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COMMENT

North Carolina's New Mental Health Laws: More Due Process

[I]t is a basic guarantee of our constitution that no individual should be deprived of his liberty without due process of law. 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.

But the impact of laws on mental illness is greater in scope than most people realize. Nine years ago, in conducting the first comprehensive congressional study of the rights of this group of citizens, the subcommittee was told that one out of every 12 children born would at one time or another be subject to treatment in a mental institution, and an even larger percentage of our population would be subject to some form of mental care.

Mental illness, and the laws governing it, are the concern of all of us. The truth of the matter is that when we tolerate arbitrary acts, vague standards, administrative and legislative lethargy which deprives others of their right to health and to effective exercise of their freedom, then we tolerate a breakdown in our constitutional form of government.¹

—Senator Sam Ervin

Based on the present rate of hospitalization, one out of every ten citizens will spend a portion of his life in a mental institution.² As indicated by Senator Ervin's statement, the laws that affect the rights of the mentally ill are obviously of major significance to everyone. However, the determination of when and to what extent the laws should restrict or protect the rights of the mentally ill is one of the most troublesome questions in the field of law today.³

In 1973, North Carolina legislators completely rewrote the sections of the North Carolina General Statutes dealing with the involuntary commitment and voluntary admission of the mentally ill and in-

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

2. S. BRAKEL & R. ROCK, *THE MENTALLY DISABLED AND THE LAW* xv (rev. ed. 1971) [hereinafter cited as *MENTALLY DISABLED*].

3. *Id.*

ebriate. This comment will examine the new mental health legislation, why it was needed, and its constitutional implications and administrative ramifications.

I. THE INCENTIVE TO CHANGE: IN RE HAYES⁴

In order to understand why the new laws were needed, it is necessary to examine both the constitutional infirmity and the administrative failure inherent under the old statutes. Under the previous statutes a person could receive mental treatment through four different procedures: voluntary admission,⁵ admission by medical certification,⁶ emergency hospitalization,⁷ and judicial hospitalization.⁸ The last two procedures were recently declared unconstitutional on their face by the North Carolina Court of Appeals in the case of *In re Hayes*.⁹

In *Hayes* a seventeen year old girl was committed to a mental hospital in North Carolina on April 14, 1969, pursuant to the emergency hospital procedures set forth in section 122-59.¹⁰ This section provided for the detention, by physical force if necessary, of any person for a maximum of twenty days if, by reason of "overt acts," he was believed to be "suddenly violent and dangerous to himself or others."¹¹ The affidavit upon which Miss Hayes was committed stated

4. 18 N.C. App. 560, 197 S.E.2d 582, *appeal dismissed*, 283 N.C. 753, 198 S.E. 2d 729 (1973).

5. Law of June 25, 1963, ch. 1184, § 2, [1963] N.C. Sess. Laws 1647 (repealed 1973).

6. Law of June 25, 1963, ch. 1184, § 2, [1963] N.C. Sess. Laws 1647-48 (repealed 1973).

7. Law of June 25, 1963, ch. 1184, § 2, [1963] N.C. Sess. Laws 1648-49 (repealed 1973).

8. Law of June 25, 1963, ch. 1184, § 2, [1963] N.C. Sess. Laws 1650-51 (repealed 1973).

9. 18 N.C. App. at 562, 197 S.E.2d at 584.

10. *Id.* at 560, 197 S.E.2d at 582.

11. Law of June 25, 1963, ch. 1184, § 2, [1963] N.C. Sess. Laws 1648-49 (repealed 1973). The section provides authorization for such detention in one of two ways. A qualified physician may submit an affidavit to the effect that he has examined the person within 24 hours of his affidavit and that he believes the person is homicidal or suicidal or dangerous to himself or others. This affidavit then becomes the police officer's authority to take a person into custody and transport the person to a suitable place of detention. This was the method by which Miss Hayes was taken into custody. If a person has not been examined by a physician but it is believed that it would be too dangerous to take the person to a physician without restraint, a second means of authorization is provided. The clerk of superior court may issue an order to the sheriff to detain such a person based on "any person having knowledge of the facts" who submits a written application signed and sworn to before the clerk stating that he believes the person to be homicidal or suicidal and stating the grounds which support this belief that it would be dangerous to attempt to examine the person without restraint. *Id.*

no overt acts upon which to base emergency hospitalization, nor did it indicate whether Miss Hayes was homicidal, suicidal, or dangerous.¹²

Fourteen days after her confinement a hearing for judicial commitment was held at the hospital in accordance with section 122-63 which provided for an "informal" hearing by the clerk of superior court after two qualified physicians had examined the person alleged to be mentally ill.¹³ Two doctors' affidavits were presented in accordance with the statutory procedures.¹⁴ A member of the hospital staff gave notice of the hearing to the girl at three o'clock in the afternoon, and the hearing was held fifty minutes later.¹⁵ Miss Hayes was not advised by counsel at the hearing, nor was she given the opportunity to cross-examine or confront the examining physicians since they were not present.¹⁶

Some of the evidence introduced to support the commitment indicated that the girl had been leaving home for several days at a time and having sexual intercourse with several members of the community. This conduct had resulted in vaginal bleeding which endangered her health.¹⁷ The girl had also been treated previously in a mental institution for approximately three years, but she did not use alcohol or drugs, and she never had attempted or threatened suicide or homicide. The clerk of court ruled at the hearing that the girl remain involuntarily committed.¹⁸ At the end of the 180 day period, which was the maximum time a clerk could have committed a patient under section 122-63, the right to a second informal hearing was "waived" by the girl,

12. Brief for Appellee at 3, *In re Hayes*, 18 N.C. App. 560, 197 S.E.2d 582, appeal dismissed, 283 N.C. 753, 198 S.E.2d 729 (1973) [hereinafter cited as *Hayes Brief*].

13. Law of June 25, 1963, ch. 1184, § 2, [1963] N.C. Sess. Laws 1650-51 (repealed 1973) requires that the clerk hold an "informal" hearing "without unnecessary delay" of which the alleged mentally ill person is notified. The clerk is required to examine the affidavits of the examining physicians and any proper witnesses. At the conclusion of the hearings, if the clerk finds the person is in need of observation or treatment, he may order the person committed up to a maximum of 180 days. *Id.*

14. Law of June 25, 1963, ch. 1184, § 2, [1963] N.C. Sess. Laws 1650 (repealed 1973). This section requires that when an affidavit and request for examination of an alleged mentally ill person is made, the clerk shall direct two qualified physicians who are not directly involved with the care and treatment of the patient in the hospital to examine the person. If the physicians find that the person is a proper subject for observation and treatment and should be hospitalized, they will sign an affidavit to that effect. This procedure must be followed before the informal hearing is held in section 122-63. *Id.*

15. 18 N.C. App. at 560, 197 S.E.2d at 583.

16. *Hayes Brief* 3.

17. 18 N.C. App. at 561, 197 S.E.2d at 583.

18. *Id.*

and upon the recommendation of the superintendent of the hospital, an indeterminate period of commitment provided by section 122-65¹⁹ was imposed.²⁰ The girl remained in the hospital almost three years before she was released by writ of habeas corpus.

The trial judge who ordered Miss Haye's release held section 122-50 (the emergency hospitalization section), section 122-63 (the section in the judicial hospitalization proceeding that gave the clerk power to commit a person after an informal hearing), and section 122-65 (the section that allowed the clerk to order commitment for an indeterminate period at the end of the first 180 days of confinement) unconstitutional on their face.²¹ The judge found that since these sections did not require adequate notice, counsel, witnesses, and a hearing before a judicial officer at all stages of the proceedings, the procedures resulted in deprivation of liberty in violation of the due process clause of the fourteenth amendment.²²

The court of appeals affirmed the trial judge's decision but did not reveal the reasoning behind its decision, nor did it cite any cases supporting its holding.²³ The court merely stated that although it did not fully agree with the trial judge's reasoning, his ultimate conclusion was correct.²⁴ The court did comment on the new involuntary commitment legislation that had repealed the three statutes in question and rewritten Chapter 122, but it did not indicate whether this fact affected its decision.²⁵ Although the court of appeals failed to cite any cases, its decision was probably based on the United States Supreme Court decision in *In re Gault*²⁶ and other recent cases²⁷ which were persuasively argued in the *Hayes* brief.²⁸

19. Law of June 25, 1963, ch. 1184, § 2, [1963] N.C. Sess. Laws 1651-52 (repealed 1973) provides that at the end of the 180 day maximum period of confinement which may be imposed under section 122-63, if the superintendent of the hospital feels the patient needs further treatment, another hearing will be held (although it may be waived by the patient) and if the clerk agrees with the superintendent, an indeterminate period of commitment ("for a minimum necessary period") may be ordered.

20. 18 N.C. App. at 561, 197 S.E.2d at 583.

21. *Id.*

22. *Id.* at 561-62, 197 S.E.2d at 583.

23. *Id.* at 562, 197 S.E.2d at 584.

24. *Id.*

25. *Id.*

26. 387 U.S. 1 (1967).

27. *E.g.*, *Specht v. Patterson*, 386 U.S. 605 (1967); *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968); *Denton v. Commonwealth*, 383 S.W.2d 681 (Ky. 1964).

28. An in depth analysis of all the constitutional arguments made to the court upon which it may have based its decision is beyond the scope of this comment; however, the main arguments will be examined briefly. For a detailed analysis, see Tiggs

Although the *Gault* case only dealt with the due process rights required in juvenile commitment proceedings, a persuasive analogy may be drawn between juvenile and mental commitments.²⁹ In *Gault*, the Court expressly rejected the argument that juvenile proceedings are "civil" and therefore not subject to criminal procedural safeguards, reasoning that "commitment is a deprivation of liberty . . . [and] incarceration against one's will whether it is called 'criminal' or 'civil.'"³⁰ This argument should also be rejected as applied to mental commitment proceedings in North Carolina.³¹ As the Court's holding indicates, what a proceeding is labeled should not be allowed to camouflage what is done in that proceeding.³² Other Supreme Court decisions support this view as it applies to mental commitments.³³

Two lower court decisions strongly challenge the civil-criminal distinction and support the application of criminal procedural safeguards to mental commitment proceedings. In *Heryford v. Parker*,³⁴ the Court of Appeals for the Tenth Circuit stated:

We do not have the distinction between the procedures used to commit juveniles and adults as in *Gault*. But, like *Gault*, and of utmost importance, we have a situation in which the liberty of an individual is at stake, and we think the reasoning in *Gault* emphatically applies. It matters not whether the proceedings be labeled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration—whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent—which commands observance of the constitutional safeguards of due process.³⁵

& Hassell, *Civil Commitment in North Carolina: Dispelling the Illusion of Due Process*, 10 WAKE FOREST L. REV. — (1974).

29. *Hayes Brief* 11.

30. 387 U.S. at 50; *Hayes Brief* 11.

31. *Hayes Brief* 15.

32. See 387 U.S. at 27; *Hayes Brief* 15.

33. In *Specht v. Patterson*, 386 U.S. 605 (1967), a case in which the petitioner was sentenced to an indeterminate mental commitment under the Colorado Sex Offenders Act, the Court stated:

These commitment proceedings whether denominated civil or criminal are subject both to the Equal Protection Clause of the Fourteenth Amendment as we held in *Baxstrom v. Herold*, 383 U.S. 107 and the Due Process Clause.

We hold that the requirements of due process were not satisfied here.

Id. at 608. *Baxstrom* involved a commitment to a mental hospital for criminals at the expiration of a criminal sentence. Reading *Gault*, *Specht* and *Baxstrom* together may well indicate that the application of criminal procedural safeguards may be required whenever deprivation of liberty is possible. *Hayes Brief* 15.

34. 396 F.2d 393 (10th Cir. 1968).

35. *Id.* at 396.

In *Denton v. Commonwealth*³⁶ the court explicitly rejected the civil-criminal distinction:

Although lunacy inquests are not concerned with criminal intent or criminal acts they may result in depriving the defendant of his liberty and his property. This deprivation should be obtained only by the due processes of law under constitutional guarantees.

We have therefore concluded that when a proceeding may lead to the loss of personal liberty, the defendant in that proceeding should be afforded the same constitutional protection as is given to the accused in a criminal prosecution.³⁷

Another justification often asserted for limiting procedural safeguards for involuntary commitments is based on the argument that mental patients constitute a special class of people who are subject to the full *parens patriae* power of the state.³⁸ This state-asserted right to help and protect those who cannot (or will not) protect themselves does not justify a limitation on procedural rights when a person's liberty is at stake.³⁹ In *Gault* the Court essentially rejected the *parens patriae* argument as it applied to juvenile delinquents and in so doing brought into question any state procedure justified on such grounds which results in a deprivation of a person's liberty.⁴⁰

The *Gault* Court held that due process required adequate and meaningful notice of charges,⁴¹ right to counsel,⁴² the rights of confrontation and cross-examination,⁴³ and the privilege against self-incrimination.⁴⁴ An examination of the specific statutes involved in *Hayes* reveals the constitutional infirmity of each.

Section 122-63, which formed the basic "judicial commitment" law under the old statute, provided that upon the filing of an affidavit

36. 383 S.W.2d 681 (Ky. 1964).

37. *Id.* at 682.

38. *Hayes* Brief 16.

39. *See id.* 16-18.

40. *See* 387 U.S. at 15-20. The court in *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968), specifically rejected the *parens patriae* argument:

Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in *parens patriae*, it has the inescapable duty to vouchsafe due process, and this necessarily includes the duty to see that a subject of an involuntary commitment proceeding is afforded the opportunity to the guiding hand of legal counsel at every step of the proceedings, unless effectively waived by one authorized to act in his behalf.

Id. at 396.

41. 387 U.S. at 33.

42. *Id.* at 41. The Court also held that if a person is indigent, counsel will be appointed. *Id.*

43. *Id.* at 57.

44. *Id.* at 55.

stating the affiant's belief that a person was in need of care and treatment for mental illness or inebriety, the clerk of court would hold a hearing to determine whether such a need existed, following an examination and certification by two physicians.⁴⁵ If the clerk decided that a person was in need of care and treatment, he could order hospitalization for a period not to exceed 180 days.⁴⁶ Although the statute required that notice of the hearing be given to the patient,⁴⁷ the notice was not required to be timely and adequate.⁴⁸ Moreover, the statute did not grant a right to counsel that included meaningful notice of this right, full opportunity to procure counsel, and the appointment of counsel for indigents. A number of courts have held that the right to counsel exists for all persons being involuntarily committed to a mental institution.⁴⁹

In order to provide meaningful representation, counsel should be provided at all significant pre-hearing stages of the commitment proceedings.⁵⁰ The most significant pre-hearing stage in the North Carolina procedure was the court-ordered psychiatric evaluation interview by two physicians provided for in section 122-62.⁵¹ In most situations, this examination would be determinative since this was usually the only evidence relied upon by the committing clerk.⁵² The possibility of lifetime institutionalization based on an interview consisting of three or four questions and possibly lasting only a few minutes compels at least the passive presence of counsel who might serve to eliminate most of these problems and add a measure of procedural fairness to the commitment process.⁵³

Other constitutional infirmities of the old statute include the lack of adequate confrontation and cross-examination of witnesses.⁵⁴ For example, the examining physicians were not required to be present at the hearing and, as noted previously, the affidavits of the doctors essen-

45. Law of June 25, 1963, ch. 1184, § 2, [1963] N.C. Sess. Laws 1650-51 (repealed 1973).

46. *Id.*

47. *Id.*

48. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1097 (E.D. Wis. 1972).

49. *E.g.*, *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1097 (E.D. Wis. 1972); *Dixon v. Attorney General*, 325 F. Supp. 966, 974 (M.D. Pa. 1971); *In re Popp*, 33 Ohio App. 2d 22, —, 292 N.E. 2d 330, 335 (1972); *State v. Collman*, 9 Ore. App. 476, 482-83, 497 P.2d 1233, 1237 (1972); see quote in note 40 *supra*.

50. *See United States v. Wade*, 388 U.S. 218 (1967).

51. *Hayes Brief* 33.

52. *Id.*

53. *Id.* at 34.

54. *Id.* at 37.

tially determined the clerk of court's decision.⁵⁵ The Court in *Gault* expressly held that the right to confrontation, and cross-examination could not be denied in juvenile hearings.⁵⁶ This view was extended in *Specht v. Patterson*⁵⁷ where the Court was dealing with a mental commitment procedure which could be instituted upon the conviction of certain crimes:

Due process in other words, requires that [the defendant] be with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed.⁵⁸

Under section 122-59, the emergency hospitalization section, a person who was believed to be suddenly violent and dangerous to himself or others could have been committed for a period of up to twenty days. The authorization for such commitment was given either by a physician who had examined the person within twenty-four hours or by the clerk based on the affidavit of anyone "having knowledge of the facts," but only if it were believed that it would be dangerous for a physician to make an examination.⁵⁹ This procedure allowed a person to be held for a period of twenty days, and possibly longer, without a hearing. Arguably, to hold a person more than a few days without judicial contact is constitutionally suspect⁶⁰ since even a criminal suspect must be given his first judicial hearing "without unnecessary delay."⁶¹ The New York Court of Appeals has held unconstitutional a proceeding that involuntarily committed a narcotics addict for three days without opportunity to be heard,⁶² and at least one court has held that a probable cause hearing for involuntary commitment must be held within forty-eight hours after a person is taken into custody and a full court hearing within ten to fourteen days.⁶³

The procedures that were not affected by the decision in *Hayes* but were repealed by the 1973 legislation were admission by medical certi-

55. See text accompanying note 52 *supra*.

56. 387 U.S. at 56-57.

57. 386 U.S. 605 (1967).

58. *Id.* at 610.

59. Law of June 25, 1963, ch. 1184, § 2, [1963] N.C. Sess. Laws 1648-49 (repealed 1973).

60. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1091 (E.D. Wis. 1972).

61. *Mallory v. United States*, 354 U.S. 449, 455 (1957).

62. *Narcotic Addiction Control Comm'n v. James*, 22 N.Y.2d 545, 240 N.E.2d 29, 293 N.Y.S.2d 531 (1968).

63. *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972).

fication⁶⁴ and voluntary admission.⁶⁵ Although these procedures were not held unconstitutional, if placed squarely before the courts today, it is unlikely that either procedure would withstand constitutional scrutiny due to the lack of certain procedural safeguards.

Admission by medical certification has often been classified as a non-protested involuntary admission as distinguished from a voluntary admission⁶⁶ since admission was not voluntarily initiated by the affirmative action of the patient himself but by two physicians with the patient's acquiescence.⁶⁷ The procedure required the affidavit of two qualified physicians stating that a person was mentally ill or inebriate and in need of care and treatment. The person was then sent to a mental hospital. The clerk of court was not necessarily involved in this procedure, but if the patient or any member of his family objected to the admission, a judicial commitment had to be instituted.⁶⁸

If, after the admission, the patient or any member of his family objected, they had to file an affidavit stating their objections with the clerk of court within sixty days after the admission. The clerk would then hold a hearing. The statute was silent as to what happened if a timely objection was not made. Presumably, and this was the interpretation the hospitals followed, the objection was waived.⁶⁹ This interpretation was questionable since waiver of a right is valid only when knowingly and consciously given,⁷⁰ and there were no provisions requiring that notice of the right to object be given to the person or his family either before or after admission. Moreover, with no maximum period being set by the statute, confinement might have been indefinite after the sixty days had passed. Physicians who may have had no psychiatric background were thus given the power to make a decision that might have resulted in indefinite institutionalization with no judicial check on the procedure.

64. Law of June 25, 1963, ch. 1184, § 2, [1963] N.C. Sess. Laws 1647-48 (repealed 1973).

65. Law of June 25, 1963, ch. 1184, § 2, [1963] N.C. Sess. Laws 1647 (repealed 1973).

66. MENTALLY DISABLED 18.

67. Law of June 25, 1963, ch. 1184, § 2, [1963] N.C. Sess. Laws 1647-48 (repealed 1973).

68. *Id.*

69. Address by Robert A. Hassell, co-author of North Carolina's new involuntary commitment laws, before the Deputies and Assistant Clerks of Court in Charlotte, North Carolina, Aug. 3, 1973. A copy of this address is on file in the *N.C. Law Review* office.

70. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

Under the voluntary admission procedures,⁷¹ a person who felt that he was mentally ill or inebriate could voluntarily admit himself to the proper hospital upon filling out an application for admission. Although there was no court intervention, the applicant did need the written statement of a qualified physician stating that the applicant was a fit and proper subject for admission. Once admitted, the only way a person could be released was to give the superintendent ten days written notice of his desire to be discharged. If it were determined that the person should not be admitted for less than thirty days, the superintendent could have the patient sign a special form agreeing to admit himself for thirty days. This consent form could be enforced upon the patient for that period. These procedures were constitutionally suspect for there were no provisions requiring that prior to admission the patient be informed that he would not be entitled to leave until he gave the hospital ten days written notice of his desire to leave, or that if he signed the thirty-day agreement, the hospital could force him to stay the entire period. At least one state supreme court has held a similar voluntary procedure unconstitutional on its face.⁷²

Although *Hayes* dealt only with the constitutionality of the emergency and judicial commitment statutes, it was apparent that all of North Carolina's commitment and admission procedures were constitutionally questionable and in need of revision. The trial court's decision was handed down just prior to the 1973 Session of the General Assembly; therefore, emergency legislation by the General Assembly was required since the state was without adequate mental commitment laws.⁷³ This legislative haste possibly accounts for many of the administrative problems presently being experienced under the new laws and some of the constitutional infirmities.

II. THE NEW MENTAL HEALTH LAWS IN NORTH CAROLINA

During the past twenty years state legislatures have been more concerned with the treatment and rehabilitation of the mentally ill than with the problem of wrongful commitment.⁷⁴ Due to advances in psychi-

71. Law of June 25, 1963, ch. 1184, § 2, [1963] N.C. Sess. Laws 1647 (repealed 1973).

72. *Ex parte Romero*, 51 N.M. 201, 181 P.2d 811 (1947).

73. The trial decision in the *Hayes* case was handed down on October 20, 1972. Immediately, the State of North Carolina petitioned the court of appeals for certiorari and asked for a stay of execution of the trial court order. The court of appeals allowed certiorari but denied the motion for a stay of execution. 18 N.C. App. at 562, 197 S.E.2d at 583.

74. MENTALLY DISABLED 35.

atric technique and greater understanding of the characteristics of mental illness, legislators have been supplied with the factual basis necessary for the enactment of laws most conducive to effective treatment of persons who are in fact mentally disabled.⁷⁵ Less formalized commitment procedures have been advocated by the medical profession because of the allegedly detrimental effect cumbersome legal machinery might have on a mentally ill person.⁷⁶ Although North Carolina's new mental health laws do not fall within the category of liberalized commitment proceedings, they recognize that a person committed under the involuntary commitment procedures has the same due process rights as any other citizen who might be deprived of his liberty. Under the new mental health laws there are two major articles: voluntary admission⁷⁷ and involuntary commitment.⁷⁸

A. *Voluntary Admission.*

The new voluntary admission procedures reflect the legislature's recognition that mental illness⁷⁹ and inebriety⁸⁰ are illnesses which, from an admissions standpoint, should be treated in the same manner as any physical illness. Under the new procedures any person may seek treatment in any treatment facility without formal or written application for evaluation or admission.⁸¹ Such a procedure has been labeled "informal" voluntary admission in order to distinguish it from "formal" voluntary admission, which was characteristic of the old North Carolina admissions statute.⁸² Under the informal admission procedure, a person is admitted on precisely the same basis that he would be admitted to any general hospital for any disorder.⁸³ No papers

75. *Id.*

76. See M. GUTTMACHER & H. WEIHOFFEN, *PSYCHIATRY AND THE LAW* 288-89 (1952).

77. N.C. GEN. STAT. §§ 122-56.1 to -57 (Supp. 1973).

78. *Id.* §§ 122-58.1 to -58.8 (Supp. 1973).

79. *Id.* § 122-36(d) (1964) defines "mental illness" as an illness which so lessens the capacity of the person to use his customary self-control, judgment, and discretion in the conduct of his affairs, and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control.

80. *Id.* § 122-36(c) (1964) defines "inebriate" as a person habitually so addicted to alcoholic drinks or narcotic drugs or other habit forming drugs as to have lost the power of self-control and that for his own welfare or the welfare of others is a proper subject for restraint, care, and treatment.

81. *Id.* § 122-56.3 (Supp. 1973).

82. *MENTALLY DISABLED* 18-19.

83. *Id.*

are signed except possibly financial responsibility or insurance forms, and the person is free to leave at any time.

The new procedures require that once a person presents himself for admission, he must be examined and evaluated by a qualified physician within twenty-four hours. If the person is accepted for treatment and care, the treatment facility must notify him in writing within twenty-four hours of acceptance that he has a right to be discharged upon request, and a form must be provided which upon his signing entitles him to immediate discharge. Although eight states provide for informal admission procedures,⁸⁴ only five require that hospital officials notify the person of his right to discharge upon written request.⁸⁵ However, failure to provide this notification has been criticized since a right is illusory without knowledge of it.⁸⁶ If the person admitted to the facility has knowledge of this discharge procedure and submits a written request for release to a member of the staff prior to the required notification by the facility, he also must be discharged immediately.

Although informal admission has been more favorably received than formal voluntary admission in some states,⁸⁷ North Carolina's new informal admission procedures have been criticized.⁸⁸ The criticism stems primarily from the lack of any control over the person accepted for admission. Since a person must be accepted if he is in need of treatment and care but at the same time must be released immediately upon written notice of his desire to be discharged, the procedure has been frequently abused, primarily by persons seeking treatment for inebriety. The phrase "revolving door" patient is used to describe the inebriated person who comes in to "dry out" overnight and then discharges himself the following morning.⁸⁹ This process may be re-

84. Connecticut, Illinois, Kansas, Maine, Minnesota, New York, Pennsylvania, and Tennessee. *Id.*

85. Illinois, Maine, New York, Pennsylvania, and Tennessee. *Id.*

86. *Id.* at 23.

87. See generally *Congressional Hearings* 27.

88. *Hearings on the Involuntary Commitment Act Before the Senate Judiciary I Comm.*, 1974 Sess. of N.C. Gen. Assembly 5 (Oct. 12, 1973) [hereinafter cited as *First Senate Hearing*]; *Hearings on the Involuntary Commitment Act Before the Senate Judiciary I Comm.*, 1974 Sess. of N.C. Gen. Assembly 8-9 (Oct. 19, 1973) [hereinafter cited as *Second Senate Hearing*]; *Hearings on the Involuntary Commitment Act Before the Senate Judiciary I Comm.*, 1974 Sess. of N.C. Gen. Assembly 5, 17 (Nov. 2, 1973) [hereinafter cited as *Third Senate Hearing*]. Minutes to the above hearings are on file in the N.C. Law Review office.

89. *Second Senate Hearing* 8-9; The Raleigh News and Observer, Sept. 8, 1973, at 20, col. 2.

peated several times, and some facilities have actually had the same person check in and out several times in the same day.⁹⁰

This type of abuse raises two major problems. The first and most serious is that in most cases treatment will have begun under which the person is given certain drugs. These drugs may have serious side effects if the person is not carefully watched and regulated until the drug is no longer effective.⁹¹ If a person is discharged immediately after receiving such treatment and drives his car, serious consequences could result. This situation places the treatment facilities in a precarious position since refusal to release a person until the drug has worn off violates the admission statute and subjects them to a suit for false imprisonment, and permitting release subjects them to civil liability if a person released under the influence of drugs causes an accident. The second problem is that the paper work involved in checking a person in and out and the assigning of physicians and staff to attend to the person results in an administrative nightmare for the facility.⁹²

A number of approaches might be used to stop this abuse. One approach would be to continue the informal admission procedure but retain from the formal admission procedures the requirement that release be granted within five days⁹³ after written request from the person unless he is released earlier by the superintendent of the treatment facility. An explanation of all present notice requirements and the new delayed discharge procedure should be given in writing and orally⁹⁴ to the person not only within twenty-four hours after accepting the person but also immediately upon the person's request for admission. The person should be informed that if the physician finds him acceptable for treatment and further psychiatric evaluation, he has the right to be discharged upon five days advance written request. The reason for requiring notice to be given to the person upon his presentation for admission is that under the present law the physician is given twenty-four hours to determine whether or not to accept a person for care and treatment and, upon acceptance, notice is required within twenty-four

90. *Third Senate Hearing* 17.

91. *Id.*

92. *Id.* Attachment D at 3, Attachment E at 1.

93. Dr. Irigary, Superintendent of Umstead Hospital, has indicated that five days would be an absolute minimum to analyze the problems of an alcoholic patient. *Id.* at 16-17.

94. N.C. GEN. STAT. § 122-56.3 (Supp. 1973) does not presently require oral notice but only written. The statute should be changed to provide oral as well as written notice.

hours.⁹⁵ Therefore it is possible that forty-eight hours would lapse before the person would be notified of his right to discharge. If the five day advance notice requirement was imposed, it could be seven days before a person would be discharged. A procedure in which a person is restrained against his will when he requests to leave may be constitutionally suspect unless there are compelling reasons for such restraint. Restraint for an amount of time necessary for the side effects of drugs to wear off would provide reasonable grounds for detention. However, since the effect of most drugs does not last longer than twenty-four to forty-eight hours,⁹⁶ the five day limitation requested by the medical profession might be constitutionally infirm in light of *Ex parte Romero*⁹⁷ which held unconstitutional a ten day restraint under a formal voluntary admission statute.

A less constitutionally suspect approach would be continue the informal procedures as they now exist but authorize the treatment facility to keep a person long enough after his request for discharge for any drugs to wear off, but in no event longer than forty-eight hours. In addition, the treatment facility director or superintendent would be given the discretion whether or not to readmit a person who has abused the informal procedures.⁹⁸ Under either of the above approaches, if a person who is voluntarily admitted requests discharge, there would be sufficient time to commence involuntary commitment procedures if it were determined that the person meets the requirements set forth in the involuntary commitment statute.

B. *Involuntary Commitment.*

North Carolina's new policy for involuntary commitments is to insure that "no person shall be committed to a treatment facility unless he is determined to be dangerous to himself or others or gravely disabled."⁹⁹

95. *Id.*

96. Telephone interview with Dr. Peter Witts, Chief of Research Services, Dep't of Human Resources, Division of Mental Health Services, Jan. 30, 1974. Dr. Witts noted that the longer a person is under treatment, the longer the time period for the serious effects of the drugs to wear off. For example, if only one injection is given to a person, then it may only take two or three hours for the drug to wear off; however, if injections are given on a normal basis for two or three days, it may take 24 to 48 hours for the serious side effects of the drugs to wear off.

97. 51 N.M. 201, 181 P.2d 811 (1947).

98. Presently the director of the inpatient service at the Psychiatric Training and Research Center at the South Wing of the North Carolina Memorial Hospital at Chapel Hill is given the discretion to approve admissions but no other director or superintendent of a treatment facility is so authorized. N.C. GEN. STAT. § 122-56.2(d) (Supp. 1973).

99. *Id.* § 122-58.1 (Supp. 1973).

It is also the policy of the state to insure that commitment will be under conditions that "protect the dignity and rights of the person" ¹⁰⁰ From an examination of the sections that make up this article, it is apparent that the term "rights" as used in the policy declaration was intended to refer to a person's constitutional right to due process. The new section that authorizes the initiation of the commitment procedures provides that a person may be involuntarily committed in only one of two ways—judicial hospitalization or emergency hospitalization. ¹⁰¹

Under the judicial hospitalization section, a law enforcement officer ¹⁰² is given authority to take into custody any person who, "by reason of the commission of overt acts, is determined . . . to be violent and of imminent danger to himself or others, or to gravely disabled" ¹⁰³ The term "gravely disabled" is defined as "unable because of mental illness or inebriety to provide for the basic personal needs for food, clothing or shelter." ¹⁰⁴ The term "overt acts" is not defined in the statute and is presumably left to judicial interpretation.

Once the officer has made the determination that a person is either violent and of imminent danger to himself or others or gravely disabled, he is required to take the person to a qualified physician ¹⁰⁵ and obtain a medical examination and evaluation within twenty-four hours. The section also provides that a qualified physician may initiate the judicial procedures, and under such circumstances, the determination by the law enforcement officer is removed from the procedure and the qualified physician makes the initial determination as to whether the person is within the coverage of the statute. ¹⁰⁶

Authorization for the law enforcement officer to retain custody of the person after the examination and evaluation depends on the physician's determination. If the physician finds the person falls within

100. *Id.*

101. *Id.* § 122-58.3 (Supp. 1973).

102. "Law enforcement officer" is defined as any sheriff, deputy sheriff, constable, police officer and highway patrolman. *Id.* § 122-58.2(d) (Supp. 1973).

103. *Id.* § 122-58.3(1) (Supp. 1973).

104. *Id.* § 122-58.2(b) (Supp. 1973).

105. *Id.* § 122-36(f) (1964) defines a "qualified physician" as a medical doctor who is duly licensed by this State to practice medicine; provided, however, that no physician is to be considered a "qualified physician" with respect to any procedure to hospitalize any person who is related by blood or marriage to the said physician.

It should be noted that clinical psychologists are not included in this definition which is questionable in light of their background and training in the mental health area.

106. *Id.* § 122-58.3(1) (Supp. 1973).

the statutory language, he must submit a written statement that he has examined the person within twenty-four hours of his statement and found the person to come within the statute. He must set forth in his statement the overt acts upon which his professional opinion is based. Once the officer has the physician's written statement, he has the authorization to retain custody of the person and to bring him before a magistrate within seventy-two hours.¹⁰⁷

When the person is brought before the magistrate, the magistrate holds a hearing in which he must determine if there are "reasonable grounds" to believe that by reason of overt acts, the person falls within the statutory language.¹⁰⁸ In making this determination the magistrate is required to "take and consider" oral testimony and he "may" consider the physician's written statement. The use of the term "may" has been questioned since it would be highly unusual if the magistrate did not consider the statement of the physician in light of the medical questions involved in such a proceeding.¹⁰⁹

Upon hearing all the evidence, the magistrate will either release the person or order him to be taken to a treatment facility to be examined by another physician. The examination and evaluation must be made within twenty-four hours after the person's arrival at the treatment facility.¹¹⁰ The person will remain at the facility pending a hearing in district court unless the examining physician at the facility determines that the person is not violent and of imminent danger to himself or others or gravely disabled, and then the person may be released until the district court hearing.¹¹¹

Under the emergency hospitalization section only a law enforcement officer may initiate commitment procedures.¹¹² If the officer has "reasonable grounds" to believe that the delay in obtaining a medical examination and evaluation would endanger life or property, he is authorized to take the person before a magistrate immediately. Although there is no specific time limit designated, the term "immediately" implies that there should be no delay in taking the person before a magistrate regardless of what time of day the person is taken into custody. The only difference between the emergency and judicial procedure is the determination, based on a reasonable belief, that life or property

107. *Id.*

108. *Id.* § 122-58.4(a) (Supp. 1973).

109. See text accompanying notes 169-73 *infra*.

110. N.C. GEN. STAT. § 122-58.5(a) (Supp. 1973).

111. *Id.* § 122-58.5(b)(1)(a) (Supp. 1973).

112. *Id.* § 122-58.3(2) (Supp. 1973).

would be endangered if the person were taken to a physician. Such a distinction could easily lead to abuse of the emergency procedure since a law enforcement officer's determination that a person is violent and of imminent danger to himself or others, by its very nature, indicates that life or property would be endangered if there were delays in presenting this person before the magistrate.

Once the person is brought before the magistrate, an order for the person's release must be made if the magistrate determines either that there are not reasonable grounds to believe, based on overt acts, that the person is violent and of imminent danger to himself or others or is gravely disabled, or that there are not reasonable grounds to believe that the delay in obtaining a medical examination would have endangered life or property.¹¹³ Under this requirement, it is possible for the magistrate to find that the person is violent and of imminent danger to himself or others but that life or property would not be endangered by delay in obtaining a medical examination. In this situation, the magistrate must release the person. It would seem more logical that the law enforcement officer should take the person to a physician and thereby begin the judicial proceeding. If such an approach is used by the law enforcement officers, the section should expressly authorize such a variance; otherwise, the requirement of "release" is merely illusory.

As in the judicial proceeding, the magistrate must take and consider oral testimony in making his determination. If the magistrate determines that the person should not be released, he will order him to be taken to a treatment facility for the purpose of obtaining a medical examination and evaluation the results of which must be furnished to the magistrate within forty-eight hours after the person's arrival at the facility or the person will be released from custody.¹¹⁴

The physician at the treatment facility must examine and evaluate the person within twenty-four hours of his arrival and make the determination of whether the person is violent and of imminent danger to himself or others or gravely disabled.¹¹⁵ This determination must be

113. *Id.* § 122-58.4(b) (Supp. 1973).

114. *Id.*

115. *Id.* § 122-58.5(a) (Supp. 1973). This section requires the physician at the treatment facility to make his determination based on the examination of the person without specifying what "overt acts" his opinion is based upon. This deletion was probably an oversight by the drafters but it could be interpreted to allow the physicians to consider a person's history of mental illnesses or inebriety as well as present "overt acts." Since most psychiatric diagnoses are based primarily on a person's mental his-

made in the form of a written statement recording the reasons for the decision and must be sent to the magistrate within twenty-four hours of the medical examination.¹¹⁶ Upon receiving this statement, the magistrate will again determine if there are reasonable grounds to believe the person falls within the statutory language. If the magistrate so determines, he will order the person to remain in custody at the treatment facility. If the written statement of the physician found the person not to be within the statute, the magistrate will release him pending the district court hearing.¹¹⁷

Section 122-58.6(a) provides for a district court hearing that must be held within five days, or for good cause shown, within ten days after the person is taken into custody.¹¹⁸ Notice of the hearing must be given to the person and his attorney forty-eight hours prior to the hearing.¹¹⁹ The person has the right to counsel at the hearing, but this right may be waived with the consent of the court.¹²⁰ This provision appears to be in conflict with another provision that provides for the mandatory appointment of counsel at the time of the hearing or prior to it if the judge finds that the person is without counsel.¹²¹ Although this latter provision is primarily concerned with the appointment of counsel for the indigent, whether the person is indigent or not, he is appointed counsel and charged with an attorney's fee if he can afford to pay it. Obviously, if this provision were to be strictly adhered to, constitutional issues might be raised as to a person's right to choose whether to be represented. Therefore the interpretation which should be given this section is that the provision allowing a person to waive counsel with the court's consent should control.¹²²

The section also states that a person must be present at the hearing and that this right may be waived only upon the written recommendation of the person's attorney and the concurrence of the court.¹²³ A

tory, the statute should specifically provide for considering such records as well as overt acts. *Hearings on the Involuntary Commitment Act Before the Senate Judiciary I Committee*, 1974 Sess. of N.C. Gen. Assembly 2 (Nov. 9, 1973).

116. N.C. GEN. STAT. § 122-58.5(b)(2) (Supp. 1973).

117. *Id.* § 122-58.4(b) (Supp. 1973).

118. *Id.* § 122-58.6(b) (Supp. 1973) provides that if the hearing is not held and a written order for commitment signed by the district court judge within ten days, the person will be released from custody immediately and from the treatment facility.

119. *Id.* § 122-58.6(a) (Supp. 1973).

120. *Id.* § 122-58.6(e) (Supp. 1973).

121. *Id.* § 122-58.6(c) (Supp. 1973).

122. *Id.* § 122-58.6(e) (Supp. 1973).

123. *Id.* § 122-58.6(d) (Supp. 1973).

person is entitled to a transcript of the hearing¹²⁴ and the right to appeal to the superior court for a hearing *de novo*, which includes the right to a jury determination if requested.¹²⁵ If the person is indigent, the state will bear the cost of the appointed attorney¹²⁶ and the transcript.¹²⁷

The district court judge will make the same determination that has previously been made by the law enforcement officer, physicians, and magistrate: whether, by reason of the commission of overt acts, the person is violent and of imminent danger to himself or others or is gravely disabled. If the judge so determines, he will order the person committed to the appropriate treatment facility for a period not to exceed ninety days.¹²⁸ If an appeal is taken, the section is silent as to what should be done with the person pending the superior court hearing. Presumably, the person is returned to the treatment facility. A problem arises, however, if the person requests a jury determination since in some North Carolina counties jury trials in superior court are only held every three or four months.¹²⁹ Therefore, a person could be held at a treatment facility for ninety days or more waiting for his superior court hearing *de novo*. Such a procedure might be constitutionally suspect in addition to creating the anomalous situation where a person may be entitled to his ninety-day rehearing of right in the district court before he receives his superior court hearing *de novo*.

If no appeal is taken and the superintendent of the treatment facility determines that the person will be in need of treatment beyond the initial ninety-day commitment period, he must make a request for a rehearing to the chief district court judge at least thirty days before the end of the initial period.¹³⁰ The request must be in writing and a copy must be given the person and his attorney. Notice of the rehearing must also be given to the person and his attorney at least fifteen days in advance. The hearing must be conducted in accordance with the same procedures and due process safeguards present in the original

124. *Id.* § 122-58.6(f) (Supp. 1973).

125. *Id.* § 122-58.6(g) (Supp. 1973).

126. *Id.* § 122-58.6(c) (Supp. 1973).

127. *Id.* § 122-58.6(f) (Supp. 1973).

128. *Id.* § 122-58.7(a) (Supp. 1973).

129. North Carolina's constitution requires that jury trials be held in each county at least twice a year. N.C. CONST. art. IV, § 9(2). According to the annual superior court calendar for the 1973-74 sessions, a number of counties provide for holding superior court with a jury available only twice during each six month session. See [1973-74] CALENDAR OF COURTS, THE SUPERIOR COURT OF NORTH CAROLINA, (adopted annually by the Supreme Court of North Carolina).

130. N.C. GEN. STAT. § 122-58.7(b) (Supp. 1973).

hearing.¹³¹ The district court judge may order recommitment up to a period not to exceed 120 days, and any further rehearings must be conducted in the same manner.¹³² A person involuntarily committed may be discharged from the treatment facility at any time prior to the expiration of the commitment period by the superintendent or director of the facility.¹³³

III. CONSTITUTIONAL IMPLICATIONS OF THE NEW COMMITMENT LAWS

Although the *Hayes* decision gave no guidelines to legislators in adopting the new involuntary commitment laws, many of the due process safeguards required by *Gault* and other recent decisions that have specifically set forth due process standards for mental commitments were incorporated in North Carolina's new laws. However, there are a number of areas in the new laws that are constitutionally suspect because they do not adequately provide the procedural safeguards which have been required by some recent decisions.

A. *The Right to a Preliminary Hearing Within Forty-Eight Hours.*

As noted previously, North Carolina's new commitment procedures provide for both a preliminary hearing—the magistrate's "reasonable grounds" determination¹³⁴—and a full hearing in district court.¹³⁵ The full hearing must be held within five days, or for good cause shown, within ten days after a person is taken into custody.¹³⁶ The problem, however, is that the preliminary hearing itself is not specifically required to be held for at least four days.

The initiating law enforcement officer under the judicial commitment procedures is given twenty-four hours to find a qualified physician and obtain an examination and evaluation of the person in custody.¹³⁷ Although the physician is allowed twenty-four hours from the time of his examination to write his statement, the written statement must also be provided within the initial twenty-four hours after the person is taken into custody in order for the law enforcement officer to retain custody of the person.¹³⁸ Upon receiving the written

131. *Id.*

132. *Id.*

133. *Id.* § 122-58.8 (Supp. 1973).

134. *Id.* § 122-58.4 (Supp. 1973).

135. *Id.* § 122-58.6 (Supp. 1973).

136. *Id.*

137. *Id.* § 122-58.3(1) (Supp. 1973).

138. *Id.* Although the section is silent as to what results in the situation where the doctor completes his examination of the person within the initial 24 hour period

statement from the physician, the officer is given an additional seventy-two hours in which to take the person to a magistrate.¹³⁹ As a result, a maximum of four days is permitted before a preliminary hearing is required.

In a recent decision, *Lessard v. Schmidt*,¹⁴⁰ in which the Wisconsin civil commitment procedures were declared unconstitutional, a federal three-judge court held that due process requires that a preliminary hearing must be held within forty-eight hours after a person is taken into custody.¹⁴¹ The court justified this time limitation on the grounds that at this stage in the process, the necessity for commitment has not yet been established and to allow "even a short detention in a mental facility may have long lasting effects on the individual's ability to function in the outside world due to the stigma attached to mental illness."¹⁴²

There appears to be no justification in the new laws for allowing up to four days for the preliminary hearing to be held. It has been recorded in one community in North Carolina that the average time spent by a law enforcement officer from the time he takes a person into custody, obtains a medical evaluation, takes the person before a magistrate, and then to a treatment facility is five hours.¹⁴³ Since magistrates are on call twenty-four hours a day in most county seats,¹⁴⁴ the law enforcement officer does not need three days to take a person before a magistrate. The maximum amount of time allowed by the new procedures before a preliminary hearing must be held is constitutionally suspect and should be brought more in line with the forty-eight hour limitation imposed by the *Lessard* court.

B. *The Right to Meaningful Representation of Counsel.*

Another area that is constitutionally questionable under North Carolina's new laws is the scope of the right to counsel. Implicit in

but does not complete his written statement, presumably the officer must release the person from custody. If the officer retains custody of the person during this interim, he may be subjecting himself to civil liability.

139. *Id.*

140. 349 F. Supp. 1078 (E.D. Wis. 1972).

141. *Id.* at 1091.

142. *Id.*

143. *Third Senate Hearing* 8.

144. Magistrates are required to be on call 24 hours a day in most county seats and in some of the larger cities, they may be on duty 24 hours a day. This is by order of the chief district judge in each district. If a magistrate, whether on call or on duty, needs to leave his area of the county, he must get another magistrate or the clerk of superior court to stand in for him.

the right to meaningful representation by counsel is the right to have counsel present at all significant pre-hearing stages.¹⁴⁵ In *United States v. Wade*,¹⁴⁶ the Supreme Court held counsel was necessary at a compulsory police lineup because this pre-trial proceeding "might well settle the accused's fate and reduce the trial itself to a mere formality."¹⁴⁷ An analogy can be drawn between the effect that a pre-trial police lineup without counsel has on a trial and the effect that a psychiatric hearing evaluation interview without counsel has on mental commitment proceedings. As stated in a recent survey of American law:

A mental commitment hearing is little more than a "hollow" formality since, "for all practical purposes," commitment is assured by the prehearing psychiatric examination. It is extremely difficult to destroy the credibility of a psychiatrist's opinion by cross-examination because that opinion is based largely on the psychiatrist's version of what the prospective patient said or did during the psychiatric interview. The prospective patient can offer his own version, but it will generally be ignored.¹⁴⁸

The most significant pre-hearing stage under the old commitment procedures in North Carolina was the psychiatric evaluation interview because of its conclusory effect on the decision of the clerk of superior court in determining whether to commit a person.¹⁴⁹ Under the new laws there are several pre-hearing stages—the initial psychiatric evaluation interview, the preliminary hearing, and the final psychiatric evaluation—all of which may be considered significant.

The court in *Lessard* held that a detained individual must have counsel at the preliminary hearing on detention since the need for commitment has not been established at this stage and an attorney may be able to prepare some initial defenses.¹⁵⁰ Some counties in North Carolina are presently providing attorneys at the magistrate's hearing, but the statute does not require the presence of counsel at this stage.¹⁵¹

The need for counsel at the psychiatric evaluation interview was also addressed by the *Lessard* court, but the conclusion was that the right to effective counsel was outweighed by the state's interest in

145. See *United States v. Wade*, 388 U.S. 218 (1967); *Hayes Brief* 33.

146. 388 U.S. 218 (1967).

147. *Id.* at 224.

148. N.Y.U., ANNUAL SURVEY OF AMERICAN LAW 38 (1969-70).

149. *Hayes Brief* 33.

150. 349 F. Supp. at 1092, 1099.

151. *Second Senate Hearing* 10.

meaningful consultation.¹⁵² The court drew an analogy to the criminal law area where a mental examination is required when an accused raises the defense of insanity.¹⁵³ The presence of counsel at the mental examination has not been allowed since the examination is of an intimate and personal nature and the presence of a third party in a legal and non-medical capacity would severely limit its efficacy.¹⁵⁴ However, the court did require that the state provide other means of maintaining the person's rights to effective counsel such as recording the interview and making available the written results to the defense counsel.¹⁵⁵

North Carolina's new laws do not provide for any alternative means of protecting the individual's rights at either of the psychiatric evaluation interviews. The possibility of misunderstanding between the physician and the person detained and the uncertainty that still exists in the field of mental health¹⁵⁶ compel that counsel at least be provided a recording of the psychiatric evaluation in order to point out to the magistrate at the preliminary hearing or to the judge at the district court hearing any irregularities and possible misunderstandings that may have influenced the physician's determination. The initial psychiatric interview may not be as significant as the interview at the treatment facility since psychiatrists usually make the examination at the treatment facility whereas physicians who are not psychiatrists usually make the initial psychiatric evaluation. However, the initial interview may still have a conclusive effect on the magistrate's determination or even that of the district court judge. Without a recording or a transcript of the interview, an attorney is not allowed to pursue fully any possible initial defenses that the detained person may have.

C. *The Right to the Privilege Against Self-Incrimination.*

Another serious constitutional problem with the new laws is the lack of notice to the person, prior to the psychiatric interview, of the privilege against self-incrimination. In *Gault* the privilege against

152. 349 F. Supp. at 1100.

153. *Id.*

154. *Id.*

155. *Id.* The California mental health act which is very similar to North Carolina's new act has also come under attack for not providing counsel at the psychiatric evaluation interview. Comment, *Compulsory Counsel for California's New Mental Health Law*, 17 U.C.L.A.L. REV. 851 (1970); Comment, *Civil Commitment of the Mentally Ill in California: 1969 Style*, 10 SANTA CLARA LAW. 74 (1969).

156. Roth, Dayley, & Lerner, *Into the Abyss: Psychiatric Reliability and Emergency Commitment Statutes*, 13 SANTA CLARA LAW. 400 (1973).

self-incrimination was held to be applicable to juvenile delinquent proceedings since one of the purposes of the privilege is "to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction."¹⁵⁷ Most patients do not realize that the psychiatric interview is not designated to treat them but to evaluate them for the purpose of commitment.¹⁵⁸ In *McNeil v. Director, Patuxent Institution*¹⁵⁹ the United States Supreme Court did not find it necessary to reach the question of self-incrimination as it was raised by the petitioner.¹⁶⁰ However, Justice Douglas' concurring opinion found that the privilege was applicable:

Whatever the Patuxent procedures may be called—whether civil or criminal—the result under the Self-Incrimination Clause of the Fifth Amendment is the same. As we said in the *In re Gault* . . . there is harm and self-incrimination whenever there is "a deprivation of liberty;" and there is such a deprivation whatever the name of the institution, if a person is held against his will.¹⁶¹

At least one court has found Justice Douglas' concurring opinion in *McNeil* and the underlying reasoning in *Gault* persuasive and held that before a person may be interviewed, he must be told by counsel and the psychiatrist that he is going to be examined with regard to his mental condition, that the statements he makes may be the basis of commitment, and that he does not have to speak to the psychiatrist.¹⁶²

D. The Right to Proof Beyond a Reasonable Doubt of the Need for Commitment.

Nowhere in the new laws is the standard for the state's burden of proof in a commitment proceeding expressed. The United States Su-

157. 387 U.S. at 47.

158. *Hayes Brief* 45.

159. 407 U.S. 245 (1972).

160. *McNeil* involved the confinement of a criminal in a mental institution for a period longer than his prison sentence because he refused to talk to the psychiatrists thereby preventing them from evaluating him in order to determine if he should be committed to the institution for an indeterminate term. *Id.*

161. *Id.* at 257.

162. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1101 (E.D. Wis. 1972). As expressed by the concurring opinion in *Haskett v. State*, 255 Ind. 206, 263 N.E.2d 529 (1970):

[R]egardless of the characterization of the proceedings, appellant, if forced to testify, would subject himself to possible involuntary commitment. Before such an individual is deprived of his liberty he must be accorded, in my opinion, the basic and fundamental right against self-incrimination contemplated by our concept of due process of law.

Id. at 213, 263 N.E.2d at 533.

preme Court in *In re Winship*¹⁶³ conclusively held that the reasonable doubt standard was to be applied in juvenile delinquency proceedings that might result in loss of liberty.¹⁶⁴ In so holding, the Court rejected the "civil-criminal" distinction argument¹⁶⁵ as well as other arguments that are usually invoked to justify the lack of due process standards in mental commitments.¹⁶⁶ The risk of loss of liberty in a commitment hearing is as great or greater than in a criminal prosecution because the "predictions of dangerous behavior are unreliable and because 'mental illness' is, at best, an illusory concept."¹⁶⁷ As a result, numerous lower courts have held that the burden of proof must be beyond a reasonable doubt in civil commitment proceedings.¹⁶⁸ Although this reasonable doubt standard may be read into the new North Carolina laws by judicial interpretation, the statute should specifically provide such a standard.

E. The Right to Exclude Hearsay Evidence and Compulsory Attendance of Witnesses.

Another area of the new laws that raises constitutional questions is the degree of formality that is allowed with respect to the admission of evidence at the preliminary and district court hearings. As to the preliminary hearing, the magistrate is required to "take and consider" oral testimony, and he "may" consider the physician's written statement.¹⁶⁹ From the language in the statute requiring the taking of "evidence" and oral "testimony" and the drafting of a written order containing the "findings of fact" by the magistrate, it would appear that only testimony from first hand knowledge should be admissible at the preliminary hearing, and hearsay testimony should be excluded.¹⁷⁰ Under this interpretation, if a law enforcement officer reasonably relied upon the statements of a family member or friend of the person being

163. 397 U.S. 358 (1970).

164. *Id.* at 368.

165. *Id.* at 365.

166. The Court rejected the argument that the purpose of the juvenile's commitment—"not to punish, but to save the child"—can override the need for a reasonable doubt standard as well as the argument that the "beneficial aspects" of the juvenile process would be destroyed by the reasonable doubt standard. *Id.* at 366-67.

167. *Hayes Brief* 23, 40-41.

168. *E.g.*, *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972); see *Denton v. Commonwealth*, 383 S.W.2d 681 (Ky. 1964); cf. *Dixon v. Attorney General*, 325 F. Supp. 966 (M.D. Pa. 1971) (clear and convincing). See also *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968).

169. N.C. GEN. STAT. § 122-58.4 (Supp. 1973).

170. *Id.*

committed in making his initial determination, those having first hand knowledge would have to testify before the magistrate as to the overt acts they witnessed.

The problem, however, comes when the physician's written statement is offered for consideration since it is objectionable as hearsay testimony.¹⁷¹ The section is worded so that the magistrate "may" consider the physician's statement, but such wording does not change the hearsay character of the evidence nor does it solve the lack of confrontation and cross-examination that exists if the statement is considered by the magistrate, which will almost always be the case due to the medical questions involved.

The new laws are completely silent as to what evidence may be considered by the district court judge at the full hearing, but presumably, since a written statement of the physician at the treatment facility is required prior to the hearing, this statement also "may" be considered in the judge's determination. Although *Gault* did not rule directly on the admissibility of hearsay evidence, the Court did provide strong dicta that the hearsay rules should not be rejected in any judicial inquiry,¹⁷² and this view is supported by lower court decisions which have held the rules applicable to mental commitment proceedings.¹⁷³ If the physician's written statement is submitted in affidavit form to the court, upon the attorney's objection, the affidavit should be excluded, and the attorney should be allowed to compel the presence of the physician in order to confront and cross-examine him on his psychiatric evaluation. Although it may be implicit in the right to counsel, the new laws do not expressly provide that a person through his counsel has the right to compulsory process for the attendance of witnesses who obviously must be available in order for the attorney effectively to represent his client.

F. *The Standard for Commitment.*

Under the new laws, there are two standards for commitment—"violent and of imminent danger" to oneself or others or "gravely dis-

171. Hearsay evidence has been defined to include written evidence presented in court of a statement made out of court, "the statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." MCCORMICK ON EVIDENCE § 246, at 584 (2d ed. E. Cleary 1972) (emphasis omitted).

172. 387 U.S. at 11 n.7.

173. *E.g.*, *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972); *Holm v. State*, 404 P.2d 740 (Wyo. 1965); see *Dixon v. Attorney General*, 323 F. Supp. 966 (M.D. Pa. 1971); *Denton v. Commonwealth*, 383 S.W.2d 681 (Ky. 1964).

abled." Both of these standards must be manifested in the form of "overt acts" in order for a person to be committed. However, the new laws do not require the finding that a person's violent and dangerous behavior is caused by reason of mental illness or inebriety.¹⁷⁴ As one court has noted, "Even an overt attempt to substantially harm oneself cannot be the basis for commitment unless the person is found to be (1) mentally ill and (2) in immediate danger at the time of the hearing of doing further harm to oneself."¹⁷⁵ Although a court would probably read into the present standard the requirement of mental illness or inebriety, the new laws should make this explicit where appropriate.¹⁷⁶

The second standard—"gravely disabled"—does provide for the finding of mental illness or inebriety as a cause of a person's inability to provide for food, clothing, or shelter.¹⁷⁷ Although the standard does not expressly require a finding of dangerousness, implicit in the determination that a person cannot provide himself basic personal needs is that he is dangerous to himself. Therefore, the requirement set forth in one decision that civil confinement must be based on a finding of "dangerousness" either to oneself or others¹⁷⁸ is met by the gravely disabled standard.

IV. ADMINISTRATIVE RAMIFICATIONS OF THE NEW COMMITMENT LAWS

At almost every stage of the commitment process, there are numerous problems in administering the new laws. Many of the problems stem from a lack of experience with the new laws and a reluctance to change from the old system; however, some of the problems are inherent in the new statute and should be examined and resolved.

A. *The Initiating Stage: Law Enforcement Officer.*

One of the major criticisms of the new laws has come from the law enforcement officer.¹⁷⁹ He is the primary initiating force behind judi-

174. *Third Senate Hearing* 2.

175. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 n.24 (E.D. Wis. 1972).

176. It would be better to leave this finding of mental illness or inebriety out of the initiating stages involving the law enforcement officer since he has no psychiatric background; however, this finding should definitely be included in the physician's, magistrate's and district court judge's determinations. See text accompanying notes 180-83 *infra*.

177. N.C. GEN. STAT. § 122-58.2(b) (Supp. 1973).

178. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972).

179. *First Senate Hearing* 10; *Second Senate Hearing* 1-2; *The Durham Sun*, Oct. 17, 1973, at 16-A, col. 1; *id.* Aug. 31, 1973, at 1-C.

cial hospitalization and the only initiating force behind emergency hospitalization. The officer's new role in initiating the involuntary commitment procedures is carried on without any court authority—a major change from his role under the old commitment laws. Previously, when an officer took a person into custody, he had an order from the clerk of court or the affidavit of a qualified physician as his authority. His authority now comes directly from the statute.

This new procedure has been criticized as requiring the officer to make psychiatric determinations for which he is not qualified.¹⁸⁰ Under the statute, a law enforcement officer may take into custody any person who he determines by reason of the commission of overt acts is violent and of imminent danger to himself or others or is gravely disabled.¹⁸¹ Nowhere does the statute require the law enforcement officer to make a psychiatric determination for the first grounds for custody—violent and of imminent danger. In other words, the statute does not require the law enforcement officer to determine that by reason of mental illness or inebriety, the person is violent and of imminent danger to himself or others; rather, the officer is required to make the same determination that he routinely makes in arresting a person for disorderly conduct or public drunkenness. The law enforcement officer is now given some discretion; instead of taking a person to jail, he now may take the person to a physician to determine whether the person is in need of care and treatment for mental illness or inebriety.¹⁸² Police initiated civil commitment has been favorably advocated as a viable alternative to the criminal process where acts such as disorderly conduct, theft, indecent exposure, assault, attempted suicide, or other acts of similar nature have been committed.¹⁸³

The second ground for custody—"gravely disabled"—does include in its definition a psychiatric determination that a person's inability to provide for basic personal needs for food, clothing or shelter is because of mental illness or inebriety. In requiring the law enforce-

180. *First Senate Hearing* 3; *Second Senate Hearing* 9; *The Durham Sun*, Oct. 20, 1973, at 3A; *id.* Oct. 17, 1973, at 16-A.

181. N.C. GEN. STAT. § 122-58.3 (Supp. 1973).

182. An actual case example of the value of allowing the law enforcement officer this discretion occurred when a man stole grapes in plain sight of the store owner after daring him to call the police. The officer who arrived at the scene agreed that the behavior was odd and instead of taking the man to jail, the officer took the man to a hospital for an examination and evaluation. The results were that the man was in need of mental treatment and received it rather than being put in jail. A. MATTHEWS, *MENTAL DISABILITY AND THE CRIMINAL LAW* 176 (1970).

183. See generally *id.* at 169-70.

ment officer to determine whether or not a person is gravely disabled, it would seem appropriate to leave the causation issue out of the initiating stages, thus allowing the officer to bring in a person who is unable to provide for his basic personal needs and to let the doctors and the court determine whether such inability is due to mental illness or inebriety. This approach would avoid any psychiatric determination by the officer in the initiating stages under either grounds for custody.

Although some officers have stated they will not accept this new responsibility, much of their reluctance appears to come primarily from the possibility of civil liability if they make the wrong determination.¹⁸⁴ The new statutes do not include a provision to protect the officer from civil liability if it is later determined that the person was not within the statutory grounds for custody. However, under North Carolina common law a law enforcement officer is clothed with immunity for mere negligence in the performance of governmental duties involving the exercise of judgment and discretion.¹⁸⁵ The officer may be held liable only if his act or failure to act is corrupt or malicious or if he acts beyond the scope of his duties.¹⁸⁶ However, an express statutory provision in the new laws for immunity from civil liability similar to those in other North Carolina statutes¹⁸⁷ would be more comforting to officers than this case law immunity.¹⁸⁸

A question that law enforcement officers and other people involved in the commitment procedures have raised is how inclusive is the phrase "overt acts." The phrase is not defined in the new laws but left to judicial interpretation. Under the old emergency commitment statute, the phrase "overt acts" was used in the same manner as it is presently being used under the new laws,¹⁸⁹ but no cases under this old statute addressed themselves to the meaning of the phrase. During the hearings before the United States Senate Subcommittee on the Constitutional Rights of the Mentally Ill, Doctor Eugene Hargrove, Commissioner of Mental Health for North Carolina, gave the following exam-

184. *Second Senate Hearing* 2, 5, 9.

185. 6 J. STRONG, N.C. INDEX 2d *Public Officers* § 9, at 516 (1968).

186. *Id.*

187. Under North Carolina's shoplifting statute, an officer who detains or causes the arrest of a person will not be held civilly liable for detention, malicious prosecution, false imprisonment, or false arrest where detention is in a reasonable manner and for a reasonable time, if he had probable cause to believe that the person committed the offense. N.C. GEN. STAT. § 14-72.1 (Supp. 1973).

188. For a discussion on the need for adequate legal protection for the law enforcement officer, see A. MATTHEWS, *supra* note 182, at 178-79.

189. Law of June 25, 1963, ch. 1184, § 2 [1963] N.C. Sess. Laws 1648-49 (repealed 1973).

ples of when emergency hospitalization under the old statutes would be appropriate under the overt acts test:

The way the code is written at the present time, it indicates that the act must be of a suicidal or homicidal nature. That if the person, for example, is threatening suicide or threatening to harm someone, that this can be taken as an overt act, and the person can be hospitalized under the emergency provision.

Now an example of where we have had some concern recently has particularly been with alcoholics, where there has been not so much the threat in person or by word of either suicide or homicide, but it has been more or less of an implied threat of drinking oneself unconscious. We have had some instances where some patients have been admitted under this emergency commitment, and where there has not been an obvious overt act, and they have been held for the 20-day period, whereas we think this probably should not have been allowed in these instances. . . .

Our attorney general has told us that it is a violation.¹⁹⁰

Under this interpretation, both physical and verbal acts would come within the scope of the phrase. The problem of whether unconscious alcoholics come within the overt acts test should be resolved under the new statutes since an unconscious alcoholic would be unable to provide food, clothing, or shelter for himself and, therefore, would come within the gravely disabled grounds for commitment. When applying the overt acts test to a person appearing gravely disabled, a law enforcement officer would probably look for negative acts, that is, the absence of proper behavior by an individual. An example would be the failure to eat or attend to other basic personal needs extending over a period long enough to constitute a hazard to his health.

A serious criticism of the law enforcement officer's new role is the fact that the officer is the only one who may sign a petition for judicial or emergency commitment, and the immediate family is removed completely from the commitment process.¹⁹¹ This aspect of the new law has been explained as an attempt to avoid the past experiences of a family "railroading" one of its members into a mental institution.¹⁹² The drafters of the statute concluded that there is less chance of abuse of process if a family must go to a law enforcement officer to get a member committed and then testify orally before a magistrate and district court judge as to what "overt acts" were wit-

190. *Congressional Hearings* 106.

191. *Second Senate Hearing* 2, 7; *Third Senate Hearing* 5, 19.

192. *First Senate Hearing* 7.

nessed.¹⁹³

The possibility of "railroading" by a family or friend is highly unlikely due to the procedural due process safeguards that are now incorporated in the new laws. The California mental health laws, which are very similar to North Carolina's in that a law enforcement officer may initiate the mental commitment procedures,¹⁹⁴ also provide for any "individual" to petition for judicial commitment.¹⁹⁵ There is, however, a "pre-petition screening" to determine if there is probable cause to believe the allegations.¹⁹⁶ Such a procedure could be instituted under North Carolina's new law by providing, as an alternative to the law enforcement officer's role in initiating and petitioning, a provision that allows any person to submit a petition in the form of a sworn affidavit before a magistrate who could, after examining the petition and the person, make a probable cause determination of whether the person falls within the statutory language and should be taken to a physician for an examination and evaluation. If the magistrate so determines, an order could be issued authorizing a law enforcement officer to take the person into custody.¹⁹⁷

In providing a means by which an individual may petition the court to begin judicial commitment, a provision should also be included in the same section stating that any individual who seeks a petition knowing that the person for whom the petition is sought is not by reason of the commission of overt acts violent and of imminent danger to himself or others or gravely disabled, is guilty of a misdemeanor and may be held liable for civil damages. A similar provision was enacted in California.¹⁹⁸ By placing the provision in the section to which it applies, the seriousness of attempting to commit a person in bad faith is emphasized.¹⁹⁹

Another criticism of the new laws is the serious threat to the effi-

193. Letter from North Carolina Representative Howard Tiggs, co-author of the involuntary commitment law, to Tom Berkau, Jan. 29, 1974, on file with the N.C. Law Review office.

194. CAL. WELF. & INST'NS CODE §§ 5150, 5170 (West Supp. 1973).

195. *Id.* § 5201 (West 1973).

196. *Id.* § 5202, (West Supp. 1973).

197. If such a procedure were adopted, the magistrate's preliminary hearing after the doctor's examination and evaluation should still be provided and with counsel in order to comply with the *Lessard* court requirement that a preliminary hearing be held with counsel and not *ex parte* and within 48 hours. 349 F. Supp. at 1091; see text accompanying notes 141-42 *supra*.

198. CAL. WELF. & INST'NS CODE § 5203 (West 1973).

199. North Carolina presently provides a civil liability statute but it is located in another section of Chapter 122. N.C. GEN. STAT. § 122-51 (1964).

ciency of law enforcement in some areas stemming from the amount of travel time expended by the law enforcement officer who must take a person to and from a treatment facility.²⁰⁰ In some rural counties of North Carolina, there may be only two or three law enforcement officers on duty. Where the treatment facility is located at a distance, an officer can lose the entire day on which a hearing is scheduled and may leave the county without effective law enforcement.²⁰¹

In North Carolina the institutions that qualify under the definition of a treatment facility²⁰² are four regional psychiatric hospitals, three alcoholic rehabilitation centers, five community health centers²⁰³ and the South Wing of North Carolina Memorial Hospital with the approval of the Director of Inpatient Services.²⁰⁴ In other words, there are only thirteen treatment facilities which must provide for the mental health needs of the entire state. As noted previously, based on the present national rate of hospitalization, one out of every ten citizens will spend a portion of his life in a mental institution.²⁰⁵ If North Carolina seriously intends to provide care and treatment for its mentally ill and inebriates, more treatment facilities must be established. To carry forth the new mental laws without completely disrupting the efficiency of law enforcement, more local community health centers are needed.

California's mental health act provides for the organization and financing of community health centers in every county or in counties act-

200. *First Senate Hearing* 10.

201. *E.g.*, Gates county only has one sheriff and one deputy and is located approximately 100 miles from the regional treatment facility for the county. On the day of the hearing, an officer must drive to the facility, pick up the person and bring him back to the county for the hearing. If the person is committed, another drive to and from the facility must be made bringing the total drive for the day to approximately 400 miles. The officer is therefore occupied all day leaving only one county officer to provide police protection for the county. NORTH CAROLINA SHERIFFS' ASSOCIATION, 1973 OFFICIAL ANNUAL DIRECTORY 188 (51st ed.).

202. N.C. GEN. STAT. § 122-56.2(d) (Supp. 1973) defines a "treatment facility" as

any hospital or institution operated by the State of North Carolina and designated for the admission of any person in need of care and treatment due to mental illness or mental retardation, any center or facility operated by the State of North Carolina for the care, treatment or rehabilitation of inebriates, and any community mental health clinic or center administered by the State of North Carolina, and, provided that approval of admission or commitment is obtained from the Director of the Inpatient Service, the Psychiatric Training and Research Center at the South Wing of the North Carolina Memorial hospital at Chapel Hill for admission or commitment to that facility.

203. *Third Senate Hearing* Attachment A at 1.

204. Newsletter from the North Carolina Neuropsychiatric Association, Sept. & Oct., 1973, at 2-3.

205. See text accompanying note 2 *supra*.

ing jointly through locally administered and locally controlled community mental health programs.²⁰⁶ These community health centers provide a seventy-two hour detention facility where a medical examination and evaluation may be performed,²⁰⁷ a procedure which coincides with the examination and evaluation given at a treatment facility under North Carolina's new commitment procedures. Having these local mental health centers would help to insure that the mental health laws would work efficiently without placing a transportation burden on the law enforcement officer in rural areas as well as avoiding the traumatic effect which may result from carrying a person who is mentally ill or inebriate over long distances.

B. The Preliminary-Hearing Stage: Magistrates.

The use of a magistrate in the new commitment procedures has been questioned, and a suggestion has been made to replace him with the clerk of court.²⁰⁸ However, since the magistrate is available twenty-four hours a day, seven days a week²⁰⁹ a hearing under the emergency procedures is available at any time, and if a provision were enacted to allow an individual to petition the court, a "probable cause" hearing could also be held at any time. A better approach might be to use both the magistrate and the clerk of court in order to provide a number of sources through which a preliminary hearing may be conducted.

A more serious question involving the magistrate and the preliminary hearing concerns the type of evidence he is allowed to consider in making his determination. As discussed previously, the hearsay rules should be applicable, and the presence of counsel should be provided.²¹⁰

C. The Hearing Stage: District Court

1. Representation of the State and the Attorney's Role. One of the basic questions raised about the district court hearing has been who represents the "state" in these proceedings.²¹¹ Collateral to this question, but possibly determinative, is whether the appointed counsel for

206. CAL. WELF. & INST'NS CODE §§ 5600, 5602 (West 1973).

207. *Id.* § 5654 (West 1973).

208. *Second Senate Hearing* 6, 10.

209. *See* note 144 *supra*.

210. *See* text accompanying notes 150, 172-73 *supra*.

211. *See Third Senate Hearing* 8, 10.

the allegedly mentally ill or inebriate should act as an adversary or just as a guardian of the person's rights keeping in mind what is in the best interests of his client.²¹² A common response to the question of legal advocacy in the commitment area is to treat the matter as a question of fact best decided by the medical experts and to consider the consequences of commitment as therapeutic.²¹³ If this approach is used and the attorney acts only as a guardian of the person's rights, then the state will not need representation since all the attorney will do is make sure the hearing is conducted in proper form, and if the physicians determine his client is in need of care and treatment, the attorney will passively accept this determination as being in the best interests of his client.

Although the statute is silent, the consequences alone of a commitment hearing would seem sufficient to indicate active advocacy as the appropriate role for the defense attorney. This approach would therefore create a need for state representation. In *Lessard v. Schmidt*,²¹⁴ the court strongly indicated that the attorney's role in a civil commitment was that of an advocate.²¹⁵ The court rejected the state's argument that counsel was provided in the person of a guardian *ad litem* noting that where a guardian is appointed, "he sees his role not as an advocate for the prospective patient but as a traditional guardian whose function is to evaluate for himself what is in the best interests of his client-ward and then proceed, almost independent of the will of the client-ward, to accomplish his."²¹⁶ Unless the attorney acts in an adversary role, persons not properly subject to involuntary commitment may be committed. It is therefore necessary that the state be represented in order to provide a balanced adversary setting in which to determine whether or not the person alleged to be in need of involuntary commitment in fact falls within the statutory classification. This approach has been followed under the California mental health act where the state is represented by the district attorney for the county unless his duties are delegated to the county counsel.²¹⁷

2. *Right to Continue the Hearing for Good Cause.* At present, the district court hearing must be held within five days, or for good cause

212. *Id.*

213. Roth, Dayley, & Lerner, *supra* note 156, at 401.

214. 349 F. Supp. 1078 (E.D. Wis. 1972).

215. *Id.* at 1098, citing Dix, *Hospitalization of the Mentally Ill in Wisconsin: A Need for a Reexamination*, 51 MARQ. L. REV., 1, 33 (1967).

216. *Id.*

217. CAL. WELF. & INST'NS CODE § 5114 (West 1973).

shown, within ten days after the person is taken into custody.²¹⁸ Theoretically this five day limit is impossible to meet under the judicial hospitalization procedure since the preliminary hearing is not required to take place for four days.²¹⁹ Moreover, forty-eight hours notice of the district court hearing must be given to the person and his attorney,²²⁰ and this obviously cannot be given until after the magistrate makes his determination. The section makes the ten day limit absolute,²²¹ but an attorney for the alleged mentally ill or inebriate person should be allowed to ask for a limited continuance for good cause shown, such as having his own psychiatrist examine the person.²²² It should also be pointed out that the notice requirement is violated when the judge determines that a person is without counsel "at the time of the hearing" and then appoints one²²³ since the attorney has not been given forty-eight hours prior notice of the hearing. Although notice may be waived by the attorney, he will obviously refuse to invoke this waiver since he will not have had time for preparation. In addition, if this is the ninth or tenth day after the person has been taken into custody, under the present reading of the section the person will automatically be released if the hearing is postponed to comply with the forty-eight hour advance notice requirement. This again points out the need for allowing the attorney to request a limited continuance past the ten day limit.

3. *Mandatory Presence of Person Being Committed at the Hearing.*

A number of criticisms have been directed at the requirement that the alleged mentally ill or inebriate person must be present at the hearing unless waived in writing by the attorney with the court's concurrence.²²⁴ These criticisms recognize that a long trip from the treatment facility to the county of the hearing and possibly back again may have a detrimental effect on the person's mental and physical health if the person is seriously in need of care and treatment.²²⁵ The transportation problem caused by the mandatory presence has also been a concern of the

218. N.C. GEN. STAT. § 122-58.6(a) (Supp. 1973).

219. See text accompanying notes 136-40 *supra*.

220. N.C. GEN. STAT. § 58.6(a) (Supp. 1973).

221. *Id.* § 58.6(b) (Supp. 1973).

222. At least one court has held that due process of law includes the right to an independent psychiatric examination for a person being involuntarily committed and if the person is indigent, the court will appoint an independent psychiatrist to examine the person. *In re Gannon*, 123 N.J. Super. 104, 301 A.2d 493 (1973).

223. N.C. GEN. STAT. § 58.6(c) (Supp. 1973).

224. See *Second Senate Hearing* 10.

225. *Id.*

law enforcement officer in rural counties who must drive an excessive amount taking the person back and forth to the treatment facility.²²⁶ However, even if the mandatory language of the statute did not exist, many attorneys would still refuse to waive their client's right to be present.

The problem also arises that, in the situation where the treatment facility is located some distance from the county of the hearing, the attorney will not have had an opportunity to talk to his client prior to the hearing. The attorney will, therefore, want the person brought to the hearing to consult with him. This situation could be resolved by the attorney driving to the treatment facility after he receives his forty-eight hour notice of the hearing, but in cases where the facility is located at considerable distance, an active attorney will usually not be able to drop all of his work and make the trip on such short notice. A few counties have come up with a possible answer to this problem by appointing counsel at the magistrate's stage and allowing the attorney to interview the person before he goes to the treatment facility.²²⁷ Under this approach, presence at the hearing may be waived by the attorney if the best interests of the client would be served, and in most cases the district court judge would concur in the attorney's judgment. However, if the attorney acts in an adversary capacity, only in extreme circumstances would he waive the presence of his client at the hearing.

D. *The Appellate Stage: Superior Court and Trial by Jury.*

Under the new laws, an appeal is allowed from the district court hearing to the superior court for a hearing *de novo* and a trial by jury if requested.²²⁸ As discussed previously, a serious administrative problem exists in some rural areas of North Carolina where a jury is only impaneled for superior court every three or four months.²²⁹ In attempting to resolve this problem the question has been raised as to whether a trial by jury is required in an involuntary commitment proceeding in North Carolina.

Sixteen states presently allow trial by jury in involuntary commitments,²³⁰ and only one state specifically does not.²³¹ Like most state

226. See *First Senate Hearing* 3.

227. *Second Senate Hearing* 10.

228. N.C. GEN. STAT. § 122-58.6(g) (Supp. 1973).

229. See text accompanying note 133 *supra*.

230. MENTALLY DISABLED 53.

231. OHIO REV. CODE ANN. § 5122.15 (Baldwin 1964).

constitutions, North Carolina's constitution provides for the right to trial by jury in most civil cases in article I section 25. The general test used to determine in what cases and under what circumstances jury trial is constitutionally guaranteed is the extent to which trial by jury was guaranteed at the time the state's constitution was adopted.²³² Many states have determined that the right to jury trial in insanity proceedings existed at common law or by statute at the time their constitution was adopted,²³³ and therefore the right to jury trial in involuntary commitments was preserved.²³⁴ *Groves v. Ware* established that the right to trial by jury in insanity proceedings did not exist in North Carolina when its constitution was adopted.²³⁵ In a later case, *In re Cook*,²³⁶ which dealt with a previous involuntary commitment procedure, the court held that commitment to a mental institution by the clerk of court without a jury trial was permissible.²³⁷ It may therefore be concluded that the right to jury trial in civil cases as set forth in North Carolina's constitution does not compel the right to a trial by jury in involuntary commitment proceedings.²³⁸

Although the right to trial by jury in criminal cases as guaranteed by the sixth amendment of the United States Constitution has been held to apply to state court proceedings as part of the fourteenth amendment due process clause,²³⁹ the seventh amendment guarantee of trial by jury in civil cases has not.²⁴⁰

232. *E.g.*, *Groves v. Ware*, 182 N.C. 553, 109 S.E. 568 (1921); *MENTALLY DISABLED* 54.

233. *E.g.*, *In re McLaughlin*, 87 N.J. Eq. 138, 102 A. 439 (1917).

234. *See In re Coates*, 8 App. Div. 444, 188 N.Y.S.2d 400 (1959), *aff'd*, 9 N.Y.2d 242, 173 N.E.2d 797, 213 N.Y.S.2d 74, *appeal dismissed*, 368 U.S. 34 (1961).

235. 182 N.C. 553, 109 S.E. 568 (1921). The court in *Groves* held:

The right to a trial by jury . . . applies only to cases in which the prerogative existed at common law, or was procured by statute at the time the Constitution was adopted, and not to those where the right and the remedy with it are thereafter created by statute. . . . This is not a proceeding according to the course of the common law, in which the right of a trial by jury is guaranteed, but the proceeding is a statutory one, and the statute, too, enacted since the adoption of the Constitution. There was not, at the time of such adoption, the enjoyment of a jury trial in such a case.

Id. at 558, 109 S.E. at 571.

236. 218 N.C. 384, 11 S.E.2d 142 (1940).

237. *Id.* at 385, 11 S.E.2d at 143.

238. In a 1971 opinion by the attorney general of North Carolina, it was interpreted under North Carolina's Constitution that due process for a person being involuntarily committed under the old commitment laws included the rights to notice, counsel, confrontation of witnesses and advisement of their rights, but not the right to trial by jury. *See* 41 N.C. ATT'Y GEN. REP. 219 (1971).

239. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

240. *Sharpe v. State ex rel. Oklahoma Bar Ass'n*, 448 P.2d 301 (Okla. 1968), *cert. denied*, 394 U.S. 904 (1969).

Finally, in holding that due process must be afforded an individual who is subject to deprivation of liberty, the Court in *In re Gault*²⁴¹ did not include the right to jury trial in the list of applicable rights it enumerated.²⁴² The argument that the fourteenth amendment due process clause assures the right to a jury trial in the adjudicative phrase of the state juvenile court delinquent proceeding was rejected in *McKeiver v. Pennsylvania*.²⁴³ The Court reasoned that "[i]f the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system and, possibly the public trial."²⁴⁴ The same reasoning would also be applicable to the involuntary commitment procedures.

A trial by jury may very possibly have a detrimental effect on a person who is mentally ill or inebriate, and since the right is not guaranteed by the North Carolina constitution, the exclusion of trial by jury may be a better approach in conducting commitment proceedings. Appeal could be allowed directly from the district court hearing to the court of appeals on the condition that the appeal would not operate as a stay of the district court order unless so ordered by the court of appeals.²⁴⁵ Under this approach, the questionable procedure under the present statute of requiring two transcripts, one in the district court and a second in the superior court where the hearing is held *de novo*,²⁴⁶ would be resolved by making only one transcript at the district court hearing. The problem of what to do with the person who is committed, but appealing, would also be resolved.²⁴⁷

The holding of the district court hearing in an open court room may possibly have a detrimental effect on a person who is actually mentally ill or inebriate. The Court in *McKeiver* allowed a state to exclude the general public while holding a delinquency proceeding,²⁴⁸ and at least one lower court decision has held that in involuntary commitment hearings, if the conduct of the alleged mentally ill person does not comport with orderly courtroom procedure, the hearing may be held

241. 387 U.S. 1 (1967).

242. It should also be noted that nowhere in the *Hayes* brief is the right to trial by jury argued as a part of the desired due process for the mentally ill or inebriate.

243. 403 U.S. 528 (1971).

244. *Id.* at 550.

245. This approach was suggested in the proposed judicial commitment draft submitted as House Bill 918.

246. N.C. GEN. STAT. §§ 122-58.6(f), (g) (Supp. 1973).

247. See text accompanying notes 128-29 *supra*.

248. See 403 U.S. at 550.

at another location.²⁴⁹ A mental commitment proceeding should therefore be allowed to be held in the judge's chambers or at the treatment facility rather than in an open courtroom unless requested otherwise by the alleged mentally ill or inebriate person.²⁵⁰

E. The Rehearing Stage.

There have been a number of questions raised about the rehearing procedures. These questions primarily relate to what testimony should be considered at the rehearing and where the rehearing should be held.²⁵¹ The section is silent as to what testimony the judge should consider on rehearing, but presumably it would be that of the doctors and staff at the treatment facility since they would be the only ones in contact with the person during the ninety day commitment period. The section is also silent as to where the rehearing should take place, but since all the witnesses and the committed person are at the treatment facility, it would seem logical and more convenient if a judge in the county where the treatment facility is located would hold the rehearing.

Another area brought into issue involves the short time period—120 days—between rehearsings.²⁵² It has been suggested that the time limit be extended to one year after the first ninety-day rehearing unless a rehearing is requested by the patient, his attorney, or the hospital.²⁵³ However, there are certain problems under the new laws with allowing the attorney or the hospital to request a rehearing.

First of all, the hospital is not going to request a rehearing since they presently have the authority to discharge a person if they feel he has sufficiently recovered to leave the facility. In many cases the person may feel he has recovered, but the hospital will not agree. This leaves the attorney, usually court appointed, to make the request. In most cases, the appointed attorney is not going to continue his relationship with his client after he is committed. Therefore there is a good

249. *State v. Collman*, 9 Ore. App. 476, 491-92, 497 P.2d 1233, 1240-41 (1972).

250. California's mental health act provides that "[h]earings conducted at any state hospital or any mental health facility designated by any county as a treatment facility . . . shall be deemed to be hearings held in a place for the trial of civil actions and in a regular courtroom of the court." CAL. WELF. & INST'NS CODE § 5118 (West 1972). The statute does allow any party to demand the hearing be public and held in a place suitable for public attendance. *Id.*

251. *See First Senate Hearing* 5, 9.

252. *Id.* at 4.

253. *Id.*

possibility that those, other than the patient, who could request a rehearing will not do so.

Unless the attorney or some interested party other than the hospital is required to check periodically with the person to see if he desires a rehearing, the 120-day rehearing of right should continue to be required. A possible answer to the situation where the person does not desire a rehearing is to enact a provision in the statutes allowing the person, through his attorney and with the court's concurrence, to waive the rehearing. However, a better approach would be to enact a provision whereby a person could change from involuntary to voluntary status.

F. Involuntary Commitment to Voluntary Admission.

The weight of opinion and observation indicate that involuntary commitment is a procedure that is over-utilized.²⁵⁴ It has therefore been suggested that before an order to commit is made, the alternative of voluntary admission should be carefully considered, and the person allowed to switch to voluntary admission if he so desires and is suitable for voluntary admission.²⁵⁵

No provisions have been adopted that would permit switching from involuntary admission. This is probably due to the new "informal" admission procedures which allow a person to be discharged upon his written request. However, this new discharge provision should not affect a procedure which allows a person to change from involuntary to voluntary status if the full implication of allowing such a change is understood.

If a person changes his status prior to the district court hearing or before an order is entered by the district court judge and later desires to be discharged under the "informal" procedures, the superintendent or director of the treatment facility, if he feels the person is still in need of care and treatment, may petition the district court to schedule the hearing or enter the order for commitment. If the only requirement is that the order be signed by the district court judge and the person has been in the treatment facility for a period less than ninety days, this time should be counted towards his ninety-day rehearing of right; however, if the person has been in the treatment facility longer than ninety days, a rehearing should be scheduled. If a person changes his status

254. MENTALLY DISABLED 63.

255. *Id.* at 62-63.

after an order for commitment has been signed but prior to the re-hearing and then requests a discharge, the superintendent or director may petition the district court to reinstate the original order which would be effective from the date it was signed. Such procedures would not offend due process, and the doctrine of "least restrictive alternatives" would be met.

The doctrine of "least restrictive alternatives" was first introduced in *Lake v. Cameron*²⁵⁶ in which the District of Columbia Circuit ruled that the lower courts had a duty to explore alternatives to involuntary commitment such as nursing homes and private care.²⁵⁷ Under North Carolina's new commitment laws the district court judge is given an option to order a person committed to outpatient treatment at the treatment facility or a private facility;²⁵⁸ however, the alternative should also be provided for allowing a person to change from involuntary to voluntary status if the person so desires and is suitable for voluntary admission.

V. CONCLUSION

The new mental health legislation has brought to North Carolina much needed due process safeguards in its involuntary commitment procedures. Although there are still some areas of the new laws that raise constitutional questions,²⁵⁹ many of these issues may be resolved by judicial interpretation; other areas will still require legislative changes.²⁶⁰

Some of the administrative problems that have been experienced under the new laws will also require legislative attention. The informal "walk in and walk out" procedure under the voluntary admission provision needs to be reconsidered to allow the treatment facility some dis-

256. 364 F.2d 657 (D.C. Cir. 1966).

257. *Id.* at 660.

258. N.C. GEN. STAT. § 122-58.6(a) (Supp. 1973).

259. For example, the requirement that a person's violent and dangerous behavior be caused by mental illness or inebriety, *see* text accompanying notes 174-75 *supra*; the reasonable doubt standard of proof for the state, *see* text accompanying note 168 *supra*; the application of the hearsay rules to the preliminary and district court hearings, *see* text accompanying note 173 *supra*.

260. For example, the requirement that the preliminary hearing must be held within a reasonable period of time such as 48 hours, *see* text accompanying notes 141-42 *supra*; counsel at the preliminary hearing, *see* text accompanying note 150 *supra*; the requirement of notice to the person of his right against self-incrimination at the psychiatric interview, *see* text accompanying notes 158-62 *supra*; a recording of the psychiatric interviews for the person's attorney, *see* text accompanying notes 155-56 *supra*.

cretion in admitting or rejecting persons who continually abuse the procedure.²⁶¹ The transportation problems being experienced by the law enforcement officers²⁶² may be resolved by creating more community health centers.²⁶³ The big, overcrowded, and under-staffed mental institutions which have provided communities with a place to send their "undesirable" mentally ill and inebriate citizens are anachronisms. Other states are approaching their mental health problems by providing local mental health facilities²⁶⁴ in order that each community may take the responsibility of care and treatment of its own mentally ill and inebriate.

In order to evaluate the full implication of North Carolina's new mental health laws, one must examine both the voluntary admission and involuntary commitment procedures and policies. The state's policy of "encourag[ing] the utilization of voluntary admissions to programs and treatment facilities"²⁶⁵ is reflected in the voluntary admission procedures that allow a person to seek treatment and care at a treatment facility as informally as any other person who may be suffering from a physical disease and seeking treatment and care at a regular hospital. North Carolina has thus recognized that mental illness and inebriety are diseases, and a person should be allowed to a certain extent to decide for himself whether or not he wants treatment or care.

Although it may be argued that mental patients do not have the capacity to choose or reject treatment as do persons with a physical disease, this assertion is not supported by the majority of mental patients:

The reason traditionally assigned for forcing treatment on the mentally ill while making it voluntary for other afflicted persons is that the mentally ill are incapable of making a rational judgment of whether they need or desire such help. As with every similar statement, this depends on what kind of mental illness is present. . . . It is true that some mentally ill people may be unable to comprehend a diagnosis and, in these instances, forced treatment may be more appropriate. But this group is a small proportion of the total committable population. Most understand

261. See text accompanying notes 89-92, 98 *supra*.

262. See text accompanying notes 200-01 *supra*.

263. See text accompanying notes 202-07 *supra*.

264. *E.g.*, California's Short-Doyle Act, CAL. WELF. & INST'NS CODE §§ 5600-767 (West 1973); see text accompanying note 206-07 *supra*.

265. N.C. GEN. STAT. § 122-56.1 (Supp. 1973).

what the clinician is saying though they often disagree with his view.²⁶⁶

North Carolina's recognition of the right of a person to decide in most cases whether he wants treatment and care for mental illness is also indicated by the narrow class of persons who may come within the involuntary commitment laws. The state's policy that "no person shall be committed to a treatment facility unless he is determined to be [violent and of imminent danger] to himself or others or gravely disabled"²⁶⁷ is carried out by the enactment of detailed procedures that insure that only this narrow class of persons are subjected to state imposed care and treatment.

This progressive view, which likens mental illness and inebriety to physical diseases and provides in most instances admission procedures analogous to those used in regular hospitals, should aid in eventually removing the stigma which has always been associated with mental illness.

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266. Livermore, Malinquist, & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 88-89 (1968).

267. N.C. GEN. STAT. § 122-58.1 (Supp. 1973). This quote actually uses the phrase "dangerous to himself or others" rather than "violent and of imminent danger" which is the test throughout the involuntary commitment sections. It appears that this change in language may have been an oversight by the drafters since a test based on dangerousness is much broader than one based on violent and of imminent danger and therefore does not reflect the drafter's obvious intent of limited application of the involuntary commitment laws.

