENCYCL. ANN. § 21-543 (1967).
30. N.D. CENT. CODE § 25-03-11(6) (1970).
31. D.C. CODE ENCYCL. ANN. § 21-545(b) (1967).
32. N.D. CENT. CODE § 25-03-11(7) (1970).
33. D.C. CODE ENCYCL. ANN. § 21-545(b) (1967).
34. N.D. CENT. CODE § 25-03-11(7) (1970). The county mental health board could possibly coerce the proposed patient to obtain other treatment, *e. g.* Area Mental Health Center, by telling the proposed patient that he or she will be committed if the suggestion is not followed.
35. N.D. CENT. CODE § 25-03-15 (1970).

visions for emergency commitment of persons who are likely to injure himself or others,[36] but that is a different subject open to attack in both jurisdictions.[37]

What is this power that can take a person out of society against his will and how does it operate?

III. STATE POWER OVER INDIVIDUALS

There are several sources of authority over a person by the state. One is the state police power to preserve the peace of the community.[38] Another is the *parens patriae* power to protect the proprietary and personal interest of the citizens.[39] Throughout these sources of authority the concept of a person's due process rights comes up repeatedly, thus it is a subject worthy of extensive treatment.[40]

IV. DUE PROCESS

The concept of due process is traced to the highest authority in our land, the United States Constitution.[41] The question as to what constitues due process, however, seems to be a never ending one and new ground is being traversed even now.[42]

A. History

The idea of having safeguards for commitment proceedings arose in the 1800's partly as a result of a crusade by a Mrs. Packard, an ex mental patient. She campaigned during the 1860's in an attempt to arouse public concern in order to prevent railroading persons to hospitals. Her activities resulted in the establishment of some due process requirements drawn from incompetency proceedings and criminal law practice. Her campaign consisted of exposing various methods used to put persons in asylums without any consideration for the person involved.[43]

B. Conflict Between Lawyers and Psychiatrists

There would possibly be very little argument about whether or not there should be due process and how protecting it should be handled in commitment proceedings if it were not for psychiatrists. The psychiatrist feels he should be responsible for the admittance

36. N.D. CENT. CODE § 25-03-08 (1970); D.C. CODE ENCYCL. ANN. § 21-521 (1967).
37. *See* L. Kaplan, *Civil Commitment "As You Like It"*, 49 B.U. L. REV. 14, 40 (1969).
38. State v. Cromwell, 72 N.D. 565, 9 N.W.2d 914, 919 (1943).
39. Kitchens v. Steele, 112 F. Supp. 383 (W.D. Mo. 1953).
40. *E. g.*, Higgins v. United States, 205 F.2d 650 (9th Cir. 1953), *cert. denied*, 346 U.S. 650 (1953).
41. U.S. Const. amend. V, XIV. No person shall be deprived of " . . . life, liberty, or property, without due process of law; . . ."
42. *E.g., In re* Gault, 387 U.S. 1 (1967).
43. Curran, *Hospitalization of the Mentally Ill*, 31 N.C. L. REV. 274, 276 (1952).

and discharge of patients as this is a health problem, whereas the lawyer feels that this is a function of the court because it involves the loss of liberty and rights.[44] Both of these forces are essential parties to a commitment proceeding. Therefore, there has to be a meeting ground between these two ideas.

There are some authorities that would do away with the judicial type hearing entirely. They would substitute the medical specialists to be the sole judge of whether or not a person should be committed to a hospital.[45] However, it should be pointed out that people have been declared mentally ill by the medical profession who were merely unable to speak English. In a 1960 Chicago incident, a Polish emigrant and his wife were committed and judged insane even though they could not speak English, and were detained in a mental hospital until the husband hung himself. The resulting publicity pointed out the injustice and the wife was released the next day.[46] If the statutory due process requirements had been followed there, it is quite likely that Mr. Duzynski would be alive and free rather than committed without a hearing. This particular case arose as a result of a discrepancy between the statutory procedure and the practical methods used. Illinois, at that time, did have procedural safe guards that should have prevented the above tragedy.[47]

The Illinois Mental Health Code, like North Dakota, provides for a hearing before commitment[48] and the Illinois statute calls for a court hearing with a jury trial as a matter of right, upon request.[49] Even the Illinois Emergency Admission procedure requires a certicifation of a physician to accompany the petition.[50] Thus it is hard to see how the Duzynskis could have been "railroaded," as they evidently were. The only answer appears to be that the doctor's concern for the mental health overrode his concern for following the law,[51] but the doctor did not do his job properly in this case.

C. What is Mental Illness?

The question is; how can meaningful due process safeguards be enacted for an individual's protection and yet allow the medical profession to adequately care for a person's mental illness?

44. Tao, *Civil Commitment of the Mentally Ill in the District of Columbia,* 13 How. L. J. 303 (1967).
45. N. Kittrie, *Compulsory Mental Treatment and the Requirements of "Due Process",* 21 Ohio St. L. J. 28, 46 (1960) describes the English Mental Health Bill.
46. Chicago Daily News, March 29, 1962, at 10, col. 1.
47. Ill. Rev. Stat. ch. 91½ (1966, Supp. 1969). The present Illinois Mental Health Code was adopted in 1951.
48. Ill. Rev. Stat. ch. 91½ § 8-3, -4 (Supp. 1969).
49. *Id.* at § 9-2 (Supp. 1969).
50. *Id.* at § 7-1 (Supp. 1969).
51. *But see* Bowman, *President's Address,* 103 Am. J. Psychiatry 1, 12 (1946) for a statement of how legal problems have caused the same result of a patient committing suicide.

This gives rise to another question; what is "mental illness" and what degree of illness must be present before a person must be committed?

It is possible that both questions will never be answered satisfactorily with the present knowledge of psychiatry. It seems as if psychiatrists can call almost any one "mentally ill" with the elastic concepts incorporated in their diagnostic manual.[52] Using the psychiatric criteria of what is mentally ill would seem to put many people in a hospital situation that would never belong there, according to a layman. For example, a law school professor who has performed brilliantly is suffering from involutional depression and there is some chance he may commit suicide. It is thought he could be helped by treatment but he refuses to see a doctor. He has expressed a hope years ago that he would never be forced to a mental hospital unless he becomes dangerous. It is doubtful that non-psychiatrists would wish this man to be committed, even though he possibly could be helped.[53]

The law requires the proposed patient be sick to a certain degree before commitment is warranted. This is where the state statutes vary immensely. Massachusetts makes social nonconformity grounds for commitment.[54] Washington, D. C. on the other hand, must find the patient likely to injure himself or others because of the illness before commitment or treatment may be ordered.[55] North Dakota falls in between this by requiring that the proposed patient either be likely to cause injury if left free, or be too ill to be able to make responsible decisions.[56] Which statute is the correct one depends on the reader's point of view, or maybe whether the reader is a psychiatrist or lawyer.

The psychiatrists argue that to wait until a person becomes dangerous before commitment or treatment can be ordered is to improperly delay needed treatment. They also urge that it is society's duty to provide this treatment because of the person's inability to recognize his need for it.[57] Lawyers may point out that psychiatry is a very inexact science and the judge of whom should receive forced mental treatment is best left to non-psychiatrists.[58] The lawyers concern themselves with due process of law as being essential to

52. ALLEN, FESSTER & RUBIN, READINGS IN LAW AND PSYCHIATRY 49-56 (1968). This article contains a reprint of the diagnostic manual.

53. J. Livermaor, C. Malmquist & P. Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. R. 75, 94 (1968).

54. MASS. ANN. LAWS ch. 123, § 1 (1969).

55. D.C. CODE ENCYCL. ANN. § 21-545(b) (1967).

56. N.D. CENT. CODE § 25-03-11(7) (Supp. 1969).

57. Kittrie, *supra* note 45, at 36.

58. Note, *Society's Right to Protect an Individual From Himself*, 2 CONN. L. REV. 150, 159 (1969).

be satisfied, before the taking of a person's freedom can be warranted.[59]

An attempt to balance the interests of both the psychiatrists and the lawyers is the only way that a satisfactory compromise will ever be reached. North Dakota has attempted to do this in several ways. First by having the medical profession assist in the construction of the statute,[60] which was first enacted in 1967.[61] Second, the statute permits emergency commitment in the event a person is considered likely to injure himself or others. Then the mental hospital shall immediately examine the person to determine if hospitalization is warranted.[62] The patient shall be released within five days, upon his request, unless the hospital superintendent or county judge delays the release for twenty days to allow for the mental health board to review the case.[63] But this statute does not insure that a person's constitutional rights will be observed. Thus the legal profession, as the officers of the court, must take an active part in protecting due process requirements and tempering the strict medical requirements.

D. Requirements of Due Process

The due process involved requires that a person is entitled to a fair hearing, on notice, should he be threatened with commitment. This requirement has been constant for many years in American courts.[64] Since the *Gault* decision however, there has been increasing discussion of what does constitute due process in mental commitment hearings.[65]

Older cases on the subject of due process in a mental commitment proceeding held that as long as notice was given and the defendant had an opportunity to defend, due process was satisfied.[66] It did not matter that the proposed patient made no attempt to defend against the charge.[67] There was no issue raised about a lawyer, as the court appointed a guardian *ad litem* who entered a plea denying the alleged insanity putting the petitioners to their proof of insanity. Due process has been held to impose limitations on all branches of government but that when life and liberty are in question there must be judicial proceedings.[68] However, the courts

59. *See* Comment, *The Expanding Role of the Lawyer and the Court in Securing Psychiatric Treatment for Patients Confined Pursuant to Civil Commitment Procedures*, 6 HOUSTON L. REV. 519 (1969).
60. Interview, *supra* note 11.
61. Ch. 196, § 3 [1957] N.D. Sess. Laws 368, 374.
62. N.D. CENT. CODE § 25-03-08 (1970).
63. N.D. CENT. CODE § 25-03-10 (1970).
64. Simon v. Craft, 182 U.S. 427, 437 (1901).
65. Comment, *supra* note 57.
66. Simon v. Craft, 182 U.S. 427, 436 (1901).
67. *Id.*
68. T. COOLEY, CONSTITUTIONAL LAW 244 (1890).

have held that due process does not always require a judicial hearing,[69] thus ground was broken for the mental health board that exists in North Dakota.

The idea of what constitutes due process has been held to be that the defendant must be given notice in order to be able to present his case.[70] Later it was given the requirement that it is a fundamental fairness doctrine[71] and as a concept, more fluid than the other provisions of the Bill of Rights.[72] The concept of the due process clause being a more fluid clause than others may be attacked as allowing different standards of proof to be required for taking a person's liberty, depending on the charge against a person. It does, however, allow for the updating of procedures to meet current ideas on due process without the necessity of legislation. This means that the court can more validly "legislate" in this area.

The natural result of "legislation" in this area would seem to be a stricter standard of due process requirements in the area of civil commitments. This would be a natural follow-up of cases like *In re Gault*[73] holding that a person must be advised of his right to be represented by counsel. It seems logical that if notice is required that a person is entitled to an attorney in a juvenile court hearing, the same requirement should be present in mental health proceedings.[74] Confinement is confinement regardless of what it is called. The basic issue is the same in the *Gault* case as in a mental health hearing: the potential loss of an individual's freedom to circulate in society.

V. ATTORNEY'S ROLE AT HEARING

Making certain that everyone knows they are entitled to an attorney is only part of the problem however. The attorney must know what he is to do in a mental health hearing. At present there are very few statutory duties for an attorney in a hearing.[75] In fact there is documentation as to confusion on the attorney's part as to who is the client, the county who pays the bill, or the patient.[76] There are suggestions that the attorney should have a role created

69. United States v. Ju Toy, 198 U.S. 253 (1905).

70. Simon v. Craft, 182 U.S. 427 (1901).

71. Bute v. Illinois, 333 U.S. 640, 649 (1948).

72. Betts v. Brady, 316 U.S. 455, 462 (1942).

73. 387 U.S. 1, 41 (1967).

74. Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968). This case stated that counsel must be provided in a mental health hearing unless knowingly waived.

75. Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX L. REV. 424 (1965-66).

76. *Id.* at 447.

by statute.[77] This hardly seems necessary for an inquiring attorney, however.

In North Dakota there would seem to be many areas in which an attorney could raise issues before the mental health board. In a petition for hospitalization under order of the mental health board, the attorney can attempt to determine if the forms have been properly completed and whether or not they were completed by persons authorized to do so.[78] One area it would seem that an attorney should give special attention to is the competency of the examining physician and the completeness of the exam. It would hardly seem possible that a doctor could examine an average person for only a few minutes and yet make a reasonable conclusion as to that person's mental health. Yet this is being done in practice.[79] The presentation of witnesses would probably only be done by an attorney and the questioning of witnesses by an attorney would seem to be preferable to that of a layman in bringing out the relevant evidence at a hearing.

The main objective is to prevent assembly line commitment. The prevention of "automatic" commitment would seem to be best provided by having a board hearing, such as in North Dakota, with the burden of proof on the shoulders of the party making the complaint.[80] In this type of procedure the testimony of the psychiatrist could be put to the test of adverse questioning and the proposed patient is assumed normal unless shown to be otherwise. Combined with a mandatory attorney for the defendant and a commitment order from the board being necessary before any involuntary patient could be admitted to a mental hospital, would seem to reduce the possibility of "railroading."

We have seen that a form of "railroading" is possible under North Dakota law. How then, could specific provisions be incorporated into the North Dakota statutes preventing this, yet allowing enough flexibility to suit local conditions?

VI. POSSIBLE REFORMS

Some suggested reforms are: do away with indefinite commitments; require an attorney for every proposed patient; set up audits on the various agencies to see that they do their job properly; require that a physician or psychiatrist present oral testimony at a commitment hearing; enact a provision expressly authorizing the

77. *Id.* at 457.
78. N.D. CENT. CODE § 25-03-11(1) (1970).
79. Wille, *The Mental Health Clinic—Expressway to Asylum,* Chicago Daily News, Mar. 26, 1962, at 10, col. 4.
80. *In re* Alexander, 372 F.2d 925 (D.C. Cir. 1967). The Washington D.C. procedure seems just.

board to order outpatient treatment at a clinic or hospital; give the board the power of arrest in order to facilitate the calling of proposed patients and witnesses to the board hearing;[81] consolidate boards in lesser populated areas.[82] These suggestions will be briefly dealt with in the following paragraphs.

Indefinite commitments have the possibility of sentencing someone to a mental health hospital for life. Even though someone may be properly committed, he may conceivably improve to a point where he may be able to care for himself but not be completely cured. Creating a commitment procedure whereby a person is committed for a predetermined period, would reduce the possibility of a lifetime confinement. The procedure could be set up so that a person's confinement is continued for more than one year only if it can be justified to the satisfaction of the committing board. The procedure could call for a detailed report by the psychiatrist, calling the board's attention to the reasons why hospitalization is needed for more than whatever the commitment period is.

Requiring an attorney for each proposed patient would help prevent abuses of a patient's due process rights and privileges. The procedure followed by the attorney however, will have to be much more thorough than the procedure followed in some areas where attorneys are appointed.[83] Inducing adequate attorney representation would seem to be best assured by paying each attorney for the actual time spent on a case and requiring an appearance by the attorney before the board in the proposed patient's behalf. It would, however, seem proper that a person could waive an attorney if the board is satisfied that the person does it knowingly.

Setting up audits or checks on the commitment of persons may be the best method to issue fair treatment to all patients. New York has an interesting service that may be used as an example. A mental health information service is a part of each division of the New York Supreme Court.[84] The service is charged with the following duties: study and review admission and retention of all involuntary adult patients and all minor patients;[85] inform patients of their rights to legal counsel and other procedural information;[86] provide the court with the necessary information about each proposed patient;[87] provide similar services for voluntary patients upon requests;[88] assist the families and patients as ordered by the court.[89]

81. Interview, *supra* note 11.
82. *Id.*
83. *See,* Cohen, *supra* note 75.
84. N.Y. MENTAL HYGIENE LAW § 88 (McKinney Supp. 1969).
85. *Id.* § 88(a).
86. *Id.* § 88(b).
87. *Id.* § 88(c).
88. *Id.* § 88(d).
89. *Id.* § 88(e).

North Dakota could duplicate this service to the extent of providing counsel to visit each recently committed patient to discuss the legal rights of the patient.

Requiring a doctor to testify at a commitment hearing would allow the board to question the doctor as to methods used to determine mental health, and whether or not they were adequately used in the case being heard. Because of documented evidence of very summary examinations,[90] this would seem to be a very necessary requirement of any hearing where a person's freedom is at stake. If an attorney were required for the proposed patient there would seem to be less need for the board to closely scrutinize the examining doctor's report, as this should be the attorney's role.

With the advent of tranquilizing drugs, the amount of hospitalization needed has been drastically reduced. The use of these drugs also should allow many to be treated on an outpatient basis rather than in a hospital setting only. Yet the North Dakota Century Code has no provision for this. It is possible to coerce someone into visiting a psychiatrist by threatening them with commitment if they do not do so. It would seem preferable that statutory recognition of the work of organizations such as the Area Mental Health Centers should be enacted.

It has been suggested that the mental health board be given the power of arrest in order to facilitate it's proceedings.[91] This could be used to assure that the subject of the hearing would be present at the commitment hearing. However, the use of these powers would require that the law enforcement agencies be involved when a witness or proposed patient does not want to appear. The use of an arresting power seems directly contrary to the provisions of the North Dakota law which provides that police vehicles are not to be used for patient transportation,[92] nor are patients to be placed in jails awaiting a hearing or commitment.[93]

The Mental Health Board presently has the power to issue and enforce subpoenas,[94] which would seem to give it adequate power to order anyone subject to the Board's authority to attend a hearing. Issuing an arrest warrant may expedite matters somewhat, but possibly expediting too much may contribute to "railroading."

Much better would seem to be the idea of consolidating the mental health boards in counties of small population.[95] Perhaps legislation could be introduced permitting counties to undertake this

90. *See* footnote 79.
91. Interview, *supra* note 11.
92. N.D. CENT. CODE § 25-03-13(1) (1970).
93. N.D. CENT. CODE § 25-03-13(2) (1970).
94. N.D. CENT. CODE § 25-02-16 (1970).
95. Interview, *supra* note 11.

voluntarily and have the chairmanship of the board rotate between the counties.[96] By doing this it is possible that more expert doctors may become available in counties where there are no psychiatrists available. Also, the board should gain more expertise by hearing more cases.

VII. CONCLUSION

North Dakota does have a workable mental health law at present. It is going to be hard to demand some of the refinements in a state with the small population North Dakota has versus that which can be found in larger states[97] Therefore, a "make do" attitude must be adopted to some extent. This is no excuse, however, to allow for the possibility of ignoring a person's constitutional rights, when the legal profession is well represented in North Dakota.[98] As a result of the foregoing discussion, it would seem that the easiest and most beneficial changes that North Dakota could make in its present law would be to provide for a lawyer to visit each patient who is committed to inform them of their rights, require the examining doctor to personally testify before the committing board, change the indefinite commitment to a commitment for a determined period, require reports from the hospital to the committing board, to consolidate some of the present boards in counties with low popula tions, and to require an attorney be present to represent each proposed patient before the mental health board.

DALE EVAVOLD

96. N.D. CENT. CODE § 25-02-11 (1970). The County Judge is the Chairman under present law.

97. It is a well recognized fact that it is hard to attract members of the medical profession to rural areas.

98. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 152 (90th ed. 1969). The table on this page shows that there is one attorney for every 872 people in the state of North Dakota.