

1968

Civil Commitment of the Mentally Ill in Nebraska

Larry L. Langdale

University of Nebraska College of Law

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

Larry L. Langdale, *Civil Commitment of the Mentally Ill in Nebraska*, 48 Neb. L. Rev. 255 (1969)

Available at: <https://digitalcommons.unl.edu/nlr/vol48/iss1/10>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

CIVIL COMMITMENT OF THE MENTALLY ILL IN NEBRASKA

One out of every twelve persons in the United States will spend a portion of his life in a mental hospital.¹ The problems arising out of this situation are not entirely medical. Institutionalization of those suffering from mental disorders is necessarily a social concern which requires the attention and involvement of our courts and legislatures. However, until recently, mental illness and its related legal problems has been one of the backwaters of American law. Commenting on this fact, one authority has said:

[T]he failure of this field to get its due legal attention can primarily be explained by the absence of a moving force behind it. Unfortunately the "insanity" field was deprived of its most powerful lobby through a process of human erosion, in institutions where cure was the exception rather than the rule.²

Paradoxically, medical knowledge in the care and treatment of the mentally ill is expanding rapidly. Advancements in these areas, which cut to the core of theories regarding commitment to mental hospitals, would seem to demand a periodic re-evaluation of such commitment procedures in order to utilize these gains. This is particularly true in view of shifting social attitudes towards infringement upon individual freedom in all forms.

One aspect of the law concerning mental illness presents a question that is basic to American legal thought and is particularly pertinent at the present time where there has been a judicial emphasis on human rights within our constitutional system. Proceedings in which persons are involuntarily committed to mental hospitals have historically been deemed "civil" in nature.³ However, these proceedings can result in the detention of an individual against his will for an indefinite period of time. Recent judicial decisions evidence a blurring of distinction between civil and criminal actions in this area with emphasis moving from the theories underlying the action to the resulting disposition of the case.⁴ In the past this labeling has been used as justification for the lax application of procedural safeguards in civil commitment procedures. This

¹ REPORT OF THE AMERICAN BAR FOUNDATION, *THE MENTALLY DISABLED AND THE LAW* 1 (Lindman and McIntyre ed. 1961) [hereinafter cited as Lindman and McIntyre].

² Kitztrie, *Compulsory Mental Treatment and the Requirements of "Due Process"*, 21 OHIO ST. L. J. 28, 29 (1960).

³ *Sorter v. Austen*, 221 Ala. 481, 129 So. 51 (1930); *Commonwealth v. Bechtel*, 384 Pa. 184, 120 A.2d 295 (1956).

⁴ *Holm v. State*, 404 P.2d 740 (Wyo. 1965) (mental illness); *In re Gault*, 387 U.S. 1 (1967) (juvenile delinquency).

solution does not adequately answer the problems facing us in this area. While considering a case of involuntary commitment, a New York court pointedly observed that "[i]ncarceration, whether called hospitalization or by some other euphemism, means depriving a person of liberty. No matter how sweetly disguised or delicate the language, involuntary confinement is a loss of freedom."⁵

The authority of the state to restrain a mentally ill person has its historical basis in the sovereign's police power to prevent destructive acts.⁶ Commitment would seem a valid exercise of the power where a person, as a result of a mental disorder, presents a danger either to himself or to the community. A second standard for commitment, "in need of care and treatment," has been developed in order to justify the detention of an individual who does not evidence dangerous tendencies as the result of his mental affliction. This theory, first expounded by Chief Justice Shaw of the Massachusetts Supreme Court in the *Matter of Josiah Oakes*,⁷ has been viewed as an extension of the ancient doctrine of *parens patriae* that envisioned the state as the father of its deranged children.⁸

While the state may have the authority to commit its citizens to mental hospitals, this situation presents difficult policy considerations as to when this power should be exercised and to what extent. It has been argued that the non-dangerous individual should be allowed to select his own method of treatment for his illness without state intervention.⁹ This position, however, overlooks the fact that by the very nature of his illness the mentally ill

⁵ *In re Neisloss*, 8 Misc.2d 912, 913, 171 N.Y.S.2d 875, 876 (Westchester County Ct. 1957). Nor is loss of freedom the only consequence resulting from a civil commitment proceeding. NEB. REV. STAT. § 38-202 (Reissue 1960) indicates that commitment to a mental hospital carries an automatic adjudication of incompetency and provides for the appointment of a guardian for the individual's estate.

⁶ Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288 (1966); Kittrie, *Compulsory Mental Treatment and the Requirements of "Due Process"*, 21 OHIO ST. L. J. 28 (1960).

⁷ 8 Law Rptr. 122 (Mass. 1845).

⁸ Project, *Civil Commitment of the Mentally Ill*, 14 U.C.L.A.L. REV. 822 (1967). There have been many critics of the quality of psychiatric aid in state institutions that are overcrowded and understaffed. This situation presents an interesting question. If a non-dangerous mentally ill person is committed on the theory that he is in need of treatment and care and if he fails because of these conditions to receive such treatment, is he being illegally held? See *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966) where the court held that a committed patient had a statutory right to treatment and strongly implied that, even in the absence of a statute, failure to receive treatment destroyed the basis for commitment and constituted an infringement upon due process rights.

⁹ Lindman and McIntyre 20.

individual may no longer be capable of a rational decision as to whether he is in need of psychiatric attention. We have here the state's interest in the maintenance of mental health weighed against individual liberty. The wisdom of confinement for one's "own good" must be questioned in light of basic tenets of the American political heritage which stress minimum interference by the state with individual rights and a belief in the maximum of personal freedom. While it is not the purpose of this article to discuss in depth the theories underlying commitment proceedings, it can be seen from this brief examination that the problems in this area cannot be solved by reference to meaningless labels or archaic legal theory.

As in many instances in which the disciplines of medicine and law overlap, competing theories are present. One area of conflict between medical men and legal authorities arises with respect to the nature of the proceeding itself. Lawyers emphasize the need for legal protections to guard against the "railroading" of sane individuals into mental institutions.¹⁰ Medical men, on the other hand, are concerned with the possible traumatic effect of too much legal formality and the delay this formality causes in the treatment of a mentally ill patient.¹¹ To a certain extent Nebraska procedures for the civil commitment of the mentally ill reflect this conflict. The purpose of this article is to examine the Nebraska procedure with an emphasis on those "due process"¹² protections normally afforded those whose liberty is in danger.

NEBRASKA PROCEDURES

In Nebraska there are three methods by which a person suffering from a mental disorder can be admitted to a state mental hospital: voluntary admission, medical certification, and involuntary commitment.¹³ Voluntary admissions will not be discussed in this article.¹⁴ While actual compulsion may not exist in commitment by

¹⁰ Most authorities agree that instances where a sane individual is committed to an institution are rare. M. GUTTMACHER AND H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 297 (1952). However, such cases do occasionally come to the attention of the courts. See *Shields v. Shields*, 26 F. Supp. 211 (W.D. Mo. 1939).

¹¹ M. GUTTMACHER AND H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 288 (1952).

¹² U.S. CONST. amend. XIV; NEB. CONST. art. I, § 3.

¹³ Voluntary admission—NEB. REV. STAT. § 83-324 (Reissue 1966); Medical Certification—NEB. REV. STAT. § 83-322.01 (Reissue 1966); Involuntary Commitment—NEB. REV. STAT. §§ 83-325 to 83-328 (Reissue 1966), *as amended*, (Supp. 1967).

¹⁴ Also excluded from this discussion are procedures concerning the commitment of sexual psychopaths under NEB. REV. STAT. § § 29-2901

medical certification, for the purposes of examining the rights of individuals under such a provision, it should be considered as involuntary.¹⁵

Under section 83-322.01 of the Nebraska procedure, any person shown to be mentally ill by certification of two physicians may be admitted to any public or private hospital for the treatment of such mental illness by the superintendent of such hospital upon the written request of any family member, near relative, friend with whom he resides, or an officer of any charitable institution or agency. The person subject to such commitment or anyone in his behalf may make a written request for his release to the superintendent. The request will be complied with unless the superintendent is of the opinion that further detention is warranted, in which case he shall request the county board of mental health of the person's home county to institute involuntary proceedings against him.

Involuntary commitments are under the jurisdiction of the county boards of mental health.¹⁶ Application for the admission to a state hospital must be filed with the board by any interested party. The information must allege belief that the person for whom admission is sought is mentally ill and a fit subject for custody and treatment in a state hospital.¹⁷ The board then holds a preliminary inquiry at which it hears such testimony, concerning the mental condition of the proposed patient, that it deems necessary and desirable.¹⁸ A physician is appointed to examine the patient and to certify his mental condition to the board.¹⁹ A hearing may then be held at which the board, upon consideration of the evidence, finds: (1) whether the allegedly mentally ill person is in

to 29-2907 (Reissue 1964) and the commitment of the mentally retarded under NEB. REV. STAT. § § 83-220 to 83-222 (Supp. 1967).

¹⁵ When faced with the possibility of commitment to a mental hospital, an individual is likely to be confused as to the nature of his situation or overwhelmed by family or friends seeking to give advice as to his best course of action. The fact that the patient stands mute in such a case should not be construed as meaning he voluntarily accepts hospitalization. Also, such statutes are usually vague or noncommittal as to what degree of force may be used to compel entrance and as to the legal ability of the person to protest the admission at that time. Lindman and McIntyre 17.

¹⁶ These boards are appointed by the district court of the county. The membership consists of a lawyer, a physician, and the clerk of the district court as an ex officio member. NEB. REV. STAT. § 83-317 (Reissue 1966).

¹⁷ NEB. REV. STAT. § 83-323 (Reissue 1966).

¹⁸ NEB. REV. STAT. § 83-325 (Supp. 1967).

¹⁹ NEB. REV. STAT. § 83-326 (Reissue 1966). The examining physician may be a member of the board. Only one physician is required.

fact mentally ill; and if so, (2) whether he should be admitted to a state hospital.²⁰ Under the provisions of Neb. Rev. Stat. § 83-328, commitment by the county board is final only upon certification within sixty days by the hospital superintendent that the person is or is not mentally ill. Appeal procedures for review of the board's decision by the district court are provided.²¹

ADMINISTRATIVE COMMITMENT

Both procedures by which an individual may be committed to a mental hospital in Nebraska are of a nonjudicial nature.²² The delegation of the power to deprive an individual of his freedom to an administrative body, and in the case of medical certification, to physicians, raises questions of constitutional dimensions.²³

Under Neb. Rev. Stat. § 83-320, the Nebraska Legislature vests the jurisdiction over commitment proceedings in a county board of mental health.²⁴ While the courts recognize the authority of the legislature to create quasi-judicial power, they also apply certain requirements limiting such delegation. First, definite standards or guidelines for the implementation of the desired policy must be established by the legislature for the administrative agency.²⁵ Secondly, review of any decision of such agency must be provided.²⁶

²⁰ NEB. REV. STAT. § 83-328 (Supp. 1967).

²¹ NEB. REV. STAT. § 83-328.02 (Reissue 1966).

²² Nebraska is one of twelve states in which only nonjudicial commitment is available. Thirty-one others have some form of such nonjudicial confinement of the mentally ill. Lindman and McIntyre 30.

²³ The Federal Constitution requires only that administrative procedure be regulated by sufficient safeguards as to insure that the due process clause of the fourteenth amendment is satisfied. *Graves v. Minnesota*, 272 U.S. 425 (1926); *Nebbia v. New York*, 291 U.S. 502 (1934). The Nebraska Constitution, however, provides that "[t]he Powers of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons being of one of these departments, shall exercise any power properly belonging to either of the other, except as hereinafter expressly directed or permitted." NEB. CONST. art. II, § 1.

²⁴ This procedure was found to be constitutional in Iowa. *County of Blackhawk v. Springer*, 58 Ia. 417, 10 N.W. 791 (1882). The power of administrative boards to constitutionally invade individual liberty has also been established in somewhat analogous situations. *Selective Draft Law Cases*, 245 U.S. 366 (1918) (selective service boards); *In re McGee*, 105 Kan. 574, 185 P. 14 (1919) (quarantine for contagious disease). See also Note, *Constitutionality of Nonjudicial Confinement*, 3 Stan. L. Rev. 109 (1950-51).

²⁵ *School District No. 39 of Washington County v. Decker*, 159 Neb. 693, 68 N.W.2d 354 (1955); *Block v. Lincoln Telephone and Telegraph Co.*, 170 Neb. 531, 103 N.W.2d 312 (1960).

²⁶ *Auburn v. Eastern Nebraska Public Power District*, 179 Neb. 439, 138 N.W.2d 629 (1965).

The county boards of mental health must then move within a defined framework provided by the legislature. However, as one authority points out, statutes in the area of civil commitment are almost universally obscure.²⁷ The provisions are so broadly worded that they fail to identify with sufficient clarity the type or degree of mental illness for which involuntary hospitalization is justified. In Nebraska mental illness is defined only in terms of origin.²⁸ The board is required to find only (1) whether the person alleged to be mentally ill is mentally ill and (2) if he should be admitted to a state hospital.²⁹ No standards for the board's direction, such as whether the patient evidences dangerous tendencies or is in need of care and treatment, are included in the statutes covering this area. The term "mentally ill" covers a vast field of abnormal behavior, particularly when open to interpretation by one not trained in psychiatric medicine.³⁰

While more definite guidelines for the determination of who should come under the commitment process should be required, the broad discretion vested in the county boards at each step of the proceeding would seem, in itself, to violate due process standards for the delegation of power to administrative bodies. In the absence of one board member, the remaining member may ask another person to sit on the board with him.³¹ After the information is filed, the board may proceed or dismiss the complaint. The board decides whether the proposed patient should be detained prior to the hearing. It is within their discretion to dispense entirely with notice of the pending hearing for the person subject to commitment and

²⁷ Lindman and McIntyre 20.

²⁸ "The term mentally ill, as used in this act, shall include persons suffering from any type of mental illness whatsoever, whether hereditary or acquired by internal or external conditions, diseases, narcotics, alcoholic beverages, accident, or any other condition or happening." NEB. REV. STAT. § 83-306 (Reissue 1966).

²⁹ NEB. REV. STAT. § 83-328 (Reissue 1966).

³⁰ With respect to standards for involuntary commitment, these provisions have been suggested: "If, upon completion of the hearing and consideration of the record, the court finds that the proposed patient

(1) is mentally ill, and

(2) because of his illness is likely to injure himself or others if allowed to remain at liberty, or

(3) is in need of custody, care, or treatment in a mental hospital and, because of his illness, lacks sufficient insight or capacity to make responsible decisions with respect to his hospitalization...."

NATIONAL INSTITUTE OF MENTAL HEALTH, FEDERAL SECURITY AGENCY, A DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL, § 9 (g) (Public Health Service Pub. No. 51, 1951) [hereinafter cited as Draft Act].

³¹ NEB. REV. STAT. § 83-317 (Reissue 1966).

they may decide whether or not he should be present at the hearing. There is no statutory command to the board that a hearing should be held in each case. It seems rather to be assumed that one will be held.³² At the hearing the board determines the ability of the individual to obtain his own counsel. The physician on the board may be the examining doctor in the case, thus making him both the trier of fact and the witness.

In view of this statutory arrangement, it is not difficult to imagine a situation where the medical member of the board, sitting with a friend, could commit an individual without notice, without an opportunity to be heard, without a hearing, and with himself as the examining physician.

Not only may the county board of mental health exercise wide discretion in its eventual disposition of the case, but they also have great leeway in determining every procedural step inherent in the administrative hearing process. The latitude given the board in these areas would seem to warrant the conclusion that Nebraska's administrative commitment could be regarded by the courts as an unlimited delegation of power and thus a violation of due process standards.

Another requirement essential to the validity of administrative orders is that adequate judicial review of such orders be provided.³³ Some authorities feel that such provisions will correct any defects in the process and thus make it more likely to withstand constitutional attack.³⁴ Neb. Rev. Stat. § 84-917 regulating appeals from administrative agencies, provides for review *de novo* without a jury. This provision allows a complete examination into all pertinent questions surrounding the commitment proceeding. An expanded writ of habeas corpus is also available. With respect to the appeal process, however, it should be noted that Neb. Rev. Stat. § 83-328 provides for an observational period of sixty days and confirmation of the board's order by the hospital superintendent before the decision is final. While this provision adds a double check to commitment by the board, it also has the effect of delaying the appeal for sixty days since only orders that are final are subject to appeal under Neb. Rev. Stat. § 84-917.

³² See *Hearing and Notice*, *infra*.

³³ *Auburn v. Eastern Nebraska Public Power District*, 179 Neb. 439, 138 N.W.2d 629 (1965). Judicial attitudes toward the "saving grace" of review proceedings will be discussed under *Hearing and Notice*, *infra*.

³⁴ Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945 (1959); Note, *Constitutionality of Non-Judicial Confinement*, 3 STAN L. REV. 109 (1950-51).

While the use of an administrative agency in involuntary commitment proceedings may be within constitutional limits if proper standards and procedures are outlined by the legislature, certain considerations militate against its use. These boards are an example of attempts to place commitment proceedings in an informal surrounding. Medical men argue that the use of this type of procedure removes any stigma of criminality which might attach to commitment by the judiciary. Formal judicial process can allegedly be harmful to the patient in that it may cause adverse psychological reactions in one already mentally ill. These reactions may stem from confrontation in open court where the patient may hear friends and relatives testifying as to his mental condition. It is said that commitment procedures should be made as informal as possible in order not to discourage an individual's family from seeking early hospitalization when cure is more likely. Also some medical authorities feel that mental illness is a medical problem and as such only trained personnel are qualified to render judgment in that area.³⁵

However, it has been said that:

The position of advocates of administrative hospitalization fails to take into consideration the fact that the ultimate decision on hospitalization is a social decision, rather than a medical one. Physicians are no more qualified to balance individual rights against the social policy of the state or its police power than are other groups. In fact, physicians may be less qualified than such a group as the judiciary.³⁶

If informal procedures are indeed desirable for the benefit of the patient, it would seem unnecessary to remove the courts from the process. This result could be reached without depriving the person of his right of judicial determination of the question of his freedom.³⁷

Perhaps the strongest consideration which militates against the use of administrative boards is that while such relaxation may be based on good intentions and directed for the benefit of the patient, the resulting proceeding may be one in which expediency is valued above individual rights. While it may be traumatic to a certain extent for a mentally ill person to take part in a judicial hearing,

³⁵ Curren, *Hospitalization of the Mentally Ill*, 31 N. CAR. L. REV. 274 (1952-1953).

³⁶ Lindman and McIntyre 31.

³⁷ Draft Act § 9 (f) provides with respect to judicial procedures that the hearing shall be conducted in as informal manner as may be consistent with orderly procedures and that the court may receive all relevant evidence which may be offered and is not bound by the rules of evidence.

it would seem equally traumatic to find oneself summarily committed to a state mental hospital.

HEARING AND NOTICE

It has been said that the minimum requirements necessary to satisfy the constitutional mandate of due process of law are notice and opportunity to be heard.³⁸ These requirements have been extended to civil commitment proceedings.³⁹ However, it would seem that these protections are not absolute in form. As Justice Roberts said in *Betts v. Brady*: "That which may, in one setting, constitute a denial of fundamental fairness... may in other circumstances, and in light of other considerations, fall short of such denial."⁴⁰ It is difficult to formulate definite standards under such a concept for the examination of the process that has been developed in Nebraska for the commitment of the mentally ill. It is without doubt that many procedures in use today would fall as being in violation of due process protections if strict interpretation were given the requirements of hearing, notice, and opportunity to be heard.⁴¹ The departures from these elements of "fundamental fairness" have been justified primarily in terms of the welfare of the people who become involved in the process. Also the courts make a distinction between civil actions and criminal proceedings. Such justifications must be sound if such practices are expected to withstand constitutional attack.

Certain jurisdictions have held that failure to give notice and to allow an allegedly mentally ill person an opportunity to defend is not fatal to a commitment proceeding. Two arguments are advanced: (1) that a substitute notice is given to someone on behalf of the allegedly mentally ill person thus satisfying the requirement,⁴² and (2) that any due process defects in the original proceeding would be cured by subsequent review or other provisions in the nature of an appeal.⁴³

Nebraska statutes in this area are somewhat unclear as to the exact process required for civil commitment with respect to notice,

³⁸ *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950).

³⁹ *Simon v. Craft*, 182 U.S. 427 (1909).

⁴⁰ 316 U.S. 455, 462 (1942).

⁴¹ *Director of Patuxent Institution v. Daniels*, 243 Md. 16, 221 A.2d 397 (1966).

⁴² *Hammon v. Hill*, 228 F. 999 (W.D. Pa. 1915); *Payne v. Arkebauer*, 190 Ark. 614, 80 S.W.2d 76 (1935).

⁴³ *In re Dowdell*, 169 Mass. 387, 47 N.E. 1033 (1897); *In re Crosswell*, 28 R.I. 137, 66 A. 55 (1907). But see *Barry v. Hall*, 98 F.2d 222 (D.C.D.C. 1938) and *In re Wellman*, 3 Kan. App. 100, 45 P. 726 (1896) both of which insist on adequate notice to the individual.

hearing, and opportunity to be heard. One authority, commenting on the Nebraska procedure, has said:

The Nebraska statutes permit a patient to be hospitalized without his ever having had an opportunity to request or to have a formal hearing. The board is not required to hold a hearing and may make its decision *ex parte*. The patient's only opportunity to be heard is through a request for a review of his hospitalization before a judge.⁴⁴

No provision for notice appears in the statutes unless it is assumed that the physician appointed by the board will serve as adequate notice at the time he examines the patient. Those arguments advanced in support of informal commitment procedures are also used to defend absence of notice, i.e., that it is traumatic for a mentally ill person to receive notice that his mental condition is being adjudicated. However, the Kansas Court of Appeals points to the fallacy of this position in *In re Wellman*,⁴⁵ where it says: "It will not do to say that it is useless to serve notice on an insane person; that it would avail nothing because of his inability to take advantage of it. His sanity is the very thing to be tried." Failure to give notice prejudices the allegedly mentally ill person prior to any contact with the commitment process.

It is suggested that the failure to provide notice to the proposed patient in Nebraska is not necessarily an oversight on the part of the legislature, but rather reflects such concern in exposing a mentally ill person to an adversary proceeding. There are, however, satisfactory alternatives to complete absence of notice. California has sought to minimize the adverse effects of such notice by the use of mental health counselors who have the initial contact with the allegedly mentally ill person, thus providing the desired buffer between the individual and the judicial process which is to follow.⁴⁶ Such substituted notice provisions may satisfy both due process requirements and the objections to personal service on the allegedly mentally ill individual.

Under present Nebraska procedures notice will not necessarily reach the proposed patient either directly or in the form of substituted service. A hearing is optional at the discretion of the county board of mental health. The presence of the individual, assuming a hearing is held, is not provided for if, in the opinion

⁴⁴ Lindman and McIntyre 32.

⁴⁵ 3 Kan. App. 100, 101, 45 P. 726, 727 (1896).

⁴⁶ Project, *Civil Commitment of the Mentally Ill*, 14 U.C.L.A.L. Rev. 822, 837 (1967). The Washington statute in this area provides that notice may be dispensed with for medical reasons only when the notice is served on a court appointed guardian *ad litem*. WASHINGTON REV. CODE 71.02.140.

of the board, such presence would be injurious to the patient. Since the loss of individual freedom is involved, this situation would appear intolerable under due process standards.

Physicians stress the fact that speed is of the essence in the treatment of the mentally ill person and thus his commitment should not be slowed by unwarranted legal protections. Also, in cases where the person manifests dangerous tendencies, hasty confinement is desirable for his protection and the protection of the community. Many commitment codes have handled this situation by emergency detention provisions.⁴⁷ This detention, as opposed to hospitalization, is a temporary measure for the speedy processing of emergency situations. Nebraska allows a warrant to be issued by the county board with suitable custody provided for the potentially dangerous patient until their investigation is complete. The period for which a person may be held prior to commitment or release is not stated.⁴⁸

A second method for dealing with emergency situations is present in the Nebraska statutory scheme.⁴⁹ Commitment by medical certification, by which a person may be admitted to a state hospital upon the certification of two physicians, seems to serve the same purpose as other emergency provisions but is not supported by a mandatory hearing after the initial commitment. The patient must initiate such a hearing process by requesting his release from the hospital superintendent who, if he feels further detention is necessary, will ask the county board to commence involuntary proceedings. The Missouri Supreme Court in *State ex rel. Fuller v. Mullinax*,⁵⁰ declared that such commitment was in violation of due process guarantees. The court based its conclusion primarily on the fact that under a medical certification procedure, no notice or opportunity to be heard was present. The court also felt that these defects were not cured by provisions for subsequent judicial review or habeas corpus proceedings.⁵¹

⁴⁷ The District of Columbia Code provides that a person who exhibits dangerous tendencies as the apparent result of a mental disorder may be detained in a hospital for a period of time not exceeding 48 hours and within that time a hearing must be held to decide whether the person should be bound over for formal commitment procedures. D.C. CODE ANN. §§ 21-521 to 21-528.

⁴⁸ NEB. REV. STAT. § 83-325 (Reissue 1966).

⁴⁹ NEB. REV. STAT. § 83-322.01 (Reissue 1966).

⁵⁰ 364 Mo. 858, 269 S.W.2d 72 (1954). The Missouri statute was virtually identical with NEB. REV. STAT. § 83-322.01 (Reissue 1966) both appearing to have been adopted from the Draft Act § 9.

⁵¹ However, one authority concludes that the majority of the cases have held that this type of commitment was valid and the due process requirements were satisfied where adequate appeal provisions

While commitment by medical certification has been called merely a non-protesting admission, this would again seem to be a case of allowing mere labels to save the procedure from due process defects.⁵² If methods are necessary to handle emergency cases, the procedures should be more clearly defined and adequate safeguards against abuse included. Medical certification could easily become a method of bypassing more formal commitment proceedings when no danger in fact exists.

The value of statutory provisions for judicial review and habeas corpus in civil commitment proceedings is questionable.⁵³ Where the responsibility for initiating such process rests on the individual, it is unlikely that the person committed to an institution would be able to avail himself of such "protections" without the assistance of counsel.⁵⁴ Such commitment protections do not adequately protect the rights of those individuals subject to commitment proceedings because such a degree of inaccessibility is present. Thus, the curative effect of the provision is greatly diminished. Methods should be developed to insure legal protections to the individual prior to or at least during the commitment proceedings.

APPOINTMENT OF COUNSEL

The effect of a civil commitment proceeding is to place the individual in direct confrontation with the power and the resources of the state in an adjudication of his mental status. Realizing that the result of the adjudication may be the restraint of the individual against his will in a state mental hospital, the desirability and necessity of the appointment of counsel for the protection of such a person should be examined. At the present time, the courts of this country have not required that a person alleged to be mentally ill be represented by counsel at the commitment hearing,⁵⁵ although

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

⁵² See note 15 *supra*.

⁵³ Project, *Civil Commitment of the Mentally Ill*, 14 U.C.L.A.L. REV. 822 (1967).

⁵⁴ Testifying before the U.S. Senate subcommittee on constitutional rights, Dr. C. H. Farrell, a member of the Douglas County Board of Mental Health, stated that while approximately 1,000 persons were committed to state hospitals for Omaha each year, there had been no appeals or habeas corpus actions during the ten years he had served on the board. *Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 1, at 162-63 (1961).

⁵⁵ Note, *The Right to Counsel at Civil Competency Proceedings*, 40 TEMPLE L. QUARTERLY 381 (1967).

some state legislatures have provided for such representation by statute.⁵⁶

The development of the right to counsel and its extension in the area of criminal law provides a standard against which we may examine this question. In a series of decisions culminating in *Miranda v. Arizona*,⁵⁷ the Supreme Court has declared that such representation is an essential element of due process in criminal proceedings. Two factors leading the court to this decision, the inability of an untrained individual to conduct an adequate defense as against the prosecutor of the state and the serious consequences which may flow from such an adjudication, are equally applicable in the area of civil commitment proceedings. Justice Sutherland in *Powell v. Alabama*,⁵⁸ has outlined the factors which militate for the appointment of counsel in criminal proceedings. Pointing out that even the intelligent layman would be severely handicapped in the preparation of a defense as the result of no training in the technique of the science of law, he concluded: "If that be true of men of intelligence, how much more true is it of the ignorant or illiterate, or those of feeble intellect."⁵⁹

Under provisions of the Nebraska commitment code, there are two preliminary investigations, a preliminary inquiry by the county board of mental health and an examination by a physician prior to the actual commitment hearing. Assuming that the purpose of these procedures is to eliminate those initial applications which have no basis in fact, we can see that by the time the individual finally reaches the hearing stage, there is a presumption in the eyes of the county board that he is mentally ill. It is difficult to see how such a person can be expected to raise relevant issues in his defense, advance reasons why he should not be committed to a hospital, or successfully challenge the medical testimony of the state. Despite protestations of benevolent intent on the part of the state, the fact remains that the individual receiving an unfavorable determination from the county board is subject to indefinite confinement, perhaps for the rest of his life. Recently the Supreme Court considered the question of the applicability of constitutional guarantees, such as assistance of counsel, in juvenile proceedings.⁶⁰ With respect to the detention of juveniles, Justice Fortas stated that "there is no place in our system of laws for reaching a result of such tremendous consequence without

⁵⁶ Lindman and McIntyre 100-03.

⁵⁷ 384 U.S. 436 (1966).

⁵⁸ 287 U.S. 45 (1932).

⁵⁹ *Id.* at 69 (emphasis added).

⁶⁰ *Kent v. United States*, 383 U.S. 541 (1966).

ceremony—without hearing, without effective assistance of counsel...."⁶¹ This statement may be taken as an effective rebuttal to those who contend that in civil commitment proceedings, as formerly in juvenile cases, the state is *parens patriae* rather than prosecuting attorney and judge and thus not held to standards of due process. This alleged parental concern for the protection of the mentally ill gives no adequate basis for the denial of those rights held by others whose liberty is in question. We have reached a point in our jurisprudential development that such labels as "civil" and "criminal" should no longer dictate results where the adjudication involves individual freedom.

The appointment of counsel in such proceedings would serve purposes other than protecting the procedural safeguards and substantive due process rights of the individual.⁶² Prior to the hearing, an appointed attorney would serve as a substitute on whom notice of the commitment proceedings could be served if, in fact, personal service on the allegedly mentally ill person would prove harmful.⁶³ At the hearing the attorney would be able to submit relevant facts based on independent investigation, cross-examine witnesses, and arrange for independent psychiatric examination. Post-hearing appeals will also become a more effective tool in the protection of individual rights since an adequate record will have been established.

The Nebraska Legislature has recently amended Neb. Rev. Stat. § 83-325 and provided for the appointment of counsel in civil commitment proceedings.⁶⁴ There is some evidence that counsel has been appointed as a matter of policy by some county boards of mental health prior to this enactment.⁶⁵ The amendment, however, is rather limited in scope. The proposed patient is told at the hearing that he may request counsel. If the board finds he is unable to retain counsel, this fact is certified to the district or county court and counsel appointed. It appears rather paradoxical to require a person, who the state has reason to believe is mentally ill, to exercise judgment in determining whether he wishes representation by counsel. Also where the commitment proceeding is under the direction of the county board, it may also be noted that the proposed patient may not have notice of such hearing and is

⁶¹ *Id.* at 554.

⁶² Note, *The Right to Counsel at Civil Competency Proceedings*, 40 TEMPLE L. QUARTERLY 381, 387 (1967).

⁶³ See note 46 *infra*.

⁶⁴ NEB. REV. STAT. §§ 83-325.01, 83-325.02 and 83.325.03 (Supp. 1967).

⁶⁵ Testimony of Dr. C. H. Farrell. *Hearing before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 1, 162-63 (1961).

not required to be present.⁶⁶ In essence, he may never have the opportunity to request the appointment of counsel on his behalf. Provided, however, that the proposed patient does appear at the hearing and request such assistance, any counsel appointed at that time must face a board which has already conducted a preliminary hearing and medical examination. Being injected into the proceeding at this point, the attorney will immediately be placed on the defensive. The bill does, however, provide that counsel may have full access to the proposed patient at all reasonable times, but fails to state a time period for the preparation of the case.

In the case of commitment by medical certification, the provisions of Neb. Rev. Stat. § 83-325.01 will not apply until the patient requests discharge and the superintendent institutes involuntary proceedings against him with the county board. In this situation, perhaps, counsel appointed after commitment by certification would be able to request that such involuntary proceedings take place, thus removing the burden from the patient who in all likelihood does not even know that he has the right to such a request.

Although there has been no determination that an individual involved in a civil commitment proceeding has the constitutional right to representation by counsel, the arguments discussed would strongly recommend that such appointment be made mandatory in each case. This fact has been recognized by the legislature by the passage of the amendment. However, a more comprehensive provision, better tailored to fit into existing procedures, is required to fulfill these purposes.

TRIAL BY JURY

Nebraska commitment procedures make no provision for trial by jury at any stage of the process.⁶⁷ Whether a person may request a jury trial to determine his mental status is questionable.⁶⁸ In *In re Warner's Estate*,⁶⁹ the Nebraska Supreme Court stated that it was committed to the view that the applicable section of the Nebraska Constitution only preserves the right to a jury trial as it existed at the common law. "The general rule seems to be that there is no right to a jury trial in proceedings to determine a

⁶⁶ See Hearing and Notice *supra*.

⁶⁷ In fact, NEB. REV. STAT. § 83-328.03 (Reissue 1966) which deals with appeals from the decisions of the county boards, expressly provides that such appeals shall be heard without a jury.

⁶⁸ NEB. CONST. art. I, § 6 provides that: "The right of trial by jury shall remain inviolate."

⁶⁹ 137 Neb. 25, 288 N.W. 39 (1939).

person's sanity, except where, as in some jurisdictions, the right is conferred by statute."⁷⁰ It may be noted, however, that the court in this case was dealing with the appointment of a guardian for an alleged incompetent and not with his commitment to an institution. In *In re Simmons*,⁷¹ the court raises the question of this right but does not find it necessary to decide the issue. In accompanying dicta, however, the court seems to be of the view that the right to a jury trial did exist at common law and suggests that an abridgement of this right by statute would be unconstitutional.⁷²

Although the jury trial was one of the earliest methods utilized to prevent unwarranted commitment the wisdom of its use has been questioned. During the twenty-five years that Illinois used the jury trial for all commitments (1867-1893), more sane persons were declared insane, as shown by reports of state institutions, than were ever wrongfully committed under the previous method.⁷³ Those who object to the use of a jury trial in such procedures usually base their objection on the fact that laymen are placed in the position of evaluating expert testimony as to the mental condition of the proposed patient, a job which it is doubtful they can handle.⁷⁴ This argument overlooks the fact, however, that the jury in such a case is not required to make a medical diagnosis of the allegedly mentally ill person. They are required only to decide, on the basis of expert medical testimony, whether the condition of the proposed patient is such that his commitment is justified under the statute.⁷⁵

At this time, thirteen jurisdictions authorize the use of a jury trial to decide the question of hospitalization,⁷⁶ although apparently only if the proposed patient requests such. It does not appear on the basis of these considerations that mandatory jury trials in civil commitment proceedings would add substantially to protections afforded the allegedly mentally ill person. However, such a jury determination should be made available to such person upon his request or upon request made by his counsel.

⁷⁰ *Id.* at 30, 288 N.W. at 44.

⁷¹ 76 Neb. 639, 107 N.W. 863 (1907).

⁷² For authorities in accord with this view, see Lindman and McIntyre 28, 29.

⁷³ M. GUTTMACHER AND H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 300 (1952).

⁷⁴ Curren, *Hospitalization of the Mentally Ill*, 31 N. CAR. L. REV. 275 (1952-53) Curren points out: "The use of a lay jury to determine such a highly technical question has been compared to calling in the neighbors to diagnose meningitis or scarlet fever." *Id.* at 283.

⁷⁵ *Hearings on S. 935 before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 185-03 (1963).

⁷⁶ Lindman and McIntyre 28.

CONCLUSION

Nebraska's procedures for the civil commitment of the mentally ill are lacking in protections for the rights of those individuals who become involved in the process and thus are constitutionally suspect. The statutes are loosely drafted and unclear as to procedural steps within the commitment proceedings. It is true that such procedures are subject to unique problems that are not readily adaptable to normal judicial processes. It is submitted, however, that individual liberties need not be subordinate to a workable commitment process. While medical and legal views of the process are to a certain extent conflicting, they are by no means mutually exclusive. An attempt should be made to reconcile the views in a more suitable code for the state.

Larry L. Langdale '69