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Civil Commitment Procedure in Louisiana

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responsibility of providing a financially solvent enterprise which could satisfy a judgment secured by a plaintiff injured through breach of the above standards. However, because of the increasing difficulty of the duties of the police force, it is felt that there should be a differentiation between negligent breaches and intentional breaches. In the former situation, the officer should be disciplined by way of administrative procedure while the municipality should bear the brunt of a civil judgment for the torts of its employee. However, in the latter situation, the mental element makes it desirable that the officer and the municipality be liable *in solido*. It is noted that such a scheme presupposes that the veil of municipal immunity would be lifted as previously discussed. It is submitted that the adoption of the above proposals would give our courts the gauge by which to adequately judge and redress violations of the legal rights of criminal suspects and would in the end accomplish the purpose of upgrading our police force.

The problem of inappropriate use of deadly force by a police officer is as old and as complicated as the problem of crime itself. To criminally convict or to civilly condemn the individual policeman is to treat the symptom while encouraging the disease to fester. The causes of the problem are an inadequately trained police force and law in the state of generality to the point of uselessness. It is only when these causes are eliminated that the problem will be resolved.

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CIVIL COMMITMENT PROCEDURE IN LOUISIANA

As of 1966, the United States had between 600,000 and 650,000 persons hospitalized because of mental illness.[1] Today more people are involuntarily hospitalized in mental institutions than are imprisoned for the commission of crime.[2] Voluminous research and writing in both the medical and the legal fields have been concerned with the problems of America's mentally disturbed. The dilemma of the mentally ill is com-

1. Couch, *Book Review*, 44 TUL. L. REV. 426, 431 (1970). In 1962-63, the average daily population in Louisiana mental hospitals was 7,188 patients. Another 10,069 persons were cared for in community clinics. LOUISIANA'S NEW PLAN—MENTAL HEALTH SERVICES 11 (La. State Dep't of Hospitals 1964).

2. Note, 35 BROOKLYN L. REV. 187, 188 (1969).

plicated by the necessity for legal protection which must be provided for every person suspected of being, and found to be, mentally disturbed, "because he is a citizen first and a mental patient second."[3] The purpose of this Comment is to review the Louisiana procedures which may be used to commit persons to mental hospitals against their will,[4] and evaluate them in the light of current federal constitutional standards and requirements and contemporary theories of mental hospitalization. Specifically, the paper is limited to the procedural problems of notice and the opportunity to be heard, the hearing, and the problem of the right to counsel.

Commitment similar to that which exists today was unknown in America before the late eighteenth century, and not until the nineteenth century did concern develop that commitment to mental institutions might be, and was being, used to deprive persons of their liberty illegally. Much effort was made to make mental commitment difficult to achieve, resulting in procedures which possibly did more to retard the progress of mental health than to protect those mentally healthy.[5] Psychiatrists protested excessive "legalisms,"[6] a reaction began, and the trend turned to increasingly liberalized procedures.[7] It is possible that reaction has become over-reaction,[8] however, and that we have deferred to medical opinion to too great an extent, perhaps forgetting that the original fears were not totally unfounded. It may be true that "railroading" is in large part mythical;[9] but the law must

3. SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, MENTAL ILLNESS AND DUE PROCESS 14 (1962).

4. Excluded from the purview of this paper are procedures for mental commitment which in any way arise from criminal proceedings. Such procedures constitute a separate area with unique problems.

5. For the early history of mental commitment in America, *see* A. DEUTSCH, THE MENTALLY ILL IN AMERICA 418-28 (2d ed. 1949).

6. Psychiatrists have often criticized what they consider excessive formality in hospitalization proceedings. In 1946, Dr. Karl Bowman, then president of the American Psychiatric Association, said: "[T]he public is so obsessed with the legal point of view and the alleged infallibility of legal procedure that they insist on protecting the so-called legal rights of the patient without thinking what his medical rights are." 103 AM. J. PSYCHIATRY 1, 12 (1946), quoted in M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 289 (1952).

7. THE REPORT OF THE AMERICAN BAR FOUNDATION ON THE RIGHTS OF THE MENTALLY ILL, THE MENTALLY DISABLED AND THE LAW 16 (F. Lindman & D. McIntyre ed. 1961) (hereinafter cited as LINDMAN & MCINTYRE); Comment, 1969 DUKE L.J. 677.

8. *See* Comment, 61 NW. U.L. REV. 977, 983 (1966), in which a student writer expresses a similar opinion.

9. A. DEUTSCH, THE MENTALLY ILL IN AMERICA 418 (2d ed. 1949); Curran, *Hospitalization of the Mentally Ill*, 31 N.C.L. REV. 274, 292-93 (1953).

guard against any possibility of liberty attaining the status of myth. American values concerning liberty and due process of law require fundamental standards of fairness in attempts to confine persons against their will because of alleged criminality. Such values, it would seem, require fairness in attempts to do the same thing—deprive one of his liberty—in the involuntary commitment of the mentally ill. As the immediate aim—confinement—is the same in criminal and civil proceedings, some of the same constitutional requirements may be found necessary in both proceedings. Because of the paucity of case law on the subject, however, it is not yet known precisely which constitutional requirements finally will be applied. If it may be assumed that most people sought to be committed are indeed mentally ill, psychological considerations will necessitate deft balancing, careful study, and selective application of constitutional standards by the courts. It is submitted that certain fundamental requirements of due process must be applicable to hospitalization proceedings, but that the entire panoply of due process requirements of the criminal process should not be, at least not in the same manner.[10] The reasons for this position will be more adequately set forth in the discussion of each particular problem.

The state's authority to detain and confine the mentally ill is said to have been based originally on society's right to protect itself against dangerous persons, that is, the police power,[11] "one of the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government."[12] Today, the doctrine of *parens patriae*, which holds that the state as servant of the common good may care for those unable to care for themselves, is also asserted to justify the confinement of the mentally disturbed.[13] The *Matter of Josiah Oakes*[14] was the first explicit judicial recognition in the United States of the principle that the state can confine the

10. Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961): "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

11. LINDMAN & MCINTYRE 17 (1961); *see also* ROSS, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945-55 (1959).

12. District of Columbia v. Brooke, 214 U.S. 138, 149 (1909).

13. ROSS, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945 (1959).

14. 8 Law Rep. 123 (1845-46). *See Confinement of the Insane*, 3 AM. L. REV. 193, 199 (1869).

mentally ill on the basis of the need for remedial or therapeutic treatment.[15] Confusion exists in the literature and the jurisprudence as to the precise delineation of these concepts.[16] The United States Supreme Court has branded the doctrine of *parens patriae* a "murky" concept whose "historic credentials are of dubious relevance."[17] It would seem that for purposes of determining proper procedure in the commitment process recourse should not be made to these nebulous concepts. Where any distinction must be made in deciding when otherwise mandatory procedures in the commitment process may be dispensed with, it should be simply on the basis of the potential danger imposed by the individual to himself and/or society.[18] If the would-be patient is seriously thought to be dangerous, whether to himself or others, then, and only then, should the more stringent procedural devices not be used prior to commitment; and, as will be illustrated later, when this is done, effective substitutes should be required. At present Louisiana does not make such a distinction; its procedural safeguards are lacking in other respects as well.

Louisiana Commitment Procedures

Louisiana provides four methods for the purely civil commitment of the mentally ill:[19] voluntary admission, coroner's commitment, judicial commitment, and emergency commitment.[20] The voluntary admission procedure, encouraged by authorities[21] in the psychiatric field,[22] allows any mentally ill, inebriate, or epileptic person desiring treatment to apply to the superintendent of the state hospital or to the director of a private hospital for admission.[23] Before he is admitted, the patient must

15. A. DEUTSCH, THE MENTALLY ILL IN AMERICA 423 (2d ed. 1949).

16. *Cf., e.g.*, E. FREUND, THE POLICE POWER § 155 (1904); Comment, 34 U. CHI. L. REV. 633, 653 n.98 (1967); State v. Green, 360 Mo. 1249, 232 S.W.2d 897 (1950).

17. *In re* Gault, 387 U.S. 1, 16 (1967).

18. *Cf.* State v. Mullinax, 364 Mo. 858, 269 S.W.2d 72 (1954).

19. The Louisiana Mental Health Law is found in Title 28 of the Revised Statutes, and is briefly outlined in Slovenko & Super, *Commitment Procedure in Louisiana*, 35 TUL. L. REV. 705 (1961).

20. LA. R.S. 28:50 (Supp. 1968).

21. LINDMAN & MCINTYRE 107 (1961).

22. Persons who enter the hospital voluntarily are usually better patients and have greater chance of early recovery. The voluntary admission helps to eliminate the detention spirit, and has become closely tied to modern therapy. SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, MENTAL ILLNESS AND DUE PROCESS 13, 16 (1962). *See also* Curran, *Hospitalization of the Mentally Ill*, 31 N.C.L. REV. 274, 277 (1953).

23. LA. R.S. 28:51 (Supp. 1966).

be fully informed of the provisions of the Mental Health Law.[24] A patient voluntarily admitted is entitled to his release upon demand;[25] however, provision is made for postponement of his discharge if the superintendent of the hospital, within forty-eight hours of the request for discharge, files a certificate with the local district court stating release would be unsafe for the patient or others. Judicial commitment proceedings must then be instituted.[26]

The coroner's commitment is initiated upon the application of any responsible person, in the absence of relatives, giving the reason why institutional care is needed.[27] The application must be accompanied by a certificate of the coroner and one other qualified physician stating that the patient has been examined within three days of the application and is in need of care or observation. The application must then be submitted for approval to the district judge of the district from which the patient is to be committed. After fourteen days, the certificate of the coroner and the physician is invalid and the superintendent may not receive the patient for confinement.[28] The coroner is authorized to detain the patient by confining him in any state hospital *or parish jail* or private mental hospital for not more than thirty days or until committed or ordered released.[29]

Judicial commitment may be upon the application of any responsible person, accompanied by a certificate of examination of the coroner and another qualified physician.[30] The judge may commit when he thinks it "in the best interest of the patient and the community."[31] A hearing is to be held not less than five days from receipt of the examiner's report. The patient's presence at this hearing is within the court's discretion, and he may even be committed to an institution for a limited period of observation. Provision is also made for the appointment of a

24. *Id.*
25. *Id.* 28:98.1 (Supp. 1954).
26. *Id.*
27. *Id.* 28:52.
28. *Id.*
29. *Id.* 28:52.1 (Supp. 1966).
30. *Id.* 28:53(a) (Supp. 1962). The statute says "accompanied by a certificate as provided in R.S. 28:52," which is the provision for the coroner's commitment. Why the coroner should be involved in this process is not clear.
31. *Id.* 28:53(b).

commission to aid the court in its decision, but this too is within the court's discretion.[32]

Any relative, friend, or curator may apply to the superintendent of a mental hospital for the emergency commitment of one who needs immediate mental care.[33] The application is to be accompanied by the certificate of a qualified physician; the accompanying certificate is valid for only twenty-four hours. Although the state sets thirty days as the ordinary maximum for confinement under this procedure, it allows the continued detention of the patient upon the authorization of the judge *or coroner*.[34] If the superintendent of the hospital thinks commitment is necessary, he must institute proceedings for coroner's or judicial commitment, and may retain the patient, on the authorization of the judge or coroner, until judicial or coroner's commitment proceedings are accomplished.[35] Another statute,[36] not contained in the title on mental health, allows the coroner to order the apprehension and detention, "for a reasonable length of time," "in a mental hospital or jail," of any person for whose detention application has been made on the ground that he is "mentally ill, mentally defective, inebriate, addict, epileptic, or psychopathic and is in need of observation or care." Such action,

32. *Id.* 28:54 (1950).

33. *Id.* 28:57.

34. While the Louisiana Constitution requires that the coroner's office ordinarily be filled by a licensed physician, a layman may serve as coroner where no physician is available or none will accept the post. LA. CONST. art. VII, § 71. Moreover, the coroner may delegate his duties to a justice of the peace if he chooses to do so. LA. R.S. 33:1553 (1950). Thus, it is conceivable that detention may be ordered by one not trained either in law or medicine, much less in the specialized field of psychiatry. *Id.* 28:52, *as amended* La. Acts 1952, No. 152, § 1 and La. Acts 1954, No. 701, § 1: "Any detentions, confinements or commitments made by the coroner under the above recited circumstances are hereby declared to be administrative acts attached to the functions of his office as required by law and for which acts he is specifically granted personal immunity, but not relieved of his official responsibility in his capacity as coroner." A similar grant of immunity is contained in LA. R.S. 33:1555 (1950). Where the coroner acts contrary to statutory procedure, however, he will not be granted immunity from an action for damages under the Civil Rights Act of 1871 (42 U.S.C. § 1983 (1871)), despite the Louisiana statutes. Delatte v. Genovese, 273 F. Supp. 654 (E.D. La. 1967).

35. LA. R.S. 28:57 (1950).

36. *Id.* 33:1555. This statute was last amended by La. Acts 1952, No. 151. *Id.* 28:52, dealing with the coroner's commitment, was amended by La. Acts 1952, No. 152. Both were approved by the governor on the same day. In addition, *id.* 28:52 was amended by La. Acts 1954, No. 701, to read as it presently does. La. Acts 1954, No. 701, contains a general repealing clause in § 2. Therefore, it may be that *id.* 33:1555 has been repealed to the extent that it conflicts with *id.* 28:52. Nevertheless, enough confusion and repetition remain in other provisions of the Mental Health Law to warrant new and clarified statutes.

the statute declares, is "for the accused person's own good and for the peace and safety of the community."

These statutory procedures for commitment are ambiguous, redundant, and conflicting; more importantly, they contain the potential for great abuse. Not only may a person be deprived of his liberty for up to thirty days without judicial review, but he may be put in jail by the coroner on the application of any "responsible" person. An irate wife, for example, might succeed in having her husband incarcerated over the week-end. And, more disturbingly, the procedures now available present the haunting possibility that political beliefs and activities which deviate from the accepted norm easily may be punished by a sojourn in a penal institution.

Notice and the Opportunity to Be Heard

The Louisiana Mental Health Law has no provisions requiring pre-commitment notice to the allegedly mentally ill person, nor is there any provision for a mandatory pre-commitment hearing. Many medical authorities would applaud these omissions; many lawyers, on the other hand, would denounce them. Pragmatically, notice gives the allegedly mentally ill person an opportunity to contest the attempt to hospitalize him, to prepare a defense to any "accusation" of mental instability. Psychiatrists are prone to think that notice will only have an adverse effect on the one to be committed, causing him trauma and further mental injury, and will be futile in any event, as an insane person will not be able to take advantage of notice served on him. This position assumes that all those sought to be committed are indeed mentally ill; but "insanity is the very thing to be tried."[37] Contrarily, of course, if notice is served on all sought to be be committed, it will be served on some who are indeed mentally ill, perhaps seriously so, and who might be traumatized by it or unable to understand its import. The problem is one which calls for a careful weighing of medical and legal considerations. Medical opinion notwithstanding, the absence of any pre-commitment notice or hearing requirements raises serious constitutional questions.

Although the United States Supreme Court has characterized the "primary sense" of due process as "an opportunity

37. *In re* Welman, 3 Kan. App. 100, 104, 45 P. 726, 727 (1896).

to be heard and to defend a substantive right,"[38] it has never decided the specific question of whether pre-commitment notice and hearing is required by the fourteenth amendment. In *Simon v. Craft*,[39] the court held that due process requires notice and hearing on the issue of the commitment of one allegedly mentally ill, but it did not decide whether the hearing must *precede* the confinement of the person. One Louisiana case has dealt with the question. In *In re Bryant*,[40] the petitioner claimed that his commitment without prior opportunity to be heard was a denial of his rights and a deprivation of his liberty without due process of law. The Louisiana Supreme Court rejected the claim, saying that "[w]ere it not for two concurring and important factors such contention might have considerable merit."[41] The factors which impressed the court were (1) that commitment is "merely a matter of police regulation, purposing to protect both the patient and the general public,"[42] and (2) the petitioner had an opportunity for a post-commitment hearing. The court did not cite any authority for its decision. It is possible that the court analogized the second reason to those cases which have held that a hearing after state action affecting property rights satisfies the due process clause.[43]

Other courts have drawn this analogy to sustain commitment without prior notice and hearing.[44] Such juridical reasoning has been criticized sharply[45] on the ground that a taking

38. Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 678 (1930).
39. 182 U.S. 427 (1901).
40. 214 La. 573, 38 So.2d 245 (1949).
41. *Id.* at 584, 38 So.2d at 249.
42. *Id.*
43. *See, e.g.*, Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941); United States v. Illinois Cent. R.R., 291 U.S. 457 (1934); Phillips v. Commissioner, 283 U.S. 589 (1931).
44. *See, e.g., In re* Ryan, 47 F. Supp. 10 (E.D. Pa. 1942); Hammon v. Hill, 228 F. 999 (W.D. Pa. 1915); Payne v Arkebauer, 190 Ark. 614, 80 S.W.2d 76 (1935); County of Black Hawk v. Springer, 58 Iowa 417, 10 N.W. 791 (1882); *In re* Dowdell, 169 Mass. 387, 47 N.E. 1033 (1897); *Ex parte* Dagley, 35 Okla. 180, 128 P. 699 (1912). *But see* Barry v. Hall, 98 F.2d 222 (D.C. Cir. 1938), in which the court, in interpreting a federal statute, rejected the appellee's reliance on cases in which after-the-fact hearings in commitment proceedings were held sufficient for due process purposes. "The provisions for ultimate hearing were held to save the statutes. We think the cases were wrongly decided." *Id.* at 228.
45. *See* Note, 75 HARV. L. REV. 847 (1962); Comment, 61 NW. U.L. REV. 977, 981 (1967). "Law such as this is an affront to the very concept of due process. Any man has the right not to be unjustly confined for an indeterminate period of time pending his eventual release through an operation of an appeal procedure." Kutner, *The Illusion of Due Process in Commitment Proceedings*, 57 NW. U.L. REV. 383, 397 (1962); Petition of Rohrer, 353 Mass. 282, 230 N.E.2d 915 (1967).

of liberty and a taking of property are not comparable—for one whose property is taken is still free to contest the action, while one who is confined against his will may not have any opportunity to initiate legal proceedings to regain his freedom. United States Supreme Court decisions sanctioning post-seizure hearings have been carefully limited. Justice Brandeis, speaking for the Court in *Phillips v. Commissioner*,[46] for example, said:

> "*Where only property rights are involved,* mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."[47] (Emphasis added.)

Even in cases involving property rights, the Supreme Court has sought to balance public and private interests, allowing dispensation with prior hearings "only where summary action is required by the peculiarly urgent nature of the governmental interest."[48] In the recent case of *Goldberg v. Kelly*,[49] the Court held that procedural due process under the fourteenth amendment requires that welfare recipients be afforded an evidentiary hearing *before* termination of state benefits by welfare authorities. The Court concluded that the recipient's interest in uninterrupted receipts of public assistance, together with the state's interest that payments not be terminated erroneously, outweighed the state's countervailing interest in conserving administrative and fiscal resources. This balancing approach is also used in conscription cases, where the private interest is not in property but in liberty. Justice Harlan, concurring in *Oestereich v. Selective Service Board*,[50] explained that the reason for postponing judicial review of induction orders is twofold: (1) to stay induction pending such review would work havoc with orderly processing into the armed forces (*i.e.*, the national interest here outweighs the private interest), and (2) the inductee has had some opportunity for review within the Selective Service System.[51] In exercising their inherent power to punish

46. 283 U.S. 589 (1931).

47. *Id.* at 596-97. *See also* Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950); *cf.* Bowles v. Willingham, 321 U.S. 503 (1944).

48. *See* Note, 76 YALE L.J. 1234, 1239 (1967), and cases cited therein.

49. 25 L.Ed.2d 287, 89 S.Ct. 287 (1970).

50. 393 U.S. 233 (1968).

51. *Id.* at 240-41. Justice Harlan felt that "[i]t is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims." *Id.* at 243, n.6. Justice Stewart, however, expressed disagreement with this statement. *Id.* at 250, n.10.

contemptuous conduct committed in their presence, a power "arbitrary in its nature and liable to abuse,"[52] courts deprive persons of liberty without prior notice and hearing. But the power is thought essential to preserve the authority of the courts and prevent the administration of justice from falling into disrepute.[53] Here again, the public interest outweighs the individual interest. It is submitted, however, that in the area of mental hospitalization, where the person whose commitment is sought is not dangerous, the public interest in providing care does not outweigh the individual's interest in preserving his liberty from summary deprivation instituted by either private citizens or the state. It is believed that the United States Supreme Court, following its approach in other areas, would not allow the hospitalization of one who presents no danger unless he has been notified of the attempt and given a hearing on the issue.[54]

Emergency commitments of the dangerous without notice and hearing are justifiable and necessary. Society has a right to protect itself—and the patient—from harm.[55] Moreover, with-

52. *Ex parte* Terry, 128 U.S. 289, 313 (1888).

53. *See* Fisher v. Pace, 336 U.S. 155 (1949). In Illinois v. Allen, 25 L.Ed.2d 353, 359, 90 S.Ct. 1057, 1061 (1970), the Court said: "It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country."

54. *But see* Baxstrom v. Herold, 383 U.S. 107, 111 (1966), where the following statement is found: "Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all.*" In *Baxstrom* the Court held that the petitioner was denied equal protection by the laws of the New York statutory procedure whereby a person may be civilly committed at the end of a penal sentence without the jury review available to all others civilly committed. He was further denied equal protection by his commitment to an institution maintained by the department of corrections beyond the expiration of his prison term without the judicial determination of his being dangerously mentally ill afforded to all being so committed except those nearing the end of a penal sentence.

Because *Baxstrom* concerned one already incarcerated for a criminal offense, it may be that the Court will limit the application of the *Baxstrom* rule to situations involving the criminally insane. Nevertheless, the broad statement quoted above may be cited in the future as authority for the holding that no distinction is to be made between those dangerously mentally ill and those who present no obvious danger to themselves or others. It is hoped that this unfortunate result will not be reached, for it could deprive many persons of their continued freedom while doing nothing to serve the interests of mental health.

55. "[L]iberty may not be carried to the point where it threatens the correlative liberty of others, and so there can be no question of the propriety of committing a person without his consent if he is dangerous to others. And since the life and health of an individual is a matter of social concern as well as of private concern to himself, society has a legitimate

out an emergency commitment procedure, dangerously ill persons will very likely be put in jail until a hearing is held, perhaps for allegedly disturbing the peace. The amount of proof needed to warrant an emergency commitment should be exacting, perhaps a stringent certification by three physicians that the person is indeed dangerous. The problem is, of course, complicated by other factors, such as the possible unavailability of so many physicians, especially in rural areas. Precisely what prerequisites will be required before an emergency commitment will be allowed is but one of the difficulties to be faced. When considering medical arguments for liberal procedures, recognition must be given to the importance of notice and hearing to our concept of justice. These procedures serve as safeguards against having "rights decided in a secret star chamber proceeding and . . . life or liberty taken by a *lettre de cachet* calling for confinement or liquidation"[56] without any chance of defense. The fact that a hearing after commitment may be demanded[57] or that the ancient writ of habeas corpus[58] is available does not help prevent the initial deprivation of liberty. Besides, the ignorant may not know of these rights, and the poor often will be unable to use them in a practical way.[59]

interest in protecting a person even against himself. For the same reason that it is proper for the state to prohibit suicide or self-mutilation, it may properly commit involuntarily a person who is seriously harming himself." M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 311-12 (1952). It is assumed for the purposes of this Comment that the present bases for commitment are constitutional. For one view that some present laws transgress constitutional limitations, see Whitmore, *Comments on a Draft Act for the Hospitalization of the Mentally Ill*, 19 GEO. WASH. L. REV. 512 (1951). A good discussion is also found in Comment, 53 VA. L. REV. 1134 (1967).

In Fhagen v. Miller, 306 F. Supp. 634, 638 (S.D.N.Y. 1969), the court said, in dictum: "Undoubtedly a forthwith commitment and temporary detention of allegedly mentally ill persons for observation without prior notice and hearing, where 'immediate action is necessary for the protection of society and for the welfare of the allegedly mentally ill,' is constitutionally permissible, providing an adequate means is available to test the cause and reasonableness of the detention."

56. M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 289 (1952).

57. LA. R.S. 28:56 (1950).

58. *Id.* 28:171(6). As one judge has remarked, "not only is 'the presumption that the confined person knows the law . . . highly unrealistic,' but if the statute is constitutionally defective, it will not be saved by the Great Writ. Nor is it saved by an express recognition in the state's Mental Hygiene Law of a patient's right to the writ. The statute adds nothing to his constitutional right to avail himself of it." Fhagen v. Miller, 306 F. Supp. 634, 638 (S.D.N.Y. 1969).

59. Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424, 453 (1969). It is interesting to recall that commitment laws when first enacted in the eighteenth century were considered but another method of dealing with pauperism and vagrancy. M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 292 (1952). Is it possible that such is still partially true today?

One might wonder whether the educated middle-class or affluent person, of good mental health, will consider recourse to these devices once he has been shocked and demoralized by finding himself in a mental institution. Reliance on post-commitment proceedings which must be initiated by the patient is unsatisfactory. If, as is suggested, prior notice and hearing are required in non-emergency cases, real and adequate substitutes[60] for them must be had in emergency cases. Notice to an attorney[61] and relatives, followed by a prompt hearing (giving counsel sufficient time to prepare his case)[62] might constitute such.

The Hearing

Louisiana makes no provision for a jury determination of the need for commitment. Although hospitalization results in a loss of liberty as does a criminal conviction, it is believed that the analogy to the criminal process is not to be extended to require jury trials in hospitalization proceedings. Almost all authorities are opposed to jury trials in this area.[63] A jury trial is said to carry the taint of criminality and to stigmatize the allegedly mentally ill person.[64] In Illinois, which made jury trials available, more commitments of the sane took place than had ever occurred because of the old procedure.[65] On the other hand juries may be misled by patients who are indeed sick and in need of care but who momentarily seem perfectly normal. The result may be that one who, in the opinion of almost all medical authorities, requires care, will be adjudged sane by a well-meaning but misled group of laymen.[66] In short, juries are not particularly suited for such determinations.

60. *See* Kutner, *The Illusion of Due Process in Commitment Proceedings*, 57 NW. U.L. REV. 383, 385 (1962), in which the author observes that in actual practice patients are seldom informed of their rights. To the same effect is Slovenko, *The Psychiatric Patient, Liberty, and the Law*, 13 KAN. L. REV. 59, 76 (1964).

61. *See* text at notes 71-81 *infra*.

62. "Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded." *In re* Gault, 387 U.S. 1, 33 (1967).

63. *See, e.g.*, Kutner, *The Illusion of Due Process in Commitment Proceedings*, 57 NW. U.L. REV. 383 (1962); Slovenko & Super, *Commitment Procedure in Louisiana*, 35 TUL. L. REV. 705 (1961); Weihofen, *Commitment of Mental Patients*, 13 ROCKY MT. L. REV. 99 (1941); Comment, 1969 DUKE L.J. 677. *But cf.* Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945 (1959).

64. *See* Comment, 1969 DUKE L.J. 677, 692-93.

65. A. DEUTSCH, THE MENTALLY ILL IN AMERICA 426 (2d ed. 1949).

66. *See, e.g.*, Project, *Civil Commitment of the Mentally Ill*, 14 U.C.L.A. L. REV. 822, 858 (1967).

Only thirteen states still authorize jury trials, and the trend is to do away with them altogether.[67]

The absence of this safeguard, however, makes the hearing assume greater importance. Because commitment is said to be seldom contested,[68] it is argued that requiring a hearing in every involuntary hospitalization proceeding would be time-consuming and usually unnecessary. One might wonder, however, if whether the reason commitment is seldom opposed is because one suddenly locked in a hospital against his will is too depressed and stunned to attempt any challenge. Yet such a person may not be mentally ill or in need of care and should be at liberty. A mandatory hearing would afford some measure of protection to such persons. A pre-commitment hearing could also serve to determine whether one who is possibly "abnormal" in some respect would benefit from care,[69] or would be better off without hospitalization (assuming he is not dangerous to himself or others).

A counter-argument is that mandatory hearings will discourage commitment of those who need it because families and friends will be hesitant to air such matters publicly and in the presence of the would-be patient. However, it would not seem that a commitment hearing would necessarily have to be public. Juvenile proceedings, for example, are often closed to the public. The important thing is that the person sought to be committed have a chance to present his defense before an impartial arbiter.[70] In this regard, provision could be made to hold the hearing in the judge's chambers, with the option of convening at any place convenient and necessary to protect the would-be patient's mental health. A request for a non-public hearing, possibly at the patient's home, should be allowed if the judge is presented sufficient evidence that such is necessary. The written statement of two or more physicians could perhaps be a requisite for such a request. That the patient be given the maximum feasible protection is of the greatest importance. Where apparently conflicting considerations—medical versus constitutional—are in-

67. LINDMAN & MCINTYRE 28 (1961).

68. Slovenko & Super, *Commitment Procedure in Louisiana*, 35 TUL. L. REV. 705, 714 (1961).

69. Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424, 455 (1966).

70. "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." Wong Yang Sung v. McGraft, 339 U.S. 33, 50 (1950).

volved, the decision becomes difficult. It is submitted that the patient should have all possible legal safeguards and that these should yield, and then but temporarily, only in cases of obvious medical necessity.

The Right to Counsel

Louisiana makes no explicit provision for the appointment of counsel in commitment proceedings. R.S. 28:171 provides, however, that every patient has the right to communicate in private with counsel.[71] It is also provided that the parish of domicile shall pay the costs of attorney's fees if the patient is not able to do so.[72] Thus, it appears that an indigent patient has the right to have his attorney's fees paid by the parish; he must first, however, secure counsel. It is doubtful whether these statutory provisions meet current federal constitutional standards. It cannot be overemphasized that commitment to a mental hospital is in many senses a very real deprivation of liberty. Where such could result from criminal prosecutions, the United States Supreme Court has required that the defendant be given the benefit of counsel, unless knowingly and intelligently waived.[73] The Court has also announced, in *In re Gault*,[74] that they are not impressed by labels,[75] and that where a loss of liberty may result from a juvenile proceeding, counsel must be furnished—whether the proceeding be denominated civil or criminal.[76] The Court's decision would seem to apply equally to involuntary hospitalization proceedings. Such reasoning has been accepted by the United States Court of Appeals for the Tenth Circuit. In *Heryford v. Parker*,[77] they held that counsel must be provided to the would-be patient at involuntary commitment proceedings, "unless effectively waived by one authorized to act in his behalf."[78] As yet, no other courts have followed or refused to follow the decision.

Counsel at commitment proceedings could perform several functions. An attorney could question the examining doctors and attempt to elicit answers in terms comprehensible to one not

71. LA. R.S. 28:171(1) (1950).
72. *Id.* 28:141.
73. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963).
74. 387 U.S. 1 (1967).
75. *Cf. also* Specht v. Patterson, 386 U.S. 605 (1967); Kent v. United States, 383 U.S. 541 (1966); Baxstrom v. Herold, 383 U.S. 107 (1966).
76. *In re* Gault, 387 U.S. 1, 41 (1967).
77. 396 F.2d 393 (10th Cir. 1968).
78. *Id.* at 396.

medically trained.[79] He could also question those seeking the commitment to assure that the would-be patient's interests, and not malice, are the stimuli for the proceedings. What type of treatment and the practical value of any treatment might also be explored to a limited extent.[80] In addition, counsel could help to protect any financial interests of the patient which might suffer as a result of commitment.[81] Especially beneficial might be the psychological aid which a lawyer would supply; the person whose commitment is sought would have someone he could feel is on his side, and might be given renewed vigor to contest a possibly unjustified commitment attempt.

Conclusion

It is submitted that Louisiana's commitment procedures are in large part constitutionally deficient. Provision should be made for prior notice and hearing and for the appointment of counsel where the individual is unable to obtain his own. Where the person is thought dangerous—a finding not to be made lightly or routinely—the constitution may allow emergency confinement if steps are instituted to safeguard the patient's rights. In this regard, notification of the emergency confinement should be made to counsel appointed to represent the patient at a hearing to follow very soon afterwards. The state might also consider establishing a Mental Health Review Service[82] which would

79. Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945, 963 (1959).

80. Note, 40 TEMP. L.Q. 381, 387-89 (1967). *See generally*, Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424, 455 (1966).

81. In interdiction proceedings, by which one is relieved of control over his property, an attorney must be appointed by the court to respresent the would-be interdict. LA. CIV. CODE art. 391. One may suffer financial losses as the result of commitment without interdiction, however, and an attorney would serve a useful function here. In any event, it is interesting to observe the curious policy of our law which apparently gives greater protection to one's property than to his freedom.

82. Such an agency was proposed for New York, in part as a substitute for pre-commitment notice and hearing. See SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, MENTAL ILLNESS AND DUE PROCESS 20 (1962). Although it is the position of this writer that pre-commitment notice and hearing are required, except in emergency cases, a review service which would function as the patient's advocate still appears highly desirable. There is always a need during the patient's entire stay for objective and periodic examination of a patient's status and right to release. *Id.* at 19.

be independent of the department of hospitals and would serve as an "ombudsman" for patients. Establishment of such a body would be a substantial step in the direction of insuring that continued confinement is necessary and that the original aims stated at its commencement are being fulfilled.

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