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Constitutional Problems with Civil Commitment of the Mentally Ill in North Dakota

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CONSTITUTIONAL PROBLEMS WITH CIVIL COMMITMENT OF THE MENTALLY ILL IN NORTH DAKOTA

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I. INTRODUCTION

1190 North Dakotans were confined against their wishes in the State Hospital at Jamestown, North Dakota in 1974.[1] They had committed no crime, yet their confinement deprived them of their liberty just as substantially as if they had been confined with the 157 of their fellow citizens who were new arrivals at the penitentiary in Bismarck during the same year.[2] We,[3] the citizens of North Dakota, who are so fond of doing things for (mental hospital residents) and to (prisoners) people, surely do not mean to "punish" our fellow citizens detained in Jamestown, but our results and rationalizations are quite similar regarding the use of both institutions. We want to "rehabilitate" and to "treat."[4] We also want, whether or not we publicly or formally admit it, to control "deviant" be-

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** Mary Jane Wrenn, my research assistant, third year law student, University of North Dakota, prepared first drafts of several portions of this article and assisted with the rest.

1. Letter from Barbara Harper, Statistician, North Dakota State Hospital, to *North Dakota Law Review*, September 8, 1975.

2. Phone call to Penitentiary office, North Dakota State Penitentiary, Bismarck, North Dakota.

3. For an excellent discussion contending that mental illness is a suspect classification in the context of the equal protection clause, based on an analysis of a "we-they" foundation for the doctrine of suspect classifications, see Note, *Mental Illness: A Suspect Classification?* 83 YALE L.J. 1237 (1974). For an unusual and perceptive analysis of the sociopsychological implications of why "we" commit "them" see Kaplan, *Civil Commitment "As You Like It,"* 49 BOSTON U.L. REV. 14 (1969).

4. For a discussion of various forms of treatment used in mental hospitals, see Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 S. CAL. L. REV. 616 (1972). The classic description of life in the mental hospital is E. GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES (1961). A recent and well known study containing a description of the experience of psychiatric hospitaliation is Rosenhan, *On Being Sane in Insane Places*, 13 SANTA CLARA LAWYER 379, 390-99 (1973).

havior and remove from our midst those whose conduct we have difficulty controlling or understanding.

We officially believe that, "It is in the best interests of the [hospitalized] individual that he or she be hospitalized in any given situation regardless whether that person thinks he or she needs hospitalization."[5] By shifting the focus from society's best interest to a seemingly benevolent concern for the interests of those we wish to institutionalize "civilly" rather than "criminally," the State through its statutes and hospitalization practices has attempted to avoid the rigors of the criminal process. The North Dakota scheme for involuntary hospitalization of the allegedly mentally ill, laid out in Title 25 of the Century Code,[6] is essentially the product of an era when "reform" and "progress" in the law of civil commitment were thought to be found in laws as far removed from the criminal process as possible.[7]

Unfortunately, decriminalization turned out to be a sword as well as a shield. The "humane" effort to avoid treating the subject as a criminal carried with it the side effect of a corresponding denial of the rights to which a criminal defendant is entitled. This dilution of rights has frequently been accomplished by invocation of the "civil" rubric; it occurs not only in commitment of the mentally ill. Indeed, the criminal law has been "divested" of its traditional clientele across a broad range of allegedly therapeutic programs for social control.[8] Professor Alan Dershowitz recently pointed out some

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5. State's Return to Petition for Writ of Habeas Corpus, Anderson v. Carbone, Fourth Judicial District Court, Jamestown, Stutsman County, North Dakota, dated July 20, 1973.

6. "Civil Commitment" will be used throughout as a synonym for involuntary commitment under the authority of N.D. CENT. CODE ch. 25-03 (1970) on the basis of alleged mental illness, unless the context indicates otherwise. No direct attention is given to commitment of alcoholics and drug addicts which is provided for in ch. 25-03, although procedural defects developed in this article are also applicable to such commitments. For a discussion of additional policy and procedural problems of alcohol and drug commitments, *see, e.g.*, Bannerot, *Civil Commitment of Alcoholics in Texas*, 48 TEX. L. REV. 159 (1969); Aronowitz, *Civil Commitment of Narcotics Addicts*, 67 COLUM. L. REV. 405 (1967).

Also, this article does not deal directly with problems of allegedly mentally retarded persons and the provisions of N.D. CENT. CODE ch. 25-04 "Care of Mentally Deficient Persons" (1970). For specific discussion of trends in this area see Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAWYER 133 (1972).

Also excluded from specific coverage herein are issues peculiar to the commitment of minors. An exhaustive discussion is contained in Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CALIF. L. REV. 840 (1974).

7. For general discussion of historical trends in the law of civil commitment, *see* N. KITTRIE, THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY (1971); AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW ch. 1 (rev. ed. S. Brakel and R. Rock 1971). The last cited book is an excellent comprehensive compilation of the mental health laws of the United States. In an appendix at 454, is a reprint of "A Draft Act Governing Hospitalization of the Mentally Ill," a 1952 publication of the Public Health Service, prepared in the Federal Security Agency by the National Institute of Mental Health and the Office of General Counsl.

Much of North Dakota's statutory law is derived from the draft act; thus, the commentary thereto, part of the appendix, is helpful in interpreting the borrowed provisions. Similarly helpful in that regard is Note, *Comments on a Draft for the Hospitalization of the Mentally Ill*, 19 GEO. WASH. L. REV. 512 (1951). See also REPORT OF THE NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE 9-12 (1957).

8. N. KITTRIE, THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY 4 (1971).

consequences of the "civil-criminal labeling game" in its broader context:

> In the course of this game's long history, prosecutors have succeeded with the help of the court, and all too often, without the opposition of "defense" attorneys, in attaching the civil label to a wide range of proceedings including commitment of juveniles, sex psychopaths, the mentally ill, alcoholics, drug addicts, and security risks. Likewise, sterilization, deportation, and revocation of parole and probation proceedings are regarded as civil. By attaching this label, the state has successfully denied defendants almost every important safeguard required in criminal trials. Invocation of this talismanic word has erased a veritable bill of rights. As Alice said, "that's a great deal to make one word [do]." To which Humpty Dumpty responded: "When I make a word do a lot of work like that . . . I always pay it extra." Until quite recently, this word must have been well paid indeed, for it was doing the work of an army of jurists.[9]

The consequences of this labeling game in the narrower sphere of mental illness commitments in North Dakota will become apparent in the course of this article. So charmed has the invocation of the "civil" label become that people sometimes forget that the due process requirement of the constitution is not limited to criminal cases.[10] But, there are limits to the work that even an army of label-mongering jurists can do in the wonderland of civil commitment. Recently, those limits have begun to be staked out, primarily by judicial[11] (but occasionally legislative[12]) recognition of the un-

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9. Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277, 1296 (1973) (footnotes omitted).

10. The seriousness of the criminal sanction coupled with other constitutional provisions delineating particular procedural protections for the criminally accused have given criminal processes a more specific and rigorous cast; however, one should not accept uncritically statements to the effect that "due process does not apply in civil commitment." Professor Dershowitz reminds us that "even civil proceedings require certain fundamental safeguards. . . ." *Id.* at 1301.

A recent note illustrates the confusion regarding due process and civil proceedings, when it states that "[t]he judicial refusal to extend due process safeguards to commitment procedures has generally been justified by viewing the proceedings in light of a 'civil-criminal' distinction." Note, *Civil Commitment of the "Mentally Ill"—Constitutional Questions*, 24 DRAKE L. REV. 213, 215 (1974). What the author presumably meant to say was that judges were refusing to extend criminal safeguards, not due process safeguards. The distinction is only important, however, where the labeling game continues to be played. The demise of the labeling game in the area of civil commitment has hopefully not been prematurely reported. *See* Dershowitz, *supra* note 9, at 1302-03.

Nevertheless, Professor Dershowitz points out that some judges, in order to avoid the embarrassing fact that civil proceedings themselves require a core of procedural safeguards, have come up with a new label—"nonadversary"—for proceedings said to be neither criminal nor civil. *Id.* at 1301. Hopefully, the North Dakota courts when presented with civil commitment issues, will avoid the seductively simplistic pseudomethodology of labeling and instead realistically pursue a functional analysis of the kind adopted by several other courts whose decisions provide the grist for the substantive portions of this article. *See, e.g.*, cases cited note 11 *infra*.

11. *See, e.g.*, Kendall v. True, 391 F. Supp. 413 (W.D. Ky. 1975); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); Bell v. Wayne Co. Gen. Hosp., 384 F. Supp. 1085 (E.D. Mich. 1974); *In re* Fisher, 39 Ohio St. 2d 71, 313 N.E.2d 851 (1974); State *ex rel.* Hawks v. Lazaro ——W. Va.——, 202 S.E.2d 109 (1974); *In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and*

questionable fact that involuntary institutionalization involves a deprivation of liberty of the greatest magnitude.[13] Moreover, courts have begun to recognize that the stigma and collateral legal consequences attaching to hospitalization for mental illness are often as severe as for conviction of a crime.[14] As a result of this realization, the issue has shifted from labeling to the complex determination of the specific process due in the mental health system.

Underlying this increase in strict due process scrutiny is an emerging focus on the worth of individuals and of procedures designed for their protection. In 1972 Judge Joseph Schneider observed that the "allegedly mentally ill person who is caught up in the nonvoluntary hospitalization process usually possesses neither the money, the knowledge, nor the initiative to assert his rights unless the state develops the resources to assist him."[15] If the rights guaranteed all citizens under the constitution are different or watered down for allegedly mentally ill persons, that necessarily implies that they are somehow less worthy as human beings to exercise the constitutional rights to which we all assume we are entitled. Viewed in this way, it is incongruous to argue that increasing legal protections for mental patients would "make criminals out of them." Surely they are entitled, at the very least, to the same legal protection as criminals.

One need not contend that the procedures must be exactly parallel; that a civil commitment hearing must be exactly "the same as" a criminal trial. To the extent that procedures are protective of basic rights, however, deprivation of those safeguards cannot be justified by an assumption that the end result of the process will be a show-

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remanded on other grounds, 414 U.S. 473 (1974), *on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded for fuller consideration*, 95 S. Ct. 1943 (1975). *But see* People v. Sansone, 18 Ill. App. 3d 315, 309 N.E.2d 733 (1st Dist. 1974). *Sansone* rejects the many reforms cited in the other cases. The case is effectively criticized, however, in Beis, *Rights of the Mentally Disabled—The Conflicting Steps Taken in Illinois*, 24 DE PAUL L. REV. 545 (1975).

12. *E.g.*, FLA. STAT. ch. 394 (1973), *discussed in* Note, *Involuntary Hospitalization of the Mentally Ill Under Florida's Baker Act: Procedural Due Process and the Role of the Attorney*, 26 U. FLA. L. REV. 508 (1974); WASH. REV. CODE ANN. §§ 71.05.010-.930 (Supp. 1974), *discussed in* Comment, *Progress in Involuntary Commitment*, 49 WASH. L. REV. 617 (1974); MICH. COMP. LAWS ANN. ch. 330 (1974); CAL. WELF. & INSTITUTIONS §§ 5000-6825 (West 1972), *discussed in* Comment, *Civil Commitment of the Mentally Ill in California: The Lanterman—Petris—Short Act*, 7 LOYOLA L.A. L. REV. 93 (1974).

13. The *In re* Ballay opinion emphasized:

> There can no longer be any doubt that the nature of the interests involved when a person sought to be involuntarily committed faces an indeterminable and, consequently, potentially permanent loss of liberty and privacy accompanied by the loss of substantial civil rights (the loss of which frequently continues even if his liberty is restored) is "one within the contemplation of the liberty and property language of the Fourteenth Amendment."

482 F.2d 648, 655 (D.C. Cir. 1973), *quoting* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (footnote omitted). *See also* the other cases cited note 11 *supra*. Indeed, in dictum, the United States Supreme Court has recognized that civil commitment involves a "massive curtailment of liberty." Humphrey v. Cady, 405 U.S. 504, 509 (1972).

14. *In re* Ballay, 482 F.2d 648, 668-69 (D.C. Cir. 1973); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972).

15. Schneider, *Civil Commitment of the Mentally Ill*, 58 A.B.A.J. 1059, 1062-63 (1972). Another judge reacts favorably to recent reforms in Flashner, *Legal Rights of the Mentally Handicapped: A Judge's Viewpoint*, 60 A.B.A.J. 1371 (1974).

ing that the subject was incapable of utilizing or appreciating the protections[16] nor by merely switching the label from 'criminal' to 'civil.' Instead, specific protections must be functionally analyzed and applied in the context of civil commitment in a manner that preserves fundamental rights while making necessary accomodations to the therapeutic goals. The United States Supreme Court, in ruling that a parolee has a due process right to written notice and hearing prior to revocation, reminded us that "due process is flexible and calls for such procedural protections as the particular situation demands."[17]

Recent attempts at reform in North Dakota have been futile, in part at least, because of the prevalence of an "end justifies the means" attitude.[18] For example, during the 1975 Legislative Assembly, a bill, H.B. 1605, was introduced that would have significantly

16. *In re* Ballay, 482 F.2d 648, 663-64 (D.C. Cir. 1973). In *Ballay*, the court rejected the argument that imposing a burden of proof beyond a reasonable doubt on commitment proceedings would unduly traumatize the subject, noting that "this argument presupposes that an individual will ultimately be committed, the very proposition that we now reappraise." *Id.* at 664.

17. Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The required process for giving substance to the guarantee of due process of law is effectively detailed for practitioners in Ginger, *Due Process in Practice or Whatever's Fair*, 25 HAST. L.J. 897 (1974).

18. An action was recently brought in federal court seeking a judgment declaring North Dakota's commitment procedures to be unconstitutional. Poe v. Smith, Civil No. A2-74-84 (D.N.D., filed Dec. 30, 1974). Although recognizing the danger of generalizing from an isolated case, several aspects of the case might fairly be taken to manifest common procedure for Grand Forks County, and thus will be sketched here.

The client was served on a Friday with a notice of a hearing the following Monday morning scheduled for 8:30 a. m. It was only by accident that she had already contacted legal counsel on another matter, and thus the author was available to make a brief investigation prior to the Monday morning hearing.

Ms. Poe (a pseudonym) was told on Monday morning to pack her bags and was thus brought to the hearing by the sheriff's deputy in readiness for transportation to the State Hospital. The examining physician, however, was not present at the hearing. The author asked for, and was granted, a continuance until the following Friday. The examiner had previously stated that he had never appeared for a hearing at any of the many cases in which he had previously served as examiner.

On Wednesday, the author filed a motion requesting that the examining physician be subpoened to appear at the hearing. He was informed that the board could not consider the request until the Friday morning hearing. On Friday morning, the board assembled, and granted the request to have the examining physician subpoened.

Three weeks later, after the examining physician returned from vacation, the board again met. At this point, the examiner stated that Ms. Poe "could with some risk be released on outpatient basis." The author's attempts to cross-examine him about the degree of risk were cut short by the board. The board then indicated that it would not commit, nor would it dismiss despite the lack of testimony supporting committability; instead, it continued the case for two months "to see whether . . . [Ms. Poe] can maintain her mental health outside the hospital environment." In the interim, the federal court suit was filed. The district court denied a request for an injunction to prevent the board from conducting another hearing without affording Ms. Poe increased procedural safeguards. Thereafter, the board reconvened and dismissed the proceedings at the county level. Subsequently, despite plaintiff's request for a declaration of her rights and expungement of the county mental health board record, the suit was dismissed as moot. Although she had obtained the result she sought, avoiding commitment to the State Hospital, she had, nonetheless, been denied a wide range of constitutional rights in the process of three board appearances. But the court felt, apparently, that only persons already committed are entitled to delineation of their constitutional rights. Ms. Poe's lack of standing (the court's order of dismissal merges the issues of mootness and standing) apparently stems from her failure to seek monetary damages for denial of her invaluable constitutional rights. Money damages and class actions would thus seems to be the key to successful litigation of commitment issues for any client except a patient at the state hospital.

improved the North Dakota commitment procedures.[19] After favorable testimony from the sponsor, Rep. Alvin Royse, and several others, the Director of the North Dakota Health Department's Division of Mental Health and Retardation Services testified that although he was in favor of civil liberties for persons alleged to be mentally ill, there is no real "problem" in North Dakota for the bill to cure since everyone is fairly treated at the State Hospital. Apparently the Legislative Assembly agreed with that position—that fair treatment at the hospital somehow excuses defects in the commitment process itself—for the bill was quickly dispatched to an ignominious grave. Although substantial reform with regard to the rights of hospital patients is being suggested and effected,[20] this article deals with the commitment process itself rather than the hospitalized patients' rights as such.

The discussion that follows shows that, unless North Dakota has been somehow transported beyond the realm of the constitutional universe recognized by the numerous recent decisions invalidating parallel provisions of other state commitment schemes, North Dakota's procedures do indeed pose significant constitutional problems. The legislature has chosen to delay remedying those problems for at least another two years. North Dakota attorneys, however, bound professionally by Canon 8 to assist in improving the legal system[21] cannot ethically ignore the substantial reform effectuated elsewhere.[22] This article is intended to serve a limited function as an impetus to reform in North Dakota.[23] It is designed to "brief" the bar on develop-

19. In December of 1974, a study was commissioned by the State Mental Health Association to investigate possibilities for statutory reform for consideration by the Forty-Fourth North Dakota Legislative Assembly. A report was submitted, T. Lockney, D. Boeck, and J. Hedahl, Proposals for Reform of North Dakota Legislation on Civil Commitment and Treatment of Mentally Ill Persons, A Report Prepared for the North Dakota Mental Health Association, January 1975, and legislation based on those proposals resulted in H.B. 1605. Previously, a Legislative Council Study Resolution, H.C.R. 3002 (suggested by the author and adopted by the Legislative Council Interim Committee on the Judiciary "A", on which the author served as a citizen member) had been approved by the House and ultimately was passed by the Legislative Assembly. H.B. 1605 was indefinitely postponed by the House.

20. Donaldson v. O'Conner, 95 S. Ct. 2486 (1975) (non-dangerous patients may not constitutionally be confined without treatment if they can live safely in freedom); Morris, *Institutionalizing the Rights of Mental Patients: Committing the Legislature*, 62 CALIF. L. REV. 957 (1974); Ferleger, *Loosing the chains: In-Hospital Civil Liberties of Mental Patients*, 13 SANTA CLARA LAWYER 447 (1973).

21. ABA, CODE OF PROFESSIONAL RESPONSIBILITY AND JUDICIAL CONDUCT Cannon 8 at 44C (1974). Implicit in the textual statement is the author's belief that the materials discussed herein, especially the recent case law, manifest a significant development in the law which for the most part constitutes an improvement.

22. Attorneys should not be reluctant to undertake this duty. Some encouragement may be taken in the Supreme Court's apparent invitation to litigate in this area. "Considering the number of persons affected [by commitment proceedings], it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated." Jackson v. Indiana, 406 U.S. 715, 737 (1972).

23. It is not suggested here that no one ever needs involuntary hospitalization. There are strong arguments available to justify that libertarian position, *e.g.*, Szasz, *The Danger of Coercive Psychiatry* 61 A.B.A.J. 1246 (1975); T. Szasz, *Involuntary Mental Hospitalization: A Crime Against Humanity*, ch. 9 IDEOLOGY AND INSANITY (1970); Note, *A New Emancipation: Toward an End to Involuntary Civil Commitments*, 48 NOTRE DAME LAWYER 1334, 1351-54 (1973), but it is the author's judgment that abolition of involuntary

ments in the area;[24] as a brief, it avoids the more ambitious goal of spelling out a detailed substitute commitment plan.[25] The arguments distributed here at wholesale require that the attorneys retail them to the judges who must then accomodate the needs of consumers of justice in the mental health system until such time as comprehensive legislative change is accomplished. For the most part, the arguments sketched here set forth those protections the courts have determined will provide the minimum level of protection that is consistent with due process.

The presentation will roughly follow the chronology of a civil commitment case. It begins with a discussion of the notice provisions which initially and formally advise the subject of the nature of the process and of the rights to which the subject is entitled. The right to and role of counsel are then discussed because of the importance of active and effective counsel to the enforcement of the other rights essential to a fair hearing. Next follows a discussion of the statutorily required examination. The discussion of the hearing procedure focuses first upon the threshold issues of appropriate statutory criteria for commitment and the required standard for their proof. The lack of any effective judicial review of the commitment decision is then pointed out. And, finally, sketched briefly, are

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commitment is a political and perhaps a moral impossibility at this time, if for no other reason than lack of adequate community care facilities in North Dakota. Some readers may, therefore, legitimately label articles of this type as exalting procedure over substance. For example, Judge Tamm, writing for the court in *In re* Ballay, noted:

> Indeed, it may not be totally inaccurate to observe that the recent surge of interest in civil commitment may occasionally focus on procedure to the ultimate detriment of substance.

482 F.2d 648, 654 (D.C. Cir. 1973).

Political realism, alas, must often excuse exercises in legalism. Moreover, we have been told that "The history of liberty has largely been the history of observance of procedural safeguards." McNabb v. United States, 318 U.S. 332, 347 (1943). In any event, as Judge Tamm went on to point out, even a review of procedures necessitates some examination of relevant substantive provisions in order to relate them to the significant interests at sake for the individual. *In re* Ballay, *supra*, at 655. Accordingly, a brief discussion of the substantive commitment criterea is included. *See* text accompanying notes 74-122 *infra*.

24. For North Dakota attorneys who would like to read more widely in the area, the following very limited bibliography may be helpful. An excellent and inexpensive three volume set of cases, briefs, articles, and other materials for practicing attorneys is published by the PRACTICING LAW INSTITUTE, LEGAL RIGHTS OF THE MENTALLY HANDICAPPED (B. Ennis & P. Friedman eds. 1973). Also useful is A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM (1974), a readable and comprehensive collection of materials surveying developments and giving a very balanced discussion of the key issues. Shorter books are B. ENNIS & L. SIEGEL, THE RIGHTS OF MENTAL PATIENTS (1973) (An American Civil Liberties Union Handbook) and F. MILLER, R. DAWSON, G. DIX, AND R. PARNAS, THE MENTAL HEALTH PROCESS (1971). Invaluable for the attorney preparing for an actual confrontation with expert testimony or opinion is J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY (2d ed. 1975).

Far and away the single best and most comprehensive periodical commentary is *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974) [hereinafter cited as *Developments*]. Excellent symposia are contained in 62 CALIF. L. REV. 671 (1974) and 13 SANTA CLARA LAWYER 367 (1973).

25. For a previous effort in that direction, however, see T. Lockney, D. Boeck, and J. Hedahl, Proposals for Reform of North Dakota Legislation on Civil Commitment and Treatment of Mentally Ill Persons, A Report Prepared for the North Dakota Mental Health Association, January, 1975. See also the recent statutes and commentary cited note 12 *supra*.

a miscellany of issues which, although less fully developed in the case law and literature of civil commitment, should be pursued by North Dakota mental health attorneys so that we may begin to act rather than react in the creative process of developing a solid legal foundation for fundamental fairness to subjects of civil commitment.

II. NOTICE

North Dakota's statute providing for notice to the proposed subject of civil commitment[26] of the application therefor, gives wide discretion to the county mental health board[27] regarding the manner, content, and recipients of the notice:

> Upon receipt of an application, the mental health board shall give notice of such application to the proposed patient, to his legal guardian, if any, and to his spouse or parent, or nearest known other relative or friend, if such persons can be found. If, however, the mental health board has reason to believe that personal notice to the proposed patient would likely be injurious to him, notice to such proposed patient may be omitted.[28]

Notice is a constitutional requirement in both civil and criminal proceedings.[29] It is the primary right, for a subject can hardly be expected to prepare for or meaningfully participate in a proceeding of which he is not given adequately communicated and sufficiently advance notice. The content of the required notice is also important. The subject must be given some idea of the reasons for his proposed commitment in order to be able to attempt to counter them; he must also be informed of the rights to which he is entitled during the proceedings if they are to be meaningfully exercised.[30] Because notice is the linchpin securing the subject's other rights, it should be mandatory rather than discretionary.[31]

A recent West Virginia decision, *ex rel. Hawks v. Lazaro*, held:

> Notice contemplates meaningful notice which affords an opportunity to prepare a defense and to be heard upon the merits. Therefore, any notice given to advise a person that commitment proceedings are being brought against him must con-

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26. The statute uses the cumbersome "proposed patient" to refer to the person alleged to be in need of hospitalization; hereinafter that person will be referred to as the "subject" of the proceedings.
27. Hereinafter referred to as "board."
28. N.D. CENT. CODE § 25-03-11(2) (1970).
29. "[N]otice is considered a fundamental element of due process in both civil and criminal cases. . . ." *Developments*, *supra* note 24, at 1273 & n.61.
30. *In re* Raner, 59 Cal. 2d 635, 642, 381 P.2d 638, 642-43, 30 Cal. Rptr. 814, 818-19 (1963).
31. *Developments*, *supra* note 24, at 1274-75. "Where a judge is given discretion to decide whether the dangers of trauma outweigh the benefits of effective notice, his lack of psychiatric expertise and constraints on his time may render careful and accurate determinations unlikely." *Id.* at 1274 n.67.

> tain a detailed statement of the grounds upon which the commitment is sought, as well as the underlying facts which support the applicant's conclusion that the individual should be committed.[32]

A three judge federal district court recently considered a Michigan notice provision similar to North Dakota's.[33] The court pointed out that since the statute did not require the petition, or a copy, to be served upon the subject, he could remain unaware of the factual basis upon which his commitment is proposed until the hearing is in progress. Because the failure to counter allegations raised in the application could result in the subject's confinement, the court held the statute unconstitutional on its face as violative of due process for failing to require service of the application upon the subject.[34] The court also held that the requirement for notice "at least 24 hours before the hearing"[35] did not guarantee that notice would be adequate to permit preparation.[36] Failure to counter allegations produced by "notice received on the eve of hearing and devoid of the issues . . . [the subject] must confront . . . " results in a breach of due process.[37]

Both the West Virginia court and the federal panel in Michigan relied heavily on *Lessard v. Schmidt,* a widely acclaimed 1972 decision of a federal panel in Wisconsin.[38] *Lessard* held:

> Notice of date, time, and place is unsatisfactory. The patient should be informed of the basis for his dentention, his right to jury trial, the standard upon which he may be detained, the names of examining physicians and all other persons who may testify in favor of his continued detention, and the substance of their proposed testimony.[39]

Although differing in some details, these recent cases make clear that due process requires that the subject be notified of the civil commitment hearing in time to prepare an adequate defense and that the notice contain a detailed statement of the grounds and the facts upon which commitment is sought or a copy of the application itself. The notice must also inform the subject of his constitutional and statutory rights.

Since North Dakota's statute fails to specify that the notice inform the subject of anything more than the receipt of an application alleging his mental illness, alcoholism, or drug addiction, and allows

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32. ——W. Va.——, 202 S.E.2d 109, 124 (1974).
33. Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085 (E.D. Mich. 1974) (MICH. COMP. LAWS ANN. § 330.21 (1975)).
34. *Id.* at 1091-92.
35. MICH. COMP. LAWS ANN. § 330.21 (1975).
36. Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085, 1092 (E.D. Mich. 1974).
37. *Id.*
38. 349 F. Supp. 1078 (E.D. Wis. 1972).
39. *Id.* at 1092.

ommission of notice if the board concludes that the notice will injure the subject, and no state court decision has interpreted the section to so require, it is thus unconstitutional on its face. Moreover, notice, when given, may also violate due process as applied by inadequately and belatedly informing the subject of the proceedings, allegations, and his constitutional and statutory rights.[40]

As one commentator concluded, speaking of his state's equally deficient notice requirement:

> Such a notice would not be adequate to satisfy the requirements of due process even if given to a person in possession of all his faculties, and it is self-evident that such a notice to a person who is alleged to have substantially impaired capacity to use self-control, judgment and discretion in the conduct of his affairs is, legally speaking, no notice at all.[41]

III. THE ROLE OF COUNSEL

Effective notice is the primary right as a matter of logical necessity. The key to due process thereafter, however, is the right to and assistance of counsel. By statute, North Dakota guarantees the subject "[a]n opportunity to be represented by counsel."[42] Upon request the board "shall appoint counsel" to be paid for by the county if the subject is unable to pay.[43] Provision of counsel should be mandatory; thus, even where the subject does not provides his own attorney nor request appointment, counsel should be appointed.[44]

Assuming that counsel is timely appointed for subjects unable to provide counsel on their own,[45] a critical constitutional issue is

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40. In Commonwealth *ex. rel.* Finken v. Roop, No. 199 Oct. Term, 1974 9-11 (Super Ct. Pa., filed April 22, 1975), the court read into the Pennsylvania Statute, PA. STAT. ANN. tit. 50, § 4406 (1969), the following requirements: that the subject be given a copy of the petition in advance of hearing; that the names of all adverse witnesses and the substance of their testimony be furnished in advance of the hearing; and, that the petitioner be required to attend the hearing. The statute, however, was not declared unconstitutional on its face. Instead, the court held that the due process requirements could be incorporated into the statute by "reasonable construction." Commonwealth *ex rel.* Finken v. Roop, *supra*, at 9.

41. Dewey, *Imprisonment of the Mentally Ill: An Inquiry into the Deprivation of Civil Liberties Under Ohio Laws and Procedures*, 1 CAPITAL UNIV. L. REV. 1, 16 (1972).

42. N.D. CENT. CODE § 25-03-11(6) (1970).

43. *Id.*

44. *See* Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1966). Waiver is a difficult question in this context. Commentators have generally agreed that waiver is impermissible in a case where the subject's mental state is at issue. "Realistically, it is doubtful that there could be an 'effective waiver' of the right to counsel by one who is allegedly so deranged as to require involuntary commitment." Comment, *Progress in Involuntary Commitment*, 49 WASH. L. REV. 617, 634 (1974). The likelihood of an "intelligent" waiver is so small in a case where the state asserts the person waiving the right is mentally ill that it would be a waste of time and valuable judicial resources to make the inquiry. Note, *Civil Comitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1292 (1966). *But see In re* Fisher, 39 Ohio St. 2d 71, 83, 313 N.E.2d 851, 859 (concurring opinion), *discussed in* Case Note, 36 OHIO ST. L.J. 436, 444-46 (1975).

45. For the right to counsel to be meaningful, the subject must be "afforded the opportunity of the guiding hand of legal counsel at every step of the proceedings. . . ." Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968); *accord*, Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085, 1092 (E.D. Mich. 1974); People v. Potts, 17 Ill. App. 3d 867, 309 NE.2d 35 (1974); *In re* Fisher, 39 Ohio St 2d 71, 313 N.E.2d 851, 858 (1974).

the role that counsel is to play. Two different attitudes common among attorneys representing civil commitment clients have been labelled by a recent comment on the subject as the "best interest" role and the "adversary or advocacy" role.[46] Closely tied to counsel's adoption of a "role" are the practical steps that he or she may take on behalf of the client. In general, it may be safely said that the attorney filling the advocacy role tends to question the need for commitment more vigorously, pursue alternatives to commitment, and, more often, obtain results that are satisfactory to the client.[47] The lawyer adopting the "best interest" role, however, by definition, must in his own mind first make the very decision that is at issue in the proceeding for which he is retained or appointed. With the expanded emphasis on procedural protections manifested in the recent developments in the law of civil commitment, and the underlying focus on the loss of liberty inherent in commitment, courts are increasingly requiring that counsel play an active role advocating the client's wishes rather than passively observe the proceedings to assure merely that the proper formalities are complied with on the way to a basically unopposed commitment in the client's "best interest."

In *Lynch v. Baxley*,[48] a three judge federal district court declared: "The right to counsel is a right to representative counsel occupying a traditional adversarial role."[49] *Lazaro* stated that counsel must "represent his client as zealously as the bounds of ethics permit."[50] Although the Code of Professional Responsibility is ambiguous on those bounds, *Lazaro* made it clear that West Virginia attorneys must "serve the function of an adversary."[51] *Lessard* too rejects the "best interest role."[52]

Until a binding ruling is obtained for North Dakota, the ambiguity will remain. Studies of other jurisdictions,[53] plus the author's limited experience and contact with the situation in North Dakota, lead to the belief that the dominant role in practice is the "best interest" role.[54] Before too readily adopting that stance, however, the civil commitment attorney should consider EC 7-19 of the Code of Professional Responsibility.

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46. Note, *The Role of Counsel in the Civil Commitment Process: A Theoretical Framework*, 84 YALE L.J. 1540, 1541 (1975) [hereinafter cited as *The Role of Counsel*].
47. *Id.* at 1542 n.10 & 1560-61.
48. 386 F. Supp. 378 (M.D. Ala. 1974).
49. *Id.* at 378.
50. ——W. Va.——, 202 S.E.2d 109, 126 (1974).
51. *Id.*
52. 349 F. Supp. 1078, 1099 (E.D. Wis. 1972). *See also* Quesnell v. State, 83 Wash. 2d 219, 517 P.2d 586 (1973).
53. *See* studies cited note 61 *infra*.
54. Evidence that the advocacy role is rare throughout the state is the lack, to the author's knowledge, of any serious challenges to the constitutionality of the North Dakota commitment procedures. Moreover, in two habeas corpus cases handled by the author for clients confined at the State Hospital, the attorney who had been appointed in each case for the initial commitment hearing before the Stutsman County Mental Health Board testified that his efforts had been of a very minimal nature. The activities he undertook

> Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet known; the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.[55]

The dubious status of psychiatry as a "science" and, more particularly, the questionable reliability and accuracy of psychiatric judgments, especially with regard to predictions of dangerousness, are increasingly being recognized.[56] It is unlikely that the legislature provided for representation by counsel, for a hearing, and for the right to present and cross-examine witnesses,[57] if it did not also intend that counsel would serve the usual function of aiding the tribunal to avoid judging "too swiftly in terms of the familiar that which is not yet fully known"—to counter the natural tendency to accept uncritically the judgment of the "expert" submitting a report calling for hospitalization.

There is no lack of persons to speak for the position that the subject needs to be hospitalized. The attorney cannot reasonably attempt to advocate both sides of a case. A passive "defense" consisting of mere insistence that the statutory formalities be followed[58]

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upon behalf of his clients, he admitted, were far below that which would be considered effective enough to satisfy the right to counsel requirement for a criminal case. In one case he could not recall having handled the case at all, although the records show that he had been appointed; the "hearing" at which he had been appointed to represent the subject had been held approximately a year and one-half earlier. The attorney explained that his minimal activities were expected by the Stutsman County Mental Health Board and that in effect additional services would have been futile in any event. Finally, numerous private conversations with North Dakota attorneys have also contributed to the author's strong belief that the "best interest" model predominates in this State to the almost total exclusion of the "advocacy" model.

55. ABA CODE OF PROFESSIONAL RESPONSIBILITY AND JUDICIAL CONDUCT Ethical Consideration 7-19 at 34C (1974) (footnotes omitted).

56. *Compare* K. MENNINGER, THE CRIME OF PUNISHMENT (1968) *with* J. Ziskin, *Coping with Psychiatric and Psychological Testimony* (2d ed. 1975); *Rosenhan, On Being Sane in Insane Places*, 13 SANTA CLARA LAWYER 379 (1973); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974); Note, *The Language of Involuntary Mental Hospitalization; A Study in Sound and Fury*, 4 U. MICH. J.L. REFORM 195 (1970).

57. N.D. CENT. CODE § 25-03-11(6) (1970).

58. A recent survey of counsel in various states revealed that:

> In Arizona, Iowa, and Texas, . . . states that rely upon nominally compensated members of the private bar, neither of the principal determinants of effective counsel were fulfilled in the slightest degree. The attorneys did not in any way regard themselves as advocates and (partly as a consequence) failed to develop the knowledge or perform the work necessary to aid their clients. Indeed, they did virtually nothing except stand passively at a hearing and add a falsely reassuring patina of respectibility to the proceedings.

Andalman & Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, A Polemic, and A Proposal*, 45 MISS. L.J. 43, 72 (1974) [hereinafter cited as *Effective Counsel*].

requires that the attorney reject the policies underlying the adversary system[59] solely on the basis of his untutored judgment that the client needs help.[60] Assuming, then, some active advocacy of the client's opposition to the commitment, what form is that advocacy to take?

> [The lawyer's] role in operational terms resembles that in ordinary cases. He may serve as elucidator of the law, laying out for his client in objective fashion the legal problems facing him, the consequences of a commitment decision, the likelihood of prevailing at the hearing, and possible alternatives to commitment. The ultimate decision as to whether to challenge the commitment petition must, however, be the client's. If the client expresses a desire to contest the commitment, the lawyer must do all he can to defeat the petition. As in a criminal setting, of course, he may discuss with the patient the possibility of "plea bargaining"; that is, negotiating less restrictive, more desirable alternatives to commitment. Arrangements may be made for his client's voluntary participation in an outpatient program in lieu of commitment, for example, or for trial visits away from the hospital while still under the institution's jurisdiction. Should the commitment decision be unfavorable, counsel must be prepared to take an active role in the dispositional phase, seeking out alternatives to total commitment in the hospital. Again, however, the client must be presented with a range of alternatives and be allowed to choose the one he prefers. Although communication with the respondent may prove troublesome (and in some instances impossible) and the lawyer might never be certain that his client means what he says, he must act upon the expressed desires of this client. It is all the lawyer has to go on.[61]

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59. *The Role of Counsel, supra* note 46, at 1556. For the classic statement of the policies believed to be served by the adversary system, *see Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159 (1958).

60. The Board is to make the commitment decision; not the subject's attorney.

> The court, which may draw upon expert advice of its choice, is the only proper party to decide what is in the ill person's and the public's best interest. The judge, not the attorney, must make this decision. The judge may not want this role, perhaps preferring, instead, an atmosphere of friendly cooperation in which all participants explore together what is in the ill person's best interests and all share, at least by acquiescence, in the choice of disposition. *Gault*, however, wisely spells an end to the era of coziness at the final hearing—an end to commitments in which the significance of the loss of freedom is smothered in warm smiles as everyone pretends that it is only the patient's interests that are being considered. In fact, the family members or police who petitioned for commitment are often motivated in part by the desire—not necessarily unjustified but clearly not selfless—to rid themselves of a troublesome presence.

Effective Counsel, supra note 58, at 48-49.

Not only does the lawyer making the judgment of the client's best interests usurp the decision making authority of the board; he also makes his decision as a person untrained and presumably unskilled in diagnosis and treatment of mental illness. R. ROCK, HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL 157 (1968).

61. *The Role of Counsel, supra* note 46, at 1562 (footnotes omitted).

This is not the place for a "how to do it" manual for attorneys interested in assuming the advocate role. Helpful sources to that end, however, are Haydock & Orey, *Involuntary Commitment in Minnesota*, 28 BENCH AND BAR, No. 9, at 23 (1972); J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY (2d ed. 1975); B. ENNIS & L. SIEGEL, THE RIGHTS OF MENTAL PATIENTS, app. B (Trial Techniques) (1973).

IV. EXAMINATION

The North Dakota statute provides that "the mental health board shall appoint at least one licensed physician as an examiner who may or may not be a member of the county mental health board to examine the proposed patient and report to the board his findings as to the condition of the proposed patient and the need for his custody, care, or treatment in a mental hospital."[62] This provision is defective for several reasons. If the examiner also sits as a member of the board determining committability, the notion of a fair hearing procedure is seriously undermined.[63] The combination of investigative, prosecutorial, and adjudicative functions bestowed on members of the South Dakota "Board of Mental Illness" was recently held to deny due process.[64] The North Dakota provision, an obvious attempt to accommodate the problems created by a scarcity of medical personnel,[65] is defective in the same way. In addition, the subject should be given a specific right to an independent examina-

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The following brief specific suggestions may serve as examples of practical steps that should be taken by the subject's attorney. The attorney must, of course, be familiar with the statutory procedures. He must also attempt to gain some familiarity with psychiatric concepts likely to be involved in the case—that task should be no more onerous than any other case involving expert witness *e.g.*, personal injury litigation involving medical testimony or, more analogously, a will contest raising competency issues. The client must be interviewed to learn his immediate desires, to inform him of the form the commitment procedure will take, and of his rights. *Effective Counsel, supra* note 58, at 52. Background information must be sought from the client and the case investigated, especially with reference to possible alternatives to hospitalization. Note, *The Right to Counsel*, 40 TEMP. L.Q. 381, 388 (1966-67); Litwack, *The Role of Counsel in Civil Commitment Proceeding: Emerging Problems*, 62 CALIF. L. REV. 816, 838-9 (1974). After investigation, counsel should advise the client of alternative modes of treatment available to him; forecast the likely result of the commitment proceeding; inform the client of counsel's own view of the best course of action for the client, and then determine and follow the client's wishes. *Id.*

Prior to the hearing, negotiation may be attempted, especially if the client seeks an alternative to hospitalization. *Effective Counsel, supra* note 58, at 52. Where the client does not wish to contest commitment, the attorney may investigate the possibility of voluntary admission to the hospital and advise the client of the rights possessed by a voluntary patient. Dix, *Hospitalization of the Mentally Ill in Wisconsin*, 51 MARQ. L. REV. 1, 33 (1967).

In the event that the hearing is necessary, a zealous defense must be studiously prepared. At the hearing, the client's case must be effectively presented, issues clarified, and the case for commitment challenged. *Effective Counsel, supra* note 58, at 52; Litwack, *supra*, at 839; *The Right to Counsel, supra*, at 388. The client's procedural rights must be protected, both prior to and during the hearing. *The Right to Counsel, supra*, at 388-89.

When commitment is inevitable, the attorney should prepare the client for hospitalization. As one in a close and trusted position, the attorney will often be able to calm the client's fears by explaining the hospitalization procedures and the client's rights while hospitalized. *Id.* at 389.

Alternatives to hospitalization to the board should be offered and explained to the board. *The Right to Counsel, supra*, at 389; *Effective Counsel, supra* note 58, at 52; Litwack, *supra*, at 839.

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

63. [1970-1972] REP. OF ATT'Y GEN. OF N.D. 210, 215 [OP. ATT'Y GEN., September 14, 1970].

64. Schneider v. Radack, Civ. No. 74-50 at 8 (1st Cir. S.D. May 3, 1974), finding S.D. COMPILED LAWS ANN. §§ 27-7-3, 5, 9 (1967) unconstitutional, *as discussed in* Crew, *Schneider v. Radack: South Dakota's First Engagement of the Struggle to Secure the Rights of the Mentally Ill*, 20 S.D.L. REV. 138, 136 (1975).

65. *Infra* note 73.

tion and the indigent subject should be entitled to have this independent examination conducted at the county's expense.[66]

There is some possible ambiguity inherent in the argument for an "independent examination."[67] The statute is seemingly neutral since it requires only an examination without specifying any appropriate affiliation for the examiner.[68] A spectrum of "independence" may be imagined. A patient confined at the State Hospital, for example, who requests a mental health board hearing following an emergency commitment, should be entitled to an examination by someone independent from the hospital. An "examination" by the doctors who have obviously already determined the necessity for confinement—else the patient would have been released without the hearing—frustrates the essence of a due process right to an independent examination by an impartial examiner. The other end of the spectrum, of course, is the private psychiatrist hired by the subject specifically for the civil commitment proceedings.

An intermediate situation might involve the subject's family physician. However, even that situation may be fraught with unfairness. Consider the situation where the physician has already certified the subject for commitment under § 25-03-11(1). A New Jersey Court recognized the minimal value of a hearing at which the only expert testimony is presented by the certifying psychiatrist and suggested that the right to a lawyer would be a meaningless safeguard without the opportunity for an independent expert examination.[69] "No matter how brilliant the lawyer may be, he is in no position to effectively contest the commitment proceedings because he has no way to rebut the testimony of the psychiatrist from the institution who has already certified to the patient's insanity. . . ."[70] Relying on its experience with the wide differences in psychiatric evaluations and diagnoses of mental illness, the court held that in civil commitment, "where the court is in effect bound by the expertise of the psychiatrist, the right to counsel is of little value without a concurrent right to an independent psychiatric examination."[71]

North Dakota attorneys seeking to enforce this right should be careful to assure courts that the argument for an independent ex-

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66. *In re* Gannon, 123 N.J. Super. 104, 301 A.2d 493 (Somerset Co. Ct. 1973); *see* Dixon v. Atty. Gen., 325 F. Supp. 966, 974 (M.D. Pa. 1971); *cf.* A. GOLDSTEIN, THE INSANITY DEFENSE 138-40 (1967).

67. Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 746-47 (1974).

68. Except, of course, in the instance of the examining physician also sitting as a member of the board.

69. *In re* Gannon, 123 N.J. Super. 104, 105-06, 301 A.2d 493, 494 (1973).

70. *Id.*

71. *Id.* "[W]here an indigent confined in a mental hospital seeks habeas corpus it is more important to provide him with an independent psychiatric examination than to give him independent counsel." De Marcos v. Overholser, 137 F.2d 698, 699 (D.C. Cir. 1943). *See* Developments, *supra* note 24, at 1290-91 n.152.

pert examination does not also require recognition of a right to "shop around" for an agreeable psychiatrist. "The independent psychiatrist is to assist the court, not the patient; all he need do is render his best judgment and make all the relevant information available both to the court and to the defense."[72]

In discussing the examination, we have been employing the term "psychiatrist." The North Dakota statute, however, only requires that the examiner be a physician. Thus, there is no requirement for even minimal qualifications regarding experience or expertise with diagnosis or treatment of mental illness. In the case of an attorney faced with a client examined by a physician who is not a psychiatrist, an attack on due process and equal protection grounds would be appropriate. There are, however, few psychiatrists in the state[73] which itself probably leads to an extra measure of over-commitment on the theory that in doubtful cases, it is better to send the subject to the State Hospital for confirmation or rejection of the examiner's diagnostic suspicions by the "experts" in Jamestown. In proceedings with such drastic consequences and requiring both an expert judgment concerning the existence of the subject's mental illness as well as the difficult predictive judgments required by the commitment criteria, the excuse that commitment to the hospital is necessary in order that the experts there might more accurately diagnose the problem is constitutionally disingenuous.

V. COMMITMENT CRITERIA

A. STANDARDS

North Dakota permits commitment under two different standards; each relies on a different constitutional theory to justify the coercive exercise of governmental power. N. D. Cent. Code § 25-03-11(7) (a) authorizes commitment pursuant to a finding that the subject is "mentally ill, an alcoholic, or a drug addict, and because of his illness is likely to injure others or himself if allowed to remain at liberty." Subdivision (b) of this provision also permits commitment if the subject is found to be "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." Subdivision (a) is an exercise of the state's police power—its authority to protect against social harm. Subdivision (b)

72. *In re* Gannon, 123 N.J. Super. 104, 105-06, 301 A.2d 493, 494 (1973).

73. During 1974-1975 there were twelve physicians in North Dakota who were certified as specialists in psychiatry and neurology by the American Board of Medical Specialists. II DIRECTORY OF MEDICAL SPECIALISTS 2017 (16th ed. 1974). Of the 615 physicians in the state, 25 have a primary specialty in psychiatry and 8 have a secondary specialty in psychiatry. IV AMERICAN MEDICAL DIRECTORY 3093-98 (26th ed. 1974).

is premised on the *parens patriae* power which authorizes the state to provide for those determined to be in need of state care.[74]

Both standards suffer from overwhelming imprecision.[75] Each requires a finding of mental illness.[76] The statutory definition of mental illness is hopelessly vague and circular; "a mentally ill individual" is defined as "an individual having a psychiatric or other disease which substantially impairs his mental health."[77] There is serious doubt, given the nature of psychiatric science and the extreme open-endedness of the concept of mental illness,[78] whether a satisfactory definition could be fashioned,[79] although much better

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74. *See* Dix, *Hospitalization of the Mentally Ill in Wisconsin: A Need for a Reexamination*, 51 MARQ. L. REV. 1 (1967) for a succinct description of the two different philosophical justifications underlying the alternative criteria for commitment. *See also* Comment, *Progress in Involuntary Commitment*, 49 WASH. L. REV. 617, 626-29 (1974). In Lynch v. Baxley, 386 F. Supp. 378, 390 (M.D. Ala. 1974) the court recognized that "commitment for dangerousness to self partakes of the *parens patriae* notion." The exact basis of the commitment obviously will not always be clear. *See also In re* Ballay, 482 F.2d 648, 661-62 (D.C. Cir. 1973).

The *parens patriae* approach to civil commitment is itself far from clear. The conceptual confusion has been described as follows:

> This parens patriae theory presumes that irresponsibility characterizes every person afflicted with mental illness, rendering him unfit or unable to make decisions in his own best interest. The argument is somewhat circular; the purpose of a constitutional procedure is to insure a fair determination of the individual's mental condition, while the state's excuse for diluting the procedure rests upon the assumption that the individual is indeed mentally ill.

Coombs, *Burden of Proof and Vagueness in Civil Commitment Proceedings*, 2 AM. J. CRIM. L. 47, 50 (1973).

75. It is beyond the scope of this survey of recent developments to elaborate on further defects that many have felt inhere in both standards because of philosophical disagreement with the appropriateness of the use of state coercive power with regard to each. As a tactical matter, however, it is essential for an attorney attacking the statute to require the mental health board to specify the standard under which the commitment is being attempted. Under present standards and practices, that in itself may be no mean task. It is, however, independently required to meet constitutional standards of notice. *See* text accompanying notes 26-30 *supra*. It is also necessary for review of the board's action. *See* discussion accompanying notes 153-65 *infra*. If the board refuses to do so, it then becomes necessary to attack the underpinnings of both standards, in addition to the vagueness inherent in both. There is nothing intrinsically wrong with that; practically, however, it requires advancing arguments against both standards and results in a position contesting authority for commitment under either standard—essentially an abolitionist position, one hardly likely to win support or sympathy from the State's judiciary, not to mention its mental health professionals.

76. The first standard—dangerousness—specifically uses the term "mental illness." The second standard—need-capacity—speaks in terms of "illness" resulting in lack of capacity to make a responsible decision concerning custody, care, or treatment in a mental hospital. The context makes it clear that the "illness" referred to must be "mental."

77. N.D. CENT. CODE § 25-01-01(1) (1970).

78. Livermore, Malmquist, & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 80 (1968):

> One need only glance at the diagnostic manual of the American Psychiatric Association to learn what an elastic concept mental illness is. It ranges from the massive functional inhibition characteristic of one form of catatonic schizophrenia to those seemingly slight aberrancies associated with an emotionally unstable personality, but which are so close to conduct in which we all engage as to define the entire continuum involved. Obviously, the definition of mental illness is left largely to the user and is dependent upon the norms of adjustment that he employs. Usually the use of the phrase "mental illness" effectively masks the actual norms being applied. And, because of the unavoidably ambiguous generalities in which the American Psychiatric Association describes its diagnostic categories, the diagnostician has the ability to shoehorn into the mentally diseased class almost any person he wishes, for whatever reason, to put there.

79. Indeed, some commentators argue that the concept of mental illness is itself im-

efforts have been attempted elsewhere.[80] Mental illness, in any event, is only a necessary, not a sufficient condition for commitment. The statute does not authorize commitment solely for the "status" of mental illness. Functional determinations of dangerousness or need-incapacity are further required before commitment is proper under the statute.[81]

Even with the additional statutorily required finding beyond "mental illness," serious doubt remains concerning the ability of the functional components of dangerousness or need-capacity to rescue the statute from the double damnation of vagueness and unconstitutional preventive detention. If one first assumes that underlying even the present degree of proceduralism of the commitment procedure is the premise that not all persons said to be mentally ill are dangerous, or need hospitalization and lack capacity to make a responsible decision regarding that need, then the basic vice of the statutory criteria, whether labeled "vagueness" or "overbreadth,"[82]

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proper for legal use. Dershowitz, *The Psychiatrist's Power in Civil Commitment: A Knife that Cuts Both Ways*, 4 TRIAL, Feb.-Mar., 1968, at 29, 30. Hardisty, *Mental Illness: A Legal Fiction*, 48 WASH. L. REV. 735, 753 (1973), vigorously argues:

> Since "mental disease" is a legal fiction which has no accepted meaning, its meaning cannot be readily inferred by the judge or jury from expert or lay testimony about underlying psychic phenomena or observed behavior. Thus, the "mental disease" requirement increases the tendency of lawyers to ask questions of psychiatrists that call for answers in the conclusory language of the substantive test. This magnifies the tendency of psychiatric witnesses to apply conclusory labels such as "mental disease" or "schizophrenia" and to neglect data on the defendant's background and personality structure.
>
> The testifying psychiatrist is presented with a dilemma when a lawyer asks him if a person has a "mental disease." He probably realizes that there is neither any accepted psychiatric definition of "mental disease" nor even any agreed-on psychiatric guidelines for determining what is a "mental disease." He may therefore assume that "mental disease" is legal jargon which serves legal purposes. When asked for an opinion, he may define the phrase by attempting to ascertain the purposes of the law in the light of his own personal values. In other words, his answer is subjective and result oriented. For example, in a civil commitment hearing a psychiatrist's definition of "mental illness" will depend on how he balances the values of liberty, the safety of the community, and involuntary psychiatric treatment.

80. *E.g.*, MICH. COMP. LAWS ANN. § 330.1401 (1975).

81. The additional focus is arguably required as a constitutional prerequisite to commitment. Without further analysis, commitment based upon a mere finding of mental illness would subject one to a loss of liberty premised upon a "status" determined by psychiatric judgments which under the present state of the art are largely subjective, vary widely from "expert" to "expert", and are heavily influenced by the morals or values of the psychiatrists who make them. *See In re* Bailey, 482 F.2d 648, 665-66 (D.C. Cir. 1973).

82. A three judge federal district court used both terms in finding the Michigan standard "fatally vague and overbroad" and, unlike the *Lessard* court or the *Hawks* court, was unable to save it through the corrective surgery of interpretation. Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085, 1096 (E.D. Mich. 1974). For a general discussion of the constitutional doctrine, see Note, *The Void—for—Vagueness Doctrine In the Supreme Court*, 109 U. PA. L. REV. 67 (1960). For specific discussion of civil commitment standards, see Coombs, *Burden of Proof and Vagueness in Civil Commitment Proceedings*, 2 AM. J. CRIM. L. 47 (1973); Note, *Involuntary Civil Commitment in South Dakota: A Step Closer to Constitutional Legitimacy*, 19 S.D.L. REV. 447, 456-60 (1974).

Two different grounds have been recognized as underlying the "vagueness" doctrine: 1) that obedience to the commands of the statute is difficult or imposible, and 2) that a statute leaves too much discretion with administrators or officials and thus allows for arbitrary or discriminatory enforcement. Coombs suggests that only the second ground is applicable for civil commitment since "mental illness is not theoretically an avoidable condition." Coombs, *supra*, at 57. *See also Developments*, *supra* note 24, at 1256-57. That

lies in their failure to offer both the subject and the mental health board adequate guidance for determining the issue of committability.

A federal district court very recently held that a Kentucky statute similar to North Dakota's, authorizing sixty day commitments for observation:[83]

> [S]uffers from a failure to specify precise standards by which the physicians or the courts could be governed in determining whether or not to commit. . . . The only basic requirement in the statute is that a finding be made that an individual needs care and treatment, and nothing in the statute requires findings as to why and under what conditions care and treatment may be imposed on an individual.[84]

It is very doubtful that a court could find that North Dakota's standards satisfy this test.

In striking down a statutory provision nearly identical to North Dakota's *parens patriae* criterion, the West Virginia Supreme Court of Appeals in *Lazaro* observed:

> The standard of hospitalization for the benefit of the individual leaves an entirely subjective determination for the committing authority which violates due process because it forecloses a meaningful appeal and places the individual in jeopardy of losing his freedom without providing an objective standard against which the committing authority's determination can be measured.[85]

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argument seems plausible enough if one uncritically accepts the medical model or ideology and its characterization of mental disease as a "condition" discoverable by medical "scientists." That view, however, is becoming more and more suspect. A recent study, for example, indicates a model of mental illness in which the "patient" manipulates rather than "suffers" his condition. BRAGINSKY, BRAGINSKY & RING, METHODS OF MADNESS—THE MENTAL HOSPITAL AS LAST RESORT (1969). One should not be too quick to assume that commitment is "unavoidable" by a subject of the process. The second ground is more clearly applicable to the civil commitment process.

> Commitment statutes . . . are vulnerable to challenge because they allow enforcement authorities too much discretion in determining who is "mentally ill." In Papachristou v. City of Jacksonville, [405 U.S. 156 (1972)] the Supreme Court unanimously invalidated a vagrancy ordinance in part because the absence of standards provided an opportunity for "arbitrary and discriminatory enforcement." [405 U.S. at 170] The Court noted that the imprecise terms of the ordinance could be used to require nonconformists "to comport themselves according to the life style deemed appropriate by the Jacksonville police and the courts." [405 U.S. at 170] Imprecise commitment standards pose similar risks of arbitrary application to individuals engaging merely in unusual or annoying behavior.

Developments, *supra* note 24, at 1257 [Footnotes omitted, except for bracketed citations].

83. KY. REV. STAT. ANN. §§ 202.060, 202.100 (1969).

84. Kendall v. True, 413 F. Supp. 413, 418-19 (W.D. Ky. 1975).

85. ——W. Va.——, 202 S.E.2d 109, 123 (1974). The court also reached the more profound and potentially far reaching conclusion that the state could not "demonstrate any compelling State interest under the police power for hospitalizing a person in his own best interests. Society abounds with persons who should be hospitalized, either for gallbladder surgery, back operations, corrective orthopedic surgery, or other reasons; yet in these areas society would not contemplate involuntary hospitalization for treatment." *Id.*

The quoted use of the term "police power" is apparently a mistake since it follows directly a lengthy discussion of *parens patriae* commitments and is followed in the next paragraph by the "specificity" objection to the *parens patriae* doctrine. The court appar-

The West Virginia court, however, sustained the validity of its police power provision allowing commitment, as does North Dakota's,[86] of a mentally ill person "likely to injure himself or others if allowed to remain at liberty."[87] However, a healthy judicial gloss, lacking in North Dakota, was put on the bare words of the statute. For danger to self, the court said commitment would be appropriate only

> when it can be demonstrated that an individual has a self-destructive urge and will be violent toward himself, or alternatively that he is so mentally retarded or mentally ill that by sheer inactivity he will permit himself to die either of starvation or lack of care. . . .[88]

The court also held constitutional commitment of a mentally ill person whose illness "is likely to produce some form of injury other than direct physical injury, if the type of injury were definitely ascertainable, and if the State had a treatment program which it could be demonstrated offered a reasonable likelihood of ameliorating the illness or condition."[89] It is unclear whether the court intended this "other injury" category to apply to injury of both self and others, or merely to self-injury.

The "standards" added by the West Virginia decision are themselves hardly models of clarity and precision. However, they exemplify judicial receptivity to the position that there must be more precision than the North Dakota statute provides. Unanswered questions obviously remain. What type or degree of "physical harm" to oneself is required? Must it be "self-destructive" as well as violent? How self-destructive must an urge be to preclude redundancy? Further issue may be taken with the *Lazaro* gloss for its failure to specify a required degree of imminence.

In *Lessard v. Schmidt*, the court determined the danger must be "imminent."[90] More recently, and slightly more descriptively, another three judge federal district court required that the subject pose a "real and present threat."[91] Because of the extreme difficul-

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ently questions the substantive constitutionality of *parens patriae* commitments, irrespective of the objectivity of the standard employed. This substantive objection (apparently due process—equal protection) is neither clearly developed nor distinguished by the court from the procedural "specificity" defect.

In Lessard v. Schmidt, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), the court relied on dicta in Humphrey v. Cady, 405 U.S. 504, 509 (1972) to justify interpreting Wisconsin's statutory definition of appropriate mental illness—"mental disease to such extent that a person so afflicted requires care and treatment for his own welfare, or the welfare of others, or of the community"—*citing* WIS. STAT. ANN. § 51.75, art. 11(f) (1975 Supp.) to require dangerousness as a constitutional prerequisite to commitment; *accord*, Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085, 1096 (E.D. Mich. 1974); Lynch v. Baxley, 386 F. Supp. 378, 390 (M.D. Ala. 1974); Kendall v. True, 391 F. Supp. 413, 419 (W.D. Ky. 1975).

86. N.D. CENT. CODE § 25-03-11(7)(a) (Supp. 1973).
87. State *ex rel.* Hawks v. Lazaro, ——W. Va.——, 202 S.E.2d 109, 123 (1974).
88. *Id.*
89. *Id.* at ——, 202 S.E.2d at 124.
90. 349 F. Supp. 1078, 1094 (E.D. Wis. 1972).
91. Lynch v. Baxley, 386 F. Supp. 378, 390 (M.D. Ala. 1974).

ty in predicting future dangerous conduct,[92] *Lessard* also required, in addition to a standard of proof beyond reasonable doubt,[93] that the determination of imminent dangerousness be premised "upon a finding of a recent overt act, attempt or threat to do substantial harm to oneself or another."[94] Overt attempts to substantially harm oneself, the court held, do not justify commitment without additional findings of mental illness and "immediate danger at the time of the hearing of doing further harm to oneself."[95]

Additionally, greater clarity may be required in delineating the type and degree of danger which may differ for danger predicted against the subject himself and against others. An example of a judicial attempt to clarify such a distinction is contained in *Lynch v. Baxley*:

> A finding of dangerousness indicates the likelihood that the person to be committed will inflict serious harm on himself or on others. In the case of dangerousness to others, this threat of harm comprehends the positive infliction of injury—ordinarily physical injury, but possibly emotional injury as well. In the case of dangerousness to self, both the threat of physical injury and discernible physical neglect may warrant a finding of dangerousness. Although he does not threaten actual violence to himself, a person may be properly committable under the dangerousness standard if it can be shown that he is mentally ill, that his mental illness manifests itself in neglect or refusal to care for himself, that such neglect or refusal poses a real and present threat of substantial harm to his well being, and that he is incompetent to determine for himself whether treatment for his mental illness would be desirable.[96]

Certainly it is reasonable to argue about whether *Lynch* articulates the "best" standard for distinguishing the two types of dangerousness; it is less reasonable, however, to dispute the desirability of attempting to close the gaping open end of North Dakota's very general dangerousness requirement.

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92. Ennis & Litwack, PSYCHIATRY AND THE PRESUMPTION OF EXPERTISE: FLIPPING COINS IN THE COURTROOM, 62 CALIF. L. REV. 693, 711-16 (1974).

93. See discussion in text accompanying notes 97-111 *infra*.

94. Lessard v. Schmidt, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972); *accord* Lynch v. Baxley, 386 F. Supp. 378, 391 (M.D. Ala. 1974); Commonwealth *ex rel.* Finken v. Roop, No. 199, Oct. Term, 1974, at 26-27 (Super. Ct. of Pa., filed April 22, 1975).

> In Lynch v. Baxley, *supra*, the court explained:
> A mere expectancy that danger-productive behavior might be engaged in does not rise to the level of legal significance when the consequence of such an evaluation is involuntary confinement. To confine a citizen against his will because he is likely to be dangerous in the future, it must be shown that he has actually been dangerous in the recent past and that such danger was manifested by an overt act, attempt or threat to do substantial harm to himself or to another.

95. 349 F. Supp. 1078, 1093 (E.D. Wis. 1972).

96. 386 F. Supp. 378, 391 (M.D. Ala. 1974).

B. BURDEN OF PROOF

The Code contains no provision specifying the burden of proof necessary to authorize civil commitment.[97] Merely because the proceedings are labeled "civil", one should not conclude that the usual burden of proof for civil cases—a preponderance of evidence—is appropriate for commitment of the mentally ill.[98] In *In re Winship*, the Supreme Court held that due process requires that all facts necessary for commitment as a juvenile delinquent must be proved beyond a reasonable doubt despite the fact that juvenile proceedings had been labeled non-criminal.[99] The Court observed that the loss of liberty and stigma resulting from the process require the safeguard of a stringent standard of proof equal to the criminal standard.[100]

A similar analysis should apply also to civil commitment cases. Not surprisingly, several courts have applied the *Winship* reasoning to the mental illness hospitalization context and have concluded that a standard higher than a mere preponderance is constitutionally required. For example, in *In re Ballay*,[101] the Court of Appeals for the District of Columbia Circuit held that the value of individual freedom, the lack of deleterious impact upon the proceedings that a higher standard would entail,[102] and "the very nature of the evidence

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97. Several decisions have adverted to the Supreme Court's characterization of burden of proof as "the kind of question which has traditionally been left to the judiciary to resolve. . . ." Woodby v. Immigration Service, 385 U.S. 276, 284 (1966), *quoted in* Lynch v. Baxley, 386 F. Supp. 378, 392 (M.D. Ala. 1974); Lessard v. Schmidt, 349 F. Supp. 1078, 1094 (E.D. Wis. 1972).

Regardless of the source, it is clear that some standard must be applied in every case, whether or not recognized or articulated. Thus, it was surprising that when the author inquired, on behalf of his client at a Grand Forks County civil commitment hearing, about the standard of proof the board intended to apply, the response was that the question had never before come up before the board. See note 17 *supra*. After brief reflection, the chairman suggested application of the civil-preponderance standard. Counsel urged the adoption of the reasonable doubt standard, citing Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972). The Chairman then suggested a compromise at "clear and convincing."

An interesting contrast to the attitude of the Grand Forks County Mental Health Board toward the issue of an appropriate burden of proof is Justice Harlan's view of the function of delineating the burden of proof. He pointed out, concurring in *In re* Winship, 397 U.S. 358, 370 (1970), that its function is "to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." As Judge Sobeloff has pointed out, discussion of the appropriate burden is "more than an empty semantic exercise; it reflects the value society places on individual liberty." Tippett v. State of Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971), (concurring in part and dissenting in part), *cert. dismissed sub nom.*, Murel v. Baltimore City Crim. Ct., 407 U.S. 355 (1972).

98. See text accompanying notes 8-14 *supra* for a general discussion of the "civil-criminal" label switching game.

99. 397 U.S. 358 (1970).

100. *Id.* at 365-66.

101. 482 F.2d 648 (D.C. Cir. 1973).

102. The *Ballay* court noted that civil commitment proceedings are already quite similar to criminal trials, including, for example, the right to counsel and to trial by jury. 482 F.2d 648, 663 (D.C. Cir. 1973). North Dakota's scheme presently omits the right to a jury trial; however, that distinction may be irrelevant if the right to a jury trial is also a constitutional requirement. *See* text accompanying notes 123-41 *infra*.

Any potential sacrifice in speed and efficiency resulting from imposition of the higher standard of proof was held to be secondary to the search for truth. *In re* Ballay,

presented" all point toward the necessity and desirability of a requirement for proof beyond a reasonable doubt.[103]

The reasonable doubt approach is attractive because of its emphasis upon the importance of the individual rights affected and the significant consequences to the individual of an erroneous decision to commit. Recently, however, a federal district court, even while recognizing that "the degree of confidence demanded of any judicial determination reflects in part the significance of the interests . . . affected" and without doubting "that the interests of those facing civil commitment proceedings are of the most serious nature" nonetheless determined "the highest degree of certitude reasonably attainable in view of the nature of the matter at issue" permits reasonable doubts, yet requires more than a preponderance of the evidence.[104] "Clear, unequivocal, and convincing evidence that the subject of the hearing is in need of confinement under the minimum standards of commitment"[105] is necessary to justify hospitalization. The intermediate standard is necessary, the court held, because subjective determinations such as mental condition and future dangerousness are felt not to be provable with the same degree of certainty as with issues involving "purely objective facts and occurrences."[106]

Commentators have disputed the claim that the inexact and subjective nature of psychiatric judgments makes the reasonable doubt burden inappropriate or impossible in this context.[107] Perhaps the

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supra, at 663. The "trauma" argument, that the subject may feel additional stigma as a result of "criminal" like procedures, was rejected because the traumatizing elements of the hearing (public exposure, testimony presented, witnesses and general adversary character) "would seem to be wholly unaffected by the burden of proof." *Id.* at 663. The court's response is even more convincing in North Dakota where the proceedings are required by statute to be private (unlike those of the District of Columbia) and where confidentiality, at least where the subject desires it, is one of North Dakota's statutory virtues. N.D. CENT. CODE §§ 25-03-11(6), 25-03-22 (1970).

Most significantly, the court also recognized that the "trauma" argument "presupposes that an individual will ultimately be committed, the very proposition that we now reappraise." *In re* Ballay, *supra*, at 664. Thus, the court realized that the trauma argument presupposes the near infallibility of the medical judgment and undercuts the rationale for even the fundamentally deficient procedures presently provided. See note 56 and accompanying text *supra*.

103. 482 F.2d 648, 656-669 (D.C. Cir. 1973).

104. Lynch v. Baxley, 386 F. Supp. 378, 393 (M.D. Ala. 1974).

105. *Id*; *accord*, State *ex rel.* Hawks v. Lazaro, ——W. Va.——, 202 S.E.2d 109, 126 (1974) ("proof need not be beyond a reasonable doubt because of the inexactitude of medical science; however, the proof must be clear, cogent, and convincing"); Dixon v. Attorney Gen., 325 F. Supp. 966, 974 (M.D. Pa. 1971) ("evidence found to be reliable by the fact finder must establish clearly, unequivocally and convincingly that the subject of the hearing requires commitment . . ."); Commonwealth *ex rel.* Finken v. Roop, No. 199, Oct. Term, 1974 Super. Ct. Pa., filed April 22, 1975); People v. Sansone, 18 Ill. App. 3d 315, 309 N.E.2d 733 (1st Dist. 1974).

106. Lynch v. Baxley, 386 F. Supp. 378, 393 (M.D. Ala. 1974). The court found the *Winship* reasoning "inapplicable to a situation such as this where the ultimate determination of the need for commitment must of necessity be based upon subjective conclusions and predictions, albeit derived from underlying objective facts." *Id.* at n.12. The court does not indicate why the overt act, which the court requires as evidence of dangerousness, should not be proven beyond a reasonable doubt. *Id.* at 391.

107. *E.g.*, *Developments*, *supra* note 24, at 1301-03.

difference in effect on proceedings between a "clear, unequivocal and convincing" standard and "beyond a reasonable doubt" is de minimis; the important thing is to focus the attention of courts and triers of fact upon the seriousness of the decision they are making and to require the greatest justificatory effort possible on the part of the persons advocating commitment—under either rubric. Continued use of the essentially societally neutral civil standard,[108] coupled with vague statutes and loose procedures,[109] legitimize a degree of unchecked discretionary power inconsistent with the fundamental values our legal system is designed to protect.[110] A significant margin of error, given "the immense individual interests involved" is intolerable.[111]

C. RIGHT TO THE LEAST RESTRICTIVE TREATMENT

Recently the so-called "doctrine of the least restrictive alternative"[112] has been applied by commentators and courts to the civil commitment context.[113] Although there are difficulties with the theory and its application in the mental health area,[114] its essence is simple to state. Professor David Chambers, whose landmark 1972 article in the Michigan Law Review stands as the most fully devel-

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108. In *In re* Winship, 397 U.S. 358, 371 (1970), Justice Harlan, concurring, explains that the civil standard requiring only a preponderance for success is applied where the stakes are primarily economic and "we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor."

109. With respect to police power commitment, the court in *In re* Bailey, 482 F.2d 648, 650 (D.C. Cir. 1973) observed:

> The evidence which serves as a prerequisite to hospitalization remains uncertain, particularly with respect to predictions of dangerousness, and the ultimate decision may therefore unduly reflect clinical, rather than the appropriate legal and community, considerations.

The court found little difference to distinguish *parens patriae* commitments for dangerousness to self, a standard which "itself sweeps in varied and complex classes who represent different interests and . . . also presents equally perplexing definitional problems." *Id.*

110. The state should not be allowed the use of a self-serving argument to this effect: vague standards are required to avoid successful resistance by subjects on the basis of "technical" failure to meet more precise criteria, criteria which are presently unrealistic given the poverty of psychiatric science as a diagnostic or predictive tool; a weak standard of proof is justified because the subjective nature of psychiatric judgments allows a subject too great an opportunity to raise a reasonable doubt concerning the need for hospitalization.

111. *In re* Ballay, 482 F.2d 648, 650 (D.C. Cir. 1973).

112. For an excellent detailed discussion of the doctrine, see Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 971 (1974).

113. *See, e.g.*, Lynch v. Baxley, 386 F. Supp. 378, 392 (M.D. Ala. 1974). Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1108 (1972).

114. *See* Sanchez v. New Mexico, 396 U.S. 276 (1970), *dismissing for want of substantial federal question*, State v. Sanchez, 80 N.M. 438, 457 P.2d 370 (1969); Reisner, *Psychiatric Hospitalization and the Constitution: Some Observations on Emerging Trends*, 1973 U. ILL. L. FORUM 9, 10-13.

Sanchez v. Mexico, *supra*, may indicate a hostile attitude on the part of the Supreme Court toward a federal constitutional basis for the doctrine in the civil commitment context. For doubts about the precedential value of *Sanchez*, both as to the significance of a dismissal in this context, and with respect to the likely reaction of the Supreme Court to the clear trend of lower courts toward recognition of the validity of the principle, *see Developments*, *supra* note 24, at 1247-48; Chambers, *supra* note 113, at 1152.

oped and convincing exposition of the constitutional arguments mandating alternatives to civil commitment,[115] has more recently and succinctly explained:

> The principle of the least restrictive alternative derives from the apple-pie premise that people should be free to live as they please unless they are harming others. From this premise, the principle declares that when government does have a legitimate communal goal to serve, it should act through means that curtail individual freedom to no greater extent than is essential for securing the goal. When you swat a mosquito on a child's back, you don't do it with a baseball bat.[116]

In *Lessard v. Schmidt,* the three judge federal court viewed the principle as constitutionally grounded:

> Perhaps the most basic and fundamental right is the right to be free from unwanted restraint. It seems clear, then, that persons suffering from the condition of being mentally ill, but who are not alleged to have committed any crime, cannot be totally deprived of their liberty if there are less drastic means for achieving the same basic goal.[117]

The court listed the following as examples of treatment orders less restrictive than full-time hospitalization: voluntary or court ordered out-patient treatment, day treatment in a hospital, night treatment in a hospital, placement in a nursing home, referral to a community mental health clinic, and home health aide services.[118]

The North Dakota statute speaks only in terms of "hospitalization."[119] An argument carrying heavy constitutional clout will thus be necessary to force a consideration of alternatives to hospitalization in North Dakota proceedings. The author was told by the Chairman of the Grand Forks County Mental Health Board that the Board had no power to order any treatment except hospitalization. However, the Chairman also stated that all reasonable alternatives were always considered before commitment is ordered. Reconciliation of the two statements suggests that informally the mental health boards may accomplish the purposes of the principle of the least restrictive alternative but are not required to do so.[120]

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115. Chambers, *supra* note 113.

116. Chambers, *Right to the Least Restrictive Alternative Setting for Treatment,* 2 LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 991, 993 (B. Ennis & P. Friedman, eds. 1973). *See also* Commonwealth *ex rel.* Finken v. Roop, No. 199 Oct. Term, 1974, at 22 (Super. Ct. Pa., filed April 22, 1975).

117. Lessard v. Schmidt, 349 F. Supp. 1070, 1096 (E.D. Wis. 1972). The "goal" referred to by the court is presumably adequate protection of the subject or others from the "imminent danger." *Id.* at 1093-1095.

118. *Id.*

119. N.D. CENT. CODE § 25-03-11(7) (Supp. 1973) (emphasis added).

120. Such an informal approach, of course, would not begin to meet the difficult questions raised regarding allocation of responsibilities for making the search for alernatives in Chambers, *supra* note 113, at 1137-77.

There is a twofold practical problem in the application of the principle in North Dakota. First, the lamentable reality is that community resources may be inadequate or non-existent.[121] A second and related problem is the legacy of a philosophy embodied in the North Dakota statute and the mental health system erected upon its foundation that views hospitalization as the primary treatment resource and which relies primarily on the State Hospital to make the more particularized judgments regarding appropriate treatment for the mentally ill individual. Professor Chambers has suggested that creative use of the doctrine of less restrictive alternatives may be useful in attempts to overcome both problems.[122]

There are also theoretical problems in the application of the least restrictive alternative doctrine to civil commitment. If one believes that presently only those who meet appropriately rigid standards for commitment are hospitalized, then expanding the authority of the mental health boards to order involuntary treatment for persons who presently would not be considered fit subjects for hospitalization raises spectres of additional and excessive power. Also, it creates a logical conundrum to read the principle as requiring a finding of a need for hospitalization, which can then be effectuated by an order for a different form of treatment. These problems, however, should not trouble one faced with the alternative of arguing that a particular person, under our existing commitment scheme, can be adequately treated short of commitment to the State Hospital, and that therefore commitment would be inappropriate.

In summary, then, the principle of a ban upon commitments without an intensive search for all feasible alternatives to commitment has been recognized by several courts. It is not contemplated by the North Dakota statutes. Thus, the principle must be urged upon the mental health boards and, where that proves unavailing, upon the courts, as a constitutional requirement which overrides the all-or-nothing rigidity of the statutory procedure.

VI. HEARINGS

A. RIGHT TO JURY DETERMINATION

The Century Code affords the subject no opportunity for a jury trial. A strict analogy to criminal proceedings would require the state to afford this right. The right to a jury trial in criminal cases has been held to be a due process requirement for states because

121. "Initially it seems clear that unless courts themselves are at liberty to order the creation of alternative treatment opportunities, the utility of the principle depends to a very considerable extent on what alternative facilities the state has chosen to provide." Reisner, *supra* note 114, at 11-12.

122. Chambers, *supra* note 113, at 1177-78, 1189-1200.

of its fundamentality in our system of justice.[123] The importance of the jury has been similarly recognized in states where it is already provided by civil commitment statutes.[124] Expansion of the right to other states by means of litigation on behalf of commitment subjects, however, is problematic.

To the extent expanded rights in commitment proceedings are justified by analogy to the rights explicated by the Supreme Court in *In re Gault*[125] for juvenile delinquency hearings, a formidable obstacle is presented by *McKeiver v. Pennsylvania*.[126] In *McKeiver*, the Court held that a jury trial is not constitutionally required to adjudicate delinquency. Use of juries, the Court felt, would inject into juvenile proceedings "the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial."[127] The Court's decision is subject to criticism on its own terms.[128] The suggestion that a jury requirement would "inject" an adversarial context is misleading, for the very nature of a potential involuntary commitment assures conflicting interests—liberty vis-a-vis therapy and social control. Both our criminal and our civil systems are based on an adversary model, which need imply no more than a system designed to best assure fair presentation and consideration of the adverse interests. Thus, "the question is not whether an adversary situation exists, but how to resolve it. The Court's opinion in McKeiver begs that important question."[129]

Professor Alan Dershowitz, a noted authority on the rights of the mentally ill, succinctly makes this strong case for allowing jury determinations in all preventive confinement cases:

> If it is acknowledged that the decision to confine someone on the basis of a prediction is a social policy judgment to be made by the community and not the expert alone, a compelling argument emerges supporting the right to trial by jury in preventive confinement cases. The analogy to the criminal law is persuasive. In both instances the legislature determines the types and degrees of harm sufficiently serious to warrant intervention; experts often aid the fact finder in determining whether the facts meet the legislative standard; and the fact finder should be the jury. The need for trial by jury is particularly persuasive if the legislature has not really faced up—as is often the case when confinement is based on prediction—to the social policy issue involved in establishing standards. If these decisions about risks and freedom

123. Duncan v. Louisiana, 391 U.S. 145 (1968).
124. *E.g.*, Lessard v. Schmidt, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972).
125. 387 U.S. 1 (1967).
126. 403 U.S. 528 (1971).
127. *Id.* at 550.
128. L. LEVY, AGAINST THE LAW 302-09 (1974).
129. Dershowitz, *supra* note 9, at 1317.

> are to be abdicated, in a democratic society it is better that it be abdicated to a jury than to a psychiatrist or a judge. Moreover, trial by jury requires a judicial articulation and elaboration of the criteria for confinement. In a trial without a jury, judges often state their conclusions in the bare language of the statute. In a jury trial, on the other hand, the judge must instruct the jury on the meaning of the statutory criteria. These instructions are often appealed and this sets in motion the common law process of appellate consideration and construction of the statute's operative phrases. This healthy process has been sorely missed in the area of preventive confinement and the denial of trial by jury discourages its introduction.[130]

Professor Dershowitz also points out that the use of juries functions to inhibit "judicial whispering"[131]—his term for the phenomenon whereby the judge learns informally the "real reason for commitment."[132] Requiring a recorded procedure before the jury, with judicial instruction, is essential to the integrity of the commitment process itself and, moreover, is necessary for an effective right to appellate review.[133]

Even assuming arguendo that a jury is not essential in the limited sense of assuring accuracy in factfinding, the jury has other functional significance. It serves the functions of "prevention of arbitrariness and oppression by the interposition of a jury verdict between the state and the defendant" and "introduction of community values into the decisionmaking process."[134]

No recent cases have specifically found a federal constitutional right to a jury trial for civil commitment proceedings. However, that may be partially explained by the fact that many states already provide the right.[135] For example, the Washington Supreme Court,

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130. Dershowitz, *supra* note 9, at 1317-18. Note that neither a "public trial" (except in the sense that the jurors represent the public) nor a requirement of a jury for all cases, even where the subject desires to waive the jury trial, are necessary concommitants to extending the right to a jury determination of commitability. Note, *Involuntary Hospitalization of the Mentally Ill Under Florida's Baker Act: Procedural Due Process and the Role of the Attorney*, 26 U. FLA. L. REV. 508, 517 (1974).

131. Dershowitz, *supra* note 8, at 1318.

132. *Id.*

133. *Id.* See discussion of the requirement for a record and for a meaningful appeal in text accompanying notes 152-65 *infra*.

134. *Developments*, *supra* note 24, at 1292. The cited note predicts, however, that even though these functions are important in civil commitment, courts, nonetheless, assuming "other basic procedural safeguards such as vigorous representation by counsel and a meaningful hearing are accorded," are not likely to require jury trials. The courts may rely on *McKeiver* and hold that the benefits of "additional procedural fairness and community involvement are outweighed by the state's interests in economy and informality." *Id.* at 1295.

The prediction offered in the note should not be accepted without question. The mental illness context certainly can be distinguished from the juvenile area; moreover, *McKeiver* has itself been subject to much criticism. *See* text accompanying notes 128-29 *supra*. If indeed informality often translates into unconstitutional procedures, efficiency alone can hardly serve as a reason for denying a safeguard, such as a jury trial, that clearly stands on its own merits.

135. *McKeiver* noted that 29 states denied the right to a jury in juvenile cases, and only

speaking recently of its statutory[136] and constitutional[137] jury trial provisions, emphasized that "the jury plays an essential role in guarding against wrongful commitment. . . ."[138] The court quoted the statement of the United States Supreme Court in *Humphrey v. Cady*:

> [T]he jury serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the state in confining a person for compulsory treatment.[139]

A jury of peers would provide a cross-section of the community which is bound to be more sympathetic to the social situation of the usually poor subject. That is to say, more bluntly, that a North Dakota mental health board, composed of a doctor, lawyer, and a judge, is not likely to understand the social problems faced by the lower-status subject and any behavior influenced by the subject's social circumstances may appear more aberrant to the unrepresentative board members than to peers. Moreover, a jury of laymen is more likely to bring a healthy skepticism to bear upon the opinion of the testifying examiner than are his fellow upper-class professionals sitting on the board.[140]

In the juvenile proceeding, there is no question regarding the appropriateness of treating the juvenile as a juvenile. Juvenile status of the subject is an item of jurisdictional fact which, assuming the accuracy of birth records, is indisputable. For the mental health process, however, a similar approach would involve boot-strapping the justification for denial of a traditional right to a jury determination by a prejudgment that the person involved is the type of person for whom paternalistic, less formal proceedings—without juries— are appropriate. An argument which presupposes the inapplicability of

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ten specifically granted the right. McKeiver v. Pennsylvania, 403 U.S. 528, 548-49 (1971). In contrast, at least 13 states specifically grant the right in commitment proceedings, and at least three more allow trial by jury in the judge's discretion. Comment, *Progress in Involuntary Commitment*, 49 WASH. L. REV. 617, 635 (1974).

136. WASH. REV. CODE § 71.02.210 (repealed 1973) (present provisions are now found in § 71-05-310 (1975)).

137. WASH. CONST. art. 1, § 21.

138. Quesnell v. State, 83 Wash. 2d 224, ——, 517 P.2d 568, 579 (1974).

139. 405 U.S. 504, 509 (1972). In *Humphrey*, the petitioner sought to challenge the Wisconsin Sex Crimes Act which provided for commitment without a jury trial. Petitioner claimed a denial of equal protection since subjects of mental illness proceedings were given that right. The district court had dismissed without an evidentiary hearing, in part, because it viewed the petitioner's claims as lacking merit as a matter of law. The Supreme Court, reversing and remanding, issued an opinion obviously sympathetic with petitioner's claims.

Although the quoted language is dictum with respect to the context of required due process guarantees for mental illness commitments, it manifests the court's favorable attitude toward arguments based on the importance of the values advanced by a jury trial in a commitment context.

140. For the argument that equal protection may require granting the right to a jury trial based on an extension of Baxstrom v. Herold, 383 U.S. 107 (1966), *see* Note, *Mental Illness: A Suspect Classification?* 83 YALE L. J. 1237, 1263-65 (1974).

the safeguard to the type of proceedings envisioned is inapplicable to the stage at which the question involves the very amenability of the subject to the less procedurally "tight" system.[141]

B. APPLICATION OF RULES OF EVIDENCE

The Statutory provisions detailing the procedures to be followed in a mental health board commitment hearing require the board to "receive all relevant and material evidence which may be offered" while specifying that the board "shall not be bound by the rules of evidence."[142] The hearing must be "conducted in as informal a manner as may be consistent with orderly procedure. . . ."[143] Recently, its supreme court of appeals held that West Virginia's nearly identical statutory language violated the subject's rights to confront and cross-examine witnesses contrary to the sixth and fourteenth amendments of the United States Constitution and similar provisions in the state constitution.[144] The similar holding in *Lessard* was less clearly tied to the confrontation and cross-examination rights; instead, the court merely cited *In re Gault*[145] and emphasized the serious nature of a hearing involving the possible deprivation of liberty.[146] Another state court observed that "[i]t would be strange indeed to deprive one of his liberty on the basis of evidence that would be inadmissible in a proceeding to determine negligence."[147]

Commentators have pointed out some of the difficulties in strictly applying the rules of evidence to commitment hearings.[148] Some flexibility can be obtained through the use of the accepted exceptions to the hearsay rule and by analogizing some aspects of the commitment proceeding to the dispositional stage of a criminal case.[149] The

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141. This argument distinguishing juvenile from mental health proceedings was suggested to me by my friend and colleague, Professor W. Jeremy Davis, who teaches Society and the Youthful Offender at the University of North Dakota School of Law.

142. N.D. CENT. CODE § 25-03-11(6) (1970).

143. *Id.*

144. State *ex rel.* Hawks v. Lazaro, ——W. Va.——, 202 S.E.2d 109, 125 (1974).

145. 387 U.S. 1 (1967).

146. Lessard v. Schmidt, 349 F. Supp. 1078, 1102-03 (E.D. Wis. 1972). The due process approach of the *Lessard* court is not inconsistent with the approach of the West Virginia court, but a clearer statement of the exact nature of the constitutional violation would have been helpful. The West Virginia court relied also on due process, but in the context of citing a federal court of appeals case for the proposition that commitment based on a physician's report containing only conclusions without underlying facts violates due process. State *ex rel.* Hawks v. Lazaro, ——W. Va.——, 202 S.E.2d 109, 125 (1974), *citing* Miller v. Blalock, 411 F.2d 548 (4th Cir. 1969). Another more recent federal court decision also purports to rely on due process, in dicta, to require at "the very least" the application of the same rules of evidence applied in other judicial proceedings to be followed in commitment proceedings. Lynch v. Baxley, 386 F. Supp. 378, 394 (M.D. Ala. 1974).

147. *See also* Commonwealth *ex rel.* Finken v. Roop, No. 199, Oct. Term, 1974, 17 (Super. Ct. Pa., filed April 22, 1975).

148. Comment, *Progress in Involuntary Commitment*, 49 WASH. L. REV. 617, 639-40 (1974); Note *Lessard v. Schmidt: Due Process and Involuntary Civil Commitment*, 68 NW. U.L. REV. 585, 623-26 (1973).

149. Comment, *supra* note 148, at 640.

current North Dakota law, however, allows a complete travesty of the concept of a judicious proceeding to determine a question as complex as committability and with the potential consequence so severe as deprivation of liberty. Of what use is an attorney when the attorney is denied a fundamental tool of his trade? Even a passing familiarity with psychiatric records and opinion making is sufficient to convince one of the great potential for abuse and injustice tolerated by the legislative direction to foresake the rules which are required for all other legal decisions of comparable magnitude.[150] The Supreme Court of Wyoming, over ten years ago, saw clearly the unconstitutionality of failure to follow the rules of evidence.

> Formality or informality of procedure is unrelated to the constitutional right of due process. Neither can relevancy or materiality supplant the need for competency of evidence which is required in courts of law. Matters that are irrelevant or immaterial may only unnecessarily encumber trial proceedings. Incompetent evidence on the contrary brings before the trier of fact evidence which is unauthenticated and therefore unworthy of belief, an example of which would be hearsay.
>
> If strictly construed, the phrase "and shall not be bound by the rules of evidence" would abolish court procedures, because court rules of evidence are court procedures.[151]

The only relevant difference between the Wyoming statutory procedure and North Dakota's is that Wyoming required a court procedure and provided a right to a trial by jury. This difference points to the overriding defect in the North Dakota scheme, discussed in the next section: at no point is the subject entitled to an adequate judicial evaluation of the question of his committability.

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150. For an example of a typical use of hearsay at a commitment hearing, consider the following dialogue between the Attorney for Ms. Lessard and an examining physician:

> Q. And how did you judge that she did not have insight?
>
> A. Several ways. First of all when a person says that they are going to commit suicide and follow up as she did, a person obviously does not have insight, a person that goes on—
>
> Q. Did she ever state to you—excuse me for interrupting—but did she ever state to you that she was going to commit suicide?
>
> A. She told me she was *not* going to commit suicide.

Brief in Support of a Motion for Summary Judgment Requesting Declaratory and Injunctive Relief, Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *reprinted in* 1 LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 161, 223 (B. Ennis & P. Friedman, eds. 1974).

As the plaintiff's brief pointed out, the physician was obviously relying on hearsay statements. There is virtually no way to question the basis of such "expert" testimony without some control over the sources of information upon which the witness may rely. Related to this problem is the class-based problem of the excessive deference shown to the fellow professional by his peers on the mental health board; a deference which can, and has in the author's personal experience, effectively nullified the right to cross-examination. The problem extends beyond even hearsay evidence to personal bias on the part of mental health board members. At a hearing before the mental health board in relation to the commitment action outlined in note 18 *supra*, a physician member of the mental health board interrupted Ms. Poe at one point indicating that "we know you" and therefore he did not wish to listen to her side of the particular point.

151. Holm v. State, 404 P.2d 740, 743 (Wyo. 1965).

VII. JUDICIAL REVIEW

North Dakota's commitment scheme, whereby commitments are made by a county mental health board composed of the county judge, a licensed practicing physician, and a licensed practicing attorney[152] is administrative in nature.[153] The subject of commitment is doubly deprived in this system. Since the board proceeding is not judicial, he is denied the many procedural protections described above. However, not only are the normal protections of the judicial process denied the subject in exchange for the "benefits" of an administrative procedure, he is also denied the opportunity for effective judicial review of administrative action, for under the North Dakota statutory scheme, there is no reference to a right to appeal.[154] The sole remedy specified for the committed subject is a statutory preservation of the right to habeas corpus through which the subject can test both his present need for hospitalization as well as the legality of the commitment.[155] The nature of habeas corpus proceedings makes them completely inadequate for initial judicial review of the administrative commitment decision.[156] The inadequacy of habeas corpus is at least two fold.

First, the habeas corpus remedy cannot be invoked, practically

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152. N.D. CENT. CODE § 25-02-11 (1970).

153. *See* THE MENTALLY DISABLED AND THE LAW 16, 55-57 (S. Brakel & R. Rock, eds. 1971). In the commitment action outlined in note 18 *supra*, the State's Brief in Support of Motion to Dismiss Plaintiff's Complaint admitted that the mental health board procedure is non-judicial. The admission came in the context of contending that the action of the board was local and thus not properly subject to federal court jurisdiction pursuant to 42 U.S.C. §§ 1983, 2281 (1970). Although the admission is instructive, the contention made to avoid federal scrutiny is clearly without merit since the mental health board action is taken pursuant to procedures specified by and under the authority of the legislative assembly.

Although N.D. CENT. CODE § 25-03-10 (1970) refers to "judicial determination pursuant to section 25-03-11" it is obvious that this constitutes an editing error by the legislature. In adopting Section 17 of the Draft Act, *supra* note 7, the legislature failed to make appropriate changes to reflect the local variation which makes commitment a mental health board determination rather than a judicial function.

By placing the decision making authority with the administrative board the legislature ignored the theory of the Draft Act that:

> [L]iberty of movement is one of the most elemental of human rights and one of which no person in this country may constitutionally be deprived without due process of law. Final authority and responsibility for compulsory hospitalization is therefore here placed in an arm of the State customarily exercising a judicial function.

Commentary to Sec. 9 of the Draft Act, reprinted in THE MENTALLY DISABLED AND THE LAW, *supra*, at 467.

154. Unlike a person aggrieved by an administrative ruling under the North Dakota Administrative Agencies Practice Act, N.D. CENT. CODE ch. 28-32 (1974), a person subject to the action of a County Mental Health Board has no right to seek judicial review of the decision before commitment is accomplished.

155. Because the Mental Health Board is not an "agency" under N.D. CENT. CODE § 28-32-01 (1974), the only remedy available to the person ordered committed is a habeas corpus proceeding under N.D. CENT. CODE § 25-03-21 (1970) and ch. 32-22 (1960). Section 5 of the Declaration of Rights of the North Dakota Constitution provides that "[T]he privilege of the writ of habeas corpus shall not be suspended unless, when in case of rebellion or invasion, the public safety may require." N.D. CENT. CONST. art. 1, § 5.

156. A recent comprehensive comment observed:

> [I]n civil commitment the provision of an administrative hearing cannot justify relaxation of those procedural safeguards which the due process clause

speaking, until after the subject has been taken to Stutsman County to the State Hospital.[157] At that point, the individual's liberty has already been substantially and irretrievably interfered with by the State. The subject suffers the stigma of hospitalization prior to any judicial hearing. This deprivation of liberty prior to judicial action or review is in itself offensive. Most patients have neither the sophistication nor the resources to initiate habeas corpus.[158] Thus, the assistance of counsel is important, but it may not always be available to indigent patients.[159] Moreover it is often quite difficult for the patient's attorney to render effective assistance in the Stutsman County forum. Additional costs, unavailability of witnesses, difficulty of communication, and other problems may all combine to make the assistance of counsel for the long distance habeas corpus proceeding ineffective.

Second, the habeas corpus remedy is deficient in that it shifts the burden of persuasion to the subject.[160] Thus, at the subject's first appearance in a court, in a county possibly far removed from his home, his friends, his attorney, and probably his witnesses, he must persuade the court that his hospitalization, already an accomplished fact, is unnecessary or inappropriate. Such a procedure gives substance to the hospital patients' common complaint that they are guilty until proved innocent—or insane until proved sane.

This reversal of our fundamental legal concept is particularly cruel and offensive when the State denies the subject any effective means to meet the burden unwillingly imposed upon him or her. In addition to the problems of long distance habeas corpus litigation, the statutory procedure denies the subject any right to effective review by failing to require particularized findings of fact or con-

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> mandates in judicial commitments. Such safeguards might be afforded in two ways. The state might provide the requisite safeguards at the initial administrative hearing, so that the proceeding would be similar to a judicial hearing with the commission acting as judge. Alternatively, the state might provide for a summary administrative determination of the need to commit an individual, and in such a case due process would seemingly require that the individual have the right to a de novo review hearing at which the necessary procedural safeguards would be applied. . . . In civil commitment, where . . . individual liberty is at stake, the need for prompt and comprehensive review of a summary administrative proceeding is . . . compelling.

Developments, supra note 24, at 1269-70 n.36.

North Dakota provides neither alternative.

157. *See* N.D. CENT. CODE §§ 25-03-21 (1970) and 32-22-01 (1960). Section 25-03-21 entitles "[a]ll patients *confined or hospitalized* to the writ." (Emphsis added).

158. Note, *Civil Commitment of the "Mentally Ill"—Constitutional Questions*, 24 DRAKE L. REV. 213, 219 (1974). Some of the practical problems facing patients seeking release through habeas corpus are described in R. ROCK, M. JACOBSON, & R. JANOPAUL, HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL 236-41 (1968).

159. District Judge M. C. Fredricks of Stutsman County, who handles the bulk of State Hospital habeas corpus cases, refuses to appoint attorneys to represent indigent hospital patients. It is his position that he has no statutory authority to do so. The New York Court of Appeals held the right to assigned counsel for indigent patients to be constitutionally based in People *ex rel.* Rogers v. Stanley, 17 N.Y.2d 256, 217 N.E.2d 636, 270 N.Y.S.2d 573 (1966).

160. *See, e.g.*, State v. Woodley, 164 N.W.2d 594 (N.D. 1969).

clusions of law by the mental health board and by failing to provide the subject with the right to a verbatim transcript of the commitment proceedings. A requirement for findings of fact and conclusions of law would seem to be essential in order to allow meaningful review of the commitment decision.[161] Without such a requirement, given the extreme subjectivity and imprecision of the commitment criteria, review becomes impossible and a proceeding is in effect *de novo*. That would not necessarily be fatal in an appropriately structured system of review,[162] but under the present system of habeas corpus review after hospitalization, it requires the district court to make the decision out of the appropriate context, without the benefit of witnesses or information or findings and conclusions being conveniently available, or practically speaking, available at all.

The statute requires the chairman of the mental health board to "make a full and complete record of each case brought before the board."[163] The Grand Forks County Board, for example, has apparently interpreted this to require only notations as to persons present and actions taken.[164] Only bare conclusory statements are entered to support board decisions. Courts have increasingly recognized the obvious fact that adequate review is impossible without a full record. In West Virginia, where the statute specified a right of appeal to a circuit court from a commitment by the "mental hygiene commission," the appeal statute was construed to require, in order to provide a "meaningful review" (which the court found implicitly intended by the legislature and mandated under the state constitution) "a verbatim transcript of the proceedings . . . and that all exhibits and other evidence be available for incorporation in a record to provide appropriate appellate review."[165]

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161. *See* Specht v. Patterson, 386 U.S. 605, 610 (1967).

162. *E.g.*, IOWA CODE ANN. §§ 229.9, 229.17 (1964) *discussed in* Note, *Civil Commitment of the "Mentally Ill"—Constitutional Questions*, 24 DRAKE L. REV. 213 (1974); H.B. 1605, 44th N.D. Legis. Assem. (1975); Proposals for Reform, *supra* note 19.

163. N.D. CENT. CODE § 25-02-14(3) (1970).

164. *See* note 18 *supra*.

165. State *ex rel.* Hawks v. Lazaro, ——W. Va.——, 202 S.E.2d 109, 127 (1974). In Lynch v. Baxley, 386 F. Supp. 378, 396 (M.D. Ala. 1974), the court required a "full record of the commitment proceedings, including findings adequate for review. . . ."

Perhaps the most comprehensive requirement is that contained in the consent decree entered in proceedings before a three judge federal District Court for the Middle District of Pennsylvania:

> There shall be a verbatim transcript and full record made of the commitment proceedings, and any member of the class committed pursuant to these proceedings shall have the right to state appellate court review, including provision for assistance of counsel and record and transcript without cost if he is unable to pay the cost thereof. Any person committed will be advised of his rights with respect to appeal by the court at the time of commitment.

Dixon v. Atty. Gen., 325 F. Supp. 966, 974 (M.D. Pa. 1971). Although the class referred to consisted of persons who had been committed at the termination of confinement following criminal convictions or charges, that distinction does not seem to detract from the standard as an appropriate one for the review of all subjects of civil commitment.

In Quesnell v. State, 83 Wash. 224, 517 P.2d 568, 578 n.21 (1974), the court listed as fundamental, in the context of enumerating rights a guardian ad litem could not waive without knowing consent of the allegedly mentally ill person, the right to "a transcript of the proceedings to permit effective review on appeal."

VIII. EMERGING ISSUES

The issues discussed thus far were chosen because of their more extensive treatment in recent decisional law or because of the author's belief in their fundamental role in providing justice to subjects of the mental health process in North Dakota. However, several other issues, thus far less developed in the case law or less susceptible to clear resolution given the current state of psychiatric knowledge and of theory in constitutional doctrine, will be briefly mentioned to stimulate creative development by the North Dakota legal system.

A critical issue without any satisfactory agreement to date is the application of the privilege against self-incrimination to commitment proceedings.[166] Courts and commentators have divided over a number of difficult questions. Is the privilege applicable?[167] If so, how is it to be implemented? Is the subject entitled to a "Miranda"[168] type warning?[169] What is the required content of any warning that may

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166. *Developments, supra* note 24, at 1303-13; Aronson, *Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examinations?* 26 STAN. L. REV. 55 (1973); Note, *Application of the Fifth Amendment Privilege Against Self-Incrimination to the Civil Commitment Proceeding*, 1973 DUKE L. J. 729.

167. Two theories might be useful in arguing for application of the privilege: "(1) that civil commitment is a 'criminal case' within the meaning of the fifth amendment and that the privilege therefore applies by virtue of the fifth amendment itself, applicable to the states through the due process clause of the fourteenth amendment; or (2) that the privilege is an element of due process under the fourteenth amendment alone." *Developments, supra* note 23, at 1303 (footnote omitted). Neither theory is persuasive according to the authors of the cited note, although they recognize that the patient might nonetheless practically refuse to be interviewed even without recognition of the privilege. *Id.* at 1312-13. A less emphatic, but partial, rejection is contained in Aronson, *supra* note 166. Aronson would apply the privilege to commitment proceedings only when functionally equivalent to criminal confinement (where based on dangerousness and no treatment is given or available). In other situations, he would not hold the privilege available, but instead argues that due process requires, because of "the deprivations inherent in institutional commitment . . . that the policies behind the privilege be protected . . ." by providing for the presence of counsel or a defense psychiatrist at the examination to assume a non-disruptive, primarily observational role and by providing, "at a minimum, the defendant should be warned that his statements may serve as the basis of his commitment. . . ." Aronson, *supra* note 166, at 93. For a more doctrinaire argument that the privilege should apply because "individuals are typically confined on the basis of their own statements and emotional responses to a skillful psychiatric interrogation . . . to protect against self-incrimination and to preserve an inviolate quantum of personal privacy," *see* Note, *Application of the Fifth Amendment Privilege Against Self-Incrimination to the Civil Commitment Proceeding*, 1973 DUKE L. J. 729, 747.

The Kentucky Supreme Court in 1964 required that the subject of civil commitment proceedings "be afforded the same constitutional protection as is given to the accused in a criminal prosecution." Denton v. Kentucky, 383 S.W.2d 681, 682 (Ky. 1964). Lessard v. Schmidt imposes a requirement that the subject have "knowledge" of the right to be silent. 349 F. Supp. 1078, 1101 (E.D. Wis. 1972). In Commonwealth *ex rel.* Finken v. Roop, No. 199, Oct. Term 1974, 19 (Super. Ct. Pa., filed April 22, 1975), the court noted: "At the outset, it is clear that statements made by an individual to a psychiatrist employed by the state are within the Fifth Amendment privilege against self-incrimination." Lynch v. Baxley, 386 F. Supp. 378, 394 (M.D. Ala. 1974) held the privilege "fully applicable at all stages of the civil commitment process, including the psychiatric interviews."

168. Miranda v. Arizona, 384 U.S. 436 (1966).

169. Lessard v. Schmidt requires both counsel *and* the psychiatric examiner to tell the subject

> that he is going to be examined with regard to his mental condition, that the statements he may make may be the basis for commitment, and that he does not have to speak to the psychiatrist. Having been informed of this danger the patient may be examined if he willingly assents.

be required?[170] Is the subject entitled to keep silent throughout the proceedings, including any examinations conducted to determine committability?[171] Must the subject's attorney be permitted to attend psychiatric interviews or examinations?[172] If so, what role can and should he play?[173]

Little agreement has yet been reached on any of these issues. However, some courts have been willing to disregard the "civil" label as a facile answer, and North Dakota attorneys should raise self-incrimination questions, especially with respect to the need for a warning that the client's statements may be used as a basis for involuntary confinement and to attempt to be allowed to be present at examinations, so that they might be resolved through the evolutionary process of judicial decision making.[174]

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349 F. Supp. 1078, 1101 (E.D. Wis. 1972).

However, while also agreeing that the privilege applied, the Pennsylvania Superior Court believes that the right to counsel's advice and the right to silence are sufficient to protect the policies of the self-incrimination privilege; thus, they held, no warning need be given by the examiner. Commonwealth *ex rel.* Finken v. Roop, No. 199, Oct. Term, 1974, 20 (Super. Ct. Pa., filed April 22, 1975).

170. See the warning required by *Lessard* quoted in note 169 *supra.*

171. *Lessard* requires that statements be shown by the state to have been made with "knowledge" of the right to silence. *Id.* Commonwealth *ex rel.* Finken v. Roop, No. 199, Oct. Term, 1974, 19 (Super. Ct. Pa., filed April 22, 1975), suggests that no sanction for refusal to answer questions is feasible. Thus, "[s]ubjects of commitment petitions will be represented and will be free, as is true of the instant case, to follow the advice of counsel and not cooperate with the examining physicians." *Id.* at n.13.

172. Thus far, courts have been reluctant to afford a right to the presence of counsel at psychiatric interviews or examinations. Lessard v. Schmidt, 349 F. Supp. 1078, 1101 (E.D. Wis. 1972); *In re* Fisher, 39 Ohio St. 2d 95, 313 N.E.2d 109, 126 (W. Va. 1974); State *ex rel.* Hawks v. Lazaro, ——W. Va.——, 202 S.E.2d 109, 126 (1974).

Fisher and *Lazaro* opined that access to reports of interviews and examinations would suffice to protect the policies of the privilege. Anyone with any experience reading psychiatric reports must be quite sceptical of that hope. The author's experience has been that reports are generally cursory, self-serving, conclusionary, and devoid of information that adequately allows counsel to probe the possible conflicts between the examiner's and subject's value systems and other misunderstandings which may contribute to inappropriate diagnoses and resulting recommendations. This factor might be utilized in presenting a due process-effective assistance of counsel argument to supplement the self-incrimination argument for counsel's presence. Aronson, *supra* note 166, at 90-92.

Lessard recognized this right to counsel or due process component and thus put the burden of providing effective alternatives to the presence of counsel at interviews on the state.

> It may be that a person charged with mental illness will be unable to properly exercise his rights of cross-examination without the presence of counsel at this critical stage in the proceeding. However, we think it appropriate to permit the state to demonstrate that other means, such as recording the interviews and making available to defense counsel the written results of the interview, will prove as effective in maintaining the individual's rights with less disruption to the traditional psychiatrist-patient relationship.

349 F. Supp. 1078, 1100 (E.D. Wis. 1972).

173. Aronson suggests that due process might provide an argument permitting defense counsel to attend examinations only as an observer.

> Although he would not be permitted to disrupt the interview, his mere presence would help prevent threats, trickery, or compulsion, insure that the defendant knew that his statements could be used against him, and dictate that subsequent disclosures were freely and knowingly given.

Aronson, *supra* note 166, at 91.

174. Since North Dakota examiners need not be and often are not psychiatrists or otherwise qualified experts in "mental disease," concern for the "traditional psychiatric-patient relationship is often misplaced." Lessard v. Schmidt, 349 F. Supp. 1078, 1100 (E.D. Wis. 1972). To the extent that the "examination" is more a tool for social control and less a "therapeutic" counseling session, the more it is imperative that the subject have the benefits of counsel's advice and presence.

The emergency commitment scheme provided in the Code[175] suffers from all the defects mentioned herein with the additional vice that even the inadequate safeguards required for mental health board hearings are absent. Under the emergency procedures "custody" (read "arrest") and subsequently, with only the "written or verbal consent of the county judge, or in his absence any member of the county mental health board," hospitalization in a private or the State hospital, may be accomplished without any judicial or legal safeguards other than, presumably, a telephone call to the county judge or fellow board member if the judge is unavailable.[176] Thereafter, the burden is on the hospitalized subject to obtain release; for indigents, this means a request for a county mental health board hearing in "either the county in which the patient is hospitalized or . . . the county of the patient's residence."[177] For indigent subjects, this will often result in a hearing before the Stutsman County Mental Health Board. If the facts revealed at two habeas corpus hearings at which the author represented clients originally committed under the emergency provisions portrayed representative Stutsman County Mental Health Board hearings for emergency hospitalized patients, such hearings may well be, insofar as constitutional protections or any realistic screening function are concerned, wholly ineffective.

Tucked away in the Code is another type of emergency provision that allows the subject of hospitalization proceedings to be detained

> during the pendency of such proceedings unless his release or discharge is ordered by a court of competent jurisdiction or by a mental health board having jurisdiction in the proceedings or upon the report of the superintendent of the state hospital that the patient may be discharged with safety.[178]

The statute is intolerably ambiguous. In practice, the "may be

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175. N.D. CENT. CODE §§ 25-03-08 to 25-03-10 (1970).

176. N.D. CENT. CODE § 25-03-08 (1970).

If no member of the board is available, the hospitalization may still be accomplished upon the written order of a licensed physician with "reason to believe that an individual 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 pending examination. . . ." *Id.*

Little insight is needed to recognize the obvious dangers to the constitutional rights of persons subjected to this system of virtually unrestrained discretion. For a detailed attack on emergency hospitalization, *see* Roth, Dayley, & Lerner, *Into the Abyss: Psychiatric Reliability and Emergency Commitment Statutes*, 13 SANTA CLARA LAWYER 400 (1973).

177. N.D. CENT. CODE § 25-03-10 (1970). *But see* Fhagen v. Miller, 29 N.Y.2d 348, 328 N.Y.S.2d 393, 278 N.E.2d 615 (1972), *cert. denied*, 409 U.S. 845 (1972) (upholding New York emergency detention provisions). For criticism of the empircal assumptions underlying the Fhagen decision, *see* Levin, *Criminal Law and Procedure*, 24 SYRACUSE L. REV. 75, 82-83 (1973).

For a discussion of the analogous difficulties in habeas corpus review, see text and accompanying notes 152-60 *supra*. See *supra* note 54 for a discussion concerning the hearings and representation two of the author's habeas corpus clients had received in commitment hearings before the Stutsman County Mental Health Board.

178. N.D. CENT. CODE § 25-03-23 (1970).

detained" often results in "shall be detained" and thus the burden is put upon the subject to obtain a court or board order (or in the case of emergency hospitalization, a superintendent's order) authorizing release. No procedures, other than the non-judicial emergency commitment procedures discussed in the preceding paragraph, are specified for determination of probable cause to believe that the patient must be detained pending a hearing. The leglislature has apparently attempted to resolve the dilemma of psychiatric inability to predict and society's need for protection, by in effect providing a presumption of dangerousness which places the burden of rebuttal upon the subject and by failing to specify clearly the procedures to be followed to obtain prehearing release. Several courts have held that some form of preliminary or "probable cause" hearing must be held before or very shortly following confinement and prior to the full hearing required for commitment.[179] A similar requirement may and should be read into the North Dakota statute.

The indeterminate length of commitment could be challenged on constitutional grounds. Considering the lack of scientific reliability and accuracy for psychiatric judgments, it might be persuasively argued that indeterminate commitment offends fundamental notions of fairness.[180] Allowing indefinite deprivation of liberty upon such a basis may deny the subject equal protection since criminals are entitled, except in the case of life imprisonment, to an outside limit on the duration of confinement. Moreover, the lack of proportionality inherent in an indefinite commitment arguably constitutes cruel and unusual punishment in violation of the eighth amendment.[181] Equal protection may also be violated by commitment of allegedly dangerous mentally ill persons since it is clear that many other persons equally or even more dangerous (race car drivers? speeders? heavy smokers?) are not subject to involuntary treatment or confinement.[182]

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179. Kendall v. True, 391 F. Supp. 413, 419 (W.D. Ky. 1975); Bell v. Wayne Co. Gen. Hosp., 384 F. Supp. 1085, 1097 (E.D. Mich. 1974); Lynch v. Baxley, 386 F. Supp. 378, 387-88 (M.D. Ala. 1974); Lessard v. Schmidt, 349 F. Supp. 1078, 1090-93 (E.D. Wis. 1972). *But see* Logan v. Arafeh, 346 F. Supp. 1265 (D. Conn. 1972), *aff'd mem. sub. nom.* Briggs v. Arafeh, 411 U.S. 911 (1973).

180. In a context only slightly different, the Supreme Court has held: "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Jackson v. Indiana, 406 U.S. 715, 738 (1972).

For the arguments of a mental health professional that commitment should be definite and limited rather than indeterminate, *see* Shah, *Some Interactions of Law and Mental Health in the Handling of Social Deviance*, 23 CATH. U.L. REV. 674, 697-99 (1974).

181. *See generally*, Dershowitz, *supra* note 9, at 1321-24.

182. See Friedman & Daly, *Civil Commitment and the Doctrine of Balance: A Critical Analysis*, 13 SANTA CLARA LAWYER 505, 509 (1973). The argument was persuasively fashioned by two therapists and a lawyer in Livermore, Malmquist, & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 85-86 (1968):

> We do not mean to suggest that dangerousness is not a proper matter of legal concern. We do suggest, however, that limiting its application to the mentally ill is both factually and philosophically unjustifiable. As we have tried to demonstrate, the presence of mental illness is of limited use in determining potentially dangerous individuals. Even when it is of evidentiary

IX. CONCLUSION

> In 1970, the North Dakota Attorney General recognized that it was conceivable that the United States Supreme Court, or a lower court on the basis of the Re Gault, [sic] reasoning, might at some time in the future consider mental health commitment proceedings to be similar to juvenile court proceedings and therefore recognize the constitutional rights ordinarily granted in ciminal proceedings as equally applicable to mental health poceedings.[183]

The Attorney General stated that he was not then familiar with any judicial decisions requiring the same constitutional rights for civil commitment subjects as for juveniles in delinquency proceedings.[184] The general rights to due process and equal protection of law are not dependent upon the application of the label "criminal" to the proceedings involved. Developments subsequent to the Attorney General's 1970 speculation have not, for the most part, required exact equivalence with each aspect of the criminal process. Instead the bill of rights and fourteenth amendment safeguards have been functionally analyzed and adapted to the legitimate needs of the mental health system.

When, if ever, the application of increased constitutional safeguards becomes a reality for the subjects of civil commitment proceedings in North Dakota may depend on the willingness of the legal profession—bench and bar—to examine afresh the balance between therapeutic intentions and constitutional requirements. The re-examination must be conducted in the light of increased sophistication concerning the limitations of psychiatry and the deprivations of liberty inherent in involuntary confinement. Civil commitment is a legal procedure and as lawyers we share a professional responsibility for improving the legal system.[185] Anyone persuaded by the developments outlined here that aspects of the North Dakota civil commitment mechanism are unconstitutional or otherwise in need

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> value, it serves to isolate too many harmless people. What is of greatest concern, however, is that the tools of prediction are used with only an isolated class of people. We have alluded before to the fact that it is possible to identify, on the basis of sociological data, groups of people wherein it is possible to predict that fifty to eighty per cent will engage in criminal or delinquent conduct. And, it is probable that more such classes could be identified if we were willing to subject the whole population to the various tests and clinical examinations that we now impose only on those asserted to be mentally ill. Since it is perfectly obvious that society would not consent to a wholesale invasion of privacy of this sort and would not act on the data if they were available, we can conceive of no satisfactory justification for this treatment of the mentally ill.

See Note, *Mental Illness: A Suspect Classification?* 83 YALE L. J. 1237, 1260-1263 (1974). *See also* Shah, *supra* note 180, at 697-99.

183. [1970-1972] REP. OF ATT'Y GEN. OF N.D. 210, 215 [OP. ATT'Y GEN., September 14, 1970].

184. *Id.* at 215.

185. ABA, CODE OF PROFESSIONAL RESPONSIBILITY AND JUDICIAL CONDUCT Canon 8 at 44C (1974) reads: "A Lawyer Should Assist in Improving the Legal System."

of improvement is ethically bound to zealously safeguard individual rights of client-subjects[186] and to assist generally in accomplishing needed change in the system.

186. ABA, CODE OF PROFESSIONAL RESPONSIBILITY AND JUDICIAL CONDUCT Canon 8 at 31C (1974) reads: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law."