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COMMENTS

CIVIL COMMITMENT IN TEXAS—AN ILLUSION OF DUE PROCESS

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Over 400,000 individuals in the United States were committed to state and county mental hospitals in 1972, and forty-two percent were committed involuntarily under civil procedures.[1] Upon commitment these individuals lost their personal freedom, significant civil rights, and suffered a social stigma, which, in many cases, deprived them of the ability to earn a living.[2] The state power of civil commitment is extensive in its application and effect.[3] This power has its source in the state police power, the right to protect the public, and the *parens patriae* doctrine.[4] Neither power is absolute, however, but must instead be balanced against the personal rights of the individual.[5] Failure of the states to give adequate consideration to this balance has, in the last four years, resulted in nine states having their civil commitment procedures declared unconstitutional.[6] This reflects the judiciary's increased concern for

1. NATIONAL INSTITUTE OF MENTAL HEALTH, STATISTICAL NOTE 105 at 2, 8 (1974).

2. *In re* Fisher, 313 N.E.2d 851, 857 (Ohio 1974). The right to drive an automobile or practice a licensed profession is lost on commitment. If the person is also found to be incompetent, he loses his right to manage his property, to vote, to contract, and to marry. *See In re* Brown, 68 F.R.D. 172, 173 (D.D.C. 1975) (employment); Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424, 467-69 (1966); Comment, *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1193-1201 (1974).

3. *See* Humphrey v. Cady, 405 U.S. 504, 509 (1972); Suzuki v. Quisenberry, 411 F. Supp. 1113, 1121-24 (D. Hawaii 1976) (current status); Hawks v. Lazaro, 202 S.E.2d 109, 117-24 (W. Va. 1974) (historical development). *See generally* Comment, *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1207-45 (1974).

4. *See* O'Connor v. Donaldson, 422 U.S. 563, 582-83 (1975) (Burger, C.J., concurring); Coll v. Hyland, 411 F. Supp. 905, 912-13 (D.N.J. 1976); Note, *Civil Commitment of the Mentally Ill: Theories and Procedure*, 79 HARV. L. REV. 1288, 1289-97 (1966). The *parens patriae* doctrine concerns the right of the state to protect those who cannot protect themselves. Coll v. Hyland, 411 F. Supp. 905, 912 (D.N.J. 1976).

5. *See* O'Connor v. Donaldson, 422 U.S. 563, 573-75 (1975); *In re* Gault, 387 U.S. 1, 20 (1967); Shelton v. Tucker, 364 U.S. 479, 488-90 (1960); Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968).

6. *See* Stamus v. Leonhardt, 414 F. Supp. 439, 453 (S.D. Iowa 1976); J.L. v. Parham, 412 F. Supp. 141, 142 (M.D. Ga. 1976); Suzuki v. Quisenberry, 411 F. Supp. 1113, 1135 (D. Hawaii 1976); Doremus v. Farrell, 407 F. Supp. 509, 517 (D. Neb. 1975); Bartley v. Kremens, 402 F. Supp. 1039, 1053-54 (E.D. Pa.), *stay granted*, 96 S. Ct. 558 (1975); Kendall v. True, 391 F. Supp. 413, 419 (W.D. Ky. 1975); Lynch v. Baxley, 386 F. Supp. 378, 397 (M.D. Ala. 1974); Lessard v. Schmidt, 349 F. Supp. 1078, 1103 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974), *on remand*,

individual rights by strengthening the constitutional standards of due process in civil commitments.[7]

The decisions to implement these more stringent procedural standards have not been free from controversy.[8] The increased formality of the process tends to force those who are actually mentally ill out of the hospital and into the courtrooms, thereby inhibiting the patient's recovery.[9] Persons subjected to commitment hearings, however, are presumed to be sane and competent.[10] Because their personal freedom is the principal issue, the state has "the inescapable duty to vouchsafe due process."[11]

PUBLIC POLICY CONSIDERATIONS

The judicial argument and policy considerations for strengthening the due process safeguards in civil commitment proceedings parallel the considerations involved in juvenile delinquency proceedings.[12] Both generally are not adversary in nature and involve a person who may not be competent to determine what courses of action are in his best interest.[13] In fact, a considerable number of recent decisions on the constitutionality of civil commitment statutes have relied upon an analogy between these two types of proceedings.[14] The Supreme Court, in the landmark case of *In re Gault*,[15] found that the states' well intended elimination of procedural safeguards in juvenile

379 F. Supp. 1376 (1974), *vacated and remanded*, 421 U.S. 957 (1975), *on remand*, 413 F. Supp. 1318 (1976); Hawks v. Lazaro, 202 S.E.2d 109, 123 (W. Va. 1974). *See also* Coll v. Hyland, 411 F. Supp. 905, 907 (D.N.J. 1976) (deficient statute recently revised); *In re* Fisher, 313 N.E.2d 851, 858 (Ohio 1974) (judicial construction of statute); Quesnell v. State, 517 P.2d 568, 573-74 (Wash. 1974) (judicial construction of statute).

7. *Compare* the procedural safeguards in Suzuki v. Quisenberry, 411 F. Supp. 1113, 1127 (D. Hawaii 1976); Doremus v. Farrell, 407 F. Supp. 509, 517 (D. Neb. 1975), *with* the summary process reported in Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424, 442-43 (1966), *and* the medical approach endorsed in Weihofen, *Hospitalizing the Mentally Ill*, 50 MICH. L. REV. 837, 859-63 (1952).

8. *See* Quesnell v. State, 517 P.2d 568, 580-85 (Wash. 1974) (concurring opinion).

9. *See* Bartley v. Kremens, 402 F. Supp. 1039, 1050 (E.D. Pa.), *stay granted*, 96 S. Ct. 558 (1975); Comment, 7 LOYOLA CHI. L.J. 507, 520-23 (1976).

10. *See* White v. White, 108 Tex. 570, 587, 196 S.W. 508, 515 (1917).

11. Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968); *accord*, Stamus v. Leonhardt, 414 F. Supp. 439, 445 (S.D. Iowa 1976); Comment, *The "Crime" of Mental Illness: Extention of "Criminal" Procedural Safeguards to Involuntary Civil Commitments*, 66 J. CRIM. L.C. & P.S. 255, 270 (1975).

12. *See* Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424, 448-49 (1966).

13. *Compare In re* Gault, 387 U.S. 1, 15-17 (1967), *with* Lessard v. Schmidt, 349 F. Supp. 1078, 1084-88 (E.D. Wis. 1972), *vacated on other grounds*, 414 U.S. 473 (1974).

14. *See, e.g.*, Heryford v. Parker, 396 F.2d 393, 395 (10th Cir. 1968); Stamus v. Leonhardt, 414 F. Supp. 439, 446-47 (S.D. Iowa 1976); Doremus v. Farrell, 407 F. Supp. 509, 515 (D. Neb. 1975).

15. 387 U.S. 1 (1967).

delinquency hearings had not actually operated in the best interests of the juvenile.[16] Therefore, the constitutional due process safeguards applied to these hearings were substantially strengthened. The Court reasoned that the best interest of individuals could be more accurately determined and the policy of the state more uniformly applied by adherence to the orderliness and impartiality of standardized procedure.[17] The Court refused, however, to directly apply adult criminal due process standards but, instead, applied standards of procedure that would preserve many of the advantages inherent in a separate juvenile system.[18] An inference can be drawn from this case that an individual may be deprived of his liberty with fewer due process safeguards when a state proceeding is in his best interest.[19] One court applied this reasoning to civil commitment proceedings, holding that due process safeguards could be relaxed when a mental patient receives adequate treatment.[20] This quid pro quo theory was severely criticized and has not yet received approval from the Supreme Court.[21] Due process relates more to the overall fairness achieved through uniformity of procedure than achievement of the most desirable result in a specific instance.[22]

A procedure which relegates commitment decisions to family, friends, and mental health professionals, with such a potential for arbitrariness and abuse, fails to provide this uniformity of procedure.[23] Additionally, these parties may not impartially and accurately consider the individual's best interest.[24] Family and friends may be strongly biased in favor of commitment to relieve themselves of a legal or moral obligation, to conserve an inheritable estate, or simply because the individual's deviation from the local social norms creates a continued embarrassment.[25] One commentator has criticized the

16. *Id.* at 18-20.
17. *Id.* at 26-27.
18. *Id.* at 30.
19. *Id.* at 21. This was evidently the original concept in moving the juvenile from the harsh realities of criminal law courts and placing them under the parental protection of the juvenile court judge. *See id.* at 15-17.
20. Donaldson v. O'Connor, 493 F.2d 507, 522 (5th Cir. 1974), *vacated*, 422 U.S. 563 (1975).
21. *See* O'Connor v. Donaldson, 422 U.S. 563, 586 (1975) (Burger, C.J., concurring). *But see* Welsch v. Likins, 373 F. Supp. 487, 499 (D. Minn. 1974) (constitutional right to adequate treatment).
22. This does not mean that the person's best interest should not be considered in establishing and delineating these safeguards. *See* O'Connor v. Donaldson, 422 U.S. 563, 583 (1975) (Burger, C.J., concurring); *In re* Gault, 387 U.S. 1, 26-27 (1967).
23. *See In re* Gault, 387 U.S. 1, 18-19 (1967); Doremus v. Farrell, 407 F. Supp. 509, 516 (D. Neb. 1975).
24. *See* Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 749-50 (1974); Rosenhan, *On Being Sane in Insane Places*, 13 SANTA CLARA LAW. 379, 394-98 (1973).
25. *See* Greene v. State, 537 S.W.2d 100, 104 (Tex. Civ. App. —Houston [1st Dist.] 1976, no writ) (dissenting opinion) (legal or moral obligation); State *ex rel.* Hawks v. Lazaro, 202 S.E.2d 109, 123 (W. Va. 1974) (conserve inheritable estate); Friedman & Daly, *Civil Commitment and the Doctrine of Balance: A Critical Analysis*, 13 SANTA CLARA LAW. 503, 514-15 (1973) (nuisance).

tendency of society to institutionalize individuals solely because their personality is unattractive and they make people around them uncomfortable.[26] There is also evidence that psychiatrists are not entirely free of bias.[27] One reason for this bias is that medical doctors, because of their training and experience, strongly advocate that it is better to treat a possibly nonexistent disease, where the treatment is not harmful, than let an existing disease go untreated.[28] In the field of psychiatry this thesis is supported by the widely publicized cases in which the doctor is sued for malpractice because he did not confine a patient who later proved to be dangerous.[29] Whether or not a person is dangerous, with minor exceptions, is much more dependent upon his environment and specific conflicts than on his diagnosed mental state.[30] Recognizing their limitations in predicting dangerous conduct, psychiatrists naturally tend to be overcautious.[31] Added to this is the fact that medicine is an inexact science.[32] Studies have shown that psychiatrists have considerable difficulty distinguishing the "sane" from the "insane."[33] When all these factors are considered, it is at least arguable that a psychiatrist's judgment as to whether or not a certain individual is a proper subject for commitment is as accurate as the impartial findings of a court.[34] Therefore, the final determination on commitment should rest with the court and not be delegated to the attending physicians.[35] Even if these public policy arguments are discounted, a number of courts have found them convincing, and as a result, there has been an almost revolutionary change in the standards of due process applied to civil commitment.[36]

STATUTORY AUTHORITY

The Texas Mental Health Code[37] has been described as one of the most

26. Bazelon, *Institutionalization, Deinstitutionalization and the Adversary Process,* 75 COLUM. L. REV. 897 (1975).

27. *See* Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 CALIF. L. REV. 693, 726-29 (1974).

28. *See* Rosenhan, *On Being Sane in Insane Places,* 13 SANTA CLARA LAW. 379, 385 (1973).

29. *See, e.g.,* Underwood v. United States, 356 F.2d 92, 94 (5th Cir. 1966); Johnson v. United States, 409 F. Supp. 1283, 1284 (M.D. Fla. 1976); Merchants Nat'l Bank & Trust Co. v. United States, 272 F. Supp. 409, 414-15 (D.N.D. 1967).

30. *See* Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 CALIF. L. REV. 693, 732-34 (1974).

31. *Id.* at 735-36.

32. O'Connor v. Donaldson, 422 U.S. 563, 584 (1975) (Burger, C.J., concurring); Greenwood v. United States, 350 U.S. 366, 375 (1956).

33. Rosenhan, *On Being Sane in Insane Places,* 13 SANTA CLARA LAW. 379, 398 1973).

34. *See* Temerlin, *Diagnostic Bias in Community Mental Health,* 6 COMMUNITY MENTAL HEALTH J. 110, 115 (1970).

35. *See* Doremus v. Farrell, 407 F. Supp. 509, 516 (D. Neb. 1975) (impartial commission).

36. *See* cases cited note 6 *supra.*

37. TEX. REV. CIV. STAT. ANN. art. 5547 (Supp. 1976).

carefully drafted statutes of its kind in the country.[38] Significantly, the welfare of those who were truly mentally ill was a major consideration of the draftsmen.[39] Prior to the current enactments, due process safeguards when in conflict with the interests of the "patient" were compromised to the point that they were criticized as being constitutionally deficient.[40] The 64th Texas Legislature made significant progress, however, toward correcting these deficiencies.[41] The 1975 amendment to the Mental Health Code requires a warrant prior to emergency detention and the consideration of less restrictive alternatives to total confinement.[42] Perhaps an even more significant change is the provision for direct appeal to the courts of civil appeals.[43] Since opinions of these courts are reported, civil commitment proceedings will probably acquire more visibility, and more discerning judicial construction of the statute will result[44] There remains, however, some question as to whether the current civil commitment procedure violates the constitutional due process requirements.[45] In order to understand these deficiencies, a comparison of due process standards with the Texas statute and associated judicial opinions is necessary.[46]

EMERGENCY DETENTION

The state has the right to temporarily detain a mentally ill person when

38. Weihofen, *Mental Health Services for the Poor*, 54 CALIF. L. REV. 920, 938 (1966).

39. Comment, *Texas Involuntary Commitment Laws—Unconstitutional?*, 25 BAYLOR L. REV. 273, 278-79 (1973).

40. *See id.* at 273-74.

41. *See* Tex. Laws 1975, ch. 377, §§ 1-7, at 981-82 (effective June 19, 1975); *id.* ch. 616, § 1, at 1913 (effective Sept. 1, 1975).

42. TEX. REV. CIV. STAT. ANN. art. 5547-27 (Supp. 1976) (warrant required); *id.* art. 5547-38(c) (less restrictive alternatives).

43. *See id.* arts. 5547-39d, 5547-57 (Supp. 1976).

44. The previous statute provided for appeal to the district court. Tex. Laws 1957, ch. 243, § 57, at 516; *see* Vail v. Vail, 438 S.W.2d 115, 116 (Tex. Civ. App.—Waco 1969, no writ).

45. Contrast the strict procedure required by Stamus v. Leonhardt, 414 F. Supp. 439, 453 (S.D. Iowa 1976), with Greene v. State, 537 S.W.2d 100 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ). In *Greene* the trial court failed to make written findings of fact or conclusions of law. "[S]uch facts as are necessary to support the trial court's judgment must be presumed to have been found." *Id.* at 102. The court did not inquire as to whether the proposed patient had voluntarily and intelligently waived her right to be present, whether the trial court followed the correct standard of proof, whether the appointed counsel was effective, or whether the conclusions on the certificates of the two physicians were sufficient evidence to sustain the burden of proof. *Id.* at 103-04 (dissenting opinion). It should be noted that the proposed patient, through *another* attorney, filed a motion to set aside the judgment on the same day that was specified in the notice as the date for the hearing. *Id.* at 101-02.

46. This analysis has been limited to those areas where the statute has a reasonable probability of being unconstitutionally applied or unconstitutional on its face. Additionally, it does not extend to the criminally insane. The recent inclusion of "persons charged with a criminal offense" was apparently made to support a specific policy rather than to correct a constitutional deficiency. *Compare* TEX. REV. CIV. STAT. ANN. arts. 5547-31, 5547-36 (Supp. 1976), *with* Berney v. State, 462 S.W.2d 949, 951 (Tex. 1971).

there is an imminent threat that the person will harm himself or others.[47] Emergency detention of a person may only be maintained for a reasonable time.[48] What constitutes a reasonable period of detention in such cases has not yet been fully defined.[49] Some jurisdictions hold that the restraint is justified for the time required to arrange for a full hearing on the need for commitment.[50] Other jurisdictions consider such an extended period of time unreasonable and require a separate probable cause hearing prior to the full hearing.[51]

The Texas civil commitment procedure appears to comply fully with the constitutional requirements for emergency detention.[52] A person may be taken into custody on the representation of a credible person that the individual is mentally ill and thereby "likely to cause injury to himself or others if not immediately restrained."[53] A health or peace officer must then obtain a warrant from a magistrate prior to taking that person into custody.[54] Within the first twenty-four hours of custody a physician must examine the person and prepare a certificate of medical examination.[55] Except for weekends and holidays or upon written order of a county or probate court, the custody cannot be extended beyond twenty-four hours.[56] When the person is placed in custody or there has been an application for temporary hospitalization, the appropriate court must set a date for a hearing within fourteen days.[57]

NOTICE AND OPPORTUNITY TO BE HEARD

The proposed patient has a constitutional right to timely and effective notice—notice that contains the time and place of the hearing and sufficient

47. *See, e.g.*, Stamus v. Leonhardt, 414 F. Supp. 439, 446 (S.D. Iowa 1976); Doremus v. Farrell, 407 F. Supp. 509, 515 (D. Neb. 1975); Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085, 1098 (E.D. Mich. 1974).

48. *See* Lynch v. Baxley, 386 F. Supp. 378, 388 (M.D. Ala. 1974).

49. *See* Coll v. Hyland, 411 F. Supp. 905, 910-11 (D.N.J. 1976) (20 days); Doremus v. Farrell, 407 F. Supp. 509, 515 (D. Neb. 1975) (5 days).

50. *See* Coll v. Hyland, 411 F. Supp. 905, 910-11 (D.N.J. 1976).

51. Stamus v. Leonhardt, 414 F. Supp. 439, 446 (S.D. Iowa 1976); Lynch v. Baxley, 386 F. Supp. 378, 388 (M.D. Ala. 1974).

52. This does not mean that the process is free from abuse. *See* Jones, *Emergency Restraint Under the Texas Mental Health Code*, 33 TEX. B.J. 31 (1970). Failure to strictly follow the provisions of the Code will render the commitment illegal. *See* Florence v. Crawford, 351 S.W.2d 77, 80 (Tex. Civ. App.—Texarkana 1961, no writ); *cf.* Johnson v. Greer, 477 F.2d 101, 104-05 (5th Cir. 1973) (confinement for more than 24 hours without a court order constitutes false imprisonment).

53. TEX. REV. CIV. STAT. ANN. art. 5547-27 (Supp. 1976).

54. *Id.*

55. *Id.* art. 5547-30.

56. *Id.* art. 5547-27.

57. *Compare id.* art. 5547-40, *with id.* art. 5547-67(d).

information to allow the person to prepare his defense.[58] One court has interpreted this to mean that:

> [T]he notice should include a clear statement of the purpose of the proceedings and of the possible consequences to the subject thereof, a statement of the legal standard upon which commitment is authorized, the names of examining physicians and others who may testify in favor of detention and the substance of their proposed testimony.[59]

The notice requirements may be less stringent, however, when the state invariably provides effective counsel.[60]

Additionally, the individual has a right to be present at the commitment hearing and participate to the extent of his ability to do so.[61] The court has an obligation to ensure that this right is not derogated.[62] Inquiry should be made into the nature of medication being administered to the individual to ensure that excessive or inappropriate medication has not impaired his ability to function effectively at the hearing.[63] If the right to be present is waived by the individual, the waiver must be approved by the court upon a judicial finding that the person understood his rights and was competent to waive them.[64] Similarly, his physical presence may be excused if he is so mentally or physically ill as to be incapable of attending.[65]

For temporary commitment the Texas Mental Health Code requires that the individual "be personally served with a copy of the application [for commitment] and written notice of the time and place of hearing thereon . . . ."[66] When indefinite commitment is involved, additional details are required in the notice.[67] For either type of commitment the court appointed attorney ad litem must have access to all records and papers relating to the

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58. *See, e.g.*, Stamus v. Leonhardt, 414 F. Supp. 439, 446-47 (S.D. Iowa 1976); Suzuki v. Quisenberry, 411 F. Supp. 1113, 1127 (D. Hawaii 1976); Hawks v. Lazaro, 202 S.E.2d 109, 124 (W. Va. 1974).

59. Suzuki v. Quisenberry, 411 F. Supp. 1113, 1127 (D. Hawaii 1976); *accord*, Doremus v. Farrell, 407 F. Supp. 509, 515 (D. Neb. 1975); Lynch v. Baxley, 386 F. Supp. 378, 388 (M.D. Ala. 1974).

60. *See* Coll v. Hyland, 411 F. Supp. 905, 911 (D.N.J. 1976).

61. *See* Stamus v. Leonhardt, 414 F. Supp. 439, 447 (S.D. Iowa 1976).

62. *See* Hawks v. Lazaro, 202 S.E.2d 109, 124-25 (W. Va. 1974).

63. Lynch v. Baxley, 386 F. Supp. 378, 389 (M.D. Ala. 1974); *accord*, State v. O'Neill, 545 P.2d 97, 104 (Ore. 1976). Administration of incapacitating drugs to patients in mental hospitals may be a common practice. *See* Roth, Dayley, & Lerner, *Into the Abyss: Psychiatric Reliability and Emergency Commitment Statutes*, 13 SANTA CLARA LAW. 400, 418-19 (1973).

64. *See* Bartley v. Kremens, 402 F. Supp. 1039, 1051 (E.D. Pa.), *stay granted*, 96 S. Ct. 558 (1975) (commitment of a child); Lynch v. Baxley, 386 F. Supp. 378, 388-89 (M.D. Ala. 1974). *But see* Hawks v. Lazaro, 202 S.E.2d 109, 125 (W. Va. 1974) (presence cannot be waived).

65. This determination may be made by the court only after an adversary hearing as to its truth. *See* Suzuki v. Quisenberry, 411 F. Supp. 1113, 1129 (D. Hawaii 1976); Lynch v. Baxley, 386 F. Supp. 378, 389 (M.D. Ala. 1974).

66. TEX. REV. CIV. STAT. ANN. art. 5547-33 (1958).

67. *See id.* art. 5547-44 (Supp. 1976).

case.[68] Therefore, if the attorney provides effective representation, a strong argument can be made that the Code meets the current minimum due process requirements.[69]

The extent of the individual's right to be present at the hearing is not well delineated. The Code provides that the individual is not required to be present but will not be denied this right.[70] This conforms to personal appearance requirements of civil suits in general, yet it fails to meet the more stringent requirements established for civil commitment actions.[71] Although not as critical as the presence of the accused in criminal trials, the individual may be excused only within specific exceptions and under the close supervision of the court.[72] Even where the court finds that the individual must be present to satisfy constitutional due process standards, there appears to be no statutory authority to require his presence.[73] Assuming that this authority exists, the statute conferring it must be considered to be vague and may be unconstitutional for its failure to "provide substantial procedures" in this critical area.[74]

IMPARTIAL HEARING

The essence of due process is a fair and impartial hearing.[75] During the course of a civil commitment hearing the State has the burden of proving that the subject of the hearing is mentally ill *and* presents a danger to himself or to others.[76] This proof must be something more than the preponderance of evidence common to other civil suits.[77] The courts are divided,

68. *See id.* art. 5547-33 (1958).

69. If the appointed counsel keeps his client informed as to the pertinent contents of the reports and their legal significance, then there is less need for detail in the notice. *See* Coll v. Hyland, 411 F. Supp. 905, 911 (D.N.J. 1976). The counter argument is that this level of effectiveness of counsel is not universally achieved in practice. *See* Brunetti, *The Right to Counsel, Waiver Thereof, and Effective Assistance of Counsel in Civil Commitment Proceedings*, 29 SW. L.J. 684, 707 (1975).

70. TEX. REV. CIV. STAT. ANN. art. 5547-36(b) (Supp. 1976).

71. *See* Note, *Constitutional Problems of Civil Commitment Procedures in New Mexico*, 6 N.M.L. REV. 113, 133-34 (1975).

72. *See* Suzuki v. Quisenberry, 411 F. Supp. 1113, 1129 (D. Hawaii 1976); Lynch v. Baxley, 386 F. Supp. 378, 388-89 (M.D. Ala. 1974).

73. *See* TEX. REV. CIV. STAT. ANN. art. 5547-36(b) (Supp. 1976).

74. Bartley v. Kremens, 402 F. Supp. 1039, 1045 (E.D. Pa.), *stay granted*, 96 S. Ct. 558 (1975).

75. *See In re* Gault, 387 U.S. 1, 30 (1967).

76. *See* Greene v. State, 537 S.W.2d 100, 102 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ); TEX. REV. CIV. STAT. ANN. art. 5547-38 (Supp. 1976). The constitutionality of confining a nondangerous person has not yet been fully defined. *See* O'Connor v. Donaldson, 422 U.S. 563, 573 (1975). The trend of lower court decisions, however, is toward requiring at least a certain degree of dangerousness. *See* Stamus v. Leonhardt, 414 F. Supp. 439, 450 (S.D. Iowa 1976).

77. *E.g., In re* Ballay, 482 F.2d 648, 668-69 (D.C. Cir. 1973); Suzuki v. Quisenberry, 411 F. Supp. 1113, 1132 (D. Hawaii 1976); Lynch v. Baxley, 386 F. Supp. 378, 393 (M.D. Ala. 1974).

however, on whether the proof must be "beyond a reasonable doubt" or merely "clear [,unequivocal] and convincing."[78] Whichever standard is chosen, the evidence introduced must meet established rules of admissibility.[79] Thus, admission of hearsay evidence, which prevents confrontation and cross-examination of the witnesses, should be limited to the recognized exceptions.[80] Also, opinions or conclusions by expert witnesses alone are not sufficient to satisfy the standard of proof.[81] The underlying facts which support such opinions must be made a part of the record.[82]

Additionally, the State must prove that there are no alternative treatments short of total confinement available.[83] Proof must be made as to available alternatives, those alternatives that were investigated, and why they were deemed to be unsuitable.[84] These alternatives should include consideration of part-time hospitalization, nursing home placement, out-patient care, utilization of community mental health services, or placement in the care of a willing friend or relative.[85]

In Texas the prospective mental patient may elect to have a trial by jury.[86] When this option is exercised, the State has the burden of proving that the individual is mentally ill and presents a danger to himself or the public.[87] This proof must be by "clear, unequivocal, and convincing" evidence for temporary commitment and "beyond a reasonable doubt" for indefinite commitment.[88] The court must also follow established rules on the admissi-

78. *See In re* Valdez, 540 P.2d 818, 822 (N.M. 1975).

79. Doremus v. Farrell, 407 F. Supp. 509, 517 (D. Neb. 1975).

80. *See* Lynch v. Baxley, 386 F. Supp. 378, 394 (M.D. Ala. 1974); Hawks v. Lazaro, 202 S.E.2d 109, 125 (W. Va. 1974).

81. *In re* Barnard, 455 F.2d 1370, 1375 (D.C. Cir. 1971); Miller v. Blalock, 411 F.2d 548, 549 (4th Cir. 1969); Moss v. State, 539 S.W.2d 936, 950-51 (Tex. Civ. App. —Dallas 1976, no writ).

82. *See* Mims v. United States, 375 F.2d 135, 141-43 (5th Cir. 1967); Moss v. State, 539 S.W.2d 936, 949-51 (Tex. Civ. App.—Dallas 1976, no writ). *But see* Greene v. State, 537 S.W.2d 100, 103 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) (express finding not required).

83. *See* Stamus v. Leonhardt, 414 F. Supp. 439, 452-53 (S.D. Iowa 1976); Welsch v. Likins, 373 F. Supp. 487, 502 (D. Minn. 1974); *cf.* Shelton v. Tucker, 364 U.S. 479, 488 (1960) (state powers are constitutionally limited to the minimum infringement of personal liberty necessary to achieve the state's objective).

84. Suzuki v. Quisenberry, 411 F. Supp. 1113, 1132-33 (D. Hawaii 1976); Lynch v. Baxley, 386 F. Supp. 378, 392 (M.D. Ala. 1974).

85. Suzuki v. Quisenberry, 411 F. Supp. 1113, 1132-33 (D. Hawaii 1976).

86. TEX. REV. CIV. STAT. ANN. art. 5547-36(e) (Supp. 1976) (jury trial must be demanded for temporary commitment); *id.* art. 5547-49(e) (trial by jury may be waived in proceedings for indefinite commitment).

87. *See* TEX. REV. CIV. STAT. ANN. art. 5547-38 (Supp. 1976).

88. Turner v. State, 543 S.W.2d 453, 455 (Tex. Civ. App.-Austin 1976, no writ) (indefinite commitment); Moss v. State, 539 S.W.2d 936, 943 (Tex. Civ. App.—Dallas 1976, no writ) (temporary commitment). *But see* Powers v. State, 543 S.W.2d 194, 196 (Tex. Civ. App.—Waco 1976, no writ) (preponderance of the evidence).

bility and probative force of the evidence.[89] Although the Code grants the court power to order the alternative treatment, there is no provision requiring an investigation of less restrictive alternatives.[90]

If a trial by jury is not selected, more fundamental deficiencies arise.[91] When there is no objection, a court may temporarily commit an individual upon findings based solely on the medical certificates of two physicians.[92] In many cases, the doctors' certificates lack the facts necessary to support their conclusions or contain hearsay as a substantial basis for the diagnosis.[93] In these situations, the judicial hearing is actually a medical determination of legal rights.[94] Therefore, the court should at least ensure that the certificates meet the standards of admissibility and contain sufficient facts to support the burden of proof. Whether or not this would be sufficient to satisfy the due process requirements is questionable. Introduction of testimony which is not subject to confrontation and cross-examination by either the court, the proposed patient, or his attorney would not seem to meet the "fundamental fairness" test.[95]

RIGHT TO COUNSEL

An individual has a right "to the guiding hand of legal counsel at every step of the [civil commitment] proceedings . . . ."[96] If the person cannot afford counsel, an attorney who will provide effective representation must be appointed.[97] The ineffectiveness of attorneys ad litem in the unique and nonadversary environment of civil commitment hearings is well documented.[98] This has prompted some courts to hold that the attorney must

89. *See* Moss v. State, 539 S.W.2d 936, 949-51 (Tex. Civ. App.—Dallas 1976, no writ).

90. *See* TEX. REV. CIV. STAT. ANN. art. 5547-38(c) (Supp. 1976).

91. *Compare* Lynch v. Baxley, 386 F. Supp. 378, 396 (M.D. Ala. 1974), *with* Greene v. State, 537 S.W.2d 100, 103-04 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) (dissenting opinion).

92. TEX. REV. CIV. STAT. ANN. art. 5547-37 (1958).

93. *See* Morris & Luby, *Civil Commitment in a Suburban County: An Investigation by Law Students*, 13 SANTA CLARA LAW. 518, 530 (1973).

94. *See* Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424, 448-50 (1966); Note, *Constitutional Problems of Civil Commitment Procedures in New Mexico*, 6 N.M.L. REV. 113, 138 (1975).

95. *See In re* Gault, 387 U.S. 1, 29-30 (1967); *cf.* Lisenba v. California, 314 U.S. 219, 238 (1941) (criminal proceeding).

96. Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968).

97. *E.g.*, Stamus v. Leonhardt, 414 F. Supp. 439, 448 (S.D. Iowa 1976); Suzuki v. Quisenberry, 411 F. Supp. 1113, 1129 (D. Hawaii 1976); Quesnell v. State, 517 P.2d 568, 575-78 (Wash. 1973).

98. *See, e.g.*, Brunetti, *The Right to Counsel, Waiver Thereof, and Effective Assistance of Counsel in Civil Commitment Proceedings*, 29 SW. L.J. 684, 707 (1975); Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424, 446-50 (1966); Note, *The Role of Counsel in Civil Commitment Process: A Theoretical Framework*, 84 YALE L.J. 1540, 1547-48 (1975).

assume an adversary role and defend his client from commitment to the limits of professional ethics.[99] Other courts go further and hold that an attorney ad litem is not constitutionally adequate, and that a separate attorney must be appointed.[100] This position is most persuasive where the attorney ad litem is appointed to represent a substantial number of individuals at the same hearing or where a different attorney is appointed for the same person at subsequent proceedings.[101]

Texas requires that an attorney ad litem be appointed at the time the application for commitment is filed.[102] The statute provides little guidance for the attorney.[103] His effectiveness is measured in the context of each case by consideration of his advice concerning the client's legal rights and his efforts in protection of those rights.[104] The extent and nature of the attorney's participation has not yet been fully defined, but the trend is definitely toward the criminal law effectiveness standard.[105] The role of the attorney in Texas civil commitment procedure at times falls far short of this standard.[106]

SELF-INCRIMINATION

The extent of constitutional protection against self-incrimination is uncertain. It is undisputed that the right extends to all criminal acts.[107] Its application to psychiatric examination or compelled testimony, however, has not been firmly established.[108] When the proposed patient, even under protest,

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99. *See* Lynch v. Baxley, 386 F. Supp. 378, 389 (M.D. Ala. 1974) (part of hearing); Hawks v. Lazaro, 202 S.E.2d 109, 126 (W. Va. 1974).

100. Suzuki v. Quisenberry, 411 F. Supp. 1113, 1129 (D. Hawaii 1976); Lessard v. Schmidt, 349 F. Supp. 1078, 1099-1100 (E.D. Wis. 1972), *vacated on other grounds,* 414 U.S. 473 (1974).

101. Quesnell v. State, 517 P.2d 568, 575 (Wash. 1973).

102. TEX. REV. CIV. STAT. ANN. art. 5547-33 (1958) (temporary commitment); *id.* art. 5547-43 (indefinite commitment).

103. *Id.* art. 5547-33 (temporary commitment); *id.* art. 5547-43 (indefinite commitment).

104. *See In re* Fisher, 313 N.E.2d 851, 855-56 (Ohio 1974); Moss v. State, 539 S.W.2d 936, 942 (Tex. Civ. App.—Dallas 1976, no writ).

105. *See* Comment, *The "Crime" of Mental Illness: Extension of "Criminal" Procedural Safeguards to Involuntary Civil Commitments,* 66 J. CRIM. L.C. & P.S. 255, 266 (1975).

106. This assumes that there has not been a drastic change from conditions reported in Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill,* 44 TEXAS L. REV. 424, 446-50 (1966). A more recent study in another state suggests that there have been no meaningful changes. *See* Note, *Constitutional Problems of Civil Commitment Procedures in New Mexico,* 6 N.M.L. REV. 113, 135-39 (1975).

107. *See* Lynch v. Baxley, 386 F. Supp. 378, 394 (M.D. Ala. 1974); Moss v. State, 539 S.W.2d 936, 944 (Tex. Civ. App.—Dallas 1976, no writ).

108. *Compare* McNeil v. Director, Patuxent Institution, 407 U.S. 245, 257 (1972) (Douglas, J., concurring), *and* Lessard v. Schmidt, 349 F. Supp. 1078, 1100-02 (E.D. Wis. 1972), *vacated on other grounds,* 414 U.S. 473 (1974), *with* Karstetter v. Cardwell, 526 F.2d 1144, 1145 (9th Cir. 1975). *See generally* Aronson, *Should the Privi-*

cooperates in the physician's examination, it has generally been held that the need for accurate medical evidence outweighs the individual's interests.[109] When the patient refuses to cooperate, however, the coercive power of the court may be somewhat limited.[110] The constitutionality of compelling the individual to testify has apparently not been tested in the courts.

A Texas court recently considered the application of the right to protection from self-incrimination to psychiatric examination and concluded that the examinations were constitutional.[111] The court acknowledged the problems of the use of coercive force to compel cooperation with the physician and the use of compelled testimony, but made no effort to resolve them.[112] Therefore, the Mental Health Code as construed appears, at the present time, to be constitutionally adequate in this area.[113]

APPELLATE REVIEW

Generally, appellate review is not constitutionally required but is considered desirable.[114] If appeal is allowed, however, counsel, transcript, and record must be provided at public expense for those who cannot afford it.[115] The courts must make written findings of fact sufficient to allow a meaningful review.[116]

Texas statutes now provide for appeal directly to the courts of civil appeals.[117] It is not necessary to request a new trial, and civil commitment proceedings receive priority review.[118] A transcript of the commitment hearing is provided if appeal is requested.[119] Apparently, however, there is no

lege Against Self-Incrimination Apply to Compelled Psychiatric Examinations?, 26 STAN. L. REV. 55, 93 (1973).

109. *See, e.g.*, Tippett v. Maryland, 436 F.2d 1153, 1155 (4th Cir. 1971), *cert. dismissed sub nom.* Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972); State v. Collins, 236 N.W.2d 376, 379 (Iowa 1975) (concurring opinion); Greene v. State, 537 S.W.2d 100, 103 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ). *Contra*, McNeil v. Director, Patuxent Institution, 407 U.S. 245, 257 (1972) (Douglas, J., concurring); Suzuki v. Quisenberry, 411 F. Supp. 1113, 1130-32 (D. Hawaii 1976).

110. *See* McNeil v. Director, Patuxent Institution, 407 U.S. 245, 250-51 (1972) (cannot be indefinitely confined for refusing to cooperate with examining psychiatrists).

111. Moss v. State, 539 S.W.2d 936, 948 (Tex. Civ. App.—Dallas 1976, no writ).

112. *Id.* at 948.

113. There may, however, be a requirement for the examining physicians to explain the purpose of the examination. *Cf.* Suzuki v. Quisenberry, 411 F. Supp. 1113, 1131 (D. Hawaii 1976) (individual may refuse to be examined).

114. *See* Coppedge v. United States, 369 U.S. 438, 455-56 (1962) (Stewart, J., concurring); Griffin v. Illinois, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring).

115. Suzuki v. Quisenberry, 411 F. Supp. 1113, 1133 (D. Hawaii 1976).

116. *See* Specht v. Patterson, 386 U.S. 605, 610 (1967); Lynch v. Baxley, 386 F. Supp. 378, 396 (M.D. Ala. 1974); *In re* Crouch, 221 S.E.2d 74, 75 (N.C. Ct. App. 1976).

117. TEX. REV. CIV. STAT. ANN. art. 5547-39d (Supp. 1976) (temporary commitment); *id.* art. 5547-57 (indefinite commitment).

118. Moss v. State, 539 S.W.2d 936, 940-41 (Tex. Civ. App.—Dallas 1976, no writ).

119. TEX. REV. CIV. STAT. ANN. art. 5547-39b (Supp. 1976).

requirement that the lower court make written findings of fact.[120] It is possible this deficiency not only deprives the individual of an effective appeal but also invites a federal habeas corpus attack.[121]

CONCLUSION

The Texas Mental Health Code appears to be constitutionally deficient in failing to adequately protect the individual's right to be present at the commitment hearing.[122] It is also at least arguably deficient in failing to require the examining physicians to appear and testify. The remaining deficiencies in the civil commitment process involve procedural due process questions which are within the discretion of the trial court. In evaluating the effectiveness of counsel, alternative treatment, and whether or not the State has met the required burden of proof with admissible evidence, the unique facts and circumstances of each case should be considered. These facts and circumstances can best be determined and analyzed in an impartial judicial hearing conducted in accordance with uniformly applied procedure.[123] The trial courts, however, are confronted with persons alleged to be seriously mentally ill and whose well being demands a speedy hearing in a clinical environment. This—together with a crowded docket, minimal attorney's fees, and a lack of understanding of the complex field of mental health—exerts considerable pressure on the court and often results in a summary process.[124] Because of this pressure there is some doubt that all trial courts will completely follow the detailed due process procedures set out by the nondirective opinions of federal district courts. These trial courts would, understandably, await a binding opinion by a superior court. Nevertheless, since an appeal is now allowed directly to a court of civil appeals, the legislature has provided for a highly visible, in-depth judicial construction and constitutional validation of the Mental Health Code. As a result, Texas appears to have an adequate foundation from which to achieve that delicate balance between the individual's constitutional rights and the compelling interest of the state in commitment of the mentally ill.

120. *See* Greene v. State, 537 S.W.2d 100, 102 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

121. *See In re* Gault, 387 U.S. 1, 30 (1967).

122. The extent of the constitutional deficiencies cannot be ascertained until the law becomes more fully developed. In this context, it is significant that the majority of decisions to date have been rendered by three judge district courts. *See* cases cited note 6 *supra*. As such, the decisions are persuasive but not judicially binding outside of the injunctive relief granted. *See* Wichita Royalty Co. v. City Nat'l Bank, 306 U.S. 103, 109 (1939). Additionally, federal influence on state civil commitment proceedings may be somewhat curtailed by the holding of Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), which extended the doctrine of nonintervention in pending state criminal proceedings to selected civil suits. *See* Schmidt v. Lessard, 421 U.S. 957 (1975) (mem.). *But see* Lessard v. Schmidt, 413 F. Supp. 1318, 1319-20 (E.D. Wis. 1976).

123. *See In re* Gault, 387 U.S. 1, 26 (1967).

124. *See* Note, *Constitutional Problems of Civil Commitment Procedures in New Mexico*, 6 N.M.L. REV. 113, 135-39 (1975).