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IN VOLUNTARY COMMITMENT OF THE MENTALLY ILL

Mary B. Troland

I. INTRODUCTION

The attempt to provide adequate criteria for commitment is a difficult if not impossible task; it may be alleged that the basis for commitment is so vague as to be limited only by the ingenuity of the person who invokes it.\(^1\)

Regardless of the difficulties inherent in establishing standards and procedures for the involuntary commitment of the mentally ill, all states, including Montana, have attempted to provide statutory solutions to the social problems posed by those whose mental illness threatens their own well-being or that of others.\(^2\) Although these statutes generally reflect society’s changing and maturing attitude toward mental illness, no legislative enactment can adequately answer or eliminate the moral and legal questions raised by the sanctioned confinement of individuals prior to their commission of prohibited acts.\(^3\) On what basis is such deprivation of liberty justified? What authority does a state have for the involuntary commitment of the mentally ill? By what standard are committable persons distinguished from those who are merely different or unwanted? To what procedural safeguards are persons thought to be committable entitled? Finally, is commitment the only or the best means of dealing with the seriously mentally ill?

Lawyers and judges must be concerned with searching for answers to these questions because of their integral role in the involuntary commitment process. The purpose of this comment is to explore the present status of the law of involuntary commitment, particularly in Montana, and to review some opinions and recommendations of judges, lawyers, and other commentators on the legal

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3. The problem of preventive detention as allowed by commitment statutes has been stated as follows:
   Whether narrowly or broadly written, commitment statutes evoke the objection that they permit a kind of preventive detention which would be unthinkable for other classes of persons, because they violate a basic principle of our society that
treatment of the mentally ill. It is hoped this overview will aid lawyers and judges in understanding that the problems raised by involuntary commitment have no simple solutions, and that legislation, no matter how progressive, does not eliminate the need for continuing efforts to protect the rights of the individuals involved and to improve the legal process.

II. JUSTIFICATIONS FOR INVOLUNTARY COMMITMENT OF THE MENTALLY ILL

Although most of the commentary on involuntary commitment centers on its legal aspects, philosophical and moral considerations are also involved. Even when stringent safeguards are incorporated in the legal process, the need remains to justify that process on a theoretical level. Such justifications are often difficult to challenge "precisely because decisions to confine persons to mental hospitals are made, for the most part, by responsible men who . . . are concerned with the dignity of human life." 4

The traditional justification for commitment of the mentally ill is the broad notion of the consequent benefit to the committed individual and to society. 5 Confining a person deemed by psychiatrists, judges, or jurors to be "ill" and providing him with mandatory treatment and care are undoubtedly worthy ends, both to protect society and to rehabilitate the mentally ill person. However, this traditional justification overlooks the less desirable consequences of involuntary commitment: the separation of the individual from his family and friends, the stigma of being labeled "mentally ill", the loss to society of the services and talents of the committed individual, and the very real deprivation of the individual's freedom. 6 As stated by Judge Bazelon: "We prefer to assume that by labelling the process 'medical' and the results 'treatment' we can convert coercion into benevolence and deprivation into help." 7

The individual's need for treatment and his assumed inability to make a rational decision as to that need are likewise often es-

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Individuals may pursue their own interests, as they perceive them, as long as they do not infringe upon the rights of others, and regardless of what they might do in the future.

R. SLOVENKO, supra note 1.

6. Id.
poused as rationales for involuntary commitment.8 These justifications, however, have also been criticized as erroneous and simplistic. Compulsory treatment for one thought to be in need of such treatment is a benevolent goal, but it ignores the functional difficulty in establishing guidelines for commitment “that will not as well justify remodeling too many people to match predominant ideas of the shape of the ideal psyche.”9 The theory that the mentally ill person cannot make a rational choice as to treatment has been criticized both as being untrue10 and as embodying a confusion of the distinction between a wrong choice and an irrational one.11 Although a mentally ill person might in fact benefit substantially from mandatory care and therapy, it can hardly be asserted that the decision not to be institutionalized is necessarily irrational, in view of the stigma of involuntary commitment and the uncertainty of successful treatment.

Less widely promulgated justifications for involuntary commitment are that a person would be happier if he were “normal”, and that society should have some means of dealing with those who have become nuisances.12 These and other similar justifications may warrant some sort of action; but compulsory confinement is a drastic measure which should be employed only when unquestionably necessary. Whenever involuntary commitment is recommended or ordered, the question must be asked: “Is the treatment and cure of the mentally ill individual of more benefit to society than the liberty of which he is deprived and the principle (lost, or tarnished) that no one should assert the right to control another’s beliefs and responses absent compelling social danger?”13

III. AUTHORITY OF THE STATE TO ORDER INVOLUNTARY COMMITMENT

The only criterion which has been wholeheartedly accepted by modern courts and legislatures for the involuntary commitment of the mentally ill person is that of dangerousness to himself or oth-

9. Livermore, Malmquist, & Meehl, supra note 8, at 94. At least one federal judge has seen the same infirmity in the “need for treatment” rationale: To permit involuntary commitment upon a finding of “mental illness” and the need for treatment alone would be tantamount to condoning the State’s commitment of persons deemed socially undesirable for the purpose of indoctrination or conforming the individual’s beliefs to the beliefs of the State.
10. Livermore, Malmquist, & Meehl, supra note 8, at 92.
11. Ennis, supra note 4, at 104.
12. Livermore, Malmquist, & Meehl, supra note 8, at 86-87.
13. Id. at 88.
Under this standard, States base the legal justification for their commitment authority on the related but distinct theories of the police power and parens patriae. Although both theories are founded on the State's power to protect its citizens, the reliance on one rather than the other may impose different obligations on the State in the commitment process.

The police power of the States, inherent in their sovereignty, places upon them the duty and the authority to protect their citizens from danger. When a mentally ill person poses danger to others, the State may invoke its police power to restrict his activities. In such a situation, the State must balance the rights of the individual against those of society in determining whether involuntary commitment is required. Such a balancing must necessarily involve consideration of such subjective factors as the likelihood and magnitude of the threatened injury and the effects of compulsory hospitalization on the individual. It has been suggested that the exercise of the police power to confine one who is potentially dangerous should be limited to cases in which the person involved has "substantially diminished responsibility" as a result of his mental illness and therefore is unable to appreciate the emphasis on deterrence in the criminal law. Under the police power, it is obvious that confinement can only be maintained as long as the danger to society exists.

The most frequently invoked legal justification for involuntary commitment is the prerogative of parens patriae. Although some courts have viewed the prerogative as part of the State's police power, it should be viewed as a separate legal doctrine, particularly as it relates to commitment proceedings. As stated by the United States Supreme Court, the parens patriae function is to be exercised "for the prevention of injury to those who cannot protect themselves." The balancing of interests when the State relies on this doctrine is even more difficult than when the police power is invoked. The interests involved are not those of society, but solely those of the individual: his right to privacy and freedom from con-

20. Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57 (1890).
finement as against his need for treatment and protection. Commit-
ment under *parens patriae* should be limited to cases in which the
person needs the State to act as "substitute decisionmaker" because
of his own inability to evaluate the desirability of treatment.21

Montana’s statutory section on the treatment of the seriously
mentally ill22 reflects the legislature’s reliance on the combination
of police power and *parens patriae* as authority for commitment.
The legislative purpose is framed in terms of care and treatment for
those committed and in terms of a search for the least restrictive
means of providing such benefits.23 The definition of the "seriously
mentally ill" limits its coverage to those who present a threat of
injury to themselves or others (police power) and those unable to
protect themselves (*parens patriae*).24

Although the State’s authority to commit the mentally ill invol-
untarily may be doctrinally justified and phrased in benevolent
terms, the result of the application of the statutes is the mandatory
confinement of the individuals. "As such, these measures must be
closely scrutinized to insure that power is being applied consistently
with those values of the community that justify interferences with
liberty for only the most clear and compelling reasons."25

### IV. Standards for Involuntary Commitment

As stated earlier, most States limit the coverage of their invol-
untary commitment statutes to persons whose mental illness makes
them dangerous to themselves or others. Although the purely segre-
gative basis for confinement stressed under common law has been
replaced in recent times by an emphasis on rehabilitation and ther-
apy,26 the requirements of some variety of mental illness and some
sort of dangerousness or threat of harm remain at the center of the
commitment process.27 The dangerousness requirement must be
met in order for the State to exercise its authority under the police

21. *Developments in the Law — Civil Commitment of the Mentally Ill*, supra note 17,
at 1216. The same theory was advanced in a recent federal decision:

Consequently, in order to deprive a person alleged to be a danger to himself alone
of the right to choose between treatment and liberty, the State must first demon-
strate that, because of his mental illness, he lacks the capacity to weigh for himself
the risks of freedom and the benefits of hospitalization.


26. *Note, Mental Illness and Due Process: Involuntary Commitment in New York*, 16

power or parens patriae. Yet because the existence of mental illness and dangerousness is unsuited to objective or legal analysis, these vital issues are necessarily determined by the subjective standards of psychiatry.28

The legal and medical professions inevitably perceive different issues and values in the involuntary commitment process.29 Doctors and psychiatrists are likely to focus primarily on the individual's need for treatment and supervision. Lawyers, on the other hand, are likely to emphasize the importance of freedom for the individual and to insist on assiduous compliance with procedural rules.30 The conflicting orientations of the two professions are the most pronounced on the issues of mental illness and dangerousness.31

The issue of the existence of mental illness or a mental disorder has not raised as much controversy as the prediction of dangerousness. This may be true because the discovery and labeling of psychological disorders does not involve legal expertise and does not conflict with established legal principles. It may also be true because a finding of the existence of mental illness is normally insufficient in itself to trigger commitment.32 Criticisms leveled at the concept stress its vagueness and its incompatibility with objective decisionmaking. For instance, one critic states that "[w]hile the term [mental illness] has its uses, it is devoid of that purposive content that a touchstone of the law ought to have. Its breadth of meaning makes for such difficulty of analysis that it answers no question that the law might wish to ask."33

The entry of psychiatric judgment into the commitment process has stimulated the most caustic criticism in the area of the

28. Some commentators have criticized the injection of the vague, subjective standards of psychiatry into a legal proceeding which may lead to involuntary confinement. As stated by one such critic: "Human liberty . . . should not depend on diagnostic bias." Ennis, supra note 4, at 103. See also B. Ennis & L. Siegel, The Rights of Mental Patients 21 (1973); Dershowitz, The Psychiatrist's Power in Civil Commitment: A Knife that Cuts Both Ways, Psych. Today 43, 46-47 (Feb. 1969).

Others feel that such vagueness is inherent in the subject matter of mental illness and that it is not subject to constitutional challenge "because mental illness and psychiatry are subjective fields incapable of a successful attack in a court of law." Note, supra note 26, at 168.


33. Livermore, Malmquist, & Meehl, supra note 8, at 80.
prediction of dangerousness. The possibility of preventive detention of harmless individuals necessarily engenders distrust and skepticism as to the predictive abilities of the psychiatrist. Incarceration of those who have as yet committed no illegal or prohibited act draws an unjustifiable distinction between the mentally ill and the rest of the American public. The principle in criminal law that it is better to let the guilty go free than to make the innocent suffer is difficult, if not impossible, to reconcile with the underlying psychiatric notion in the commitment area that it is acceptable to have harmless people confined and treated "lest one dangerous man be free." 34

Lawyers' abhorrence of preventive detention is exacerbated by the practical unreliability of psychiatrists' predictions of dangerousness. 35 Although doctors and psychiatrists assert that wrongful commitment rarely occurs, 36 this assertion is not widely accepted. 37 As stated by one author: "Although it may be convenient to label persons, to reify behavior into attributes, and thus to predict future conduct, it must be recognized that such a process has no scientific or logical basis and that there is no reason to expect that such predictions will come true." 38 Overpredictions of dangerousness and consequent unjustified commitments have been viewed as the inevitable outcome of the commitment process as it now exists. Underprediction may lead to severe criticism of the psychiatrist if the diagnosed individual becomes violent and causes injury. Overprediction, on the other hand, has no actual consequences for the psy-

34. Id. at 82.
35. Two examples should be sufficient to show the tenor of the response to psychiatric prediction. One author has asserted: "I know of no reports in the scientific literature which are supported by valid clinical experience and statistical evidence that describe psychological or physical signs or symptoms which can be reliably used to discriminate between the potentially dangerous and the harmless individual." Diamond, The Psychiatric Prediction of Dangerousness, 123 U. Pa. L. Rev. 439, 444 (1974). Other authors' skepticism at predictions by psychiatrists has been expressed as follows: "In summary, training and experience do not enable psychiatrists adequately to predict dangerous behavior. Rather such predictions are determined by the time and place of diagnosis, the psychiatrist's personal bias, social pressures, the class and cultures of the respective parties, and other extraneous factors." Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Calif. L. Rev. 693, 733 (1974).
36. "It suffices to say that the medical profession has consistently asserted that wrongful commitments are very infrequent, that they are in the main imaginary fears played upon by Sunday-supplement sensationalist writers." Curran, Hospitalization of the Mentally Ill, 31 N.C. L. Rev. 274, 293 (1953).
37. One author commented on unwarranted confinement and preventive detention: "For every man who, if at liberty, would take his life, or assault his neighbor, there are thousands in confinement who would not. For every man who, if at liberty, would embarrass his career, there are thousands whose careers are destroyed because of confinement." Ennis, supra note 4, at 108.
A subsequent determination that the committed individual is in fact harmless may always be explained by the intervening confinement. 38

Commentators have advocated various solutions to the problem of alleged overprediction and unreliability of psychiatric findings of dangerousness. One author suggests that final responsibility for commitment should rest solely with the medical profession. Placing the final burden of involuntary confinement on the psychiatrist would, it is alleged, eliminate the fear of wrongful commitment. 40

Another commentator advocates a compromise position whereby the psychiatrist remains an integral part of the commitment process; but exclusive reliance is not placed on his judgment or opinion, because the psychiatrist is "not necessarily the person most qualified to decide an issue which draws from social values as well as scientific data and prediction." 41 Montana's involuntary commitment statutes incorporate this position: the psychiatrist's judgment as to the existence of a mental disorder is required, but the final determination as to serious mental illness and commitment is made by a judge or jury. 42 Whether the psychiatrist's opinion is not in actuality the decisive factor in the commitment determination is open to question.

The final suggestion for resolving the medical-legal balance in the commitment process is to eliminate psychiatric input entirely. 43 Under this theory, the commitment process would become purely legal, with the substitution of traditional legal terminology and procedure for the existing medical orientation. An advocate of the elimination of psychiatric opinion states his position as follows:

The lesson of this experience [overprediction of dangerousness] is that no legal rule should ever be phrased in medical terms; that no legal decision should ever be turned over to the psychiatrist; that there is no such thing as a legal problem which cannot — and should not — be phrased in terms familiar to lawyers. 44

The resolution of the conflict between the legal and medical professions in the area of involuntary commitment is perhaps impossible, in view of the constantly expanding knowledge of mental

39. For a discussion of overprediction, see Dershowitz, supra note 28, at 47; and Diamond, supra note 35, at 447.
40. Curran, supra note 36, at 283-84.
41. Comment, supra note 16, at 993. Another commentator explains the rationale for the compromise position as follows: "The judicial commitment procedure minimizes the physician's liability for improper confinement by providing a check on him as well as spreading the responsibility." R. SLOVENKO, supra note 1, at 205.
43. Diamond, supra note 35, at 452.
44. Dershowitz, supra note 28, at 47.
illness. The most workable solution at this point appears to be the balancing of professional expertise — the psychiatrist testifying as to the individual's mental condition and the lawyer seeking to insure that the individual's freedom is not circumscribed absent clear proof of his inability to function in society without harming himself or others.

V. DUE PROCESS REQUIREMENTS IN THE COMMITMENT PROCESS

Involuntary commitment of the mentally ill is not a criminal proceeding in the strict legal sense. It involves no criminal or other prohibited action by the individual. It is generally included in the sections of state statute on mental health,45 or, in Montana, in the section on the “insane and feeble minded.”46 Yet, regardless of the benevolent intentions of lawyers and doctors to provide treatment for the mentally ill, the commitment process results in an undeniable deprivation of liberty. C. S. Lewis, speaking of the humanitarian theory of criminal confinement, voiced a sentiment equally applicable to the civil process of commitment:

To be taken without consent from my home and friends; to lose my liberty; to undergo all those assaults on my personality which modern psychotherapy knows how to deliver; to be re-made after some pattern of “normality” to be hatched in a Viennese laboratory to which I never professed allegiance; to know that this process will never end until either my captors have succeeded or I have grown wise enough to cheat them with apparent success — who cares whether this is called Punishment or not? That it includes most of the elements for which any punishment is feared — shame, exile, bondage, and years eaten by the locust, is obvious.47

Lawyers and judges have devoted substantial time and effort to safeguarding the procedural rights of those suspected or accused of criminal actions. In view of the similar outcomes of criminal trials and civil commitments, it is surprising that there has been so little judicial emphasis on the rights of the mentally ill. One of the justifications for the less stringent due process requirements in commitment proceedings has been that the committed person is entitled to treatment — that he is not being punished, but helped.48 This justi-

45. See, e.g., CAL. WELF. & INST'NS CODE §5150 (West 1972); N.Y. MENTAL HYGIENE LAW §76 (McKinney 1971).
46. R.C.M. 1947, title 38.
47. Lewis, The Humanitarian Theory of Punishment, 6 REs JUDICATAE 224, 227 (1953).
fication overlooks the fact that some forms of mental illness are untreatable by present psychiatric and medical techniques. Furthermore, mental illness is the only disease for which American law condones compulsory treatment, a distinction seemingly without philosophical basis when injury to self is the criterion for commitment.

Federal courts are beginning to look beyond the civil-criminal terminology formerly used as a rationale for ignoring the constitutional requirements of due process in commitment proceedings. Many courts rely on the Supreme Court case of In re Gault to impose greater safeguards for the rights of the mentally ill. In that case the Court held that it was the consequence of a juvenile proceeding (possible incarceration) which determined the applicability of the due process clause, not the designation of the proceeding as civil or criminal. Applying the same rationale to commitment proceedings, the Court of Appeals for the Tenth Circuit stated:

It matters not whether the proceedings be labeled "civil" or "criminal" or whether the subject matter be mental disability 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.

Other courts have also employed the "deprivation of liberty" reasoning to impose due process requirements on state commitment proceedings. Although federal courts generally agree that commitment proceedings require constitutional safeguards, they differ as to the exact nature of specific requirements to be met by state courts and legislatures. Montana's statutory provisions on commitment of the seriously mentally ill generally incorporate the most stringent of the safeguards set forth by the courts. It is debatable, however, whether legislative safeguards are sufficient in themselves to protect the rights of the individuals involved.

49. 387 U.S. 1 (1967).
50. Id. at 13, 49.
51. Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968).
INVOLUNTARY COMMITMENT

A. Notice and Opportunity to Be Heard

The federal courts differ as to whether notice is required prior to the probable cause hearing on detention of a person alleged to be seriously mentally ill. Notice before any final hearing, however, is universally required by those courts which have addressed the due process issue. Such notice must contain the time and place of the hearing, the facts relied upon to justify commitment, the names of witnesses, and the substance of their testimony.

Montana's commitment statutes state that there is a "right to notice reasonably in advance of any hearing or other court proceeding . . . ." Specifically, notice of the petition alleging serious mental illness must be hand delivered to the respondent and his counsel on or before respondent's initial appearance. The petition must contain the facts supporting the allegation of serious mental illness, the name of the person requesting the petition, and a statement of the respondent's rights.

Prior to any commitment decision or order, the individual must be given an opportunity to be heard. Some courts have held that due process also requires a hearing on probable cause, although others require only a judicial determination to justify detention. The latter requirement is incorporated in the Montana statutes. After the determination of probable cause, a respondent in Montana must be brought before the court for an initial appearance at which he is to be advised of his rights and the substantive effect of the petition alleging that he is seriously mentally ill.

A final hearing on commitment is consistently enumerated by federal courts as a requirement of due process, some courts man-


57. Id. § 38-1305(6) (Supp. 1977).

58. Id. § 38-1305(2) (Supp. 1977).


62. Id.

dating that such hearing be held within strict time limits.\textsuperscript{64} Montana's statutes provide that, within five days of the initial appearance, there must be a formal hearing on the existence of serious mental illness, unless the respondent's lawyer requests a further extension.\textsuperscript{65} Such an extension could be used by the lawyer when the psychiatrist believes temporary confinement is necessary, but for a period shorter than the three months ordered upon commitment. Thus, the attorney could serve the best interests of his client by seeing that short-term treatment is provided, while avoiding actual involuntary commitment. Montana's statutes further provide for a separate post-trial disposition hearing on the type of treatment or confinement to be ordered for the individual found to be seriously mentally ill.\textsuperscript{66}

\textbf{B. Right to Counsel}

The federal courts have also held that a person is entitled to counsel at every stage of the commitment proceedings.\textsuperscript{67} Montana includes the right to counsel in the list of rights guaranteed to the mentally ill person.\textsuperscript{68} The statutes also specifically require that counsel be appointed for the respondent as soon as probable cause is found,\textsuperscript{69} and that the respondent be represented by counsel at every stage of the trial on serious mental illness.\textsuperscript{70}

\textbf{C. Standards for Commitment and Conduct of the Hearing}

As stated earlier, the only standard for commitment which allows the State to exercise its police power or \textit{parens patriae} functions is that of dangerousness to oneself or others.\textsuperscript{71} Montana's statutes on involuntary commitment provide that, at the trial, the only issue is the "determination of whether or not the respondent is seriously mentally ill . . . ."\textsuperscript{72} A person is "seriously mentally ill" only when he is "suffering from a mental disorder which has resulted

\begin{itemize}
  \item \textsuperscript{64} Kendall v. True, 391 F. Supp. 413, 419 (W.D. Ky. 1975) (21 days from date of confinement); Lynch v. Baxley, 386 F. Supp. 378, 388 (M.D. Ala. 1974) (30 days); Lessard v. Schmidt, 349 F. Supp. 1078, 1092 (E.D. Wis. 1972) (10 to 14 days).
  \item \textsuperscript{65} R.C.M. 1947, § 38-1305(3)(b) (Supp. 1977).
  \item \textsuperscript{66} R.C.M. 1947, § 38-1306(1) (Supp. 1977).
  \item \textsuperscript{68} R.C.M. 1947, § 38-1304(4)(d) (Supp. 1977).
  \item \textsuperscript{69} Id. §38-1305(3)(b) (Supp. 1977).
  \item \textsuperscript{70} Id. § 38-1305(7) (Supp. 1977).
  \item \textsuperscript{71} Lessard v. Schmidt, 349 F. Supp. 1078, 1094 (E.D. Wis. 1972); Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 309 U.S. 270 (1940). See also Ennis, \textit{supra} note 4, at 110.
  \item \textsuperscript{72} R.C.M. 1947, § 38-1305(7) (Supp. 1977).
\end{itemize}
in self-inflicted injury or injury to others, or the imminent threat thereof; or which has deprived the person afflicted of the ability to protect his life or health."

In the final determination as to commitment, the courts have stated that many of the procedural safeguards available to criminal defendants must also be provided to the mentally ill. Thus, the individual must be given the right to be present at the hearing, unless he waives this right or there is a judicial determination that his conduct is disruptive or that he is unable to attend. Montana statutes provide that a respondent is to be present at the trial. They also provide that this right may be waived by the lawyer and responsible person with the concurrence of the judge and doctor, if the respondent's presence would adversely affect his condition.

Other rights guaranteed to the individual include the right to cross-examine witnesses, to present evidence, to assert the privilege against self-incrimination, and to insist on strict adherence to the rules of evidence. These rights are expressly included in Montana's statutes, either in the section enumerating the rights of the person subject to commitment, or in the section setting forth the procedure for trial.

On other procedural matters, the constitutional mandate is less clear. Some courts do not mention the right to a jury trial in their discussion of due process. Others view provision for jury trial as desirable, but not constitutionally mandated. The United States Supreme Court has stated that jury trials may be beneficial in commitment proceedings because "the jury serves the critical function

73. Id. §38-1302(14) (Supp. 1977).
85. Id. § 38-1305(7) (Supp. 1977).
of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment." 88 Montana's statutes require jury trial if requested by the respondent or his lawyer prior to the date set for the hearing on serious mental illness. 89

Some courts and commentators have stated that the State has a duty in commitment proceedings to investigate alternatives to institutionalization, so that the least restrictive available means may be employed to aid the individual and to protect society. 90 The United States Supreme Court recently dismissed, for want of a substantial federal question, an appeal from a state decision that the courts were not required to consider alternatives. 91 Such a dismissal, however, does not constitute a judgment on the merits. Therefore, whether investigation and ascertainment of the least restrictive treatment is a constitutional requirement is still open to question. The Montana legislature has included such a requirement in the purpose clause of its commitment statutes 92 and in the provision on the choice of treatment for a person found to be seriously mentally ill. 93 One advocate of full exploration of available alternatives has asserted that "[i]f the purpose of the inquiry is to assure that persons will not undergo unwarranted deprivations of liberty, attention must be paid not only to whether or not any deprivation of liberty is justified but also to what is the minimum deprivation required." 94

Probably the greatest difference of opinion among the courts on due process requirements centers around the standard of proof necessary to sustain an order of confinement. Some courts feel that "clear and convincing evidence" is sufficient because of the subjective nature of the issues. 95 Others have held that proof "beyond a reasonable doubt" is required because of the consequences of an order of commitment — involuntary incarceration. 96 Legal commentators generally advocate that the quantum of proof be the same as

90. See, e.g., Lake v. Cameron, 364 F.2d 657, 661 (D.C. Cir. 1966).
93. Id. § 38-1306(1) (Supp. 1977).

https://scholarship.law.umt.edu/mlr/vol38/iss2/3
that for criminal trials.\textsuperscript{97} Montana law provides four separate standards, depending on the issues to be proved. Physical facts or evidence must be proved beyond a reasonable doubt; mental disorders must be evidenced to a "reasonable medical certainty"; dangerousness must be shown by a recent overt act; and all other matters must be proved by clear and convincing evidence.\textsuperscript{98} Much of the judicial and scholarly discussion about the standard of proof in commitment proceedings seems to be merely semantic. The standard may have some meaning if the commitment order is appealed; but in the trial, the great weight given by judges and jurors to psychiatric and medical judgments leads to lack of attention to factual controversies and lack of strict adherence to the required standard of proof.

D. Waiver of Rights

Constitutional rights are not mandatorily imposed upon Americans. They may be waived, as long as such a waiver is voluntary. In the area of mental illness, however, waiver of rights raises serious questions.\textsuperscript{99} The former Montana statutes on involuntary commitment provided that a respondent could waive his procedural rights if such a waiver was "knowingly and intentionally made."\textsuperscript{100} However, if the respondent were later found to be "seriously mentally ill", such a finding in itself would negate the knowing and intentional qualities of the previous waiver. To be "seriously mentally ill" a person must be suffering from a "mental disorder", which is defined as a condition having "substantial adverse effects on an individual's cognitive or volitional functions".\textsuperscript{101} How could such a person be said to have intelligently waived his constitutional or statutory rights? The recently enacted revisions to the commitment statutes continue to allow waiver of rights by the respondent and therefore continue to present a legal dilemma as to the validity of a waiver by a person suffering from a "mental disorder".\textsuperscript{102} The omission in the amended statutes of the "knowing" and "intentional" language does not eliminate the requirement that the waiver be voluntary. The statutes also provide for waiver by the respondent's lawyer and responsible person if they make a record of the reasons for their action.\textsuperscript{103} Such a waiver should be given only when it is

\textsuperscript{97} Ennis, \textit{supra} note 4, at 110; Note, \textit{supra} note 26, at 184.
\textsuperscript{99} Note, \textit{supra} note 26, at 185.
\textsuperscript{100} R.C.M. 1947, § 38-1304(1) (Supp. 1975).
\textsuperscript{101} \textit{Id.} § 38-1304(1) (Supp. 1977).
\textsuperscript{102} \textit{Id.} § 38-1304(1) (Supp. 1977).
\textsuperscript{103} \textit{Id.}
obvious that the substantive rights of the person represented will not be adversely affected.

A review of the federal decisions concerning due process in commitment demonstrates that most of the safeguards imposed on the criminal process are now also applied to other proceedings which involve deprivations of liberty. The Montana legislature has incorporated most of these protective provisions in its involuntary commitment statutes. There may be technical, and even substantive, defects in the law, but it nevertheless illustrates a legislative attempt to protect the rights of those subject to involuntary commitment.

VI. ROLE OF LAWYERS AND JUDGES IN THE COMMITMENT PROCESS

Although Montana's involuntary commitment laws are protective and equitable, the implementation of the laws must be examined prior to drawing any conclusions about the workability or desirability of involuntary commitment in general. The United States Supreme Court addressed the need for continuing scrutiny of the commitment process:

We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity . . . and the special importance of maintaining the basic interests of liberty in a class of cases where the law though "fair on its face and impartial in appearance" may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings.104

No legal process can function fairly and impartially unless the persons responsible for its administration understand its purposes, possibilities, and limitations. The rights of those subject to commitment — rights carefully provided for in Montana's statutes — are merely paper rights if the procedures established to protect them are circumvented by judges, county attorneys, and lawyers representing the respondents. All participants must be conscious of the rights of the respondents; they must also be aware that commitment raises philosophical as well as legal questions.

The judge plays a primary role in the commitment process. The duty falls on him to supervise strict compliance with the statutes and to insure that the persons alleged to be seriously mentally ill are not adjudged as such in violation of their basic right to be free.

The judge must determine whether a petition alleging serious mental illness is sufficient to show probable cause for further detention and investigation. This determination must be based on factual information contained in the petition, not merely on psychiatric conclusions and opinions. The petition establishes grounds for possible detention or continuing action toward commitment; it also provides notice to the individual involved of the facts upon which the proceedings are based. A deficient petition may adversely and permanently affect the rights of the respondent. It is also often the judge's duty to make a binding determination of the necessity of involuntary commitment. In this role as decisionmaker, the judge must insist that serious mental illness is clearly proved. Again, conclusions and opinions by psychiatrists should not be enough in themselves to justify commitment. Factual grounds must be shown, along with results of psychological tests and concrete reasons for predictions of dangerousness. Depriving another of liberty without compelling reasons cannot be justified either legally or morally. Furthermore, the statutes mandate that the court investigate and choose the least restrictive alternative necessary for protection and treatment and that the commitment order include the factual basis for commitment and the reasons for the alternative chosen. These requirements indicate a legislative concern that a committed person have a record for possible appeal and that the absolute need for commitment be not only considered, but also expressly articulated. Thus, the judge must serve as the protector of the rights of the individual sought to be committed and also as the guardian of the process itself, insuring strict compliance with the procedure and substance of the law.

The county attorney's function in the involuntary commitment process is difficult to define. It is his duty to proceed with those commitment petitions which he perceives to be justified. At the same time, however, he must strictly comply with the statutory provisions on commitment, including those provisions guaranteeing the respondent's rights. No petition should be filed or prosecuted unless justified in light of the facts and psychiatric evaluations. Predictions of potential dangerousness should be closely scrutinized because of their alleged unreliability. Finally, the county attorney must attempt to insure that commitment proceedings are not instigated for extralegal reasons, such as to relieve a family of a burden.
The lawyer representing the person alleged to be seriously mentally ill has responsibilities which differ from those of the judge and the county attorney. One author has described the lawyer's role as "the individualizing function." He must act as the mediator between the socio-medical world and the legal one. Although he should act as counselor to his client and recommend voluntary admission for treatment when advisable, it is his obligation to represent his client zealously if the client protests therapy and care. Thus, it is not his duty to act as judge of the best interests of society; this duty falls on the court or the jury and can only be effectively performed if conflicting views and interests are skillfully and professionally presented. By taking an adversarial position and promoting his client's desire for freedom, the lawyer "is administering a highly effective form of psychotherapy as well as manifesting loyalty to the traditions of his profession." He may be the only person in the entire commitment process who is willing to listen to and articulate the respondent's desires as opposed to his alleged needs.

Beyond their specific functions in the commitment process itself, judges and lawyers have a continuing responsibility to promote needed changes in the law. "Today the legal process and the legal profession have the responsibility for protecting individual liberties and at the same time, contributing to the evolutionary process that one hopes will culminate with mental illness being treated as any other illness." Many parts of the commitment laws deserve attention, amendment, and possible elimination. For instance, the laws provide no middle ground for people who, although mentally ill and in need of treatment, are not likely to endanger themselves or others. Involuntary commitment, as it now stands, is an all-or-nothing proposition. Perhaps such a situation is inevitable when legislation deals with areas in which knowledge and expertise are constantly expanding, but the problem nevertheless deserves study by the legal profession.

In addition to the obligation to seek necessary changes in the law on involuntary commitment, lawyers and judges have an obligation to seek changes in the social structure of the community in

111. Id. at 455.
113. Blinick, supra note 30, at 115.
114. Id. at 119.
115. Cohen, supra note 110.
which the law operates. This obligation includes the education of nonlawyers, including doctors and psychiatrists, on the legal and moral questions presented by involuntary commitment of the mentally ill. Perhaps a larger part of the obligation is encouraging the establishment of alternatives to institutionalization. Montana’s statutes require that the court “choose the least restrictive alternative necessary to protect the respondent and the public and to permit effective treatment.” 116 However, if no facilities other than institutions are available, the court’s choice is a meaningless one, and not necessarily in the best interests of the mentally ill individual. Whether through the legislature or through the community, lawyers and judges must promote the financing and establishment of workable alternatives to institutionalized confinement, such as half-way houses and local mental health clinics. Continuing effort to improve the system is the duty of every member of the legal profession.

VII. Conclusion

The involuntary commitment of the mentally ill raises grave legal and moral questions. It is not enough to assert that commitment benefits the individual by providing care and supervision. Depriving a person of his liberty is a drastic step which should be taken only when compelling reasons exist. Even with Montana’s law, which complies with due process requirements, lawyers and judges must exercise continuing vigilance to safeguard the process and the rights of the persons subject to commitment. It is possible that the risk of involuntarily confining harmless individuals outweighs the desirability of segregating and treating those who might be dangerous; perhaps, then, the entire process of involuntary commitment should be abolished. Although there are no simple solutions to the problems posed by involuntary commitment, the problems can no longer be ignored.

We shall have to decide how much we value individual freedom; how much we care about privacy and self-determination; how much deviance we can tolerate — and how much suffering. 117

117. Ennis & Litwack, supra note 35, at 752.