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Constitutional Problems of Civil Commitment Procedures in New Mexico

Edeltraut Hanneman

Mary Anne McCourt

NOTES

CONSTITUTIONAL PROBLEMS OF CIVIL COMMITMENT PROCEDURES IN NEW MEXICO

The courts and the legal profession have only recently become concerned with involuntary civil commitment procedures and the rights of the mentally ill.[1] In contrast to developments in criminal law, where courts have enlarged the scope of procedural and constitutional protections for a defendant, due process safeguards for persons facing civil commitment have been severely limited, considering the potential loss of freedom which commitment entails.

This article will discuss and analyze civil commitment procedures in New Mexico with emphasis on substantive standards, procedural requirements, and the hearing process itself. Potential constitutional deficiencies and needed statutory change will be analyzed in light of developing federal constitutional protection and rights of the mentally ill.[2] Relevant empirical data gathered over a seven-month period in the District Court of Bernalillo County, New Mexico, will also be presented.[3] Furthermore, the need for counsel for the pro-

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To avoid the sexist connotations implicit in the exclusive use of masculine pronouns throughout this paper, we have deliberately alternated the use of "he" and "his" with "she" and "her."

1. In convening a series of hearings on the constitutional rights of the mentally ill, Subcommittee Chairman Sam Ervin commented:

> Certainly the loss of freedom, of property, and of civil and personal rights solely because of mental illness is a process which should disturb every American concerned with the blessings of liberty. It is tempting to say that the problems of the mentally ill and their families are of no concern to the rest of the population.

Hearings on the Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 1st & 2d. Sess., at 1 (1969-1970) [hereinafter *Senate Hearings, 1970*].

2. See O'Connor v. Donaldson, 95 S.Ct. 2486 (1975); Humphrey v. Cady, 405 U.S. 504 (1972); *In Re* Gault, 387 U.S. 1 (1967); *In Re* Ballay, 482 F.2d 648 (D.C. Cir. 1973); Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974) (three-judge court); Bell v. Wayne County General Hospital, 384 F. Supp. 1085 (E.D. Mich. 1974) (three-judge court); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972) (three-judge court); *vacated and remanded on other grounds,* 414 U.S. 473, *reinstated* 379 F. Supp. 1376 (1974), *vacated and remanded on other grounds,* 421 U.S. 957 (1975); and Dixon v. Attorney General of Pennsylvania, 325 F. Supp. 966 (M.D. Pa. 1971) (three-judge court).

3. E. Hannemann, *The Labeling Perspective and Commitment Procedures: A Case Study of Bernalillo District Court in Albuquerque, New Mexico* 38 (unpublished master's thesis in University of New Mexico Library, 1974).

posed patient and counsel's role in the commitment process will be considered.

CIVIL COMMITMENT PROCEDURES IN NEW MEXICO

Initiating Involuntary Commitment

New Mexico emergency and nonemergency involuntary civil commitment are commenced by filing a written application with the district court. Almost anyone involved with the allegedly mentally ill person may file the application.[4] The application for nonemergency commitment must be accompanied by a certificate of a licensed physician or osteopath attesting to having examined the individual and concluding that the proposed patient is mentally ill and should be involuntarily referred for mental health care.[5] The court must notify the proposed patient that an application has been filed and appoint at least one physician to examine the patient and report the findings.[6] If the physician finds mental illness, a hearing is held before a special commissioner to determine if the proposed patient should be committed. If the physician reports a finding of no mental illness, the court must dismiss the application.[7]

4. N.M. Stat. Ann. § 34-2-5 (Supp. 1975). Mental health care upon court order—Judicial procedure.—

A. Proceedings for the involuntary referral of an individual by the court for mental health care under this section may be commenced by the filing of a written application with the district court by a friend, relative, spouse or guardian of the individual, or by a licensed physician, a health of public welfare officer or the head of any public or private institution in which such individual may be. Any such application shall be accompanied by a certificate of a licensed physician that he has examined the individual and is of the opinion that he is mentally ill and should be involuntarily referred for mental health care or a written statement by the applicant that the individual has refused to submit to an examination by a licensed physician.

5. *Id.*

6. N.M. Stat. Ann. § 34-2-5B (Supp. 1975). Upon receipt of an application the court shall give notice thereof to the proposed patient, to his legal guardian, if any, and to his spouse, parents and nearest known other relative or friend.

C. As soon as practicable after notice of the commencement of proceedings is given, the court shall appoint one (1) or more licensed physicians to examine the proposed patient and report to the court his findings as to the mental condition of the proposed patient and his need for custody, care or treatment in a mental hospital or mental health facility, or is in need of any alternative course of mental health care.

7. N.M. Stat. Ann. § 34-2-5E (Supp. 1975). If the report or reports of the licensed physician or physicians is or are to the effect that the proposed patient is not mentally ill, the court may without taking any further action terminate the proceedings and dismiss the application; otherwise, it shall forthwith fix a date for, and give notice of, a hearing to be not less than five (5) nor more than fifteen (15) days from receipt of the report. However, the minimum five-day period may be waived by the court with the consent of the proposed patient's employed or appointed counsel and upon receipt of testimony or an affidavit from the examining physician that immediate hearing is in the best interest, or for the welfare of the proposed patient. If the report or reports of the licensed physician or physicians is to the effect that the proposed patient is mentally ill and is likely to injure himself or others or

The emergency commitment procedure also requires a written application accompanied by a physician's certificate. This certification must include a medical opinion of mental illness and the likelihood of injury to self or others. The individual must be admitted within three days after the medical examination.[8] The medical certification authorizes "any health or law enforcement officer to take the individual into custody and transport him immediately to the nearest hospital or mental health facility that has the approval of the state department of public health as a suitable facility for the custody and care of such patients and which will admit the individual."[9] The patient must be released within 24 hours unless a member of the hospital staff agrees that the person is dangerous to self or to others.[10] And the patient must be released after five days unless the

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is in need of custody, care or treatment, the court, in any community that has a community mental health center or a similar facility, shall proceed as follows: the court shall then refer the proposed patient for examination by the community mental health center and for a report therefrom to the court on the appropriateness of community based care for the patient.

F. The proposed patient, the applicant and all other persons to whom notice is required to be given shall be afforded an opportunity to appear at the hearing, to testify and to present and cross examine witnesses, and the court may in its discretion receive the testimony of any other person. The proposed patient shall not be required to be present, and all persons not necessary for the conduct of the proceedings shall be excluded, except as the court may admit persons having a legitimate interest in the proceedings. The hearings shall be conducted in as informal a manner as may be consistent with the orderly procedure and in a physical setting not likely to have a harmful effect on the mental health of the proposed patient. The court shall receive all relevant and material evidence which may be offered and shall not be bound by the rules of evidence. An opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither he nor others provide counsel, the court shall appoint counsel.

8. N.M. Stat. Ann. § 34-2-18 (Supp. 1975). Involuntary referral for mental health care on medical certification–Emergency procedure–Detention pending judicial determination.–A. The superintendent or admitting physician of a hospital or mental health facility may admit an individual upon:

> (1) the sworn application, signed by any health or law enforcement officer, officer of any charitable institution, legal guardian, spouse or relative stating his belief that the individual appears to be mentally ill and because of his illness is likely to cause injury to himself or others if not immediately taken into appropriate custody, the grounds for such belief, and the names and addresses of the individual's legal guardian, spouse or nearest relative, if known; and
>
> (2) a certification by at least one (1) licensed physician that he has examined the individual and is of the opinion that the individual is mentally ill and, because of his illness, is likely to injure himself or others if not immediately taken into appropriate custody. An individual with respect to which such a certificate has been issued may not be admitted on the basis thereof at any time after expiration of three (3) days after the date of examination by the licensed physician.

9. N.M. Stat. Ann. § 34-2-18A(2), B (Supp. 1975).

10. N.M. Stat. Ann. § 34-2-18C (Supp. 1975). Whenever a patient has been admitted pursuant to this section, he shall be examined by a physician on the staff of the hospital or

hospital or mental health facility has initiated court proceedings.[11]

Methods of Appeal and Periodic Review

Under the New Mexico statute, any court-committed patient is entitled to have the civil commitment order reexamined by the committing court on petition.[12] And the court must unconditionally release a person found to have been erroneously committed. Other avenues of potential relief are available to a person institutionalized against his or her will. The patient has a right to a hearing six months after commitment and once every year thereafter.[13] The patient may also apply for a writ of habeas corpus at any time.[14] The statute also provides for an automatic medical review every six months.[15] If the medical examination shows that the involuntarily committed patient is no longer in need of hospitalization, he must be discharged.[16]

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mental health facility as soon as practicable and in all events within twenty-four (24) hours after admission.

D. After being examined by a staff physician the patient shall be released immediately unless the examining physician finds and certifies that based on his examination he believes the individual is suffering from a mental illness and that he is likely to injure himself or others because of such illness unless provided with appropriate care and custody. Such certification, along with the application and certification for admission shall be maintained with the permanent records of the hospital or mental health facility.

11. N.M. Stat. Ann. § 34-2-18F (Supp. 1975). Every patient involuntarily referred for mental health care under this section shall be released from the hospital or mental health facility within five (5) days after his admission unless the superintendent of the hospital or mental health facility commences or causes to be commenced proceedings for judicial determination pursuant to § 34-2-5 NMSA 1953.

12. N.M. Stat. Ann. § 34-2-12 (Supp. 1975). Petition for re-examination of order of involuntarily referral for mental health care.—Any patient involuntarily referred for mental health care pursuant to section 5 (34-2-5) shall be entitled to a re-examination of the order for his involuntary referral for mental health care on his own petition, or that of his legal guardian, parent, spouse, relative, or friend, to the district court of the county in which he resides or is detained. Upon receipt of the petition the court shall conduct or cause to be conducted by a special commissioner proceedings in accordance with such section 5 (34-2-5) except that such proceeding shall not be required to be conducted if the petition is filed sooner than six (6) months after the issuance of the order of involuntary referral for mental health care or sooner than one (1) year after the filing of a previous petition under this section.

13. *Id.*

14. N.M. Stat. Ann. § 34-2-16 (Comp. 1953). Writ of habeas corpus.—Any individual detained pursuant to this act [34-2-1 to 34-2-25] shall be entitled to the writ of habeas corpus upon proper petition by himself or a friend to any court generally empowered to issue the writ of habeas corpus in the county in which he is detained.

15. The six-month automatic medical review is sometimes shortened to 90 days after hospitalization; as observed at three civil commitment hearings conducted by a special commissioner at the Bernalillo County Mental Health Center, Albuquerque, New Mexico, Sept. 17, 1975.

16. N.M. Stat. Ann. § 34-2-10 (Comp. 1953). Discharge.—The head of a hospital shall as frequently as practicable, but not less often than every six (6) months, examine or cause to

COMMITMENT STANDARDS

The New Mexico statutes require proof that the proposed patient is mentally ill and is either likely to injure self or others or is in need of custody, care or treatment.[17] In all cases New Mexico also requires a showing of the individual's incapacity "to make responsible decisions with respect to his custody, care or treatment."[18] Once these standards have been met, the court may order hospitalization or involuntary referral to a mental health facility for an indeterminate period or for a temporary observational period not exceeding six months, or order an alternative course of treatment in the best interests of the person.[19]

The New Mexico statute does not indicate the rationale underlying its commitment standards.[20] But the state's authority to commit derives either from its role as *parens patriae* or from its police power. Subsection 2(a) of the statute, which requires a likelihood of dangerousness to others, is founded upon the police power of the state. The state has a legitimate interest in protecting its citizens against threats to their persons or property.[21] Where the state's power flows from a finding that an individual is dangerous to self or is in need of care or treatment, that power derives from the *parens patriae* function of the state rather than from the police power. When a mentally ill individual lacks the capacity to make treatment decisions, the state may properly use its *parens patriae* power to compel commitment for the best interests of the person.[22] However, in New Mexico a commit-

be examined every patient and whenever he determines that the conditions justifying involuntary hospitalization no longer obtain, discharge the patient.

17. N.M. Stat. Ann. § 34-2-5G (Supp. 1975). If, upon completion of the hearing and consideration of the record, the court finds that the proposed patient:

> (1) is mentally ill; and
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> (2) (a) because of his illness is likely to injure himself or others if allowed to remain at liberty; or
>
> (b) is in need of custody, care or treatment in a mental hospital or mental health facility, or is in need of any alternative course of mental health care; and
>
> (3) because of his illness, lacks sufficient insight or capacity to make responsible decisions with respect to his custody, care or treatment, it may order his involuntary referral to a hospital or a mental health facility or to the custody of the hospitals and institutions department for an indeterminate period, or for a temporary observational period not exceeding six (6) months; or order any alternative course of treatment which the court believes will be in the best interests of the person and the public; otherwise it shall dismiss the proceedings.

18. N.M. Stat. Ann. § 34-2-5G(3) (Supp. 1975).
19. N.M. Stat. Ann. § 34-2-5G (Supp. 1975).
20. *Id.*
21. *See* Jacobson v. Massachusetts, 197 U.S. 11, 24-25 (1905).
22. *See Developments in the Law–Civil Commitment of the Mentally Ill* 87 Harv. L. Rev. 1190, 1212-22 (1974) [hereinafter *Developments in the Law*].

ment predicated upon a finding of dangerousness must also rest upon a finding that the person lacks "sufficient insight or capacity to make responsible decisions with respect to his custody, care or treatment."[23] The New Mexico statute requires a finding of incapacity both for a police power commitment (dangerousness to others) and for a *parens patriae* commitment (dangerousness to self and need for care or treatment). This showing generally comports with substantive due process because it requires not only that the state have a valid objective, but also that the proposed patient be incapable of making the decisions alone.[24] The state's power to decide flows, in part, from the individuals' inability to do so.

The state's police power may justify confinement of persons found guilty of the commission of a crime, but it does not permit the state to confine persons for potential future criminal conduct.[25] However, the New Mexico statute permits the mentally ill to be confined because of their potential for antisocial behavior, not for harm already caused. The equal protection clause demands that there be a substantial state interest to justify treating the mentally ill person who is potentially dangerous, differently from a sane person similarly predisposed.[26]

Preventive detention of the mentally ill because of their dangerousness can only be justified by a statute which clearly defines the term so that the mentally ill person knows what constitutes "dangerousness" just as the criminal defendant must have notice of what acts are forbidden by a statute. Dangerousness must also be clearly defined to provide governmental authorities and the courts with appropriate standards for enforcing the law.[27]

The United States Supreme Court discussed the concept of dangerousness as a standard for civil commitment in *O'Connor v. Donaldson.*[28] The Court held that a state cannot constitutionally confine a nondangerous mentally ill individual if he is capable of surviving safely in freedom by himself or with the help of willing family members or friends.[29] The Court held that the state had not established a constitutionally adequate purpose for the confinement.[30] Confinement of a nondangerous mentally ill person who can be cared for by

23. N.M. Stat. Ann. § 34-2-5G(3) (Supp. 1975).
24. *See Developments in the Law, supra* note 22, at 1210-28; *see also* Postel, *Civil Commitment: A Functional Analysis,* 38 Brooklyn L. Rev. 1, 28-37 (1971).
25. *See Developments in the Law, supra* note 22, at 1228.
26. *Id.* at 1210, 1215-16 & n. 83.
27. *Id.* at 1253.
28. 95 S. Ct. 2486 (1975).
29. *Id.* at 2494.
30. *Id.* at 2492-94.

family or friends is justified neither by the state's *parens patriae* power nor by its police power.

However, the constitutional issue in *Donaldson* was narrowly drawn by the Court. The Court admitted that it did not have to decide the issue of

> . . . when or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person—to prevent injury to the public, to ensure his own survival or safety, or to alleviate or cure his illness.[31]

Thus, the Supreme Court has yet to consider whether commitment standards requiring only a showing of general "dangerousness" might deprive the proposed patient of his liberty without due process because they are too vague to ensure that individuals will not be committed except in furtherance of valid state objectives.[32]

The New Mexico statutory standard of likelihood of injury to self or to others is subject to different interpretations. The statute does not require proof that the likelihood of injury to self or others is substantial or is based upon a recent overt act of the individual. By contrast, the federal court in evaluating the Wisconsin civil commitment statute *Lessard v. Schmidt* held that substantive due process requires proof of a "recent overt act, attempt or threat to do substantial harm to oneself or another"[33] to validate a commitment for dangerousness.

The court in *Lessard* also held that the Wisconsin civil commitment statute could withstand a constitutional challenge for vagueness only if construed to require a showing of "an extreme likelihood that if the person is not confined he will do immediate harm to himself or others."[34] Similarly, the federal court in *Lynch v. Baxley*, a case challenging Alabama civil commitment procedures, required a "real and present threat of substantial harm to himself or to others."[35]

Dangerousness is usually proven by expert testimony of a physician. Doctors asked whether a proposed patient is dangerous to self or to others invariably answer in the affirmative.[36] The New Mexico statute, like most others, does not specify what magnitude of prob-

31. *Id.* at 2493.

32. *See Developments in the Law, supra* note 22, at 1253 & n. 278. A major Supreme Court case defining the void-for-vagueness doctrine is Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

33. 349 F. Supp. 1078 (E.D. Wis. 1972) (three-judge court).

34. *Id.* The *Lessard* court cited Cross v. Harris, 418 F.2d 1095, 1102 (1969) for this standard of dangerousness.

35. 386 F. Supp. 378, 390 (M.D. Ala. 1974) (three-judge court).

36. E. Hannemann, *supra* note 3, at 38.

able danger or injury must be found or the required likelihood of its occurrence. The testifying physician or psychiatrist is thus left to interpret and predict the amount and degree of danger as he alone deems fit. An American Civil Liberties Union study found that psychiatrists or psychologists agree on the prediction of dangerousness only 54 percent of the time.[37] Another study[38] revealed that judges and juries estimated the potential for dangerous behavior better than hospital staff. But the essential point is not who is more correct in predicting dangerous behavior, but that commitment statutes do not unambiguously specify what constitutes dangerous behavior. The paradox is that "85 percent of all convicted criminals will commit additional crimes after they are discharged from prison. . . . (B)ut . . . we let them go."[39] On the other hand, the mentally ill may be deprived of their liberty on the basis of predictions of future behavior. Not only expert witnesses view the mentally ill as dangerous:

> . . . laymen frequently seem to erroneously view the institutionalized mentally ill as almost universally homicidal or suicidal. The figures do not support this position. Whether the mentally ill are allowed to remain in the community or whether they are institutionalized would seem to have no significant effect on the overall rate of violent crime or suicide.[40]

Research shows that mental patients are, on the whole, less dangerous than the general population.[41] Psychiatrists grossly overpredict[42] dangerousness, ascribing an element of danger to most mental patients.

37. B. Ennis & L. Siegel, The Rights of Mental Patients, The Basic ACLU Guide to a Mental Patient's Rights 286 (1973).

38. J. Rappeport, The Clinical Evaluation of the Dangerousness of the Mentally Ill 4 (1967).

39. B. Ennis & L. Siegel, *supra* note 37, at 23.

40. Testimony of Morton Birnbaum, *Senate Hearings, 1970, supra* note 1, at 639.

41. "Where individuals have been released despite psychiatric findings of dangerousness or inability to get along in the community, the error rate has been shown from 44% to 95%." J. Ziskin, Coping with Psychiatric and Psychological Testimony, 364-365 (1970).

See Senate Hearings, 1970, supra note 1, at 265. *See also* Baxstrom v. Herold, 383 U.S. 107 (1966) which results in the transfer of 1000 mentally ill ex-convicts from a high-security hospital to a civil mental hospital and in the release of some patients, all of whom had been predicted to be extremely dangerous. Fear, which later proved unfounded, was expressed for the safety of the community. The psychiatric predictions were almost totally incorrect. "After one year the Department of Mental Hygiene reported that 'there have been no significant problems with the patients . . . over 200 have been released, and only seven have been certified as too dangerous for a civil hospital' . . .

. . . out of 1000 predictions, the psychiatrists were right only seven times." B. Ennis & L. Siegel, *supra* note 22, at 1230, note 157 for a slightly different conclusion.

42. Dershowitz, *On Preventive Detention,* The New York Review of Books, 22-27 (Mar. 13, 1969); Dershowitz, *The Psychiatrist's Power in Civil Commitment: A Knife That Cuts*

The United States Supreme Court, in *Humphrey v. Cady*,[43] adopted a balancing test between a patient's potential for doing harm and the curtailment of his liberty.[44] To correct the subjectivity in making a prediction of dangerous behavior, the New Mexico civil commitment statutes should clearly define "dangerous behavior" by adopting standards similar to those imposed in *Lessard* and *Lynch*. Because the deprivation of liberty which commitment entails is great, both the magnitude of the probable harm and the likelihood of its occurring must be substantial.

PROCEDURAL DUE PROCESS AND CIVIL COMMITMENT

The United States Supreme Court has developed a two-tiered approach to determining the procedural demands the due process clause imposes upon government actions against individuals. The first inquiry is whether the individual's interest which is affected by government action is "liberty" or "property" within the meaning of the clause.[45] If it is, the Fifth and Fourteenth Amendments require that procedural safeguards suitable to protect individual interests without doing violence to governmental objectives be employed. The court must weigh the importance of individual interests affected against the governmental interest in avoiding the expense and inconvenience which more stringent procedures will entail.[46] The nature of the interests affected and of the dispute itself determine the kind of process which is due. Determining whether due process demands apply to civil commitment procedures depends on whether the involuntary hospitalization of the mentally ill is a deprivation of liberty. Deprivation of liberty can result from physical confinement in a mental health facility, or from other consequences, which may include the loss of numerous civil rights.[47]

Both Ways, 2 Psychology Today 43-47 (Feb. 1969); *Senate Hearings, 1970, supra* note 41, at 639.

43. 403 U.S. 504 (1972).

44. *Id.* at 509.

45. *See* Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972); Morrissey v. Brewer, 408 U.S. 471, 481-83 (1972); Perry v. Sinderman, 408 U.S. 593, 599-603 (1972); *See also* Note, *Procedural Due Process in Government-Subsidized Housing*, 86 Harv. L. Rev. 880, 887-93 (1973).

46. *See* Morrissey v. Brewer, 408 U.S. 471, 481-90 (1972); Richardson v. Perales, 402 U.S. 389, 401-07 (1971); Goldberg v. Kelly, 397 U.S. 254, 263-71 (1970).

47. *See* Lessard v. Schmidt, 349 F. Supp. 1078, 1088-90 (E.D. Wis. 1972) (three-judge court). The Lessard court was particularly influenced by the loss of civil rights under Wisconsin laws. In Wisconsin, a committed mental patient cannot vote, cannot make contracts, cannot drive a car and cannot be married. *Id.* at 1088-89. New Mexico statutes do not prevent the exercise of civil rights by a committed mental patient unless such person is adjudicated an incompetent and has not been restored to legal capacity. Incompetency is determined by a different judicial proceeding than is civil commitment. *See* N.M. Stat. Ann.

Another factor contributes to the deprivation suffered by the involuntarily committed: the individual's stigmatization as mentally ill. The *Lessard* court noted the disabilities often suffered by an individual after his release from a mental institution.[48] Upon release the patient may suffer psychological pressures because of difficulties in readjusting to the outside world. There may also be serious side effects of institutionalization imposed upon persons who did not initially need treatment.[49] Third, a stigma may attach to those involuntarily committed, which rivals or even surpasses in severity that which attaches to those labeled criminal. Laymen often consider mental illness opprobrious, both more serious and threatening than physical disease.[50]

As a result of civil commitment hearings, proposed mental patients are medically and legally labeled by the state mentally ill. The term "mental illness" is general, ambiguous, and arbitrary, but a powerful social label and a stigma.[51] The power and persistence of the label was demonstrated in an experiment conducted recently by Dr. D. L. Rosenhan.[52] Eight pseudo-patients were admitted to different mental hospitals on the East and West coasts. They gained admission by pretending to "hear voices," then ceased simulating any symptoms of abnormality upon admission. Seven of these "sane, normal" persons were labeled "schizophrenic" in state hospitals, and one was labeled "manic-depressive" in a private hospital. Rosenhan, a psychi-

§ 32-2-1 to 32-2-10 and N.M. Stat. Ann. § 34-2-15 (Supp. 1975). The person adjudged incompetent loses his right to dispose of property, to execute contracts, to make purchases, to enter contractual relationships, and to vote. N.M. Stat. Ann. § 34-2-15A(3) (Supp. 1975).

48. 349 F. Supp. at 1089.

49. *See In re* Ballay, 482 F.2d 648, 665 (D.C. Cir. 1973).

50. *See* E. Goffman, Asylums 355-56 (1962):

> In response to his stigmatization and to he sensed deprivation that occurs when he enters the hospital, the inmate frequently develops some alienation from civil society. . . . This alienation can develop regardless of the type of disorder for which the patient was committed, constituting a side effect of hospitalization that frequently has more significance for the patient and his personal circle than do his original difficulties.

See also In re Ballay, 482 F.2d 648, 665 note 56 (D.C. Cir. 1973).

51. The label mental illness is also considered to be a stigma. One commentator, noting that "former mental patients do not get jobs," has insisted that in "the job market, it is better to be an ex-felon than ex-patient." Testimony of Bruce J. Ennis, American Civil Liberties Union, New York, at *Senate Hearings, 1970, supra* note 1, at 284. This statement is also quoted in the *Lessard* case, 349 F. Supp. at 1089.

One critic, who is both a lawyer and a psychiatrist, states: "I might add that I have ruefully discovered that the cure is often worse than the disease, that families are disrupted, jobs are lost, lives are ruined, and . . . the stigma of mental illness has consequences far beyond anything which those of us in this room would really like to consider." Testimony of Dr. Kaufman, *Senate Hearings, 1970, supra* note 1, at 304.

52. Rosenhan, *On Being Sane in Insane Places,* 179 Science 250-59 (1973).

atrist and himself a participant in the experiment, pointed out that "once a person is designated abnormal, all of his other behaviors and characteristics are colored by that label. Indeed, that label is so powerful that many of the pseudo-patients' normal behaviors were overlooked entirely or profoundly misinterpreted."[53] As this study indicates, the psychiatric label has a life and an influence of its own, and the label endures beyond discharge.[54]

The American Psychiatric Association has pointed out that ". . . psychiatrists know full well that irrational factors belie [the diagnosis'] validity and that labels of themselves condition our perception."[55] Nevertheless, in commitment hearings the participants specifically request that the testifying psychiatrist attach a general label, mental illness, and a specific diagnosis, e.g., schizophrenia, manic-depressive, to the proposed patient.[56]

Proposed patients who are labeled mentally ill are often stigmatized socially and professionally.[57] Thomas Szasz, discussing the term stigma and its discrediting attributes, has said that ". . . being considered or labeled mentally disordered—abnormal, crazy, mad, psychotic, sick—is the most profoundly discrediting classification that can be imposed on a person today."[58]

Most patients in American mental institutions are committed involuntarily. One may ask, who determines whether an individual is, or is not, to be committed? Szasz's answer is that institutional psychiatry has unchecked power to make this decision.[59] This unchecked power is wielded in civil commitment hearings, where courts place psychiatric witnesses outside usual legal controls. The decision to label a person insane or sane often rests solely with the expert witness, whose subjective standards decide who is to be

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53. *Id.* at 251.

54. Release for the ex-mental patient is still a traumatic experience, for ". . . nothing has happened to cancel out the stigmas imposed upon him by earlier commitment ceremonies: the original verdict or diagnosis is still formally in effect." Erikson, *Notes on the Sociology of Deviance,* 9 Social Problems 312 (1962).

55. Committee on Nomenclature and Statistics, Am. Psychiatric Ass'n Diagnostic and Statistical Manual of Mental Disorders viii (1968).

56. ". . . the criteria and norms used in defining 'mental disease' are neither specific nor objective, nor are they separate from a multitude of ethical and social considerations inhereint in the labeling process." Testimony of Saleem A. Shah, *Senate Hearings, 1970, supra* note 1, at 584.

57. Note that in July, 1972, Senator Thomas Eagleton was forced to resign from the vice presidential race in part, at least, because of his history as a mental patient. *See also In re* Ballay, 482 F.2d 648, 668 n. 72 (D.C. Cir. 1973).

58. T. Szasz, The Manufacturing of Madness 62 (1970) [hereinafter cited as Szasz]. *Cf.* Brown v. Board of Education, 347 U.S. 483, 494 (1953).

59. T. Szasz, *supra* Note 58.

labeled mentally ill.[60] Testifying psychiatrists are the agents of private lawyers or district attorneys who, not trained in medicine or psychiatry, accept the subjective, unscientific labeling process and use it as evidence to support commitment.

Jerome J. Shestack, chairman of the American Bar Association Commission on the Mentally Disabled, has noted that testifying psychiatrists often play two roles: the traditional one of doctor to patient, and that of technician requested by the employing institution or the state to make an objective evaluation for legal purposes; and

> Deprivation of a person's liberty or status without due process has long been the law's concern, particularly when the depriving institution is an arm of the state. The dangers that may arise from the psychiatrist's conflict of roles are precisely dangers to human freedom. Hence, it can hardly be denied that the role conflict is an appropriate one for the law's intervention.[61]

The difficulty of the psychiatrist's discharging such inconsistent duties is compounded by the inherently unreliable nature of the prediction he is asked to make. The most common findings[62] indicate that psychiatrists agree upon diagnoses no more than 60 percent of the time. The resulting danger of erroneous deprivation of individual liberty dictates the need for stringent procedural safeguards.

The court must also consider the objectives of the state in civil commitment process. The court must recognize the state's concern for efficient and economic allocation of its resources.[63] However,

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> "The following ideas have been presented to the committee: the conviction that most people currently labeled mentally ill are not ill at all, but show learned behavior patterns that are deviant and usually maladaptive; . . . that . . . [they] . . . can learn 'crazy' behavioral responses to various situations . . . if the 'crazy' responses should happen to be reinforced; that the term 'mental illness' relieves the individual of responsibility for his behavior and creates unrealistic expectations of cure from an external source. . . ."

Senate Hearings, 1970, supra note 1, at 570.

61. Shestack, *Psychiatry and the Dilemmas of Dual Loyalties,* 60 A.B.A. J. 1521, 1523 (1974).

62. Several research studies indicate reliability of diagnosis between two psychiatrists from as high as 60 percent, to 54 percent, and as low as 42 percent *supra* note 41, at 181-83. See the following studies in J. Ziskin: Ash, *The Reliability of Psychiatric Diagnosis,* 44 J. Abnormal Social Psychology 272 (1949); V. Norris, Mental Illness in London (Maudsley Monograph 1959); Spitzer, Cohen, *et. al., Quantification of Agreement in Psychiatric Diagnosis,* 17 Archives Gen. Psychiatry 83 (1967); Beck, Wane, *et. al., Reliability of Psychiatric Diagnoses: A Study of Consistency of Clinical Judgments and Ratings,* 11 Am. J. Psychiatry 351 (1962).

63. *See Developments in the Law, supra* note 22, at 1272.

the most significant goals of the state are the substantive objectives defined by the statutory standards for commitment. The state has a valid interest in preventing those changes in procedure which will thwart the substantive objectives of the statute.

Commitment standards authorize involuntary hospitalization by the state under the police power and the *parens patriae* power. It is necessary to distinguish between these two kinds of commitments in order to understand the state's argument for relaxed procedural protections.[64]

The state has an interest in confining those persons who are dangerous to others under its police power.[65] This substantive objective is impaired by procedural safeguards which might increase the margin of error that a dangerous person will go free. Recognition of the right to remain silent or a higher burden of proof might have this effect. However, the state's interests would not be impeded by procedures which increase the accuracy of the factfinding process, such as an indigent's right to an independent psychiatric examination at state expense.

In *parens patriae* commitments the state can offer other reasons for relaxed procedures. Under this power, a person who lacks sufficient capacity or insight to determine whether he needs care and treatment may be confined if the courts finds the benefits of hospitalization outweigh the deprivations of commitment.[66] The state can justify an informal procedure because its motives are benevolent, not punitive, and because a formal adversary setting might traumatize the proposed patient.[67]

Traditionally, courts have refused to apply stringent due process safeguards to civil commitment proceedings on the grounds that civil commitment procedures are civil, not criminal in nature.[68] Therefore, the argument goes, procedural requirements due criminal defendants are not mandated, even though civil commitment in-

64. *See In re* Ballay, 482 F.2d 648, 656-60 (D.C. Cir. 1973). The court held that in police power commitments, based upon the dangerousness of the proposed patient, stringent due process safeguards should be applied as in criminal prosecutions but that in *parens patriae* commitments, based upon a person's danger to himself, relaxed procedures may be justified in some circumstances to avoid interference with the individual's care and treatment. *Id.* at 658-59.

65. *See Developments in the Law, supra* note 22, at 1223-45.

66. *Id.* at 1212-22. Who bears the cost of mistakes under the parens patriae model? Those who need treatment but who are not committed ("undercommitted") and those who do not need treatment but are committed ("overcommitted"). *See* Comment, *The Role of Counsel in the Civil Commitment Process: A Theoretical Framework*, 84 Yale L.J. 1540, 1553 (1975).

67. *Developments in the Law, supra* note 22, at 1273 n. 60.

68. *See* Postel, *supra* note 24; *Project: Facts and Fallacies about Iowa Civil Commitment*, 55 Iowa L. Rev. 895 (1970).

cludes the possibility of abridgement of personal freedom, just as does imprisonment for the commission of a crime.

Another argument used to oppose application of due process safeguards to involuntary civil commitment contends that because the alleged mentally ill person will receive needed treatment, lack of procedural safeguards is excused.[69] This contention that the state's use of its *parens patriae* power justifies commitment with relaxed procedural standards has recently been rejected.[70] Similarly, recent federal court decisions have cast doubt upon the validity of the civil/criminal distinction.[71] *Lessard v. Schmidt*[72] declared Wisconsin's commitment procedure unconstitutional, rejecting both of the foregoing arguments. The court held that the magnitude of the individual interests affected by involuntary civil commitment mandate "strict adherence to stringent procedural requirements and the necessity for narrow, precise standards."[73] The court found that the possibility of involuntary confinement, whether for the commission of a crime or for treatment as a mental incompetent,[74] demands that procedural due process protection be stringent. The court relied in part on Supreme Court decisions applying due process safeguards to juvenile court proceedings[75] which, like civil commitment proceedings, have the ostensible goal of helping, not punishing, the subject of the proceedings.

The *Lessard* court relied on *Kent v. United States*[76] in rejecting the argument that right to treatment justifies lack of procedural due process. The court noted that an individual institutionalized in a mental hospital may not receive the beneficial care necessary to compensate for the loss of liberty and that several mental illnesses remain untreatable.[77] Thus, the *Lessard* court concluded, "no per-

69. *See* Lessard v. Schmidt, 349 F. Supp. 1078, 1086-87 (E.D. Wis. 1972) (three-judge court); Note, *Lessard v. Schmidt: Due Process and Involuntary Civil Commitment*, 68 Nw. U.L. Rev. 585, 593 n. 30 (1973).

70. Lessard v. Schmidt, 349 F. Supp. 1078, 1086-87 (E.D. Wis. 1972) (three-judge court).

71. *Id.* at 1088; Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968).

72. 349 F. Supp. 1078 (E.D. Wis. 1972) (three-judge court).

73. *Id.* at 1088.

74. *Id.* at 1086-90.

75. Kent v. U.S., 383 U.S. 541 (1966); *In re* Gault, 387 U.S. 1 (1967). Similarly, the New Mexico Supreme Court in Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968), held that juveniles are entitled to the essentials of due process and fair treatment.

76. 383 U.S. 541 (1966).

77. 349 F. Supp. at 1087. See Livermore, *On the Justifications for Civil Commitment*, 117 Pa. L. Rev. 75, 93 (1966) (quoting psychiatric finding that recovery rates from long term paranoid schizophrenia are very low, and substantial evidence that any lengthy hospitalization, particularly where it is involuntary, may greatly increase the symptoms of mental illness and make adjustment to society more difficult). *See also, Senate Hearings, 1970, supra* note 1, at 214-15, 319, 409.

son should be subjected to 'treatment' against his will" unless procedural due process requirements have been met.[78]

The Supreme Court of New Mexico in *State v. Sanchez*[79] held that due process was afforded a proposed patient who only had notice and an opportunity to defend. However, many courts have since imposed more stringent procedural requirements and more narrow and precise standards.[80] The New Mexico Supreme Court's willingness to require a more precise standard of proof for civil commitment in *State v. Valdez and Garcia,*[81] may indicate a willingness to re-evaluate the procedures by which New Mexico permits commitment of the allegedly mentally ill.

Assuming that due process safeguards are required in involuntary civil commitment procedures, what procedures does due process require? This question will be explored in two contexts—nonemergency civil commitment pursuant to § 34-2-5 of the New Mexico statutes and emergency commitment pursuant to § 34-2-18 of the New Mexico statutes.

Right to Notice

The United States Supreme Court has considered notice as essential to procedural regularity as the hearing itself.[82] This right to notice is founded in the Fourteenth and Fifth Amendments. The Supreme Court stated in a landmark case involving the right to notice:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.[83]

More specifically, effective notice must be both timely and explan-

78. 349 F. Supp. at 1087. *See also* the invalidation of state commitment statutes on due process grounds in Bell v. Wayne County General Hospital, 384 F. Supp. 1085 (E.D. Mich. 1974) (three-judge court), and Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974) (three-judge court).

79. 80 N.M. 438, 457 P.2d 370 (1969), *appeal dismissed,* 396 U.S. 276 (1970). For a critical analysis of the holding in State v. Sanchez, *see Developments in the Law, supra* note 22, at 1247-48; also *see* Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives,* 70 Mich. L. Rev. 1108, 1141-42 (1972).

80. *See, e.g.,* Lessard v. Schmidt, 349 F. Supp. 1078, 1088 (E.D. Wis. 1972) (three-judge court).

81. 88 N.M. 338, 540 P.2d 818 (1975).

82. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

83. *Id.*

atory:[84] it must provide enough time and convey enough information to allow the recipient to respond effectively.[85] Adequate notice preceding a hearing must be given all persons with substantial interests which the state seeks to affect. Welfare recipients must be given notice of the reasons for proposed termination of welfare payments.[86] Prior to a preliminary hearing on probable cause for parole revocation, alleged parole violators must be notified of their alleged misconduct.[87] Minors and their parents must be given notice of charges relating to juvenile delinquency proceedings.[88] As in criminal prosecutions,[89] due process requires that persons subject to civil commitment procedures be given adequate notice of charges against them so that they may have sufficient time to prepare their defense.[90]

The New Mexico statute does not require notice of hearings to determine whether nonemergency involuntary commitment will be ordered.[91] In *State v. Sanchez*[92] the New Mexico Supreme Court held that notice of the nonemergency commitment hearing was required both by the statute and by due process, but the Court did not mention what the notice must include.

Some disagreement between members of the medical and legal professions exists regarding the requirements of notice. Doctors object to the requirement because service of papers upon an alleged

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84. In *In re* Gault, the Court said:

> 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, and it must "set forth the alleged misconduct with particularity."

387 U.S. 1, 33 (1967).

85. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), the Court stated:

> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected. . . .

Id. at 315. Quarae: what is "reasonable" in the context of civil commitment proceedings?

86. Goldberg v. Kelly, 397 U.S. 254, 268 (1970).

87. Morrissey v. Brewer, 408 U.S. 471, 486-87, 489 (1972). The notice prior to preliminary hearing must include specific references to the alleged parole violations cited as grounds for parole revocation. *Id.* at 487.

88. *In re* Gault, 387 U.S. 1, 31-3 (1967).

89. *See, e.g.,* Garfield v. United States *ex rel.* Goldsby, 211 U.S. 249 (1908); Holden v. Hardy, 169 U.S. 366 (1898).

90. *See, e.g.,* Simon v. Craft, 182 U.S. 427, 436 (1901); Lessard v. Schmidt, 349 F. Supp. 1078, 1091-92 (E.D. Wis. 1972) (three-judge court).

91. N.M. Stat. Ann. § 34-2-5B; § 34-2-18 (Supp. 1975).

92. 80 N.M. 438, 457 P.2d 370 (1969), *appeal dismissed,* 396 U.S. 276 (1970).

mentally ill person might aggravate her mental state.[93] Legal commentators reject this view because it presupposes insanity,[94] the very matter sought to be established by the commitment process.

Under the due process requirements delineated in *Lessard,* notice must be given regardless of the circumstances because of the potential for serious deprivation of liberty.[95] Following *Lessard,* the federal court in *Bell v. Wayne County General Hospital,*[96] held that the Michigan statute failed to provide due process because it did not require that notice, including a copy of the petition itself, be served on the patient prior to the hearing to allow adequate preparation.[97] The *Bell* court reasoned that due process requires the same kind of notice as that required in juvenile criminal proceedings.[98]

The New Mexico statute says that "upon receipt of an application the court shall give notice thereof to the proposed patient. . . ."[99] It does not require that the actual application for commitment be delivered to any person or that the notice include the grounds for the proposed commitment and the factual basis for the application. In all other civil and criminal actions the defendant is made aware of the nature of the allegations against him. The criminal defendant receives at his arraignment a copy of the indictment or information. The civil defendant receives a copy of the complaint setting out the plaintiff's allegations when served with summons.

In *Lynch v. Baxley*[100] the court set explicit due process standards for notice to the proposed patient: notice must include the date, time and place of the hearing; a clear statement of the purpose of the proceedings and the potential consequences involved; the alleged facts upon which the proposed commitment is based; and a state-

93. *Developments in the Law, supra* note 22, at 1274-75.

94. Weihofen, *Hospitalizing the Mentally Ill,* 50 Mich. L. Rev. 837, 844 (1952).

95. 349 F. Supp. at 1092.

96. 384 F. Supp. 1085 (E.D. Mich. 1974) (three-judge court).

97. *Id.* at 1092.

98. *Id.*

99. N.M. Stat. Ann. § 34-2-5B (Supp. 1975). State *ex rel.* Hawks v. Lazaro, 202 S.E.2d 109 (W. Va. 1974), held that the notice provisions of the West Virginia civil commitment statute were unconstitutional as applied. The statutory requirement of West Virginia is almost identical to that of New Mexico. W. Va. Code 27-5-4(b) (Supp. 1975), as amended provides: "Upon receipt of an application, the clerk shall give notice thereof to the individual. . . ." In *Hawks,* the court said:

> 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 contain 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.

202 S.E.2d 109, 124 (W. Va. 1974).

100. 386 F. Supp. 378 (M.D. Ala. 1974) (three-judge court).

ment of the legal standard upon which such commitment is authorized.[101]

The New Mexico statute should set out more specific requirements for notice to the prospective patient. Such notice should include the purpose, time and place of the hearing, and should include a copy of the application for commitment. Notice should come sufficiently in advance of the hearing to permit preparation of an adequate defense. Notice should also be given of the statutory basis for the proceeding, the right to counsel, and the factual basis for allegations of mental illness and dangerousness to self or others. Lack of full notice renders the opportunity to be heard meaningless because the respondent in the civil commitment action is disabled from presenting a well-reasoned and convincing case on his behalf. Thus, the process of applying substantive law to facts through the adversary proceeding is subverted because the proposed patient cannot present an argument equal in weight to that of the state.

Right to Preliminary and Full Hearings

The right to an opportunity to be heard following notice is fundamental under the Fourteenth and Fifth Amendments.[102] Due process tolerates variances in the form of a hearing "appropriate to the nature of the case,"[103] and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]."[104]

The threat to individual interests in "liberty" at stake in civil commitment proceedings necessitates a hearing on probable cause and a full hearing on the merits. The purpose of the preliminary probable cause hearing is to determine the propriety of detaining a person several days for psychiatric observation and care. The purpose of the full hearing is to determine whether the alleged mentally ill person should be hospitalized indefinitely.[105]

Two recent lower federal court cases have held that a hearing to determine probable cause for detention is constitutionally required within a reasonable time after an emergency commitment proce-

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101. *Id.* at 388.

102. *See, e.g.,* Fuentes v. Shevin, 407 U.S. 67, 81-82 (1972); *see also* Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974); North Georgia Finishing, Inc. v. Di-Chem, Inc., 95 S. Ct. 719 (1975).

103. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

104. Boddie v. Connecticut, 401 U.S. 371, 378 (1971).

105. Lessard v. Schmidt, 349 F. Supp. 1078, 1091-92 (E.D. Wis. 1972) (three-judge court). *See also* Gerstein v. Pugh, 95 S. Ct. 854 (1975), in which the United States Supreme Court held that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following a warrantless arrest.

dure.[106] In New Mexico prior to judicial commitment of the individual for observation a judge must find that the person is "suffering from a mental illness and that he is likely to injure himself or others because of such illness unless provided with appropriate care and custody."[107] The hearing procedure must be initiated within five days after the patient is admitted to a hospital or mental health facility or the patient must be released.[108] The statute also requires that a doctor be appointed who will make an examination of the individual "as soon as practicable."[109] The statute further requires that the full hearing on the merits be held between five and 15 days after receipt of the doctor's report.[110]

The statute which governs the emergency commitment procedure fails to set a time limit other than "as soon as practicable" for appointment of the examining physician. There is no time limitation within which the medical report must be filed. There is also no statutory maximum number of days during which an individual may be confined in the state hospital prior to a full hearing.

The statute alone cannot be taken at face value, since the emergency commitment procedure actually followed does not provide a speedy hearing for the alleged mentally ill person.[111] The fact that the statute requires commencement of proceedings for a hearing within five days of incarceration is deceiving. In practice, the hearing is usually held six to eight weeks after the individual is institutionalized.[112]

Recent decisions support the proposition that statutory procedures which permit much time to pass before a full hearing are invalid. In *Bell v. Wayne County General Hospital* a three-judge federal court held that temporary detention for a maximum of 120

106. *In re* Barnard, 455 F.2d 1370 (D.C. Cir. 1971); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972) (three-judge court). In *Lessard,* the Court based the right to a meaningful hearing upon the language in *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971): an individual must "be given an opportunity for a hearing before he is deprived of any significant property interest. . . ." The *Lessard* court said:

> The individual's interest in liberty is even more compelling than his interest in property rights: it follows that no significant deprivation of liberty can be justified without a prior hearing on the necessity of the detention.

Id. at 1091.

107. N.M. Stat. Ann. § 34-2-18D (Supp. 1975).

108. *Id.* § 34-2-18F. The statute provides for the indirect action of the head of the hospital or admitting physician in commencing commitment proceedings by the language "cause to be commenced;" it is not clear what these words mean.

109. N.M. Stat. Ann. § 34-2-18C (Supp. 1975).

110. N.M. Stat. Ann. § 34-2-5E (Supp. 1975).

111. N.M. Stat. Ann. § 34-2-5F (Supp. 1975).

112. Stipulation of Facts at 5A, Thompson v. Hensley, Civil No. 74-279 (D. N.M., filed May 30, 1974); Stipulation filed on Jan. 28, 1975).

days without a hearing was an unconstitutional deprivation of liberty without due process.[113] The court held that the Fourteenth Amendment demands a prompt preliminary probable cause hearing within five days and a full hearing, if probable cause exists, within a reasonable time.[114] In *Lynch v. Baxley*[115] the court found the Alabama emergency commitment statute unconstitutional on its face,[116] partly because the statute permitted apprehension of a person without limit on the time he could be held prior to being brought before a judge. In *Lynch* the court concluded:

> [W]here a person said to be mentally ill and dangerous is involuntarily detained, he must be given a hearing within a reasonable time to test whether the detention is based upon probable cause to believe that confinement is necessary under constitutionally proper standards for commitment.[117]

The court in *Lessard* invalidated a provision permitting incarceration without a hearing for five days.[118]

Lessard, Bell, and *Lynch* all require judicial review or approval of extension of time prior to a hearing.[119] In *Bell* and in *Lessard* the statutes under review set a definite time period during which a hearing on probable cause had to be held; the New Mexico statute does not provide for judicial review of detention pending a full hearing, nor does it set a specific time limit within which a hearing must be held. It sets only a time limit for the "commencement" of proceedings.[120]

In the recent case of *Thompson v. Hensley*[121] the New Mexico emergency commitment statute and the procedures involved were

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113. 384 F. Supp. 1085 (E.D. Mich. 1974) (three-judge court). The Bell court based its holding upon Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972) (three-judge court) and upon *In re* Barnard, 455 F.2d 1370 (D.C. Cir. 1971). The court quoted from the Barnard opinion:

> [W]here a person, said to be mentally ill and dangerous, is involuntarily detained, he must be given a hearing within a reasonable time to test whether the confinement is based upon probable cause. . . . When personal freedom is at issue due process at least demands that a person's legal status be determined at the earliest possible time.

455 F.2d at 1374-75.

114. 384 F. Supp. at 1098.

115. 386 F. Supp. 378 (M.D. Ala. 1974) (three-judge court).

116. *Id.* at 387.

117. *Id.* at 388.

118. 349 F. Supp. at 1090.

119. *See* Memorandum Brief in Support of Permanent Injunction for Plaintiff at 7, Thompson v. Hensley, Civil No. 74-279 (D. N.M., Dec. 23, 1975); Brief filed on Jan. 28, 1975.

120. N.M. Stat. Ann. § 34-2-18F (Supp. 1975).

121. Civil No. 74-279 (D. N.M., Dec. 23, 1975).

challenged before a three-judge federal court in Albuquerque. The plaintiff alleged violation of his constitutional rights by the district attorney of his county, the admitting physician, and the hospital staff of Las Vegas State Hospital.[122] The plaintiff sought a declaratory judgment that § 34-2-18, N.M.S.A., is unconstitutional for several reasons: 1) lack of notice to the proposed patient and lack of a preliminary hearing on probable cause; 2) lack of judicial review of the emergency detention; 3) transportation and incarceration in a mental institution far from the person's residence prior to a full hearing; 4) lack of any time limit within which a full hearing must be held; 5) vague and overbroad criteria for mental illness and dangerousness to self or to others; and 6) procedural inadequacies of the subsequent full hearing held at the Las Vegas State Hospital.[123] Thompson alleged that as of March 25, 1974, one person had been confined in the Las Vegas State Hospital for five and a half years; four for two and a half years; and 33 persons for up to 18 months pursuant to emergency commitment procedures without a hearing.[124] On December 23, 1975, the three-judge court rendered its opinion in the case.[125] Over one dissent, the court found the statute met the due process requirements of the Fourteenth Amendment.[126]

Despite this holding, the state's imposing such serious deprivation of individual liberty without ever having presented to a neutral magistrate facts which show that the deprivation is substantially authorized seems clearly to contravene the language and the purpose of the due process clause, and is inconsistent with the decisions of other federal courts. Statutory provisions limiting the time during which a person can be committed without judicial authorization are required.

Presence of the Proposed Patient at the Hearing

Under the New Mexico statute, the proposed patient "shall not be required to be present" at the civil commitment hearing.[127] However, the court in *Lynch v. Baxley*[128] held that due process requires

122. *See* Second Amended Complaint, Thompson v. Hensley, Civil No. 74-279 (D. N.M., Dec. 23, 1975).

123. *Id.*

124. Stipulation of Facts at 5A, Thompson v. Hensley, Civil No. 74-279 (D. N.M., Dec. 23, 1975); Stipulation filed on Jan. 28, 1975.

125. Thompson v. Hensley, Civil No. 74-279 (D. N.M., Dec. 23, 1975); Motion to Amend filed Jan. 5, 1975.

126. Memorandum Opinion at 3, Thompson v. Hensley, Civil No. 74-279 (D. N.M., Dec. 23, 1975).

127. N.M. Stat. Ann. § 34-2-5F (Supp. 1975).

128. 386 F. Supp. 378 (M.D. Ala. 1974 (three-judge court).

the presence of the person proposed to be involuntarily committed at all judicial proceedings conducted for that purpose unless the right to be present has been knowingly and intelligently waived by such person or by his "adversary" counsel.[129] Such a waiver is valid only upon acceptance by the court following a judicial determination that the person understands the nature of the right and is competent to waive it. The court must determine that the proposed patient is so mentally and physically ill as to be incapable of attending the civil commitment proceedings. The *Lynch* court also said that the right to participate at the hearing "to the extent of the subject's ability"[130] precludes administering excessive or inappropriate medications to the proposed patient immediately preceding the hearing.[131]

The presence of the person at the hearing is closely related to the opportunity to be heard. The proposed patient has an interest in being present to confront witnesses testifying against him, a right afforded criminal defendants by the Sixth Amendment. The individual's presence at both the preliminary hearing and the hearing on the merits may be helpful. The individual will be assured that her interests are being protected, and presence at the hearing will give the trier of fact an opportunity to speak to the individual and observe her manner and behavior.[132] If the psychiatric reports are conclusory in nature or framed in medical terms unrelated to the statutory commitment standards, the factfinder can compare his own observations of the proposed patient who is present with those of the examining doctor.[133]

New Mexico's permitting absence of the proposed patient demonstrates an *a priori* assumption of mental illness,[134] making "railroading" persons into mental institutions more likely. Presence of the person is essential to reduce the danger of commitment of persons who do not meet commitment standards and who have no other opportunity to defend themselves.

Right to Counsel

The New Mexico statute for nonemergency commitment requires that every proposed patient be given an opportunity to be represented by counsel and that the court appoint an attorney if none has

129. *Id.* at 388-90.

130. *Id.* at 389.

131. *Id. See also* Developments in the Law, *supra* note 22, at 1282, n. 111.

132. *See Developments in the Law, supra* note 22, at 1282-83. One court has held that failure to allow the proposed patient to be present at the hearing violates due process. *See* State *ex rel.* Hawks v. Lazaro, 202 S.E.2d 109, 125 (W. Va. 1974).

133. *Developments in the Law, supra* note 22, at 1282-83.

134. E. Hannemann, *supra* note 3, at 31.

been retained.[135] Under the emergency commitment procedure, the right to counsel is also provided in the judicial proceeding which is held after the proposed patient is confined in the hospital or mental health facility.[136] However, New Mexico statutes covering both emergency and nonemergency commitment do not establish the right of the alleged mentally ill person to notice of his right to counsel at the outset of the commitment process.

The court in *Bell* extended the right to counsel to every step of the commitment proceedings and held that a person must also be notified of this right at the outset of the proceedings.[137] Under the *Lynch* rule the proposed patient is entitled to counsel at all "significant stages" of the commitment process, which include all judicial proceedings and "any other official proceedings at which a decision is, or can be, made which may result in a detrimental change in the conditions of the subject's liberty."[138] *Lynch* does not require that right to counsel in Alabama extend to preliminary information gathering stages of any proceeding, but the patient must be advised of the right to counsel and to appointment of counsel if indigent. The court specified that counsel must be made available to the proposed patient far enough in advance of the final commitment hearing so that there is sufficient time for preparation. Before the final commitment hearing, the names of the examining physicians and all other witnesses testifying in support of the petition to commit must be made available to counsel for the proposed patient. He or his attorney must also be afforded a reasonable opportunity to inspect any documents and records pertaining to the case.[139] The court also held that appointment of a guardian *ad litem* for the subject of an involuntary civil commitment proceeding satisfies the constitutional right to counsel only if the guardian is a licensed attorney and occupies a "truly adversary position."[140]

To demonstrate the need for such right to counsel rules, it is perhaps best to introduce observations and findings of commitment hearings as conducted in Bernalillo County District Court.

Case Study of Bernalillo County District Court

Civil and criminal commitment hearings were observed in the district court of Bernalillo County from September 1973 to March

135. N.M. Stat. Ann. § 34-2-18B (Supp. 1975).

136. § 34-2-18F states that proceedings for judicial determination must be commenced pursuant to section 34-2-5 NMSA (1953).

137. 384 F. Supp. at 1093.

138. 386 F. Supp. at 389; *Id.* at n. 5.

139. *Id.* at 389.

140. *Id.*

1974, a seven-month period. Most district court judges welcomed research in this area and granted lengthy interviews, although one did not allow any research in his courtroom. Access to court files to obtain a more thorough and accurate sample was requested. However, access was denied on the ground of confidentiality, an unfortunate research limitation. Data had to be gathered by the non-participant observation method, which resulted in a limited working sample.

The majority of "insanity" hearings, as they are anachronistically called, were held in a formal public courtroom,[141] although some were held in the judge's private chamber. Judges were assigned on a rotating basis to hear the cases. Almost all proposed patients were indigents represented by court appointed counsel.[142] Court appointed attorneys are chosen by the district attorney's office. At the time of the study lawyers donated their time for these hearings. A rule since adopted provides that appointed counsel for civil commitment hearings now receive $60 per case[143] from the Bernalillo County Commission Civil Insanity Fund. There can be little doubt that the time for preparation of a defense is severely limited. Because of late appointments and low payment for their work at the time of the study, attorney involvement was usually minimal. It was not at all unusual for counsel and client to meet for the first time shortly before the commitment hearing started. Thus, counsel must have obtained information from the physician or psychiatrist or from the district attorney, and not from the proposed patient. Most attorneys did not cross-examine the expert witness thoroughly. They asked a few questions as to medical details, which served to emphasize their own lack of medical and psychiatric expertise, or they belabored one minor point, perhaps to legitimize their role as representative of the proposed patient.

It should be noted that in this study the testifying expert witness was either a psychologist, a doctor of general medicine or a psychiatrist. Whereas most state laws require that one or two psychiatrists make evaluations and testify, the New Mexico statutes state that only one "licensed physician," or an "osteopath" is needed.[144]

141. All civil commitment hearings are now held at the Bernalillo County Mental Health Center. A special commissioner assigned by the district court conducts the hearings.

142. N.M. Stat. Ann. § 34-2-5F (Supp. 1975).

143. Interview with Helen Cordova, Secretary of District Attorney's Office, Albuquerque, New Mexico, Sept. 15, 1975.

144. N.M. Stat. Ann. § 34-2-1C (Supp. 1975). Licensed physician. A doctor of medicine or osteopathy licensed under the laws of this state to practice medicine or a medical officer of the government of the United States while in this state in the performance of his official duties.

During the course of this study it was common practice in Bernalillo County District Court to have general practitioners testify as experts in psychiatric cases.

In several hearings the expert witness was a psychologist, who although perhaps capable, was not the "licensed physician" required by the statute. Yet, his professional opinions and testimony admitted into evidence became the basis for commitment. Following one judge's refusal to accept a psychologist's testimony because it did not conform to statutory requirements,[145] progressively more psychiatrists testified at commitment hearings. But it is incongruous that the New Mexico statute allows a physician who took perhaps one course in psychiatry in medical school to testify to a person's mental condition, while experienced psychologists with years of study are barred.

Over a period of seven months, 27 mental competence hearings were observed at the Bernalillo County Courthouse. Of these, 11 were civil and 16 criminal. The data from the criminal hearings is not relevant because the question was the defendant's competency to stand trial, not whether he should be involuntarily committed to a mental health facility. This is a very small sample for data analysis, of course, and one cannot build a very compelling case from it; but the hearings observed were almost the only ones conducted during the period of the study and, in that sense, are virtually a universe. Despite the small size of the sample, some interesting tendencies appear in the data.

Most other studies of commitment procedures in the literature deal exclusively with civil cases, and for purposes of comparison with other such studies, this discussion must be confined to civil cases, making the sample even smaller. Of the 11 patients proposed for civil commitment, 10 were committed. The other was referred for outpatient treatment with the provision that if he failed to participate he would be arrested.

AVERAGE LENGTH OF HEARING
BY TYPE OF OUTCOME

Outcome	*No.*	*Average (min.)*
Civil commitment indefinite	7	18.4
Civil commitment 6 months	3	18.3
Release	0	—

The working sample of 10 hearings resulted in seven civil commitments for an indefinite period of time, three commitments for a

145. Court hearing, Bernalillo County District Court, Albuquerque, New Mexico, Oct. 15, 1973.

six months period, and a zero release rate. The average length of the hearings was 18.4 minutes per case, with a range from 5 to 31 minutes. This average is very high when compared to other studies. Miller and Schwartz[146] reported that the average length of hearings in their study was 4.1 minutes, and some cases were completed in less than two minutes. Scheff,[147] who studied civil commitment proceedings in a Midwestern state, observed 22 hearings in one court. He calculated a mean time of 1.6 minutes per hearing. Wenger and Fletcher,[148] who researched the effect of legal counsel on the length of hearings, found that the average length was 8.13 minutes but that hearings at which counsel was present were twice as long (16.84 minutes) and those without legal counsel (6.15 minutes).

In Bernalillo County legal counsel was present at every commitment hearing, and the high average of 18.4 minutes per case suggests a more thorough and concerned investigation than elsewhere. This is misleading, for most of the hearing time is taken up by the testimony of the expert witness, the court appointed psychiatrist. In contrast to other states, where the average hearing length is considerably shorter than that in Bernalillo County, a detailed and lengthy explanation by the doctor is welcomed by everyone (except possibly the proposed patient). Of course, a lengthy hearing is preferred to two-minute ones, but the outcome is usually the same.

In all 10 cases covered by this study the psychiatrist's recommendations were accepted by the court. This alone indicates the doctor's power in commitment hearings. One could easily argue that, if the doctor's testimony determines the outcome of most hearings, why then have a hearing at all? Why cloak medical opinions in a veil of legality?

Hearings observed during this study certainly do not protect the proposed patient's rights, nor were patients adequately represented by counsel. The proposition that civil commitment hearings are ritualistic, farcical and lacking in due process seems valid when the zero release rate is considered. A zero release rate suggests that counsel never "won" a case and that the court never overruled the psychiatrist's recommendations.

To summarize, the findings suggest that civil commitment procedures are neither complete nor adversarial. Although the average

146. Miller & Schwartz, *County Lunacy Commission Hearings: Some Observations of Commitments to a State Hospital,* 14 Social Problems 26, 32 (1966).

147. Scheff, *Social Condition for Rationality: How Urban and Rural Courts Deal with the Mentally Ill* in Mental Illness and Social Processes 107-118 (1967).

148. Wenger & Fletcher, *The Effect of Legal Counsel on Admissions to a State Mental Hospital: A Confrontation of Professionals,* 10 Journal of Health and Social Behavior 69 (1968).

length of a hearing was 18.4 minutes, much higher than in other studies, hearings were dominated by the expert witness' testimony, which determined the outcome of court orders. The data suggest that court appointed counsel do not adversarily represent proposed patients, but perform primarily a ceremonial function. To call them "roleless" attorneys seems appropriate.

> Civil commitment proceedings are further characterized by mutual expectations of perfunctory performance. No pressure for the alteration of role and function is exerted from the formal participants—the judge, the attorney, the psychiatrist, or the proposed patient. All seem content to go through the empty ritual of the hearing and resist any temptation to indulge in self-evaluation.[149]

The data also indicates that on the basis of this ritualistic legal ceremony, people are effectively incarcerated. "Incarceration, whether called hospitalization or by other euphemism, means depriving a person of liberty."[150] As long as people are deprived of their liberty on the basis of commitment hearings, implementation of procedural safeguards seems an urgent necessity.

Role of Counsel

The role of counsel in civil commitment proceedings creates ethical problems for the attorney. Attorneys and courts seldom consider the hearing adversarial in nature.[151] Nonadversarial proceedings have traditionally been justified by the *parens patriae* concept,, which casts the state in the role of parent protecting the individual. The attorney for the proposed patient is placed in the dilemma of choosing to act as an advocate for the client's freedom or to maintain a more neutral stance as a protective guardian.[152] Professor Cohen, discussing the role of counsel, has said:

> Direct observation of commitment hearings and extensive interviews with participating attorneys lead to the conclusion that unless the proceeding is adversary in nature (and here that equates with a jury trial), the attorney does not engage in any preparation and does not effectively participate in the hearing.[153]

The New Mexico statute does not define the role of counsel in

149. *Senate Hearings, 1970, supra* note 1, at 482.

150. J. Katz, J. Goldstein & A. Dershowitz, Psychoanalysis, Psychiatry and Law 563 (1967).

151. Note, *supra* note 69, at 617.

152. *Id.* at 616.

153. Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 Texas L. Rev. 424 (1966).

civil commitment proceedings. The attorney in civil commitment proceedings who often lacks, in this capacity, an adversarial role model[154] and special expertise, usually accepts the medical expert's testimony at face value.

> Lawyers who succumb to claims of expertise fail to utilize and develop the legal process as an instrument of change and as a mechanism to challenge those who from even the best motives seek to deprive a person of his liberty . . . and in exchange allow the psychiatrist to determine difficult questions that have been assigned for solution to the legal process.[155]

Ziskin in *Coping with Psychiatric and Psychological Testimony*[156] argues that the lawyer should always point out that a) psychiatry is an inexact science without established principles or theories; b) that psychiatry is not medicine and has neither scientifically established nor clearly defined mental diseases; and c) that psychiatric examinations are fraught with danger of distortion, bias, and inaccuracy in the collection, perception, recollection and interpretation of the data obtained. Ziskin says:

> For lack of reasonable certainty in psychiatric evaluation and diagnosis, it must be concluded at the present time that psychiatric diagnoses and evaluations are speculative and conjectural and, therefore, are inadmissible. The reliability and validity of psychiatric diagnoses and evaluations have been demonstrated to be lower than the reliability and validity of evlaluations based on the use of the polygraph and the latter have consistently been held to be inadmissible.[157]

Civil commitment hearings can be greatly improved if attorneys realize their potential functions in these proceedings.[158]

Cohen[159] suggests these prehearing tasks for lawyers in civil

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> The difficulty . . . is that the lawyer involved in a civil commitment case has no tradition to rely upon, develops no experience in this area because of a limited number of appearances, has little in his professional training to prepare him for this role, and has no source to consult for guidance; also, the county judge is unlikely to require any more than a perfunctory performance. Without direction from the statute he must turn elsewhere for guidance–and his search will be futile.

Id. at 441.

155. *Id.* at 450.

156. Ziskin, *supra* note 41, at 297-300.

157. *Id.* at 299-300.

158. *See* O'Neill, *A Practical Guide for Attorneys Appointed as Guardians Ad Litem in Civil Mental Health Commitment Proceedings, Hearings before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 257, 269 (1963).

159. Cohen, *supra* note 153, at 452-55.

commitment proceedings: Study the records; communicate with the proposed patient, family, friends; consult with the hospital staff, physician, social worker; investigate facts; require a full medical-social report in the nature of a pre-sentence report used in criminal proceedings; prior to the hearing explore the treatment plan[160] and custodial resources; explore various services offered in the community; attempt to explain to the client the legal consequences of a commitment; insist that the physician use language that is understandable and provide reasons for the decisions; question the physician on whether the danger is to self or others and the degree, type, and likelihood of such danger. In the litigation itself, counsel should seek to ensure that statutory procedures and time limitations have been met.[161]

Counsel should vigorously cross examine the testifying physician and present testimony of relatives, friends or other physicians which will support the person's claim to retain his liberty. Finally, appeal should be taken upon the client's informed request.

> . . . the lawyer becomes a mediator between the socio-medical model and the legal mode. He can and should perform the function lawyers often perform in this mediational role: Interpret specialized information to the client and other participants; advocate and negotiate on behalf of the client; clarify, anticipate, and communicate effects of alternative courses of action; and design and clarify policy. If the attorney fails to perform these functions, in all likelihood they will not be performed by anyone.[162]

It is necessary that both the courts and the bar of New Mexico better understand and define the role of counsel in the commitment process. Provisions should be made to reimburse counsel on an hourly basis, including time for preparation of a case, or, as Cohen[163] suggests, attorneys should be required to file a detailed

160. ". . . Recent surveys in some states show that about two thirds of the state hospital patients are there only because alternatives apparently were not available . . . another study shows that more than fifty per cent of the state hospital patients are not under active treatment." Cohen, *supra* note 153, at 454.

161. Recall that a full hearing must be had no less than five days and no more than 15 days after the petition is filed, and § 34-2-5E makes no provision for an extension of time.

162. Cohen, *supra* note 153, at 455. *See also* Ziskin, Coping with Psychiatric and Psychological Testimony (1970); and suggestions by B. Ennis & L. Siegel in An American Civil Liberties Union Handbook: The Rights of Mental Patients (1973), especially "Trial Techniques" at 283-97.

163. Cohen, *supra* note 153, at 458. *See also* ABA, Standards Relating to the Defense Function § 3.3(a); *cf.* Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 41-42 (1963); *see also* ABA, Juvenile Justice Standards Project, Standards Relating to the Role of Counsel for Private Parties (L. Teitelbaum, Tent. Draft 1976) § 2.1(b):

> (1) Lawyers participating in juvenile court matters, whether retained or

report with the court for each case that would serve as the basis for determination of the appropriate fee. Counsel's fee should be based on actual involvement, and the concept of a standard fee should be abandoned. Provisions should be made for appointing an independent psychiatrist at state expense in order to balance medical testimony by the state.

OTHER PROCEDURAL SAFEGUARDS IN CIVIL COMMITMENT

Privilege Against Self-Incrimination

The Fifth Amendment says that no person "shall be compelled in any criminal case to be witness against himself."[164] The accused may remain silent from the time of arrest to the end of trial. Recently, some courts have extended the privilege against self-incrimination to the proposed mental patient, whose statements to psychiatrists and other mental health staff can be used against him as part of the basis for commitment.[165] In the psychiatric interview, the proposed patient is asked questions which may subsequently be used by the examining physician as evidence that the person is mentally ill and dangerous to others or to self, or in need of care and treatment.

Under due process analysis the interests of the individual protected by the privilege against self-incrimination must be weighed against the costs to the state if the privilege is granted. The most important function which a right to remain silent would serve in civil commitment would be to protect the individual's privacy.[166] If the privilege is allowed, the state will have more difficulty in meeting its burden of proof. The exercise of the privilege thwarts the state's ability to determine the proposed patient's mental state by means of

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> appointed, are entitled to reasonable compensation for time and services performed according to prevailing professional standards. In determining a fee for his services, the lawyer should take into account the time and labor actually required, the skill required to perform the legal service properly, the likelihood (if apparent to the client) that acceptance of the case will preclude other employment for the lawyer, the fee customarily charged in the locality for similar legal services, the possible consequences of the proceedings, and the experience, reputation and ability of the lawyer or lawyers performing the services. . . .

164. U.S. Constitution, amend. V.

165. Lessard v. Schmidt, 349 F. Supp. 1078, 1100-02 (E.D. Wis. 1972) (three-judge court). Such application has been proposed under two theories: 1) civil commitment is a "criminal case" within the meaning of the Fifth Amendment self-incrimination clause, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment, and 2) the privilege is an element of due process of law under the Fifth and Fourteenth Amendments. *See Developments in the Law, supra* note 22, at 1303-12.

166. For examples of psychiatric probing into unquestionably private matters, see Lacovara, Workshop Session on Mental Illness, 37 F.R.D. 143 (1967).

psychiatric interviews and testing which appear essential to deducing necessary evidence.[167]

Lessard v. Schmidt addressed the question of whether an individual has the right to remain silent during the psychiatric interview.[168] The court, applying the due process clause, weighed, on one hand, the deprivation of liberty resulting from civil commitment[169] and, on the other, the need for treatment or confinement which might be foregone if the privilege against self-incrimination were invoked.[170] The court concluded that a person may not be committed on the basis of evidence obtained from the examination by the psychiatrist unless the patient is informed of the right to refuse to answer the psychiatrist's questions.[171]

The prevailing view is that the privilege against self-incrimination should not be extended to psychiatric examinations made in the course of civil commitment proceedings.[172] Notifying proposed patients of a privilege not to cooperate with psychiatrists would undermine the state's attempt to obtain the most reliable evidence of whether a person has a mental state requisite to warrant commitment.

The Fifth Amendment privilege against self-incrimination could be read as limited to individuals who risk revealing participating in criminal acts.[173] However, *In re Gault,*[174] which extended the privilege to respondents in juvenile court proceedings, emphasized the nature of the particular statements and the result of the proceedings rather than the civil/criminal distinction. The Court said:

> Commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil." And our Constitution guarantees that no person shall be "compelled" to be a witness against himself when he is threatened with the deprivation of his liberty. . . .[175]

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167. *Developments in the Law, supra* note 22, at 1310-12.

168. 349 F. Supp. at 1100-102.

169. *Id.* at 1100-101.

170. *Id.* at 1101.

171. *Id.* In Lynch v. Baxley, 386 F. Supp., 378, 394 (M.D. Ala. 1974) (three-judge court), the three-judge court held that the privilege against self-incrimination is applicable at all stages of a civil commitment proceeding, but protects only disclosures which might be used as evidence or to obtain evidence in criminal prosecutions.

172. Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971), *cert. dismissed sub nom;* Muriel v. Baltimore City Criminal Court, 407 U.S. 355 (1972) (The court refused to apply the privilege against self-incrimination to psychiatrict examinations of alleged mentally defective delinquents). *See Developments in the Law, supra* note 22, at 1303-12.

173. The Fifth Amendment says that no person "shall be compelled in any criminal case to be witness against himself."

174. 387 U.S. 1, 47-57 (1967).

175. *Id.* at 49, 50.

It is argued from *Gault* that the privilege against self-incrimination should apply to any "civil" proceeding which involves a substantial curtailment of liberty.[176] However, *Gault* involved conduct which, if committed by an adult, would have been criminal, the factor which seems the unifying element in Supreme Court decisions on the matter.

The *Lessard* court may have wrongly concluded that the individual's interests outweigh those of the state.[177] Since psychiatric examination is an essential to the state's case, prevention of an examination to determine a proposed patient's mental condition would unduly thwart legitimate interests of the state—confinement of persons who are dangerous to others and treatment of those who cannot care for themselves.

Standard of Proof

The standard of proof required for involuntary commitment is closely related to the finding of mental illness and dangerousness necessary to justify an order for compulsory hospitalization. Because "mental illness" and "dangerousness" are elusive concepts, entailing a high risk of error, in order to prevent erroneous commitment a standard of proof higher than mere preponderance of the evidence should be required.

Until September 5, 1975, New Mexico applied the preponderance standard for civil commitment determination. Then, the Supreme Court of New Mexico in *State v. Valdez,*[178] as have other courts,[179] adopted the standard of clear and convincing evidence for civil commitment proceedings. The Court said:

> . . . In the civil commitment situation the interests of the State are pitted against restriction on the liberty of the individual. The specific question which needs to be answered is whether there exists sufficient State interests to counterbalance the loss of individual liberty and justify the application of the particular burden of proof. Based on the language of § 34-2-5, *supra,* it appears that the aim of

176. Lessard v. Schmidt, 349 F. Supp. 1078, 1101-102 (E.D. Wis. 1972) (three-judge court). Justice Douglas in his concurring opinion in McNeil v. Director, Patuxent Institution, 407 U.S. 245, 257 (1972), stated on the basis of *Gault,* that the defendant should be able to use the privilege during the psychiatric examination because of the potential loss of liberty involved.

177. *See Developments in the Law, supra* note 22, at 1312.

178. State v. Valdez, N.M. , 540 P.2d 818 (1975).

179. Dixon v. Attorney Gen. of Pennsylvania, 325 F. Supp. 966, 974 (M.D. Pa. 1971) (three-judge court); Lynch v. Baxley, 386 F. Supp. 378, 393 (M.D. Ala. 1974) (three-judge court); *see also* Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 285 (1966). Woodby involved a deportation proceeding in which the United States Supreme Court held the government to proof by clear, unequivocal and convincing evidence.

> the State is to first protect society from the mentally ill, a manifestation of the State's police power and also protect the mentally ill from themselves, while at the same time providing care and treatment, as *parens patriae.*[180]

Noting that mental illness is not a crime, the Court noted that patients must be afforded "some type of effective treatment since their liberty is abridged; mere custodial care is not sufficient."[181] The Court concluded that the state's interests "are sufficient and the realities of treatment, though not ideal, are adequate to justify subjecting individuals to possible commitment based on this new standard of proof."[182]

The clear and convincing standard was preferred because psychology and psychiatry are inexact. The Court reasoned:

> ... Where there is sometimes disagreement as to the meaning of a diagnosis of "mental illness," even among the disciplines concerned with human behavior, it would seem that the highest standard of proof would be desirable, but at the same time the question arises whether the reasonable doubt standard is workable within this particular framework. In the opinion of this court, proof beyond a reasonable doubt is too stringent a standard.[183]

Lessard v. Schmidt held that permitting indefinite commitment on the basis of a preponderance of the evidence that a person is mentally ill and dangerous to himself or others was violative of due process.[184] The *Lessard* court held the state to the burden of proving beyond a reasonable doubt all facts necessary to show that an individual is mentally ill and dangerous.[185] Because of the deprivation both of liberty and basic civil rights as well as the stigma caused by lack of confidentiality of the adjudication, the *Lessard* court concluded that the highest standard must apply. The court compared the interests at stake in a hearing to determine juvenile delinquency and in a proceeding to determine civil commitment and found a stronger need for a stringent standard of proof in civil commitment proceedings than in juvenile delinquency proceedings: the juvenile respondent forfeits no civil rights, and the proceedings are confidential. Yet the court in *In re Winship,* involving a juvenile delinquency hearing, required proof beyond a reasonable doubt.[186]

180. State v. Valdez, N.M. , 540 P.2d 818, 822 (1975).
181. *Id.*
182. *Id.*
183. *Id.* at 822-23.
184. 349 F. Supp. at 1096.
185. *Id.*
186. *Id.* at 1095.

In *In re Ballay* the Court of Appeals for the District of Columbia similarly held that due process requires the standard of proof beyond a reasonable doubt in civil commitment proceedings.[187] The court compared the interests of the state and those of the individual in civil commitment and in criminal proceedings. It found the interests of the state less weighty in civil commitment cases than in criminal cases, while individual deprivations resulting from the two proceedings are equivalent. The court concluded that the higher standard of proof would not create undue administrative inconvenience while it would reduce the danger of erroneously committing a person.[188]

The clear and convincing standard of proof has been proposed as a compromise which gives the individual protection from an arbitrary determination of his mental state without placing an impossible burden of proof upon the state.[189] Others argue that to compensate for the inexactitude of medical science, proof beyond a reasonable doubt should be the standard for commitment. One attorney has suggested that agreement between at least two testifying psychiatrists or doctors should be required.[190] By requiring corroborating expert testimony a state's burden of proof beyond a reasonable doubt could be met. If juries are required to decide the mental state of a criminal defendant who raises the insanity defense, based upon proof beyond a reasonable doubt, the standard should be workable in civil commitment proceedings, where the respondent's mental state is also at issue.[191] The criminal standard should apply in a commitment proceeding because the risk of error, the injury resulting from stigmatization, and the deprivation of liberty are of the same magnitude.[192]

Use of Hearsay Evidence

The courts in *Lessard v. Schmidt* and *Lynch v. Baxley* held that the rules of evidence controlling testimony should apply to involuntary civil commitment proceedings.[193] In *Lynch* the court said that hearsay evidence excluded from other proceedings should also be excluded from commitment hearings.[194]

McCormick has defined hearsay evidence as:

187. 482 F.2d at 656, 669.
188. *Id.* at 667-69.
189. Note, *supra* note 69, at 634.
190. Interview with attorney Raymond Schowers in Albuquerque, New Mexico, Sept. 19, 1975.
191. *Id.*
192. Ennis & Siegel, *supra* note 37, at 34.
193. 349 F. Supp. at 1102-103; 386 F. Supp. at 393.
194. 386 F. Supp. at 394.

> testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.[195]

In determining whether to admit out-of-court statements, courts should consider the purpose for which the evidence is being introduced and the hardship posed to the respondent if counsel is unable to cross examine out-of-court declarants.

Hearsay problems in commitment hearings take several forms. Out-of-court utterances of the proposed patient have traditionally been regarded as evidence of irrational conduct, not as hearsay.[196] These statements are offered to show the mental state of the individual and not to prove the truth of the matter which the individual assets.[197] Testimony of the examining physician to out-of-court statements of a relative of the proposed patient, on the other hand, presents good reasons for exclusion. There is the possibility that the declarant either lied, lacked ability to observe, or remembered poorly the proposed patient's statement, which he related to the testifying physician. These are classic reasons for requiring that there be an opportunity to cross examine the declarant.[198]

Medical or psychiatric reports offered as evidence, where the person making the report is not present to testify during the hearing, present the same problem, compounded by the ambiguity of many psychiatric terms. Presence of the examining psychiatrist or doctor would enable the trier of fact to benefit from cross examination as to the physician's ability to observe the proposed patient and the extent to which his findings relate to commitment standards. Opportunity to confront and cross examine should be afforded whenever it will enhance the accuracy of fact finding.[199] Hearsay exclusion seems the most effective way of insuring that the opportunity exists.

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195. McCormick, Evidence 584 (2d. ed. 1972); for a functional analysis of the hearsay problem, *see* Tribe, *Triangulating Hearsay,* 87 Harv. L. Rev. 957 (1974).

196. *Id.* at 593.

197. *Id.* An example of such statement by a proposed patient is: "I am Henry the Eighth." The statement is not being offered to show the truth of the statement, only that the person believes he is Henry the Eighth and is suffering from a delusion.

198. *See* Note, *supra* note 69, at 625-26, which criticizes the *Lessard* case holding hearsay evidence inadmissible in involuntary civil commitment proceedings. The court based its holding upon the Due Process Clause, not upon the Sixth Amendment right to confront witnesses. The second basis has been emphasized by the United States Supreme Court. He also comments that the scope of the hearsay rule was never defined in *Lessard.* It is unclear whether the rule applies to statements made in court and to statements made by examining physicians. *Id.* at 626.

199. *See, e.g.,* Peters v. Hobby, 349 U.S. 331, 350-51 (1955); Willner v. Committee on Character and Fitness, 373 U.S. 96, 104-05, 107-08 (1963).

The *Morrissey v. Brewer*[200] holding that hearsay in the form of letters, affidavits and reports would be admissible in a parole revocation hearing, although such evidence could not be used in a criminal trial, might suggest the opposite conclusion.[201] In parole revocation hearings, however, the hearsay evidence is offered to prove the specific act or acts which violated the terms of parole. In such hearings the defendant himself can rebut this hearsay evidence which is unfavorable to his position. In civil commitment hearings, out-of-court statements are offered to prove the broad concept of a mental condition, not to prove the commission of a specific act. Counsel for the proposed patient may face a dilemma: to allow the client to testify to rebut the harmful effects of hearsay statements creates a risk that the client may be so unable to present testimony in a clear manner that the state's case will appear stronger.[202] Moreover, no practicable means appear for attacking a physician's out-of-court statements or reports short of cross examination. Finally, the proposed patient's credibility, as an instrument of rebuttal, may be significantly diminished by the action's having been brought at all. Hearsay exclusion seems necessary to achieving factual accuracy in commitment hearings.

The New Mexico civil commitment statute, by providing that "the Court shall receive all relevant and material evidence which may be offered and shall not be bound by the rules of evidence,"[203] permits use of hearsay evidence. Rules of evidence represent court's judgments that some evidence has too little probative value to justify the prejudice it engenders. The commitment process affects individual interests important enough to require that considerable care be taken in correctly determining facts. The conduct of the commitment hearing should be governed by the rules of evidence.

CONCLUSION

Extension of stringent procedural safeguards to persons who are subject to involuntary civil commitment proceedings should be of paramount concern to the New Mexico courts, legislature and bar. The New Mexico civil commitment statutes should be revised to require fuller notice in all cases and mandatory prompt probable cause hearings in emergency commitment. Statutory vagueness should be eliminated: terms such as "mental illness" and "dangerous-

200. 408 U.S. 471 (1972).
201. *Id.* at 489.
202. *See* Note, *supra* note 69, at 626.
203. N.M. Stat. Ann. § 34-2-5F (Supp. 1975).

ness" need more precise definitions, explaining fully and in detail what constitutes mental illness and dangerousness and the magnitude and likelihood of both which justify involuntary hospitalization. The panoply of substantive and procedural rights should be observed both by statute and by vigorous representation by well-prepared counsel.

EDELTRAUT HANNEMAN*
and
MARY ANNE McCOURT**

*Ph.D. candidate in guidance and counseling at UNM.
**Third-year student at UNM School of Law.